



San Bernardino County

Legislation Text

File #: 6672, Agenda Item #: 38

**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

Non-Financial Amendment to Agreement with SUSE LLC, for SUSE Software Licenses

RECOMMENDATION(S)

Approve non-financial Amendment No. 1 to Agreement No. 21-648, including non-standard terms, with SUSE LLC, which includes an Addendum, the SUSE Volume License Agreement, and the SUSE Linux Enterprise Server End User License Agreements, for SUSE license subscriptions for purchase amounts as authorized by County Policy, updating the terms and extending the period of the Agreement by one year for the total contract period of October 1, 2021, to September 30, 2023.

(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 this item will not result in the use of Discretionary General Funding (Net County Cost). Amendment No. 1 to the Agreement is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ITD manages multiple enterprise systems and hosts countywide departmental applications for many County departments. These systems and applications utilize several different operating systems. The SUSE Linux Enterprise Server (SLES) is a computer operating system that supports basic computer functions to run other software applications. SLES is needed for County departments to utilize applications, such as FileNet, InfoSphere, WordPress, GIS, and IBM Cognos.

The usage of SUSE SLES is governed by the terms listed in the respective SLES End User License Agreements (EULA) and the SUSE Volume License Agreement (VLA). On September 14, 2021, (Item No. 25), the Board approved Contract No. 21-648, including non-standard terms, with SUSE LLC (SUSE), which included an Addendum, the SUSE VLA, and the SUSE Linux Enterprise Server EULA, applicable to SUSE license subscriptions for the period of October 1, 2021, to September 30, 2022.

Approval of Amendment No. 1 to the Agreement extends the term of the Agreement through September 30, 2023 and replaces the Terms and Conditions for SUSE Subscription Offerings dated July 2021 with the Subscription Terms and Conditions for SUSE Subscription Offerings dated June 2022. The Amendment will allow ITD to continue to utilize the SLES license subscription for an additional one-year period of October 1, 2022, through September 30, 2023.

The SUSE Subscription Terms and Conditions Agreement is SUSE's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. SUSE is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Governing law is The State of New York.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under New York law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on New York law, which may result in fees that exceed the total Agreement amount.

2. SUSE may assign the Agreement without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: SUSE 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. County Counsel cannot advise on whether and to what extent New York law may permit or restrict a party's right to assign without an express provision in the Agreement.

3. SUSE and the County mutually agree to indemnify the prevailing party in any litigation against legal costs, including reasonable attorneys' fees, interest, court costs, accountant and other expert fees, and other reasonable fees of litigation.
 - 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.

4. SUSE has the right to audit the County's use of the subscription offering. If the audit reveals that the purchases have been insufficient, the County will purchase sufficient offerings to cover any shortfall at the then-current full list price, and if the shortfall is 5% or more, reimburse SUSE for the costs of the audit.
 - 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 offerings exceeds the number of licenses purchased, SUSE may demand payments of additional fees plus interest, and reimbursement of audit costs, which will result in fees that exceed the total Agreement amount.

5. The Agreement does not require SUSE to indemnify the County, as required by County Policy 11-07, including for intellectual property infringement claims.
 - The County standard contract indemnity provision requires the Contractor to indemnify, defend, and hold the 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 the 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: SUSE is not required to defend, indemnify or hold the County harmless from any

claims, including indemnification for claims arising from SUSE'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 SUSE's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount. County Counsel cannot advise on whether and to what extent New York law may allow the County to require SUSE to defend or indemnify it absent an express provision in the Agreement.

6. The Agreement does not require SUSE 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 SUSE 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.

7. SUSE's maximum liability to the County is limited to the fees received by SUSE for the particular offering during the preceding 12-month period or \$50 if the offering was free, excluding liability for death or personal injury, fraud or fraudulent misrepresentation, or any other liability that cannot be lawfully excluded or limited.
 - 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. County Counsel cannot advise on, whether and to what extent, New York law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

8. The venue is in New York County, New York.
 - The County standard contract requires the venue for disputes to be the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in New York County, New York may result in additional expenses that exceed the amount of the Agreement.

Due to the cost and complexity of migrating to a different operating system, ITD recommends approval of the Amendment, including the non-standard terms, for the continued use of the SUSE Linux Enterprise Server operating system as well as future updates and patches related to security and performance issues to ensure County applications perform as needed.

PROCUREMENT

The Amendment, 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 5, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on August 4, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on August 5, 2022; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) on August 10, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on August 28, 2022.