



San Bernardino County

Legislation Text

File #: 5037, Agenda Item #: 77

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT AND RECORD OF ACTION

October 26, 2021

FROM

DAN MUNSEY, Fire Chief/Fire Warden, San Bernardino County Fire Protection District

SUBJECT

Information Technology Contracts with EMC Corporation, Active 911, Inc. and Intterra, Inc.

RECOMMENDATION(S)

Acting as the governing body of San Bernardino County Fire Protection District:

1. Approve non-financial Channel Partner End User Terms with EMC Corporation, also known as Dell Technologies, including non-standard terms, for EMC Corporation equipment and software providing backup and recovery environments for an indefinite period until terminated.
2. Approve Terms of Service and Modification to Terms of Service with Active911, Inc., including the non-standard terms, for emergency notification alerting and incident mapping for the computer aided dispatch incidents in the amount of \$58,750 for the period of October 31, 2021 through October 31, 2026.
3. Approve Annual Subscription - 5 Year Agreement with Intterra, Inc., including the non-standard terms, for software, production support and subscription services associated with Operations, Incident Management, PrePlanning, Advanced Reporting, and Analytics, in the amount of \$371,656.25 for the period of December 1, 2021 through November 30, 2026.
4. Approve End User License Agreement with Intterra, Inc., including the non-standard terms, for software, production support and subscription services associated with Operations, Incident Management, PrePlanning, Advanced Reporting, and Analytics for an indefinite period until terminated.
5. Designate the Fire Chief/Fire Warden to electronically accept the:
 - a. Channel Partner End User Terms with EMC Corporation, also known as Dell Technologies;
 - b. Terms of Service and Modification to Terms of Service with Active911, Inc.; and
 - c. End User License Agreement with Intterra, Inc.

(Presenter: Dan Munsey, Fire Chief/Fire Warden, 387-5779)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

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 Discretionary General Funding (Net County Cost). These Information Technology (IT) contracts will be funded by revenue of the San Bernardino County Fire Protection District (SBCFPD). Sufficient appropriation for these IT contracts is included in SBCFPD's 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

To aid in the mission of protecting the public it serves, SBCFPD uses multiple IT products to provide professional and modern fire protection and advanced life support services. The products and services listed in the Recommendation section of this item play a vital role in assisting SBCFPD with providing these services and ensuring the communities served by SBCFPD receive a professional and dedicated response.

Pursuant to County Policy 11-06, contracts that contain non-standard contract language require approval by the Board of Directors (Board). All of the aforementioned IT contracts include non-standard terms.

Channel Partner End User Terms

Approval of the Channel Partner End User Terms with EMC Corporation, also known as Dell Technologies or Dell, will allow SBCFPD to continue to receive production support, and subscription services from Dell Technologies for Avamar Server and Data Domain services for systems that serve as backup and recovery environments for SBCFPD.

The Dell Technologies Channel Partner End User Terms is Dell'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 Texas.
 - The contract is governed by the laws of the State of Texas. Also, court venue would be in the state and federal courts located within Travis or Williamson County, Texas.
 - SBCFPD's standard contract term is that governing law is California, and venue is San Bernardino County.
 - Potential Impact: County Counsel has reviewed the Dell EMC Product Warranty and Maintenance Table and Channel Partner End User Terms but cannot provide advice as to its legal form without retaining outside counsel licensed to practice law in Texas. Also, in the event of a dispute, court venue would likely be in Travis or Williamson County, Texas. In the event of any resulting lawsuit, this term could result in costs associated with the retention of outside counsel and travel to Texas.
2. The contract is silent on Dell's right to assign the contract without notice to the County and without the County's approval.
 - The County's standard contract requires the County to approve any assignment of the contract.
 - Potential Impact: Dell could assign the contract to a third party or business with which the County is legally prohibited from doing business with 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 Texas law may permit or restrict a party's right to assign without an express provision in the contract.
3. The contract does not address attorneys' fees and costs.
 - The County's 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.
4. The contract does not require Dell to meet the County's insurance standards as required pursuant to County Policy 11-07.

