

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

May 21, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreements with OpenAI for Generative Artificial Intelligence Tools

RECOMMENDATION(S)

1. Approve the following non-financial Agreements, including non-standard terms, with OpenAI, LLC for generative artificial intelligence tools that will enable County departments to leverage cutting edge technology to provide a higher level of service to the public, effective upon electronic acceptance and continuing until terminated by either party:
 - a. OpenAI Business Terms **Agreement No. 24-420.**
 - b. OpenAI Service Terms **Agreement No. 24-421.**
 - c. Data Processing Addendum **Agreement No. 24-422.**
2. Authorize the Chief Information Officer, Assistant Chief Information Officer, or Chief Information Security Officer to electronically accept the Agreements in Recommendation No. 1 and future updates to the Agreements, subject to review by County Counsel, provided that such updates do not substantively modify the terms of the original Agreements.
3. Direct the Chief Information Officer, Assistant Chief Information Officer, or Chief Information Security Officer to transmit printed copies of any updated terms to the Agreements in Recommendation No. 1 related to the use of generative artificial intelligence tools that are electronically accepted, to the Clerk of the Board of Supervisors within 30 days of 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 OpenAI Business Terms Agreement (Business Terms), OpenAI Service Terms Agreement (Service Terms), and Data Processing Addendum Agreement (collectively, Agreements) with OpenAI, LLC (OpenAI) are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under the Agreements, participating departments will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

Generative Artificial Intelligence (Generative AI) is a type of artificial intelligence technology with the ability to provide various types of content including text, imagery, audio, and synthetic data.

Non-Financial Agreements with OpenAI for Generative Artificial Intelligence Tools May 21, 2024

Generative AI is not a new concept and has been around since the 1950s. On November 30, 2022, OpenAI's Chat Generative Pre-trained Transformer (ChatGPT) was introduced to the public, accessible through a computing device (e.g., smartphone, laptop) via an app or web browser.

OpenAI offers several Generative AI tools with its most well-known being ChatGPT, which is designed for a large language model (LLM) to achieve general-purpose language generation and natural language processing. LLMs are foundational machine learning models, trained on vast amounts of text data, and use deep learning algorithms to understand, process and generate human-like language. LLMs acquire their capabilities by analyzing statistical relationships within text documents and are used for text generation, which is a form of Generative AI. In practical terms, LLMs take the initial input text and repeatedly predict subsequent words while creating coherent, contextual sequences.

The Business Terms and Service Terms are OpenAI's standard commercial agreements, which include terms that differ from or are omitted from the standard County contract. OpenAI is unwilling to negotiate these terms. The Business Terms non-standard and missing terms include the following:

1. OpenAI may assign the Business Terms to an affiliate without notice to the County and without the County's approval, and to a third party upon 30 day's prior written notice, without the County's consent.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: OpenAI could assign the Business Terms 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 could be out of compliance with the law until it becomes aware of the assignment and terminates the Business Terms.
2. All disputes arising under the Business Terms must be settled by binding arbitration.
 - The County standard contract does not require arbitration.
 - Potential Impact: Binding arbitration decisions are not appealable.
3. The County is required to indemnify OpenAI against third party claims arising out of or relating to the County's use of the services in violation of the Business Terms, including OpenAI policies, County applications, and County input.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify OpenAI, 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 OpenAI without such limitations and the County could be responsible to defend and reimburse OpenAI for costs, expenses, and damages, which could exceed the total Business Terms amount.
4. The Business Terms do not require OpenAI to meet the County's insurance standards as required pursuant to County Policies 11-05, 11-07 and 11-07SP.

Non-Financial Agreements with OpenAI for Generative Artificial Intelligence Tools
May 21, 2024

- County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that OpenAI will be financially responsible for claims that may arise under the Business Terms, which could result in expenses to the County that exceed the total Business Terms amount.
5. OpenAI's maximum liability to the County under the Business Terms is limited to the total amount paid to OpenAI in the 12 months before the claim arises, excluding indemnification obligations, gross negligence, willful misconduct, and breach of OpenAI's information security obligations.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Business Terms amount leaving the County financially liable for the excess.
6. The Business Terms indicate that payment is due upon issuance of invoice with late payment interest of 1.5% per month.
- County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. Failing to immediately pay invoices may result in a material breach of the Business Terms, which could allow OpenAI to terminate the Business Terms and seek other legal remedies, including suspending the services and charging the County interest at a rate of 1.5% per month, which could exceed the Business Terms amount.
7. Venue for disputes arising under the Business Terms is in San Francisco, California.
- County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in San Francisco, California may result in additional expenses that exceed the amount of the Business Terms.

The Service Terms non-standard and missing terms include the following:

1. OpenAI may change certain terms of the Service Terms upon 30 days' prior written notice and other terms without notice at any time.
 - County Policy 11-06 requires that any changes to the contract be reduced to writing, executed and attached to the original contract and approved by the person(s) authorized to do so on behalf of the contractor and County.
 - Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without approval of the new terms by the Board.
2. OpenAI may assign the Service Terms without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: OpenAI could assign the Service Terms 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 could be out of compliance with the law until it becomes aware of the assignment and terminates the Service Terms.

