



San Bernardino County

Legislation Text

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

February 8, 2022

FROM

LEONARD X. HERNANDEZ, Chief Executive Officer, County Administrative Office

SUBJECT

Agreements and Terms of Service for Live Streaming Software and Platforms to Provide Content for Public Viewing

RECOMMENDATION(S)

1. Approve the Wirecast Studio End User License Agreement, Terms of Service, and Terms and Conditions of Sale with Telestream, LLC, including non-standard terms, for the ability to stream content live, for a total estimated contract amount of \$599 annually, for an indefinite period of time until terminated by either party.
2. Approve the YouTube Terms of Service with Google, LLC, including non-standard terms, for the use of the YouTube platform to provide content for public viewing, at no cost for an indefinite period of time until terminated by either party.
3. Approve the Facebook Terms of Service with Meta Platforms, Inc., including non-standard terms, for the use of the Facebook platform to provide content for public viewing, at no cost for an indefinite period of time until terminated by either party.

(Presenter: Martha Guzman-Hurtado, Chief Communications Officer, 387-5417)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

FINANCIAL IMPACT

Approval of these agreements do not require the use of additional Discretionary General Funding (Net County Cost). The Telestream Wirecast Studio subscription is based on a cost of \$599 annually. Use of the YouTube and Facebook platforms are at no cost to the County. Sufficient appropriation to fund the software subscription is included in the County Administrative Office's (CAO) 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Telestream will be used by the CAO for live-streaming content and broadcasting live events, using YouTube and Facebook, across multiple platforms simultaneously from one laptop. The software will be useful to disseminate information to the public through live-streaming of events. Per County Policy 11-05, the Board of Supervisors (Board) must approve missing or non-standard contract terms.

Telestream's End User License Agreement (EULA), Terms of Service (ToS) and Terms and Conditions of Sale

(T&C's) are Telestream's standard commercial contracts, which include 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. Telestream may change the ToS and T&C's at any time by posting on the website, and continued use of the website following notice constitutes acceptance of the amended terms.
 - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person(s) authorized to do so on behalf of Contractor and County.
 - Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.
2. Telestream may assign the EULA, ToS, and T&Cs without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Telestream 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.
3. All disputes arising under the EULA must be settled by binding arbitration.
 - 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.
4. The prevailing party in any legal action related to the EULA is entitled to recover attorneys' fees and costs, including arbitration fees. If Telestream is the prevailing party in any legal action related to the T&C's, Telestream is entitled to recover attorneys' fees and costs, but the County is not.
 - 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 EULA, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount. If either party institutes any legal proceedings related to the T&C's, if Telestream is the prevailing party, Telestream will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount. If the County is the prevailing party, the County will not be entitled to recover attorneys' fees and costs.
5. Telestream disclaims the warranty of non-infringement and has no obligation to provide any defense or indemnification for claims made against the County under both the EULA and the ToS.
 - There is no warranty requirement in the County standard contract. 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: 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 the Telestream software, 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.

6. The County is required to indemnify Telestream against any claim, lawsuit, action or liability brought against Telestream based on the County's use of the software, posted content, negligence or willful misconduct, and breach of contract under the EULA. The County is required to hire attorneys to defend Telestream and pay damages related to the County's breach of the ToS.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Telestream, 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 Telestream without such limitations and the County would be responsible to defend and reimburse Telestream for costs, expenses, and damages, which could exceed the total contract amount.
7. None of the EULA, the ToS, nor the T&C's require Telestream 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 County has no assurance that Telestream 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. Telestream's maximum liability to the County under the EULA is limited to the license fees paid in the 12 months prior to the claim.
 - 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.
9. Payment terms are pay in advance and late payment not cured within 10 days are ground for termination and interest of 1.5% per month. All fees are non-refundable.
 - 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 make timely payment will result in a material breach of the contract, which would allow Telestream to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1.5% per month, which would exceed the contract amount.
10. The term of the contract is indefinite, until terminated.
 - 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.
11. Venue for legal actions under the EULA and the ToS is in Nevada County, California. Venue for legal actions under the T&C's is Sacramento County, California.
 - The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
 - Potential Impact: Having a venue in Nevada County, California or Sacramento County, California may result in additional expenses that exceed the amount of the contract.
12. Telestream provides the software and website "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 software is solely at its own risk.