- County Policy 11-07 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.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Dell 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. The term of the contract is indefinite.
- 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.
6. Venue is in the state and federal courts located within Travis or Williamson County, Texas.
- The County's standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Travis or Williamson County, Texas may result in additional expenses that exceed the amount of the contract.
7. Except for claims covered by the indemnity provision, Dell's liability for its sole negligence is limited \$1,000,000 and the price paid. Also, in the case of any loss of data, Dell is only liable for the typical effort to recover the data which would have accrued if SBCFPD had appropriately backed up its data.
- The County standard contract does not include a 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 contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, any applicable law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

Active911, Inc. (Active911)

Active911 is an emergency communications application that provides emergency notification alerting and incident mapping for the computer aided dispatch (CAD) incidents to SBCFPD suppression personnel. The software provides first responders immediate advanced incident mapping and provides an alternate method of notification in the event other notification methods fail.

The existing agreement with Active911 was authorized by the Board on December 15, 2020 (Item No. 73) and expires on October 31, 2021. The recommended agreement with Active911 renews the subscription, in the amount of \$12,690 for the period of November 1, 2021 through October 31, 2022. The agreement documents include the Terms of Service and Modification to Terms of Service. Approval of the agreement with Active911 will allow SBCFPD to continue to receive production support, and subscription services from Active911.

The Active911 Terms of Service is Active911'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. The contract does not require Active911 to indemnify the County.
 - 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: Active911 is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from negligent or intentional acts and intellectual property infringement. If the County is sued for any claim based on its use of Active911's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
2. The County is required to indemnify, defend, and hold Active911 harmless to the maximum extent provided by law for the acts or omissions of SBCFPD and any others acting on behalf of SBCFPD.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Active911, 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 Active911 without such limitations and the County would be responsible to defend and reimburse Active911 for costs, expenses, and damages, which could exceed the total contract amount.
3. The contract does not require Active911 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.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Active911 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.
4. Active911 disclaims all liability whatsoever to the County based on the County's use of its service.
- The County standard contract does not include a 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 contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, any applicable law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

Intterra, Inc. (Intterra)

Intterra provides a cloud-based software that processes the CAD data for a centralized, visual picture of SBCFPD resources and firelines during emergencies, as well as assists in preplans all in real time. This software assists SBCFPD during incidents and provides reporting data to share with stakeholders.

The existing agreement with Intterra was authorized by the Board on December 15, 2020 (Item No. 73), and expires on November 30, 2021. The recommended agreement with Intterra renews the software, production support and subscription services associated with Operations, Incident Management, PrePlanning, Advanced Reporting, and Analytics, in the amount of \$371,656.25 for the period of December 1, 2021 through November 30, 2026. The agreement documents include the Annual Subscription - 5 Year Agreement (which incorporates by reference the original agreement with Intterra dated December 12, 2018), Terms of Use Agreement, End User License Agreement, and Privacy Policy. Approval of the agreement with Intterra will allow SBCFPD to continue to receive system support, and subscription services from Intterra.

The Intterra End User License is Intterra's standard commercial contract, as negotiated between the parties, 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 Colorado law.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under Colorado law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Colorado law, which may result in fees that exceed the total contract amount.
2. All disputes arising under the contract must be settled by binding arbitration in the city of Castle Rock, Colorado.
 - The County standard contract does not require arbitration.
 - Potential Impact: The contract requires binding arbitration for all disputes between the parties. Disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action. Arbitration decisions are not appealable. Having a venue for arbitration in Castle Rock, Colorado may result in additional expenses that exceed the amount of the contract.
3. Intterra 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: Intterra 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. County Counsel cannot advise on, whether and to what extent Colorado law may permit or restrict a party's right to assign without an express provision in the contract.
4. 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, Colorado 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.
5. The contract does not require Intterra 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: Intterra is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Intterra's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Intterra'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 Colorado law may allow the County to require Intterra to defend or indemnify it absent an express provision in

the contract.

