

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

February 6, 2024

FROM

**LYNN FYHRLUND, Chief Information Officer, Innovation and Technology
Department**

SUBJECT

Non-Financial Agreement with Adobe, Inc. for Software Licenses, Support, and Maintenance

RECOMMENDATION(S)

1. Approve non-financial Adobe Stock Additional Terms (**County Contract No. 24-126**) with Adobe, Inc., including non-standard terms, simultaneously terminating Contract No. 23-177, for software licenses, support, and maintenance of Adobe software products, beginning on the date of first use of the product and continuing until terminated by either party.
2. Authorize the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to electronically accept the Adobe Stock Additional Terms and to accept online agreements as they pertain to changes to the Adobe software licenses, support, and maintenance of Adobe software products, subject to review by County Counsel, provided that such documents do not substantively modify the terms applicable to the County.
3. Direct the Chief Information Officer, the Assistant Chief Information Officer, or the IT Division Chief to transmit printed copies of any updated terms related to Adobe software licenses, support, and maintenance of Adobe software products referenced in Recommendation No. 2 to the Clerk of the Board of Supervisors within 30 days of electronic acceptance.

(Presenter: Lynn Fyhrlund, 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). The Adobe Stock Additional Terms (Terms) are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under the Terms, 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 and other County departments maintain perpetual licenses for several Adobe, Inc. (Adobe) proprietary software products, including Acrobat Pro, Photoshop, InDesign, Creative Cloud, and Captivate, which are used for editing Portable Document Format (PDF) format files, graphic design, desktop publishing and page layout, video editing, and eLearning (Adobe Product Files).

On March 14, 2023 (Item No. 20), the Board approved the Value Incentive Plan for Large Government Agencies (Contract No. 23-171) and incorporated terms of other Adobe agreements (LGA Package), including non-standard terms. The LGA package has been indefinite since the Value Incentive Plan for Large Government Agencies (Agreement No. 19-110) was first approved by the Board on March 12, 2019 (Item No. 28), but is reviewed annually prior to the issuance of the annual purchase order to determine if any changes or updates have occurred that require Board approval.

The LGA Package included the Terms (Contract No. 23-177) and on September 15, 2023, Adobe revised the Terms, superseding all prior versions with new terms that include the indemnification for Firefly Creations.

FireFly is a new product within Adobe applications that offers generative Artificial Intelligence tools made for creative needs. It allows for images to be created using words, text effects, and generative fill, which can add, extend, or remove content from images.

The Terms is Adobe's standard contract, which, in addition to the non-standard and missing terms of the LGA, includes terms that differ from the standard County contract and omits certain County standard contract terms. Adobe is not willing to negotiate these terms. The non-standard and missing terms include the following:

1. The County is required to indemnify Adobe against claims arising out of the County's use of the stock assets or FireFly output and violation of the Terms.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Adobe, 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 Adobe without such limitations and the County could be responsible to defend and reimburse Adobe for costs, expenses, and damages, which could exceed the total Terms amount.
2. Adobe limits its liability to the County for any indemnified stock asset and indemnified FireFly output to a maximum aggregate of \$10,000 per asset or output with no exceptions for indemnification, gross negligence, willful misconduct or violation of law.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Terms amount leaving the County financially liable for the excess.

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3. The County's right to bring a lawsuit or dispute resolution proceeding is limited to two years from the event giving rise to the claim.
 - 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 two years from the date of the event giving rise to the claim 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 Terms. Adobe's right to bring claims is not similarly limited, so Adobe may bring claims any time within the Statute of Limitations.

ITD recommends approval of the Terms, including non-standard terms, to allow ITD and other County departments to purchase software licenses, support, and maintenance of Adobe software products, including FireFly, used for Adobe Product Files.

PROCUREMENT

Adobe offers an array of products that are tailored for creative production with applications ranging from video editing to graphic design. Along with being the industry standard for these functions, Adobe products have been utilized by the County for years, which has developed a deep and detailed knowledge of the applications that could not be replicated by other, similar competitors. ITD does not recommend switching to a new creative production application solution at this time due to the significant time and cost it would take to replace the functionality of the suite of Adobe products in use. ITD continues to evaluate new software options on an ongoing basis and when new features are required. Based on the functionality of Adobe products and in the interest of standardization of County products, the Purchasing Department concurs with the non-competitive justification.

The Terms, 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 December 29, 2023; Purchasing (Christina Reddix, Buyer III, 387-2060) on December 29, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on December 29, 2023; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on January 18, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on January 22, 2024.

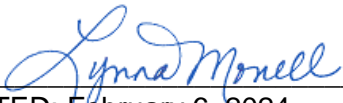
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Curt Hagman
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: February 6, 2024



cc: IT - Thomas w/agree
Contractor - c/o IT w/agree
File - w/agree
CCM 02/12/2024