



# San Bernardino County

## Legislation Text

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**File #: 5197, Agenda Item #: 48**

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

**December 7, 2021**

**FROM**

**PETE MENDOZA, Interim Director, Purchasing Department**

**SUBJECT**

Agreement for Prepaid Gasoline and Retail Cards

**RECOMMENDATION(S)**

1. Approve Agreement with Blackhawk Network LTD for the provision of prepaid gasoline and retail cards as detailed in Attachment A, to be issued to eligible County clients by various departments commencing on December 7, 2021, subject to termination by either party with 60 days prior notice, for the total contract amount not to exceed \$2,295,000.
2. Authorize the Purchasing Agent to approve the addition of prepaid cards to meet department needs through the term of the agreement.

(Presenter: Pete Mendoza, Interim Director, 387-2073)

**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 additional Discretionary General Funding (Net County Cost). The County's three-year average yearly expenditures for the purchase of prepaid cards in pre-pandemic years was approximately \$3,460,000, and while its use has declined since the pandemic, volumes are expected to reach similar averages in upcoming fiscal years. Most funding for prepaid cards is provided by Federal and State sources including Public Safety Realignment, 1991 Realignment, Mental Health Services Act, Victim Witness Assistance Program grant funding, County Victim Services funding, the Independent Living Skills Program, and Assembly Bill 2766 (AB 2766). Sufficient appropriation and revenue are included in the individual department 2021-22 budgets and will be included in future recommended budgets. Departments will not exceed the annual budgeted dollar amount listed in Attachment B.

The San Bernardino County (County) Internal Controls and Cash Manual requires Board of Supervisors (Board) approval for the distribution of prepaid cards exceeding \$2,500 per department per fiscal year. Departments must obtain authorization from Auditor-Controller/Treasurer/Tax Collector's Internal Audits to distribute prepaid cards prior to purchasing or distributing cards.

**BACKGROUND INFORMATION**

Departments order prepaid cards primarily for issuance to clients as supportive service to assist with program requirements or to assist victims of crime, as needed. State law mandates that counties provide transportation assistance to eligible clients to participate in mandated activities or when requested by clients. Approximately 94% of the total distribution is authorized for Human Services to comply with federal and state requirements. The majority of prepaid cards are for gasoline used by clients to attend meetings, doctor appointments, or job interviews. Prepaid cards are also disbursed as an incentive for participation in County employee benefit programs such as the County Rideshare Program. At a later time, Purchasing may need to add merchants to help departments meet the needs of their clients such as when a merchant opens a new location in the County as stated in Recommendation No. 2.

On April 7, 2020 (Item No. 37), the Board approved Agreement No. 20-176 with SVM LP (SVM) for Prepaid Gasoline and Retail Cards for the period of April 7, 2020 through April 7, 2025.

Blackhawk Network LTD (Blackhawk) acquired SVM in April 2020 and allowed SVM to continue to conduct business with no changes to operations. In May 2021, Blackhawk informed the County about the acquisition and began migrating clients from SVM to Blackhawk. On July 13, 2021, Blackhawk advised the County that the company would not agree to the existing terms and conditions of SVM's contract. Despite negotiations, Blackhawk declined to accept a number of the County's terms and conditions.

Blackhawk's standard commercial contract includes a card order agreement, Privacy Policy and Smartsheet security policy. Collectively these documents list terms that differ from the County standard contract and omits certain County standard contract terms. The non-standard and missing terms are:

1. Assignment: This contract states assignment may occur without notice to County.
  - County Policy requires advance notice to the County if there is a sale of all of the company's assets to another company. This contract states it may occur without notice to County.
  - Potential Impact: Although assignment may not be made without the County's prior approval, Blackhawk is permitted to assign the contract to a controlled Affiliate, or a purchaser of all or substantially all of Blackhawk's assets under this agreement without prior notice or consent of County.
2. Contract Term: The term of the contract has no fixed term expiration.
  - Standard County Policy contract term is five years.
  - Potential Impact: This contract will remain in force until the later of such time each party's obligations as defined herein are fulfilled for the placement of orders or the agreement is terminated upon 60 days' notice or amended by the parties.
3. Dispute Resolution: This contract requires disputes to be resolved by arbitration.
  - Non-binding arbitration is acceptable under County Policy.
  - Potential Impact: Any controversy or claim arising out of or in any way connected with this Agreement or the alleged breach thereof shall be resolved by one arbitrator held in San Francisco Bay Area. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Costs of arbitration will be shared equally by the Parties.
4. Indemnification: The contract indemnifies the County against claims from breach or alleged beach, violation of law, gross negligence, willful or fraudulent misconduct, and infringement claims.
  - County Policy requires the Contractor to indemnify the County against all claims arising out of the contract from any cause whatsoever. The County standard contract does not include any indemnification or defense by the County of a Contractor, and here the County must also indemnify the Contractor for those same types of claims. The County also indemnifies the Contractor for the resale of cards by County's business clients or consumers, and for email delivery of virtual card codes and electronic cards.
  - Potential Impact: By agreeing to indemnify Blackhawk, 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 Blackhawk without such limitations and the County would be responsible to defend and reimburse Blackhawk for costs, expenses, and damages, which could exceed the total contract amount.

