

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

July 27, 2021

FROM

ANDREW GOLDFRACH, Interim Director, Department of Public Health

SUBJECT

Software License, Maintenance and Support Agreement with Biscom, Inc.

RECOMMENDATION(S)

Approve the Software and Services Standard License **Agreement No. 21-574** with Biscom, Inc. for the license, maintenance, support, and upgrade of software and hardware to send and receive secure fax documents to the Department of Public Health's electronic health record, in the total dollar amount not to exceed \$25,000 annually or \$125,000 for the total five-year term, for the period of August 5, 2021 through August 4, 2026.
(Presenter: Andrew Goldfrach, Interim Director, 387-9146)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

FINANCIAL IMPACT

Approval of this item will not result in the use of additional Discretionary General Funding (Net County Cost). Adequate appropriation and revenue have been included in the Department of Public Health's (DPH) 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

DPH Clinic Operations staff use Biscom software (Biscom) to send/receive secure fax documents to San Bernardino County (County) Electronic Health Records (EHR).

Biscom is utilized in the majority of the DPH clinics by the case management team and other users on a daily basis. The recommended contract will allow for continued use of the software licenses, technical support, and continue to use proprietary software program to manage and track patients' examination results. Biscom has been utilized by DPH since 2013.

DPH nursing and paraprofessional staff, funded via the state Child Health and Disability Prevention Program (CHDP), use Biscom to enter and record data related to care coordination of children with health conditions that require diagnosis and treatment. Biscom organizes and reports data in a manner that facilitates timely follow-up with the parents/guardians of the children to ensure care is initiated as soon as possible. The Biscom software also generates follow-up and reminder letters for the families of the children. This software allows DPH to meet various reporting requirements of CHDP.

**Software License, Maintenance and Support Agreement with Biscom,
Inc.
July 27, 2021**

The Biscom Software and Services Standard License Agreement is its standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. Biscom may assign the contract without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Biscom could assign the contract 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.
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 Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.
3. The County is responsible and indemnifies and holds Biscom harmless for any and all losses, liability or damages arising out of, or incurred in connection with, Licensee's use of the Software. Each of the Parties agrees to be liable for its own conduct in connection with this Business Associate Agreement (BAA) and to indemnify the other Party against any and all losses, therefore. In addition, the County agrees to indemnify, defend and hold Biscom harmless against all third-party claims arising from or relating to the acts or omissions of the County in connection with the County's performance under the BAA.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Biscom, 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 Biscom without such limitations and the County would be responsible to defend and reimburse Biscom for costs, expenses, and damages, which could exceed the total contract amount.
4. The contract does not require Biscom to meet the County's insurance standards.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Biscom 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 contract amount.
5. Biscom's liability for damages under the agreement shall not exceed the amount paid by the County for the Software.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Biscom caps its liability to the County at the amount paid by the County for all claims arising under the contract without exclusion. Claims could

exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited.

6. The term of the contract is automatically renewing.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board of Supervisors (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.
7. There is no termination for convenience.
 - 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: There is no termination for convenience. If the County attempts to terminate the contract prior to the end of the contract period, the County would be in breach of contract, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
8. Venue anywhere in the State of 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 outside of San Bernardino County may result in additional expenses that exceed the amount of the contract.

The contract is written for a five-year period and may be terminated by Biscom for convenience upon 30 days' prior written notice to the County for any reason, or by either party if there is any material default or breach of this contract by the other party within a seven-day notice period. The contract will be automatically renewed for a period of one year with a fee increase of 5% annually contingent upon County providing a 60-day notification and request of new quote, and mutual agreement by both parties.

PROCUREMENT

Under the Purchasing Department's authority, the Purchasing Agent has previously issued Purchase Orders with Biscom since 2013 for the non-competitive purchase of the requisite proprietary software licenses and technical support.

Pursuant to County Policy 11-05, contracts that contain non-standard contract language must be approved by the Board. Purchasing supports the continued non-competitive contract with Biscom of the Biscom proprietary software licenses and technical support, based on compatibility and existing agreement, allowing continuity in use of this software and resulting in a significant cost savings.

Negotiation of the non-standard contract language with Biscom involved lengthy discussions between the County's and the vendor's counsels. This item is being presented at this time, as this is the first date available following the negotiations and required operational, fiscal and legal reviews. The prior Purchase Order expired on April 5, 2021, and as the non-standard contract terms were being negotiated in good faith by both parties, Biscom continued to provide DPH

**Software License, Maintenance and Support Agreement with Biscom,
Inc.
July 27, 2021**

with access to this software. Approval by the Board on this date will have no impact on DPH's services or activities in relation to this contract.

REVIEW BY OTHERS

This item has been reviewed by Human Services Contracts (Becky Giroux, HS Contracts Manager, 388-0241) on July 9, 2021; County Counsel (Adam Ebright, Deputy County Counsel, 387-5455) on June 24, 2021; Finance (Paul Garcia, Administrative Analyst, 386-8392) on July 12, 2021; County Finance and Administration (Tanya Bratton, Deputy Executive Officer, 388-0332) on July 12, 2021.

**Software License, Maintenance and Support Agreement with Biscom,
Inc.**

July 27, 2021

Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Dawn Rowe Seconded: Col. Paul Cook (Ret.)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: July 27, 2021



cc: PH- Shin w/agree
Contractor- C/O PH w/agree
File-w/agree

LA 07/28/2021