

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

**October 26, 2021**

**FROM**

**BOB DUTTON, Assessor-Recorder-County Clerk**

**SUBJECT**

Agreement with BMC Software, Inc. for Software Licensing and Support Services

**RECOMMENDATION(S)**

1. Approve an End User License **Agreement No 21-808** with BMC Software, Inc. to license software and provide support services for information technology helpdesk and asset tracking and management systems for a contract period retroactive to June 22, 2021, through June 21, 2026.
2. Designate the Assessor-Recorder-County Clerk or Departmental IS Administrator to accept online agreements as they pertain to BMC Track-It! software licenses and support services, subject to review by County Counsel.

(Presenter: Bob Dutton, Assessor-Recorder-County Clerk, 382-3254)

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

**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 BMC Software, Inc. (BMC) End User License Agreement (EULA) is non-financial in nature and does not commit the County to make any purchase. When future purchases are made under this EULA, the Assessor-Recorder-County Clerk Department (ARC) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

**BACKGROUND INFORMATION**

BMC's Track-It! software and support services provide a wide variety of Information Technology tools ranging from the management of daily Help Desk ticketing, Change Management, to overall asset management of hardware and software components. Approval of the BMC EULA would authorize the Assessor-Recorder-County Clerk or Departmental IS Administrator to download and install licenses, and electronically accept terms and conditions for Track-It! software licenses and support services, subject to review by County Counsel. This item is being presented to the Board at this time, as this is the first date available for presentation after an extended procurement process and negotiations over non-standard County terms were completed. ARC currently needs to renew its Track-It! software licenses and support services, which ended on June 21, 2021. BMC requires that the renewal period begin on June 22, 2021. To mitigate prolonged negotiations in the future, ARC will upgrade to the latest software version with a multi-year supported platform and be assigned a new account manager by the vendor.

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The EULA is BMC's 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. Governing law is the State of Texas.
  - The County standard contract requires California law and venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.
  - Potential Impact: The EULA will be interpreted under Texas law. Any questions, issues, or claims arising under this EULA will require the County to hire outside counsel competent to advise on Texas law, which may result in fees that exceed the total contract amount.
2. The contract does not address 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: There is no provision in the contract addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, Texas 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 contract.
3. There is no termination for convenience without any obligation.
  - The County standard contract gives the County the right to terminate the contract, for any reason, with thirty (30) days 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 terminate the contract with thirty (30) days advanced written notice for its convenience on a prospective basis; however, such termination will have no effect on orders placed prior to its effective date and such order will remain in full force and effect under the terms of the EULA.
4. Except for violation of license restrictions, proprietary rights, and confidentiality, infringement claims, gross negligence, willful misconduct, death or bodily injury, fraud and any liability that cannot be excluded or limited by law, BMC's maximum liability to the County is the amount paid and payable by the County for the license to the product giving rise to the claim.
  - County Policy 11-05 provides the standard contract term is no limitation of liability for contractors.
  - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
5. Venue is in the state or federal courts located in Houston, Texas.
  - The County standard contract requires California law and venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.

- Potential Impact: Having a venue in Houston, Texas may result in additional expenses that exceed the total contract amount.
6. The EULA is silent on BMC's right to assign the EULA.
    - The County must approve any assignment of a contract.
    - Potential Impact: County Counsel cannot advise on, whether and to what extent, Texas law may allow BMC to assign the contract without notice and without the County's consent.
  7. The EULA does not require BMC to meet the County's insurance standards as required pursuant to County Policy 11-07.
    - County Policy require 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 EULA does not include County standard insurance requirements. This means that the County has no assurance that BMC will be financially responsible for claims that may arise from the County's use of the software and services, which could result in expenses to the County.

The recommended agreement, including the non-standard terms, will enable ARC to receive Track-It licenses and support services for Help Desk and inventory tracking purposes. Approval of this item will allow ARC to operate in a fiscally-responsible and business-like manner by providing access to Information Technology tools such as management of daily Help Desk ticketing to overall asset management of hardware and software components.

#### **PROCUREMENT**

BMC's EULA, including non-standard terms, will be used to accompany future purchases to be approved, as necessary, in accordance with County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

County Policy 11-05 requires departments to obtain Board approval for procurement of goods or services with non-standard terms and conditions.

#### **REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on September 21, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on September 27, 2021; Risk Management (Victor Tordesillas, Director, 386-8621) on September 30, 2021; Finance (Carl Lofton, Finance Analyst, 387-5404) on October 12, 2021; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-4342) on October 12, 2021.

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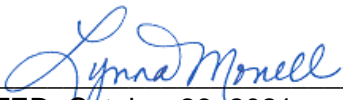
Record of Action of the Board of Supervisors  
San Bernardino County

**APPROVED (CONSENT CALENDAR)**

Moved: Joe Baca, Jr. 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: October 26, 2021



cc: ARC - Gaeta w/agree  
Contractor - C/O ARC w/agree  
File - w/agree  
CCM 11/2/2021