

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

March 29, 2022

FROM

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

SUBJECT

Purchase of Unbudgeted Equipment and Related Software

RECOMMENDATION(S)

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

1. Approve the non-competitive purchase of unbudgeted fixed assets and related items in the amount of \$207,758 for 14 pharmaceutical vending machines and supporting equipment and software from Bound Tree Medical to expand the San Bernardino County Fire Protection District Emergency Medical Services' emergency medicine capabilities.
2. Approve non-financial End User License **Agreement No. 22-248** with WG Connect, LLC, including non-standard terms, for embedded software in the pharmaceutical vending machines which shall remain in effect for as long as the San Bernardino County Fire Protection District continues to access or use the embedded software, or until terminated in accordance with the provisions of the End User License Agreement.
3. Approve non-financial Terms of Services (**County Contract No. 22-249**) with U-Select-It Corp, including non-standard terms, to access and use the IQ Technology vending and dispensing products, a website and website services all associated with the pharmaceutical vending machines which shall remain in effect for as long as the San Bernardino County Fire Protection District continues to access or use the services, or until terminated in accordance with the provisions of these Terms of Services.
4. Approve budget adjustments, as detailed in the Financial Impact Section, for the purchase of the 14 pharmaceutical vending machines and supporting equipment and software and authorize the Auditor-Controller/Treasurer/Tax Collector to post the adjustments (Four votes required).

(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 to purchase the pharmaceutical vending machines and related items will not result in the use of additional Discretionary General Funding (Net County Cost). The total cost of \$207,758 will be funded through Use of Available Reserves for the San Bernardino County Fire Protection District (SBCFPD).

The necessary budget adjustments are as follows:

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Fund Center	Commitment Item/GL Account	Qty	Amount Each	Description	Increase (Decrease) Amount
1064102410	54404040	14	\$ 8,004	Vending Machines	\$ 112,056
1064102410	52002125	14	\$ 1,873	Biometric Readers	\$ 26,222
1064102410	52002115	14	\$ 1,200	Software for new machines	\$ 16,800
1064102410	52002115	21	\$ 1,200	Software for existing machines	\$ 25,200
1064102410	52002125	6	\$ 4,580	Door Locker Extension	\$ 27,480
1060002410	37008880	Fund Balance - Available Reserves			(\$207,758)

BACKGROUND INFORMATION

SBCFPD's Emergency Medical Services (EMS) Section is responsible for keeping up with the ever-changing emergency medical mandates, equipment and program development for both advanced and basic life support education and training.

SBCFPD's EMS Section is enhancing its emergency medicine capabilities through the purchase of pharmaceutical vending machines and related items. Pharmaceutical vending machines are used to store and dispense emergency, non-narcotic medications. The software for the machines will track individual medication type, expiration date, lot number, and National Drug Code (NDC) number. The software will allow SBCFPD to view the status of all pharmaceuticals in-stock throughout SBCFPD's jurisdiction from any web-enabled device.

Pharmaceuticals are currently purchased by each fire station; however, some medications are purchased in a quantity that is more than a station may be able to use by the expiration date. By expanding the use of these vending machines throughout SBCFPD, purchases can be made at the division level, thereby allowing the quantities to be spread over multiple stations and increasing the likelihood that the medications will be used within the expected life of the product and allowing SBCFPD to track trends in use, decrease number of expiring medications, and move medications closer to expiration to a busier station for use.

In December 2020, SBCFPD started a pilot project to test the new process of purchasing and storing pharmaceuticals, moving the pharmaceuticals from a station level to a division level, thereby allowing the division to split boxes of medications among the pharmaceutical vending machines. The vending machines are secured with personal identification numbers and biometric authentication and the software tracks access to the machines and pharmaceuticals by user. SBCFPD found the pilot project to be successful. SBCFPD wishes to expand this project by purchasing additional pharmaceutical vending machines and related software. The pharmaceutical vending machines and supporting equipment and software will be purchased through Bound Tree Medical (Bound Tree); however, the software used by the pharmaceutical vending machines is governed by the WG Connect, LLC (WG) End User License Agreement and the IQ Technology vending and dispensing products, website, and associated website services are provided by U-Select-It Corp (USI) pursuant to the IQ Technology Terms of Services. These software agreements include terms that differ from the standard SBCFPD contract and omit certain SBCFPD standard contract terms. WG and USI were unwilling to negotiate these terms.

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Pursuant to Policy 11-05, contracts that contain non-standard terms require approval by the Board of Directors (Board).