Non-Financial Agreements with OpenAI for Generative Artificial Intelligence Tools
May 21, 2024

3. All disputes arising under the Service Terms must be settled by binding arbitration.
 - The County standard contract does not require arbitration.
 - Potential Impact: Binding arbitration decisions are not appealable.
4. The County is required to indemnify OpenAI against third party claims arising out of or relating to the County's use of the services and content or any violation of the terms of the Service Terms.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify OpenAI, 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 OpenAI without such limitations and the County could be responsible to defend and reimburse OpenAI for costs, expenses, and damages, which could exceed the total Service Terms amount.
5. The Service Terms do not require OpenAI to meet the County's insurance standards as required pursuant to County Policies 11-05, 11-07 and 11-07SP.
 - County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that OpenAI will be financially responsible for claims that may arise under the Service Terms, which could result in expenses to the County that exceed the total Service Terms amount.
6. OpenAI's maximum liability to the County under the Service Terms is limited to the greater of the amount paid for the service giving rise to the claim in the 12 months before the claim arises or \$100.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Service Terms amount leaving the County financially liable for the excess.
7. Venue for disputes arising under the Service Terms is in San Francisco, California.
 - County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in San Francisco, California may result in additional expenses that exceed the amount of the Service Terms.
8. OpenAI provides the services and/or products "AS IS" and disclaims all warranties of any kind.
 - County Policy 11-05 requires a contractor to fully warrant its services and products.
 - Potential Impact: The County's use of the services and/or products is solely at its own risk.

The Innovation and Technology Department (ITD) recommends approval of OpenAI's Agreements, including non-standard terms, to enable County departments to leverage Generative AI tools and its capabilities. This technological advancement fosters innovation, accelerates business processes, and leads to greater efficiency in delivering services to the public. OpenAI's platforms such as ChatGPT Plus and ChatGPT Enterprise provide a means to

Non-Financial Agreements with OpenAI for Generative Artificial Intelligence Tools
May 21, 2024

advance services dependent on the department's business requirements. Generative AI will benefit departments by enhancing effectiveness, saving costs, improving data analysis, improving decision-making, and facilitating robust information gathering.

Generative AI has emerged as a powerful tool with the potential to revolutionize various aspects of County business operations. ITD recognizes the value that Generative AI provides; therefore, an artificial intelligence risk management framework (RMF) by the National Institute of Standards and Technology (NIST) has been established to manage risks associated with using these tools responsibly.

On August 31, 2023, ITD distributed an Interoffice Memo Countywide titled: Important Guidance on Using ChatGPT and Other Generative AI Tools. Additionally, processes have been established to mitigate potential risks (e.g., privacy, security, bias, ethics, and data trustworthiness) along with the NIST RMF.

Prior to using this technology, each employee is required to sign the Generative AI Acceptable Use Agreement (AUA) to acknowledge the provided guidance and guardrails for responsible and appropriate use. Additionally, the employee is required to view a short and comprehensive Generative AI awareness training video to reinforce the need for responsible and ethical use.

PROCUREMENT

OpenAI's ChatGPT Agreements are the result of a non-competitive procurement. ChatGPT's scalability, efficiency, and versatility make it a powerful tool for the County to harness its capabilities to improve customer interactions, streamline processes, and gain valuable insights. The field of Generative AI is dynamic with rapid advancements and multitudes of options. Competitors such as Meta, Google, IBM, X.ai and others offer similar Generative AI tools with varying capabilities. Microsoft also offers Copilot and OpenAI services such as ChatGPT through its Azure Cloud Infrastructure services. OpenAI (i.e., ChatGPT offerings) is the current Generative AI industry standard; therefore, ITD is recommending approval of the Agreements to manage associated risks and allow departments the opportunity to leverage the capabilities of ChatGPT, which has the potential to boost productivity significantly, increase innovation, enhance productivity, and optimize operational efficiency in a rapidly expanding Generative AI landscape. ITD anticipates presenting terms and conditions from other providers to the Board for future consideration.

The Agreements, including non-standard terms, will be used to accompany future purchases to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services, provided that OpenAI does not substantively modify its Agreements. The Purchasing Department concurs with the recommendation of a non-competitive procurement of OpenAI's ChatGPT.

REVIEW BY OTHERS

This item has been reviewed County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on May 6, 2024; Purchasing (Christina Reddix, Buyer III, 387-2060) on May 7, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on May 7, 2024; Finance and Administration (Elias Duenas, Administrative Analyst, 387-4052) on May 6, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on May 6, 2024.

**Non-Financial Agreements with OpenAI for Generative Artificial
Intelligence Tools
May 21, 2024**

Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: May 21, 2024



cc: IT - Onyango w/agrees
Contractor - c/o IT w/agree
File - w/agree
CCM 05/24/2024