



San Bernardino County

Legislation Text

File #: 7294, Agenda Item #: 11

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

January 10, 2023

FROM

CHRIS WILHITE, Assessor-Recorder-County Clerk

SUBJECT

Non-Financial Service Level Agreement with Whitaker Brothers Business Machines, Inc. for Office Equipment Preventative Maintenance Services

RECOMMENDATION(S)

Approve a non-financial Service Level Agreement, including non-standard terms, with Whitaker Brothers Business Machines, Inc., for office equipment preventative maintenance services, for the period of January 10, 2023, through January 9, 2028.

(Presenter: Chris Wilhite, Assessor-Recorder-County Clerk, 382-3208)

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 additional Discretionary General Funding (Net County Cost). The Service Level Agreement (Agreement) with Whitaker Brothers Business Machines, Inc. (WBBM) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, the Assessor-Recorder-County Clerk (ARC) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

The ARC utilizes various office equipment to assist with daily tasks. Some equipment requires routine preventative maintenance to keep it running at optimum performance. An example of this type of equipment is high-speed envelope openers used daily to accommodate the processing of large volumes of incoming mail. Lack of maintenance on equipment, including an envelope opener, could result in envelope jams, feeding problems, envelopes only being partially cut, or envelope contents being cut. WBBM offers preventative maintenance agreements that include adjustments, cleaning, and lubricating to ensure proper and safe operation of office equipment.

The Agreement is WBBM's standard commercial agreement, which includes terms that differ from the County's standard contract and omit certain County standard contract terms. WBBM is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. The Agreement is silent on governing law.

- The County standard contract requires California governing law.
 - Potential Impact: Having no specified governing law in the Agreement results in uncertainty over which state's laws will govern the interpretation of the Agreement, and leads to ambiguity in interpretation of the Agreement terms. WBBM's corporate headquarters is in Rockville, Maryland, and has branch offices in Washington DC, California, Maryland, and Florida. The Agreement could be interpreted under any state law depending on where the claim is brought, including Maryland or California. Any questions, issues, or claims arising under this Agreement could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total Agreement amount.
2. The Agreement is silent on assignment.
- The County standard contract requires the County to approve any assignment of the contract.
 - Potential Impact: WBBM 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 a particular state's law may permit or restrict a party's right to assign without an express provision in the Agreement.
3. There is no provision in the Agreement addressing each party's responsibility for paying attorney's fees.
- The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: County Counsel cannot advise on whether and to what extent, a particular state's law may affect a party's requirements to pay the prevailing party's attorney's fees and costs in a legal action where no specific provision is provided in the Agreement.
4. The Agreement does not require WBBM to indemnify the County, as required by County Policy 11-07.
- 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.
 - Potential Impact: WBBM is not required to defend, indemnify, or hold the County harmless from any claims arising from WBBM's negligent or intentional acts. If the County is sued for any claim, 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 a particular state's law may allow the County to require WBBM to defend or indemnify it absent an express provision in the Agreement.
5. The Agreement does not require WBBM to meet the County's insurance standards as required pursuant to County Policy 11-07.
- County policy requires contractors to carry appropriate insurance at certain dollar limits and under conditions determined by the County's Risk Management Department. These requirements are set forth in the County's standard contract.
 - Potential Impact: The County has no assurance that WBBM will be financially responsible for claims that may arise from WBBM's provision of service, which could result in expenses to the County that exceed the total Agreement amount.
6. There is no stated venue in the Agreement.
- The County standard contract requires venue for disputes to be in Superior Court of California, County of San Bernardino, San Bernardino District.

- **Potential Impact:** WBBM's corporate headquarters is in Rockville, Maryland, and the company has branch offices in Washington DC, California, Maryland, and Florida. Having no express venue in the Agreement means that venue in any proper jurisdiction, including potentially, Montgomery County, Maryland, could be applied to legal matters brought under this Agreement, which may result in additional expenses, including hiring outside counsel licenses to practice in that jurisdiction, that exceed the total Agreement amount.

The recommended Agreement, including non-standard terms, will allow ARC to operate in a fiscally-responsible and business-like manner by enabling ARC to purchase preventative maintenance services, to be approved in conformity with County purchasing policies, and provide a method of ensuring proper and safe operation of office equipment for the period of January 10, 2023, through January 9, 2028.

PROCUREMENT

The Agreement, including non-standard terms, will be used to accompany future purchases to be approved in accordance with County purchasing policies.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Kristina M. Robb, Principal Assistant County Counsel, 387-5455) on November 30, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2418) on November 30, 2022; Risk Management (Victor Tordesillas, Director, 386-8621) on December 12, 2022; Finance (Penelope Chang, Finance Analyst, 387-4886) on December 14, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on December 20, 2022.