



San Bernardino County

Legislation Text

File #: 6669, Agenda Item #: 36

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

September 13, 2022

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Agreement with CA, Inc. for Software Licenses, Maintenance and Support

RECOMMENDATION(S)

1. Approve Software License Foundation Agreement, including non-standard terms, with CA, Inc., for software licenses, maintenance, and support for the total amount of \$1,309,578, for the period of September 30, 2022, through December 20, 2025.
2. Authorize the Purchasing Agent to issue Purchase Orders to CA, Inc. in amounts not to exceed \$500,000 aggregate to purchase additional software licenses, maintenance, and support for the period of September 30, 2022, through December 20, 2025.

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

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The Innovation and Technology Department (ITD) operating costs are recovered via service rates approved annually by the Board of Supervisors (Board). The three-year total cost for the CA, Inc. (CA) Software License Foundation Agreement (Agreement) for the software licenses, maintenance, and support is \$1,309,578. The additional not to exceed amount of \$500,000 for purchase orders will be used to purchase additional software licenses, maintenance, and support as needed during the Agreement term. The costs for the Agreement and purchase orders are included in the ITD Computer Operations 2022-23 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

ITD maintains a variety of different CA software platforms used to support several critical departmental applications, such as the Jail Information Management System and Property Information Management System, and for the cataloging of storage tapes that are used for data back up and part of the County's disaster recovery plan.

On December 19, 2017 (Item No. 25), the Board approved a non-financial Foundation Agreement No. 17-905 with CA that included terms and conditions to govern the purchase of software licenses, support, and professional services purchased directly from CA. On October 22, 2019 (Item No. 19), the Board approved

Amendment No. 1 to the Foundation Agreement with CA adding termination provisions and providing for pro rata refund of prepaid license fees for the period December 21, 2017, through December 20, 2022. The Agreement with CA is required to continue to use the software and receive maintenance and support.

The Agreement is CA's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard terms. While the parties negotiated certain contract terms to meet County standards, CA would not agree to all County standard terms. The non-standard and missing terms include the following:

1. CA may assign its payment rights, or grant a security interest in, the Agreement, and any transaction document to a third party without requiring that third party to be liable for the obligations of CA under the Agreement or transaction document, so long as CA remains directly responsible and the County's obligations are not otherwise affected, and provided that such third party nor its principals are debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: CA could 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. Should this occur, the County would be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement.
2. In any formal action or proceeding arising from a dispute or relating to non-payment, the prevailing Party is entitled to recover its costs and reasonable attorneys' fees from the other Party as awarded by a court of competent jurisdiction.
 - 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 Agreement amount.
3. CA or CA's independent third-party auditor may audit the County's compliance with the Agreement, remotely or at County facilities. If an audit reveals any unpaid or unlicensed use, the County will order at CA's then-current list price, a sufficient number of licenses and support to cover its past or current excess use. If an audit reveals an underpayment of ten percent (10%) or more of total fees owed for the review period, the County will also reimburse CA for its reasonable audit expenses.
 - 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, CA may demand payments of additional fees and reimbursement of audit costs, which will result in costs that exceed the total Agreement amount.
4. The County is required to indemnify CA against any claim that any data, materials, items or information supplied to CA under the Agreement infringes any US patent, copyright or trademark within the jurisdictions where CA is provided with such information.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify CA, 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 CA without such limitations and the County would be responsible to defend and reimburse CA for costs, expenses, and damages, which could exceed the total Agreement amount.

5. The Agreement does not require CA 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 CA 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 Agreement amount.
6. CA's total liability to the Count is limited to direct damages not to exceed one million dollars, except for breach of confidentiality or title, and third-party claims arising under CA's indemnification obligations.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess.

ITD recommends approval of the Agreement, including the non-standard terms, for the continued use of the various CA software including future updates and patches related to security and performance issues to ensure County applications perform as needed.

PROCUREMENT

A competitive process was not completed for this procurement. ITD currently utilizes a variety of CA software platforms and does not recommend switching to new software at this time due to the significant time and costs it would take to replace these critical products. CA offers the various software including the maintenance and support to be purchased directly through CA. Purchasing concurs with the non-competitive justification of obtaining the software and support vendor direct as this is more cost efficient and provides less system downtime risk for the County to receive software maintenance and support directly from the manufacturer. 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, Supervising Deputy County Counsel, 387-5455) on August 10, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on August 12, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on August 18, 2022; Finance (Ivan Ramirez, Administrative Analyst III, 387-4020) on August 24, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on August 28, 2022.