



San Bernardino County

Legislation Text

File #: 4772, Agenda Item #: 25

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

September 14, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreement with SUSE LLC, for SUSE Software Licenses

RECOMMENDATION(S)

Approve non-financial Agreement, including non-standard terms, with SUSE LLC, which includes an Addendum, the SUSE Volume License Agreement, and the SUSE Linux Enterprise Server End User License Agreements, applicable to SUSE license subscriptions for the period of October 1, 2021, to September 30, 2022.

(Presenter: Larry Ainsworth, Chief Information Officer, 388-5501)

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 Agreement will not result in the use of Discretionary General Funding (Net County Cost). This Agreement is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under this Agreement, 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 manages multiple enterprise systems and hosts countywide departmental applications for many County departments. These systems and applications utilize several different operating systems. The SUSE Linux Enterprise Server (SLES) operating system hosts several critical applications, such as FileNet, InfoSphere, WordPress, GIS, and IBM Cognos.

The usage of SUSE SLES is governed by the terms listed in the respective SLES End User License Agreements (EULA) and the SUSE Volume License Agreement (VLA). On August 25, 2020 (Item No. 26), the Board approved Contract No. 20-867, including non-standard terms, with SUSE LLC, which included an Addendum, the SUSE Volume License Agreement, and the SUSE Linux Enterprise Server End User License Agreements, applicable to SUSE license subscriptions for the period of October 1, 2020, to September 30, 2021.

Approval of this Agreement incorporates SUSE's latest product specific terms into a single document, referred

to by SUSE as the Addendum to the VLA. In addition to compiling the various terms and conditions into a single Agreement, the Addendum to the VLA will allow ITD to continue its existing SLES license subscription for the one-year period of October 1, 2021, through September 30, 2022.

The SUSE agreements are SUSE's standard commercial terms, 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 Utah.
 - The County standard contract requires California governing law and venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: The agreement will be interpreted under Utah law. Any questions, issues or claims arising under this agreement will require the County to hire outside counsel competent to advise on Utah law, and having a venue in Utah may result in additional expenses, both of which may result in fees that exceed the total contract amount.
2. SUSE may assign the agreement or its obligations under the agreement without notice to or the consent of the County (i) in the case of a merger or acquisition, (ii) upon transfer of a software product to a third party, or (iii) to its parent or a subsidiary of its parent.
 - The County must approve any assignment of the contract.
 - Potential Impact: SUSE may 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. County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand SUSE's ability to assign the agreement.
3. In any legal proceeding related to the Agreement, the prevailing party will be entitled to recover reasonable 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: 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. County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand this provision.
4. SUSE has the right to audit County's use of the software to ensure compliance with the terms of the Agreement. If the audit reveals any underpayments of any fees payable under the Agreement, County shall promptly pay any outstanding amounts, plus 1.5% interest, and reimburse SUSE for its out-of-pocket audit costs if the underpaid amounts are greater than 5%.
 - The County standard contract does not permit Contractors to audit the County's compliance.
 - Potential Impact: If an audit determines that the County's use of the software exceeds the number of licenses purchased, SUSE may demand payments of additional fees plus interest, and reimbursement of audit costs, which will result in fees that exceed the total contract amount. County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand this provision
5. The agreement does not require SUSE to indemnify the County, 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: If the County is sued for any claim, including intellectual property infringement based on its use of SUSE'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 Utah law may allow the County to require SUSE to defend or indemnify it absent an express provision in the agreement.
6. The agreement does not require SUSE to meet the County insurance standards as required pursuant to County Policy 11-07, and the Director of Risk Management has not granted a waiver.
- 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 County has no assurance that SUSE 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. County Counsel cannot advise on whether, and to what extent, Utah law may require SUSE to provide insurance.
7. Maximum liability to the County of the greater of 1.25% of the actual amounts paid by the County for the software or service giving rise to the claim or \$10,000, excluding damages for personal injury or tangible property cause by SUSE's negligence or willful default. For free software limitation of liability, the cap is \$50.
- The County standard contract does not include any limitation of liability.
 - Potential Impact: 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 agreement is not similarly limited. County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. Payment terms are net 30 days from date of invoice with a 1% monthly late fee interest penalty.
- 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 timely pay SUSE will result in a material breach of the contract, which would allow SUSE to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1% per month, which would exceed the contract amount.
9. 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: Any attempted termination by County without cause would result in payment liability for the full contract amount, which could result in payment liability where no funds are available.
10. Venue is in any state or federal court in the State of Utah.
- The County standard contract requires venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Utah may result in additional expenses, which may result in fees that exceed the total contract amount.
11. SUSE disclaims any implied warranty of non-infringement.
- There is no warranty requirement in the County standard contract.
 - Potential Impact: The disclaimer of a warranty of non-infringement, coupled with the lack of indemnity for intellectual property infringement means that, should the County be sued for

intellectual property infringement based on its use of SUSE software or services, the County will be liable for the costs of defense and damages. While infringement claims against end users are rare, they have been known to occur, and the County could be responsible for defense costs and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Utah law may allow the County to require SUSE to defend or indemnify it absent an express provision in the agreement.

ITD recommends approval of this Agreement, including the non-standard terms which are typical in the IT industry, due to the cost and complexity of implementing and migrating to a different operating system needed to run these critical County applications.

PROCUREMENT

The Agreement, 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.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on August 18, 2021; Purchasing (Michael Candelaria, Lead, Buyer III, 387-0321) on August 19, 2021; and Finance (Joon Cho, Administrative Analyst, 387-5402) on August 23, 2021; and Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-3076) on August 23, 2021.