



# San Bernardino County

## Legislation Text

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**File #: 2283, Agenda Item #: 27**

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

**June 9, 2020**

#### **FROM**

**JASON ANDERSON, District Attorney**

#### **SUBJECT**

Software License Agreement with Bosch Automotive Service Solutions Corporation for Vehicle Forensic Toolkit

#### **RECOMMENDATION(S)**

1. Approve the terms and conditions of the End User License Agreement with Bosch Automotive Service Solutions, Inc. for the Crash Data Retrieval Toolkit, effective upon execution of the online agreement and renewed annually, for a period of three years, and authorize payment to Crash Data Group, Inc., sole distributor for Bosch Automotive Service Solutions, Inc., for software licensing, hardware upgrades, and training, at a total cost not to exceed \$25,500.
2. Designate the Chief of the Bureau of Investigation, or authorized designee, to execute the online agreement on behalf of the County, for a period of three years, subject to review by County Counsel.
3. Direct the District Attorney to transmit copies of all documents in relation to this agreement to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Michael Fermin, Assistant District Attorney, 382-3662)

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

**Operate in a Fiscally-Responsible and Business-Like Manner.**

**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). The costs of the agreement are being funded within the District Attorney's existing budget allocation. The hardware for the BOSCH Crash Data Retrieval system was purchased in 2018 and costs for the next few years are for the software subscription, hardware upgrades, and additional training, if needed. Sufficient appropriation will be included in future recommended budgets.

#### **BACKGROUND INFORMATION**

To thoroughly investigate cases involving vehicles, District Attorney Investigators utilize vehicle forensic tools and software. In 2018, the District Attorney (Department) purchased the hardware and software subscription to the BOSCH Crash Data Retrieval tools (BOSCH CDR) to obtain vehicle forensic information for cases involving vehicle collisions. BOSCH is the industry standard in Event Data Recorder (EDR) imaging technology. The BOSCH CDR tools can download data from the largest selection of automobile manufactures (90% of the vehicles on the road in North America). Crash Data Group, Inc. is the sole distributor of this

equipment.

The BOSCH CDR system retrieves critical vehicle information captured during a collision including: the amount and direction of force acting upon the vehicle during a collision, changes in velocity, occupancy, seating position, steering input, percentage of braking and throttle being applied by the driver, wheel speed, and equipment failure/warning lamps. The data recovered can also reveal if the vehicle's on board accident avoidance systems were actively engaged prior to and during the collision.

Hardware upgrades will be needed as automobile manufacturers improve their technology to record more data during collision events. As auto manufacturers have begun using newer technology in their 2020 models, the Department's existing hardware will not be able to retrieve the additional information without necessary upgrades.

The types of cases that benefit from obtaining vehicle forensic information include vehicular homicide investigations, major injury collision investigations, arson investigations, and auto insurance fraud investigations. The BOSCH CDR system provides a key component in the reconstruction of automobile collisions. When requested, the Department also assists other County departments and law enforcement agencies to retrieve vehicle forensic information.

The vehicle information is retrieved on-premise, meaning information is not transmitted to, or accessible by, BOSCH unless the investigator provides permission and access when technical support is required.

Bosch's End User License Agreement (EULA) consists of terms and conditions that are not standard to County contracts and require approval from the Board of Supervisors. Bosch has taken the position that its End User License Agreement terms and conditions are not negotiable. County Counsel has identified the non-standard terms and conditions, however, the EULA is governed by Michigan law, and County Counsel cannot advise on the impact of such terms and conditions under Michigan law.

The following are the non-standard terms:

1. The EULA requires binding arbitration to resolve any dispute or claim arising out of the EULA.
2. BOSCH disclaims all warranties, express or implied, including the implied warranties of merchantability or fitness for a particular purpose.
3. BOSCH does not provide infringement indemnity to the County in the EULA.
4. The software is provided "As Is" and with all faults. The County's sole remedy after acceptance of the software is correction of any defects or delivery of a new version of the software, as decided by BOSCH.
5. Applicable governing law is that of Michigan. Binding arbitration is required and the stated location of any arbitration is Oakland County, Michigan or such other location as agreed by the parties.
6. The EULA does not contain a provision regarding assignment of rights and obligations.

Potential Impacts of these non-standard provisions include:

1. The standard County contract language encourages the parties to use "best efforts" to settle disputes through good faith negotiation. Alternatively, County Policy No. 11-05 allows for a non-binding form of dispute resolution. Binding dispute resolution is a non-standard contract term,

and requires Board of Supervisors (Board) approval.

2. BOSCH does not specifically disclaim the warranty of noninfringement. Under California law, without a specific disclaimer, BOSCH would owe a warranty of noninfringement. The EULA however is governed by Michigan law and County Counsel cannot advise regarding the result under Michigan law. The possibility exists that there will be no warranty of noninfringement. Standard County contract language requires the contractor to fully warrant its product. County Policy No. 11-05 allows for a limited warranty which is industry standard, if approved by County Counsel. For technology contracts, County Policy No. 11-05 permits disclaimer of a warranty for non-infringement provided there is indemnity for infringement. The EULA does not contain indemnity for infringement.
3. The EULA does not contain infringement indemnity and may not offer a warranty of noninfringement (see no. 2). Again, County Counsel cannot advise of the exact result under Michigan law, but generally speaking the lack of these protections significantly increases the County's potential for liability in the event of a third party lawsuit for intellectual property infringement.
4. The standard County contract does not contain a limitation of liability. In this EULA, BOSCH limits the County's remedies to repair or replacement of the software. There is no monetary amount, which can be recovered, as is often seen in software contracts, and preferred by the County Risk Management Department.
5. The standard County contract requires governing law to be California and venue of any disputes to be in the courts of the County of San Bernardino. Under the terms of this EULA, Michigan law governs and the venue of the required binding arbitration is Oakland County, Michigan. Out of state arbitration could significantly increase the County's cost, and requires Board approval.
6. Under California law, the lack of an assignment provision would mean both parties are free to assign the contract. County Counsel cannot advise on what the result will be under Michigan law. The standard County contract provides the County must approve any assignment of the contract.

The Department recommends approval of the terms and conditions of the EULA with Bosch Automotive Service Solutions, Inc. for the Crash Data Retrieval Toolkit, including non-standard terms and conditions, as BOSCH is the industry standard to obtain vehicle forensics for vehicles involved in collisions and Crash Data Group, Inc. is the sole distributor. It is in the County's best interest to have access to this software to facilitate the Department's thorough investigation of cases involving vehicle collisions, including but not limited to vehicular homicide investigations, major injury collision investigations, arson investigations, and auto insurance fraud investigations, and to continue assisting other County departments and law enforcement agencies with retrieving vehicle forensic information.

### **PROCUREMENT**

County Policy 11-05 requires Board approval of the non-standard contract provisions discussed above. The Department has been using Bosch's CDR Toolkit since May 2018 and plans to continue for the next several years. This is a non-competitive procurement as Bosch is the developer of the hardware and software and Crash Data Group is the sole distributor of the CDR Toolkit.

Purchasing concurs with the non-competitive justification of sole source for the service and support of the CDR Toolkit. If Bosch revises its EULA during the term of this agreement, County Counsel will review the

changes to determine if the Department needs to obtain additional approval from the Board.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Katherine Hardy, Deputy County Counsel, 387-5437) on May 14, 2020; Purchasing (Leo Gomez, Purchasing Manager, 387-2063) on May 18, 2020; Finance (Carl Lofton II, Finance Analyst, 387-5404) on May 21, 2020; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on May 22, 2020.