



San Bernardino County

Legislation Text

File #: 5215, Agenda Item #: 25

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

December 7, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Amendment to Master Service Agreement with Oracle America, Inc.

RECOMMENDATION(S)

Approve Amendment No. 3 to Master Service Agreement No. 14-800 with Oracle America, Inc. to add Oracle University Terms & Policies for enrollment in training courses with no change to the total not-to-exceed amount of \$5,000,000 for the period of February 1, 2022, through September 30, 2024.

(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 Amendment No. 3 to Master Service Agreement No. 14-800 with Oracle America, Inc. (Oracle) will not result in the use of Discretionary General Funding (Net County Cost) as there is no increase to the not-to-exceed amount of \$5,000,000 associated with this Amendment. The cost associated with this Agreement is included in the Innovation and Technology Department (ITD) Computer Operations 2021-22 adopted budget and will be included in future recommended budgets. Operating costs are recovered via service rates approved annually by the Board of Supervisors (Board).

BACKGROUND INFORMATION

ITD maintains the Employee Management and Compensation System (EMACS), Geographic Information System applications, tape libraries and tape drives housed in the ITD data center and the disaster recovery center, all of which utilize Oracle products.

On September 23, 2014 (Item No. 25), the Board approved Master Service Agreement (OMSA) No. 14-800 with Oracle for proprietary software and hardware support and maintenance from October 1, 2014, through September 30, 2019, in the amount of \$3,623,643 and also approved the non-financial Amendment No. 1 to the OMSA to update the terms and conditions.

On September 10, 2019 (Item No. 31), the Board approved Amendment No. 2 to renew the OMSA for the five-year-period of October 1, 2019, through September 30, 2024, and increased the contract amount to a not to exceed amount of \$5,000,000 to allow the County to continue to receive necessary software and hardware

support services for a variety of Oracle proprietary products that are critical to County operations.

Approval of this Amendment will add the Oracle University Terms & Policies as an attachment to the OMSA, which are necessary for County staff to enroll for online or in-person training courses.

The Oracle University Terms & Policies is its 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 is silent on Oracle's right to 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: Oracle may 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.
2. The contract does not require Oracle to indemnify the County, including for intellectual property infringement claims.
 - 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. The County standard contract general 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.
 - Potential Impact: Oracle is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Oracle'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 Oracle's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
3. The contract does not require Oracle to meet the County's insurance standards.
 - 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 contract does not include County standard insurance requirements. This means that the County has no assurance that Oracle 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. Oracle's maximum liability to the County is limited to the fee paid by the County for the order giving rise to the liability, and if the damages result from the County's use of Oracle products or services, to the fee paid for the product or service giving rise to the liability, without exclusion.
 - 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.
5. Neither party may bring a claim more than two years after the cause of action accrued, except for actions for non-payment or breach of Oracle's proprietary rights.
 - 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 2 years 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.
6. The term of the contract is perpetual.
- 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 until terminated.
7. Venue is in the courts in San Francisco and Santa Clara Counties, California.
- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in San Francisco and Santa Clara Counties, California may result in additional expenses that exceed the amount of the contract.
8. Oracle provides the products and services "AS IS" and disclaims all warranties of any kind.
- There is no warranty requirement in the County standard contract. The County expects its vendors and service providers to fully warrant the products and services they provide to the County.
 - Potential Impact: The County's use of the Oracle products and services is solely at the County's own risk.

ITD recommends approval of the Oracle University Terms & Policies, including the non-standard terms, to allow ITD to obtain training services from Oracle.

PROCUREMENT

There is no procurement action related to this Amendment. The terms will be used to accompany future purchases 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 October 28, 2021; Purchasing (Michelle Churchill, Supervising Buyer, 387-2070) on October 10, 2021; Risk Management (Victor Tordesillas, Director, 386-8623) on November 29, 2021; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on November 16, 2021; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on November 17, 2021.