



San Bernardino County

Legislation Text

File #: 7086, Agenda Item #: 35

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

November 15, 2022

FROM

JASON ANDERSON, District Attorney

SUBJECT

Purchase of Unbudgeted Fixed Asset and Agreement with Berla Corporation for Vehicle Forensic iVe Ecosystem

RECOMMENDATION(S)

1. Approve the purchase of vehicle forensic iVe Ecosystem Toolkit from Berla, Inc., in the amount of \$10,600, as an unbudgeted fixed asset to retrieve forensic data from vehicles connected with crimes.
2. Approve End User License Agreement, including non-standard terms, with Berla, Inc., for the vehicle forensic iVe Ecosystem, including system training and certification of department personnel, at a cost not to exceed \$38,000, upon execution of the online agreement and renewed annually, for a period of four years, effective December 1, 2022 through November 30, 2026.
3. Approve appropriation adjustments of \$10,600 for the unbudgeted fixed asset purchase and authorize the Auditor-Controller/Treasurer/Tax Collector to post necessary budget adjustments, as detailed in the Financial Impact Section (Four votes required).
4. Authorize the Purchasing Agent to issue future change orders up to \$10,000, change any non-financial/non-material terms, and sign corresponding non-substantive amendments, subject to County Counsel review.
5. Designate the Chief of Bureau of Investigation as authorized to execute the online agreement annually on behalf of the County, for a period of four years, subject to review by County Counsel.
6. Direct the District Attorney to transmit copies of all documents in relation to Berla Inc.'s iVe Ecosystem End User License Agreement to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Michael Fermin, Chief Assistant District Attorney, 382-3662)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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 one-time cost of \$10,600 for the forensic iVe Ecosystem Toolkit will be funded with savings in Professional Services. The cost of the user license agreement will not exceed \$5,000 annually. Training costs are \$4,500 per person and the District Attorney (Department) estimates that no more than four staff will need training during the term of this agreement for a total of \$18,000. The Department estimates that the total cost of the license agreement and training will not exceed \$38,000 during the term of the agreement. Sufficient

appropriation and revenue are included in the Department's 2022-23 budget and will be included in future recommended budgets.

A budget adjustment is requested according to the table below.

Fund Center	Commitment Item	Description	Action	Amount
4500001000	52002445	Professional Services	Decrease	\$10,600
4500001000	54404040	Equipment	Increase	\$10,600

BACKGROUND INFORMATION

The Department is the public prosecutor and has the mandated responsibility to prosecute crimes committed within San Bernardino County (County) pursuant to Government Code Section 26500. The Department bears the responsibility to provide the burden of proof (beyond a reasonable doubt) for crimes committed. This means that during prosecution, the Department must provide evidence, motive, and the means, or ability, to commit crimes.

In 2015, the Department purchased a vehicle forensic iVe ecosystem toolkit from Berla, Inc. (Berla) for the Bureau of Investigation to retrieve data from vehicles connected with crimes. Berla sets the industry standard for vehicle forensics and retrieves and interprets data from most vehicles. The tools and software retrieve information from numerous vehicle components such as global positioning system (GPS) data, navigation history, call logs, contact lists, short messaging service (SMS) messages, and emails. The software can identify devices that have been paired with the vehicle before, during, and after the vehicle's involvement in a crime. The data retrieved can provide additional proof (beyond a reasonable doubt) that the defendant was involved with the crime under investigation.

The types of cases that require vehicle forensic information include auto theft, auto insurance fraud, arson investigations, homicides, vehicular homicides, and human trafficking. When requested, the Department assists other County departments and law enforcement agencies to retrieve vehicle forensic information.

On September 24, 2019 (Item No. 20), the Board of Supervisors (Board) approved a five-year renewal of the license agreement with non-standard terms for its existing toolkit. Over the last several years, there has been a significant increase in the number of cases for which vehicle forensic data has strengthened cases by providing additional evidence that connects defendants to the particular crime in question. To avoid delays in investigation, prosecution and the loss of evidence, the Department requests approval of a second forensic toolkit. Obtaining certification requires a week-long training course, successful completion of a two-part examination process and yearly Continuing Education Unit (CEU) requirement.

Berla would not provide fixed pricing for the annual license agreement due to changes in manufacturing processes and changing technology. However, they did provide not to exceed annual license costs and a fixed cost for training. Berla's End User License Agreement (EULA) includes terms and conditions that are non-standard to County contracts and require approval from the Board. Berla has taken the position that its EULA terms and conditions are not negotiable.

County Counsel has identified the non-standard terms and conditions but cannot advise on the potential impact as the EULA is governed by the laws of the state of Maryland.

1. The EULA requires the County to pay costs of enforcement and collection, including attorney's fees in the event of nonpayment of invoice.
 - The standard County contract requires each party to pay their own costs and fees in the event of a dispute.