A. The non-financial End User License Agreement with WG, includes terms that differ from the standard SBCFPD contract and omits certain SBCFPD standard contract terms. The non-standard and missing terms include the following:

1. Governing law is Iowa and venue is Polk County, Iowa.
 - SBCFPD's standard contract term is that governing law is California, and venue is San Bernardino County.
 - Potential Impact: County Counsel has reviewed WG's End User License Agreement but cannot provide advice as to its legal form without retaining outside counsel licensed to practice law in Iowa. In the event of any resulting lawsuit, this term could result in costs associated with the retention of outside counsel and travel to Iowa.
2. The contract does not require WG to indemnify SBCFPD, including for intellectual property infringement claims. In addition, the contract requires SBCFPD to indemnify and hold WG harmless from any and all claims, damages, attorneys' fees, etc. arising from or relating to any breach by SBCFPD of SBCFPD's obligations to strictly comply with all U.S. export control laws and regulations and must obtain authorization to export, re-export, or import the embedded software and related technology.
 - The SBCFPD standard contract indemnity provision requires the Contractor to indemnify, defend, and hold SBCFPD 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 SBCFPD 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: WG is not required to defend, indemnify or hold SBCFPD harmless from any claims, including indemnification for claims arising from WG's negligent or intentional acts and intellectual property infringement. If SBCFPD is sued for any claim, including intellectual property infringement based on its use of WG's software or services, SBCFPD may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Iowa law may allow SBCFPD to require WG to defend or indemnify it absent an express provision in the contract. SBCFPD may incur costs that exceed the total contract amount for indemnifying and holding harmless WG regarding export compliance. This provision could also result in SBCFPD waiving its sovereign immunity.
3. The contract does not require WG to meet SBCFPD's insurance standards as required pursuant to Policy 11-07.
 - Policy 11-07 requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the SBCFPD standard contract.
 - Potential Impact: The contract does not include SBCFPD standard insurance requirements. This means that SBCFPD has no assurance that WG will be

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financially responsible for claims that may arise from SBCFPD's use of the software, which could result in expenses to SBCFPD that exceed the total contract amount.

4. The contract shall remain in effect for as long as SBCFPD continues to access or use the embedded software, or until terminated in accordance with the provisions of the End User License Agreement. SBCFPD may terminate the agreement at any time by notifying WG in writing and discontinuing all use of and access to the software.
 - Policy 11-05 does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the contract and SBCFPD is indefinitely bound to the terms and conditions of the contract while the software is in use by SBCFPD or until the contract is terminated in accordance with the provisions of the contract. Software license agreements are for a one-year period and SBCFPD has the option of renewing the license agreement each year or discontinuing the use of the product at any time by notifying WG in writing and discontinuing all use of and access to the software.
5. The contract provides WG the right to assign the contract without notice to SBCFPD and without SBCFPD's approval.
 - The SBCFPD's standard contract requires SBCFPD to approve any assignment of the contract.
 - Potential Impact: WG could assign the contract to a third party or business with which SBCFPD is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without SBCFPD's knowledge. County Counsel cannot advise on whether and to what extent Iowa law may permit or restrict a party's right to assign without an express provision in the contract.
6. WG provides the software "as is". WG disclaims all warranties and conditions, including any warranty of non-infringement, title, fitness for a particular purpose, and merchantability, whether express, implied or statutory. There is also no warranty that the software will be error-free, that access will be uninterrupted, that any information provided or used with the product will be uninterrupted, free of viruses or other harmful code, timely, secure, or error-free. The agreement provides that WG shall not be liable for the software and in the event of any liability, WG's total cumulative liability arising from or related to the software, whether in contract or tort or otherwise, shall not exceed two times the fees actually paid for the software at issue in the prior 12 months. This limitation is cumulative and will not be increased by the existence of more than one incident or claim.
 - The SBCFPD standard contract requires the vendor to fully warrant the product or provide a warranty or a revision that satisfies Policy 11-05.
 - Potential Impact: SBCFPD bears all risk arising out of the performance and use of the software. County Counsel cannot advise on what warranties are available to SBCFPD under Iowa law.
7. WG disclaims all liability whatsoever to the SBCFPD based on SBCFPD's use of its software.
 - The SBCFPD standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving SBCFPD financially liable for the excess. In addition, SBCFPD's liability under the contract is not similarly limited. County Counsel cannot advise on, whether

and to what extent, any applicable law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