The Google, LLC (Google) YouTube Terms of Service ("Terms") is Google's standard commercial contract for using the YouTube platform, 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. Google may change the Terms at any time with reasonable advanced notice of material changes and the opportunity to review the changes, except (1) when Google launches a new product or feature, or (2) in urgent situations, such as preventing ongoing abuse or responding to legal requirements. Unless the County removes its Content and stops using the Service, the revised terms will apply.
 - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person (s) authorized to do so on behalf of Contractor and County.
 - Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.
2. The Terms do not restrict Google's right to assignment.
 - The County must approve any assignment of the contract.
 - Potential Impact: Google 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.
3. The County agrees to defend, indemnify and hold harmless Google against claims arising from the County's: (i) use of and access to YouTube; (ii) violation of the Terms; (iii) violation of any third party right, including copyright, property, or privacy rights; or (iv) Content causing damage to a third party.
 - The County standard contract does not include any indemnification or defense by the County of a vendor.
 - Potential Impact: By agreeing to indemnify Google, 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 Google without such limitations and the County would be responsible to defend and reimburse Google for costs, expenses, and damages, which could exceed the total contract amount.
4. The Terms do not require Google 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 Google 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. Google limits its maximum liability to the County, without exceptions or exclusions, to the greater or the amount of revenue that YouTube has paid to the County from the County's use

of the service in the 12 months before the date of the County's notice of the claim, and \$500.

- 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.

6. Both parties agree that any cause of action arising from the use of the services must be brought within one year, or be permanently barred.

- 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.

7. Venue is in Santa Clara County, California.

- The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
- Potential Impact: Having a venue in Santa Clara County, California may result in additional expenses that exceed the amount of the contract.

8. Google provides the YouTube platform "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 YouTube platform is solely at its own risk.

The Meta Platform, Inc. (Meta) Facebook Terms of Service ("Terms") is Meta's standard commercial contract for using the YouTube platform, 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. Meta may change to the Terms at any time with notice and an opportunity to review the changes before they go into effect, unless otherwise required by law. The County's continued use of Facebook once any updated Terms are in effect, constitutes acceptance.

- The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person (s) authorized to do so on behalf of Contractor and County.
- Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.

2. The Terms do not restrict Meta's right to assignment.

- The County must approve any assignment of the contract.
- Potential Impact: Meta 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.

3. The Terms do not require Meta 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 Meta 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. Meta limits its aggregate to the greater of \$100 or the amount the County has paid to Meta in the past 12 months.
- 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. Venue is in the U.S. District Court for the Northern District of California or a state court located in San Mateo County
- The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
 - Potential Impact: Having a venue in Santa Clara County, California may result in additional expenses that exceed the amount of the contract.
6. Meta provides Facebook "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 Facebook is solely at its own risk.

The CAO recommends approval of the agreements with Telestream, for Wirecast Studio software, Google for YouTube, and Meta for Facebook, including the non-standard terms, as these agreements would benefit the County with its communications strategy and help disseminate information to the public. Either party may cancel or terminate the respective agreement upon written notice to the other party.

PROCUREMENT

The recommended agreements are the result of a non-competitive procurement. The department selected the software that would best meet its needs based on popular social media platforms and software that would stream across multiple platforms (Telestream). County Policy 11-04 states that any non-competitive procurement under \$200,000 may be approved by the Purchasing Agent. However, these agreements are being presented to the Board due to the non-standard terms or missing terms in these agreements.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on January 12, 2022; Department of Risk Management (Victor Tordesillas, Director, 387-5564) on January 18, 2022; Finance (Stephenie Shea, Administrative Analyst, 387-4919) on December 29, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on January 5, 2022.