- Potential Impact: This provision creates the possibility that the County will be responsible for Berla's costs, including attorney's fees in the event of nonpayment. County Counsel cannot advise on the enforceability of this provision under Maryland law.
2. The EULA requires the County to maintain complete records relating to its use of the Software and the number of computers or workstations on which it may be installed. Additionally, the EULA gives Berla the right, upon reasonable notice, to order an independent third-party copy and audit of such records at least twice a year. If the audit establishes that any additional amounts are due to Berla, the County must immediately pay such amounts plus interest. If the deficit amount is greater than five percent of the amount actually paid in the relevant period, then the County is required to reimburse Berla for the cost of the audit.
 - The County does not typically agree to pay penalty interest or costs.
 - Potential Impact: This provision gives Berla audit rights relating to software use and creates the possibility that the County will be liable for additional amounts, including audit costs and interest. County Counsel cannot advise on the enforceability of this provision under Maryland law.
 3. The EULA requires the County to agree not to export or re-export the software except in full compliance with applicable law, and to indemnify Berla for any claims resulting from the breach of this requirement.
 - The standard County contract does not require the County to indemnify private parties.
 - Potential Impact: By agreeing to indemnify Berla, the County may 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 Berla, and the County would be responsible to defend and reimburse Berla for costs, expenses and damages. County Counsel cannot advise on the enforceability of this provision under Maryland law.
 4. The EULA gives Berla a right of termination for cause. The County does not have a similar right though the EULA would terminate if the County ceased payment.
 - The standard County contract provides that the County may terminate for convenience or for cause.
 - Potential Impact: Once the County approves the EULA it is in effect for the license term stated in the order form, provided that the County has paid and is current on all fees, unless Berla terminates the EULA for cause. County Counsel cannot advise on the enforceability of this provision under Maryland law.
 5. The EULA disclaims the warranty of non-infringement and offers no indemnity for infringement claims.
 - Standard County policy requires either a warranty of non-infringement or indemnity for infringement claims. Berla offers neither.
 - Potential Impact: If the County is sued for any claim, including intellectual property infringement based on its use of Berla equipment and services, the County may be solely liable for the costs of defense and damages. County Counsel cannot advise on the enforceability of this provision under Maryland law, or the extent to which Maryland law may allow the County to require Berla to defend or indemnify it absent an express intellectual property indemnity provision in the EULA.
 6. The EULA contains a limitation of liability. To the maximum permitted by law, Berla states it shall not be liable for any claim or other liability under the EULA, and in no event shall its liability

exceed the total amount of fees paid to Berla for software costs. Indemnity obligations, gross negligence, willful misconduct and violations of law are not excluded from the limitation of liability.

- Standard County policy does not allow the contractor to limit its liability in performance of the contract, but does allow Risk Management, County Counsel and Purchasing to agree to a limitation of liability that is appropriate for the type of purchase but excludes indemnification obligations, gross negligence, willful misconduct and violations of law.
 - Potential Impact: Given the limitation of liability, the County's use of the equipment and services may be primarily at the County's sole risk of loss. County Counsel cannot advise as to the enforceability of this provision under Maryland law.
7. The EULA provides that in the event Berla pursues any claim or action to enforce the terms of the EULA, Berla shall be entitled to recover all costs, including but not limited to court costs, witness fees, costs of investigation and attorney's fees.
- The standard County contract requires each party to pay their own costs and fees in the event of a dispute.
 - Potential Impact: This provision creates the possibility that the County will be responsible for Berla's costs, including attorney's fees in the event of a dispute. County Counsel cannot advise on the enforceability of this provision under Maryland law.
8. The EULA is governed by the laws of the state of Maryland, and the venue of any disputes will be in the federal and state courts of Maryland.
- The standard County contract requires governing law to be that of the State of California and venue to be in the courts of San Bernardino County.
 - Potential Impact: The EULA will be interpreted according to the laws of the State of Maryland. Any questions, issues or claims arising under the EULA will require the County to hire outside counsel to advise on Maryland law.
9. Berla's rights to assign the EULA are not addressed.
- Standard County policy requires the County's prior consent for an assignment.
 - Potential Impact: This provision creates the possibility that Berla may be able to assign the EULA without the County's prior consent. County Counsel cannot advise on the enforceability of this provision under Maryland law.
10. The EULA does not contain the standard County insurance requirements.
- Standard County policy requires inclusion of the standard County insurance requirements in contracts unless otherwise approved by the Risk Management Department.
 - Potential Impact: The County is uninformed as to the insurance put in place by Berla, and therefore cannot evaluate its adequacy in terms of providing protection to the County.

The Department recommends approval of Berla's EULA, including non-standard terms, to ensure continued access to vehicle forensic tools to retrieve information that is critical to the investigation and prosecution of cases.

PROCUREMENT

This is a non-competitive procurement based on Berla being the developer and sole provider of the iVe toolkit. Berla also provides maintenance, support, and training to use their toolkit. The Department has been using Berla's iVe vehicle forensic system since late 2015. There are not any close competitors who offer a similar system for law enforcement due to the amount of resources required to develop a specialized system of tools

and software. It is a labor-intensive process to reach the vehicle components that contain forensic information.

Other vendors may provide the service of retrieving forensic information, but their focus is usually on reconstructing vehicle collisions for insurance purposes. Some vendors require that their personnel come onsite and retrieve the data before making it accessible. Due to the need to demonstrate the chain of custody for case evidence, the Department prefers that its staff retrieve and interpret the data.

The Purchasing Department concurs with the non-competitive justification of specialized credentials for the service and support of the iVe Ecosystem.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Katherine Hardy, Deputy County Counsel, 387-

5455) on October 14, 2022; Purchasing (Michelle Churchill, Supervising Buyer, 387-2070) on October 14, 2022; Auditor-Controller/Treasurer/Tax Collector (Vanessa Doyle, Chief Deputy Controller, 382-3195) on October 17, 2022; Risk Management (Victor Tordesillas, Director, 386-8623); Finance (Kathleen Gonzalez, Finance Analyst, 387-5412) on October 28, 2022; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on October 28, 2022.