5. Insurance: The Blackhawk Card Order Agreement does not include insurance standards as required pursuant to County Policy 11-07.
  - The County standard contract requires the Contractor to carry the insurance specifications as stated in County Policy 11-07SP.
  - Potential Impact: The County will not be an additional insured by the Contractor's insurance under the Agreement and will have to rely on its own insurance for any direct or indirect third-party claims.
6. Limitation of Liability: The Limitations of Liability are consistent with County Policy 11-05 A.8, except the specific limitation provision does not expressly exclude violations of law by the Contractor.
  - The County standard contract term is that the Contractor may not limit its liability, but County Policy allows an acceptable revision upon approval by Risk Management, County Counsel and Purchasing.
  - Potential Impact: Contractor may argue that a violation of law, although silent, is included within the liability limitation. However, the limitation of liability does exclude indemnity obligations, which includes violation of law. Also, gross negligence, willful misconduct, and fraud are expressly excluded from the limitation of liability.
7. Payment terms: Prepaid. The Contractor will process the order after receipt of full payment.
  - County standard term accepts for net 60, 45 and 30 days and payment in full is not required before the order is processed.
  - Potential Impact: Orders are fulfilled after full payment.
8. Termination for convenience: contract's termination for convenience is 60 days' notice.
  - Standard County policy is 30 days' notice.
  - Potential Impact: Delay of 30 additional days to terminate contract.
9. Warranty: This contract excludes warranties except for intellectual property infringement and is an acceptable revision for this type of product/service being offered.
  - The County standard contract term is that Contractor fully warrants its services and product.
  - Potential Impact: The County will not possess a claim for the statutory or common implied warranties of merchantability or fitness for a particular purpose and implied warranties arising from course of dealing or course of performance.

Purchasing recommends approval of the agreement, including the non-standard terms, because the benefits of allowing County departments to purchase the prepaid cards outweigh the potential risk.

## **PROCUREMENT**

The Purchasing Department issued Request for Proposal (RFP) No. PURC-3676 for prepaid cards on December 26, 2019. Two vendors submitted proposals, SVM and NGC US, LLC. Following an evaluation of the two proposals based on cost, method of delivery, card attributes, reporting capabilities, financial stability, and reference, SVM was recommended for award.

Blackhawk acquired SVM in 2020 and made the decision not to assign the contract terms and conditions of SVM's contract. The Purchasing Department supports issuing the recommended non-competitive agreement in order to avoid disruptions to County operations. The original termination date of the contract was April 7, 2025. Accepting the agreement with Blackhawk, will allow the Purchasing Department time to develop and release an Invitation To Bid (ITB) for gift card services in 2022. After the solicitation process is complete,

Purchasing will submit a recommendation to the Board for a new agreement in mid-2022 and upon approval, Purchasing will terminate the agreement with Blackhawk.

Any party shall be entitled upon at least 60 days' prior written notice to the other party, to terminate this agreement.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (John Tubbs II, Deputy County Counsel, 387-5455) on November 8, 2021; Risk Management (Rafael Viteri, Deputy Director, 387-8730) on November 9, 2021; Auditor-Controller/Treasurer/Tax Collector (Denise Mejico, Chief Deputy Auditor, 382-3183) on November 9, 2021; Aging and Adult Services (Cesar Bernal, Administrative Supervisor II, 891-3926) on November 10, 2021; Behavioral Health (Ruben Gasco, Administrative Supervisor I, 388-0824) on November 10, 2021; Workforce Development (Fred Burks, Administrative Supervisor, 387-9845) on November 9, 2021; Probation (Thomas Kamara, Director of Probation Administration, 387-9631) on November 9, 2021; District Attorney (Claudia Walker, Chief of Administration, 382-7689) on November 9, 2021; Human Resources (Amy Coughlin, Deputy Director, 387-9676) on November 11, 2021; Finance (Sofia Almeida, Administrative Analyst III, Jessica Trillo, Administrative Analyst III, Kathleen Gonzalez, Administrative Analyst III, Carl Lofton, Administrative Analyst III, Christopher Lange, Administrative Analyst III, Carolina Mendoza, Administrative Analyst III, and John Hallen, Administrative Analyst III, 387-4378) on November 12, 2021; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on November 18, 2021.