8. In the event of a contract dispute, the contract requires arbitration and a waiver of participation in a class or representative action if the parties are unable to reach a resolution through information discussions. The agreement does include a 30-day opt-out provision if SBCFPD does not wish to be bound by the arbitration and class-action waiver provisions.
 - The SBCFPD standard contract requires the parties to use their best efforts to settle a dispute through negotiation with each other in good faith and does not include an arbitration provision.
 - Potential Impact: Costs to SBCFPD due to this arbitration provision could exceed the amount of the contract. In addition, SBCFPD will not be able to resolve disputes, including participation in a class action lawsuit, in court. County Counsel has reviewed this contract but cannot provide advice on the contract, this provision or whether SBCFPD should opt out of it without retaining outside counsel licensed to practice law in Iowa.
9. WG is entitled to an award of all costs, fees, expenses including its reasonable attorneys' fees in the enforcement of the agreement.
 - The SBCFPD standard contract provides that except for indemnity obligations, neither party is responsible to pay for the other party's attorneys' fees and costs.
 - Potential Impact: Costs to SBCFPD due to this fee provision could exceed the amount of the contract.
- B. The non-financial Terms of Services with USI, includes terms that differ from the standard SBCFPD contract and omits certain SBCFPD standard contract terms. The non-standard and missing terms concerning the access and use of the IQ Technology vending and dispensing products, a website and website services all associated with the pharmaceutical vending machines (Services) include the following:
 1. Governing law is Iowa and venue is Polk County, Iowa.
 - SBCFPD's standard contract term is that governing law is California, and venue is San Bernardino County.
 - Potential Impact: County Counsel has reviewed USI's Terms of Services but cannot provide advice as to its legal form without retaining outside counsel licensed to practice law in Iowa. In the event of any resulting lawsuit, this term could result in costs associated with the retention of outside counsel and travel to Iowa.
 2. The contract does not require USI to indemnify SBCFPD, including for intellectual property infringement claims. In addition, the contract requires SBCFPD to indemnify, defend, release, and hold USI and its employees, officers, etc. harmless from any and all claims, damages, attorneys' fees, etc. arising from or relating to various items noted in Section 8 of the Terms of Services. Section 8 of the Terms of Services also provides that USI reserves the right, at SBCFPD expense, to assume the exclusive defense and control of any matter for which SBCFPD is required to indemnify USI, and SBCFPD agrees to cooperate with USI's defense of such claims.
 - The SBCFPD standard contract indemnity provision requires the Contractor to indemnify, defend, and hold SBCFPD 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 SBCFPD 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: USI is not required to defend, indemnify or hold SBCFPD harmless from any claims, including indemnification for claims arising from USI's negligent or intentional acts and intellectual property infringement. If SBCFPD is sued for any claim, including intellectual property infringement based on its use of USI's Services, SBCFPD may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Iowa law may allow SBCFPD to require USI to defend or indemnify it absent an express provision in the contract. SBCFPD may incur costs that exceed the total contract amount for indemnifying, defending, releasing and holding harmless USI and its employees, officers, etc. regarding the matters identified in Section 8 of the Terms of Services. This provision could also result in SBCFPD waiving its sovereign immunity. In addition, USI reserves the right, at SBCFPD expense which could exceed the contract amount, to assume the exclusive defense and control of any matter for which SBCFPD is required to indemnify USI, and SBCFPD agrees to cooperate with USI's defense of such claims.
3. The contract does not require USI to meet SBCFPD's insurance standards as required pursuant to Policy 11-07. In addition, the contract requires SBCFPD to release USI and its employees, officers, directors, and agents from all liability for any loss, occurrence, event, or condition covered by SBCFPD's insurance.
 - Policy 11-07 requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the SBCFPD standard contract.
 - Potential Impact: The contract does not include SBCFPD standard insurance requirements. This means that SBCFPD has no assurance that USI will be financially responsible for claims that may arise from SBCFPD's use of the Services, which could result in expenses to SBCFPD that exceed the total contract amount. In addition, the contract requires SBCFPD to release USI and its employees, officers, directors, and agents from all liability for any loss, occurrence, event, or condition covered by SBCFPD's insurance.
 4. The contract shall remain in effect for as long as SBCFPD continues to access or use the Services, or until terminated in accordance with the provisions of these Terms of Services.
 - Policy 11-05 does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the contract and SBCFPD is indefinitely bound to the terms and conditions of the contract while SBCFPD continues to access or use the Services. SBCFPD may end this contract by not renewing the services at any subsequent renewal date.
 5. The contract provides USI the right to assign the contract without notice to SBCFPD and without SBCFPD's approval.
 - The SBCFPD's standard contract requires SBCFPD to approve any assignment of the contract.