6. The County is required to indemnify and hold harmless Intterra from any third-party claims, damages, liabilities, costs and fees (including reasonable attorney fees) arising from the County's use of the software or service as well as from the County's failure to comply with any term of this Agreement.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Intterra, 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 Intterra without such limitations and the County would be responsible to defend and reimburse Intterra for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Colorado law may limit or expand this contract term.
7. The contract does not require Intterra 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.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Intterra 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.
8. Intterra limits its maximum liability to the County to the purchase price of the software paid by the County, or the minimum amount permitted by law.
 - The County standard contract does not include a 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 contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, Colorado law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. Either party's right to bring a legal claim is limited to one year from when it could be filed.
 - The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the County's ability to bring suit to one year amounts to a waiver of the Statute of Limitations for claims and shortens the period of time in which the County may file a lawsuit under the contract.

PROCUREMENT

EMC Corporation Equipment and Software

On September 28, 2021, SBCFPD released an informal request for quotes for EMC Corporation's Avamar Server and Data Domain hardware and software subscription and support services from EMC Corporation and Avamar Server and Data Domain authorized resellers. The following quotes were received:

Vendor	Total Cost
Dell Technologies	\$8,772.00
Sidepath	\$9,978.24
Dyntek, Inc.	\$7,904.68

Dyntek was chosen based on their quote providing the best value and service for SBCFPD.

Notwithstanding the above, the Avamar Server and Data Domain procurement was a non-competitive procurement due to the fact that vendors with similar products or services were not contacted. SBCFPD did not seek quotes from vendors with similar products or services based on functional specifications that Avamar Server and Data Domain systems provide as backup and recovery environments for SBCFPD. Implementing a new backup and recovery system would not be in the best interest of SBCFPD due to the lack of additional benefits similar products/services would provide and the increased costs associated with implementing new systems. While Purchasing has the authority to approve the purchase of these products from Dyntek, Inc., the associated non-financial Channel Partner End User Terms with EMC Corporation must be approved by the Board due to the non-standard terms.

Active911

Active911 was procured by CONFIRE. Although SBCFPD assumed management of their information technology systems from CONFIRE in 2018, SBCFPD does not plan to change systems in the foreseeable future. SBCFPD's continued use of this software is based on functional specifications and compatibility with other existing SBCFPD and CONFIRE systems and software, and to avoid any interruption in services to staff. Therefore, the recommended IT contract with Active911 is non-competitive. SBCFPD must continue to purchase their own license from Active911 for compliance with the CONFIRE CAD system. The previous agreement was approved by the Board on December 15, 2020 (Item No. 73).

Intterra

In 2018, SBCFPD released a request for bid to obtain quotes for software that would provide analytics from SBCFPD's CAD system. The process, which included contacting three vendors, resulted in Intterra being the only vendor that submitted a quote. On an annual basis, SBCFPD plans to reassess the effectiveness of this software and perform market research and cost analysis to determine continued use of the Intterra software. SBCFPD's continued use of this software is based on functional specifications and compatibility with other existing SBCFPD systems and software, and to avoid any interruption in services to staff. Therefore, the recommended IT contract with Intterra is non-competitive. The previous agreement was approved by the Board on December 15, 2020 (Item No. 73).

Purchasing concurs with the non-competitive justification for these agreements.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Scott Runyan, Supervising Deputy County Counsel, 387-5455) on October 21, 2021; Purchasing (Cody Leslie, Lead Buyer, 387-2065) on October 18, 2021; Risk Management (Rafael Viteri, Deputy Director, 386-8730) on October 12, 2021; Finance (Tom Forster, Administrative Analyst, 387-4635) on October 8, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on October 11, 2021.