

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

January 10, 2023

FROM

CHAD NOTTINGHAM, Deputy Executive Officer, Innovation and Technology Department

SUBJECT

Software Transaction Agreement with Quest Software Inc. for Platform Management Software and Maintenance Services

RECOMMENDATION(S)

1. Approve Software Transaction **Agreement No. 23-04**, including non-standard terms, with Quest Software Inc., for platform management software and maintenance services for purchase amounts as authorized by County Policy for the period beginning upon the download, installation, or use of the software and continuing until termination by either party.
2. Designate the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief, to electronically accept the Agreement in Recommendation No. 1 and future updates to the Agreement, subject to review by County Counsel, provided that such updated terms and applicable licenses do not substantively modify the terms of the original Agreement.
3. Direct the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to transmit any updated terms to the Software Transaction Agreement that are electronically accepted by the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Chad Nottingham, Deputy Executive Officer, 387-4811)

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 Discretionary General Funding (Net County Cost). The Software Transaction Agreement (STA) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the STA, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ITD uses Quest Software Inc. (Quest) software such as Quest ActiveRoles Server, Quest Change Auditor for Active Directory, Quest Toad, and Quest Stat for PeopleSoft to facilitate the management of several of the County's enterprise infrastructure applications including the Employee Management and Compensation System (EMACS) and Geographic Information System (GIS).

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Quest ActiveRoles Server is a web-based platform that enables County departments to securely manage their user accounts within the County's Active Directory, which is managed by ITD. Quest Change Auditor for Active Directory provides real-time threat monitoring and security for the Microsoft Active Directory domain managed by ITD. Quest Toad is a database management solution, which is used to support GIS and EMACS. Quest Stat for PeopleSoft is a change management solution that allows for the quick deployment of patches and platform upgrades without overwriting customizations within EMACS.

The STA is Quest's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The STA is a non-negotiable clickwrap accepted by downloading, installing, or using the software. The non-standard and missing terms include the following:

1. Quest may assign the STA without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Quest could assign the STA 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 STA.
2. The prevailing party is entitled to recover attorneys' fees and costs.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If either party institutes any legal proceedings related to the STA, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total STA amount.
3. The County agrees to indemnify and defend Quest against any claim brought in connection with the County's application, operating system, and database implementation, performance tuning, and maintenance services provided by the County and be liable to Quest for the acts and omissions of the County's clients in connection with their use of the software and documentation.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Quest, 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 Quest without such limitations and the County would be responsible to defend and reimburse Quest for costs, expenses, and damages, which could exceed the total STA amount.
4. The STA does not require Quest 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.

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- Potential Impact: The County has no assurance that Quest 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 STA amount.
5. Quest's maximum liability to the County is limited to the fees paid and/or owed (not including maintenance services or a product subject to recurring fees) for the products that are the subject of the claim. For maintenance services and products subject to recurring fees the aggregate and cumulative liability is limited to the amount paid and/or owed in the 12 months preceding the claim. The limitations do not apply to Quest's infringement indemnity, legal fees, or liability that cannot be excluded or limited as a matter of law.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the STA amount, leaving the County financially liable for the excess.
6. Payment is due 30 days from date of invoice and late fees of 1.5% interest will apply to late payments.
- 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 in 30 days from the date of invoice will result in a material breach of the STA, which would allow Quest to terminate the STA and seek other legal remedies, including charging the County interest at a rate of 1.5% monthly, which would exceed the STA amount.
7. The term of the STA depends on the type of software or services purchased. The term for on-premises software the term begins upon installation and is perpetual unless otherwise stated in the order. The term for cloud hosted software (Software-as-a-Service), begins upon access and use of the software and continues for the term stated in the order, automatically renewing. For non-perpetual licenses the Maintenance Period is equal to the duration of the license. For all other licenses, the Maintenance Period begins on the date of the initial delivery of the Software and lasts for a period of 12 months. The Maintenance Period for perpetual Licenses will automatically renew for additional 12-month terms unless the renewal is cancelled 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 contract and the County is indefinitely bound to the terms and conditions of the contract until canceled, terminated by mutual agreement of the parties, or for a party's uncured breach.
8. There is no termination for convenience and the County agrees to non-refundable fees.
- The County standard contract gives the County the right to terminate the contract, for any reason, with a 30 day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: The County can only terminate the STA with the mutual consent of Quest or due to an uncured breach by Quest. Any attempted termination by the County without cause would permit Quest to retain fees already paid but unused.

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9. Venue is in the state or federal courts located in Orange County, California.
- 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 Orange County, California may result in additional expenses that exceed the amount of the STA.

ITD recommends approval of the STA with Quest, including non-standard terms, to allow ITD to effectively manage the County's enterprise infrastructure and related applications.

PROCUREMENT

The STA, including non-standard terms, 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, provided that Quest does not substantively modify the terms of the STA.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on December 13, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on December 12, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on December 13, 2022; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) on December 15, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on December 20, 2022.

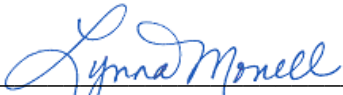
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Record of Action of the Board of Supervisors
San Bernardino County

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: January 10, 2023



cc: IT - Danczyk w/agree
Contractor - C/O IT w/agree
File - w/agree
CCM 01/10/2023