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- Potential Impact: USI could assign the contract to a third party or business with which SBCFPD is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without SBCFPD's knowledge. County Counsel cannot advise on whether and to what extent Iowa law may permit or restrict a party's right to assign without an express provision in the contract.
6. USI provides the Services "as is". USI disclaims all warranties and conditions, including any warranty of non-infringement, title, fitness for a particular purpose, and merchantability, whether express, implied or statutory. There is also no warranty that the Services will be error-free, uninterrupted, secure, etc. The agreement provides that USI shall not be liable for the Services and in the event of any liability, USI's total cumulative shall not exceed two times the fees actually paid in the prior 12 months. This limitation does not apply to any willful, wanton, intentional, or reckless misconduct of USI or gross negligence of USI in those states that do not permit limitation of liability for gross negligence.
- The SBCFPD standard contract requires the vendor to fully warrant the product or provide a warranty or a revision that satisfies Policy 11-05. The SBCFPD standard contract does not include a limitation of liability.
 - Potential Impact: SBCFPD bears almost all risk arising out of the performance and use of the Services. Claims could exceed the liability cap and the contract amount leaving SBCFPD financially liable for the excess. In addition, SBCFPD's liability under the contract is not similarly limited. County Counsel cannot advise on what warranties are available to SBCFPD under Iowa law, or whether and to what extent, any applicable law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
7. In the event of a contract dispute, the contract requires arbitration and a waiver of participation in a class or representative action if the parties are unable to reach a resolution through information discussions. The agreement does include a 30-day opt-out provision if SBCFPD does not wish to be bound by the arbitration and class-action waiver provisions.
- The SBCFPD standard contract requires the parties to use their best efforts to settle a dispute through negotiation with each other in good faith and does not include an arbitration provision.
 - Potential Impact: Costs to SBCFPD due to this arbitration provision could exceed the amount of the contract. In addition, SBCFPD will not be able to resolve disputes, including participation in a class action lawsuit, in court. County Counsel has reviewed this contract but cannot provide advice on the contract, this provision or whether SBCFPD should opt out of it without retaining outside counsel licensed to practice law in Iowa.
8. USI is entitled to an award of all costs, fees, expenses including its reasonable attorneys' fees in the enforcement of the agreement.
- The SBCFPD standard contract provides that except for indemnity obligations, neither party is responsible to pay for the other party's attorneys' fees and costs.
 - Potential Impact: Costs to SBCFPD due to this fee provision could exceed the amount of the contract.

Notwithstanding the non-standard provisions, SBCFPD is recommending that the Board approve the non-financial End User License Agreement with WG and the Terms of Services with USI as they will collectively allow SBCFPD to use the pharmaceutical vending machines,

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and the IQ technology vending and dispensing products, embedded software, USI website, and associated USI website services in relation to the machines.

PROCUREMENT

On March 28, 2020, Request for Proposals (RFP) Bid No. FPD120-FIREA-3835 was advertised through the County's Electronic Procurement Network (ePro) seeking proposals from qualified vendors to provide Pharmaceutical Dispensing/Vending Machines. The RFP was sent to all applicable registered vendors within the ePro system. Responses were received from Bound Tree and Life Assist.

An evaluation committee comprised of SBCFPD staff, including two nurses, the warehouse manager, EMS Committee Chair, and the Management Information Systems Manager reviewed the proposals received in response to the RFP. The criteria used to evaluate the proposals included proposal requirements, technical review, qualifications, experience, cost, and references. The evaluation committee recommended Bound Tree for this purchase based on their proposal, which provided the best value and service for SBCFPD. No protests were received.

SBCFPD desires to expand the use of the pharmaceutical vending machines and recommends the purchase of the additional pharmaceutical vending machines from Bound Tree based on functional specifications and compatibility with the existing machines. Purchase of the pharmaceutical vending machines from Bound Tree is non-competitive due to the fact that vendors with similar products were not contacted. Purchasing concurs with the non-competitive justification.

REVIEW BY OTHERS

This item has been reviewed by Auditor-Controller/Treasurer/Tax Collector (Vanessa Doyle, Deputy Chief Controller, 387-5669) on March 18, 2022; County Counsel (Scott Runyan, Supervising Deputy County Counsel, 387-5455) on March 15, 2022; Purchasing (Cody Leslie, Lead Buyer, 387-2065) on March 15, 2022; Risk Management (Victor Tordesillas, Director, 386-8730) on March 17, 2022; Finance (Tom Forster, Administrative Analyst, 387-4635) on March 15, 2022; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-5423) on March 15, 2022.

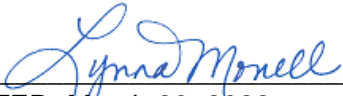
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Record of Action of the Board of Directors
San Bernardino County Fire Protection District

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, SECRETARY

BY 
DATED: March 29, 2022



cc: SBCFPD - Munsey w/agrees
Contractor - C/O SBCFPD w/agree
File - w/agree
CCM 04/7/2022