

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

September 13, 2022

FROM

MICHAEL JIMENEZ, Interim Registrar of Voters, Registrar of Voters

SUBJECT

Agreement of Non-Standard Terms for Routing and Dispatching Software

RECOMMENDATION(S)

1. Approve the Terms of Service **Agreement No. 22-818** with OptimoRoute, Inc., including non-standard terms, for routing and dispatch application to manage logistics of election equipment, for purchase amounts as authorized by County Policy for a period beginning upon each access of the service and continuing during the period of use, until terminated by the County.
2. Authorize the Registrar of Voters and his designees to accept the Terms of Service, including substantive amendments, for a period of five years from September 13, 2022 through September 12, 2027.

(Presenter: Michael Jimenez, Interim Registrar of Voters, 387-2100)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

FINANCIAL IMPACT

Approval of this recommended Agreement does not require the use of additional Discretionary General Funding (Net County Cost). The cost to utilize the OptimoRoute, Inc. (OptimoRoute) routing and dispatch application is \$44.10 per driver per month. It is anticipated that up to 30 drivers may utilize this application for a one-month period in years where elections are conducted, resulting in a cost of \$1,323 per month. It is anticipated that the annual cost will not exceed \$15,876. Sufficient appropriation is included in the Registrar of Voters' (ROV) 2022-23 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

ROV provides logistics to deliver and pick-up election equipment and supplies to over 300 polling sites for each election. Currently, staff manually perform dispatch and routing tasks using internet mapping resources and spreadsheets. OptimoRoute will increase efficiency and develop optimal routes for deliveries based on location by automating route planning and providing real-time route modification. Proof of delivery using photos and digital signatures also improve efficiency to replace the paper documentation that is currently used. The application also improves customer service by allowing staff and sites to track deliveries, and send sites customized messages to inform them of estimated times of arrival. Customers are also able to provide feedback to assist ROV with improving customer service and its logistics process. Per County Policy 11-05, the Board of Supervisors (Board) must approve missing or non-standard contract terms.

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The OptimoRoute Terms of Service Agreement (Agreement) is OptimoRoute's 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 Agreement accepted upon accessing and using the service. The non-standard and missing terms include the following:

1. Governing law is the State of Delaware.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under Delaware law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Delaware law, which may result in fees that exceed the total Agreement amount.
2. OptimoRoute may change the Agreement terms without notice at any time by posting them on the website. Access and use of the service constitutes acceptance of the then-current 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 Contractor and County.
 - Potential Impact: The County 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 Delaware law may affect the enforceability of unilateral changes to the terms.
3. OptimoRoute may assign the Agreement without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: OptimoRoute could assign the Agreement 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 Agreement. County Counsel cannot advise on whether and to what extent Delaware 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, Delaware 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 require OptimoRoute to indemnify the County, 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 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: OptimoRoute is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from OptimoRoute's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of OptimoRoute's software or services, the County 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 Delaware law may allow the County to require OptimoRoute to defend or indemnify it absent an express provision in the Agreement.
6. The County is required to indemnify OptimoRoute against any third party claim arising out of content the County submits, posts, transmits, or otherwise make available through the Service, County's use of the Service, County's connection to the Service, any content the County creates, manages or controls in connection with the service, County's violation of the terms of the Agreement, or County's use of the service in violation of any third-party rights.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify OptimoRoute, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against OptimoRoute without such limitations and the County would be responsible to defend and reimburse OptimoRoute for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Delaware law may limit or expand this Agreement term.
7. The Agreement does not require OptimoRoute 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.
 - Potential Impact: The County has no assurance that OptimoRoute 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 Agreement amount.
8. OptimoRoute's maximum liability to the County is limited to the total monetary amount actually received by OptimoRoute from the County for the services in the three months preceding the event giving rise to the claim.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. County Counsel

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cannot advise on, whether and to what extent, Delaware law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

9. County will not solicit, engage, retain, or employ any current employee, contractor, owner, or agent of OptimoRoute during the subscription term and for a period of twelve months thereafter.
 - The County standard contract does not include a non-solicitation/non-compete provision.
 - Potential Impact: Hiring an OptimoRoute employee, contractor, owner, or agent will result in breach of the Agreement and OptimoRoute may terminate the Agreement and seek any available legal remedies.
10. The term of the Agreement is indefinite beginning at the time the service is accessed and used and continuing during the period of use. Each access and use begins a new contract period.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: Each access and use subjects the County to the terms that are posted at the time of access, which may have been amended at OptimoRoute's discretion without notice. The County may terminate the subscription, without providing notice, at any point, by emailing OptimoRoute.
11. Venue is in the courts of Delaware.
 - 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 any court in the State of Delaware may result in additional expenses that exceed the amount of the Agreement.
12. All services are provided "AS IS", "AS AVAILABLE", AND "WITH ALL FAULTS" and without any warranty.
 - 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. County Counsel cannot advise on, whether and to what extent, Delaware law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ROV recommends approval of the recommended Agreement with OptimoRoute, LLC, including the non-standard terms because it would benefit the County and allow it to more efficiently manage ROV's logistics for elections.

PROCUREMENT

The recommended Agreement is the result of a non-competitive procurement. Two other software vendors for routing and dispatch were researched, but those software venues were in Canada and Singapore. ROV selected the software that would best meet its needs based on its features, and with a venue within the United States. County Policy 11-04 states that any non-competitive procurement under \$200,000 may be approved by the Purchasing Agent. This Agreement is being presented to the Board due to non-standard terms or missing terms.

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REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on September 7, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on September 8, 2022; Finance (Elias Duenas, Administrative Analyst, 387-4052) on September 8, 2022; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on September 8, 2022.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Janice Rutherford

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: September 13, 2022



cc: ROV - Shea w/agree
Contractor - C/O ROV w/agree
File - w/agree
CCM 09/21/2022