

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

**May 7, 2024**

**FROM**

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

**SUBJECT**

Non-Financial Agreements with Dell Products, L.P. and Hewlett Packard Enterprise, Inc. for License Physical Infrastructure and Cloud Environment Analysis Software Tools

**RECOMMENDATION(S)**

1. Approve non-financial End User License **Agreement No. 24-370**, including non-standard terms, with Dell Products, L.P. for the use of open-source Live Optics software used to document configuration and performance of information technology infrastructure, for the period commencing on the date of first use of the software and continuing until terminated.
2. Approve non-financial Terms of Service **Agreement No. 24-371**, including non-standard terms, with Hewlett Packard Enterprise, Inc. for the use of open-source CloudPhysics software used to identify the optimal configuration of new and existing information technology cloud infrastructure, for the period commencing on the date of first use of the software and continuing until terminated.
3. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept the End User License Agreement in Recommendation No. 1, with Dell Products, L.P., and the Terms of Service in Recommendation No. 2, with Hewlett Packard Enterprise, Inc., and any future updates for either agreement, as they pertain to changes to the use of software, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original agreements.
4. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit printed copies of any updated terms to the End User License Agreement and Terms of Service in Recommendation Nos. 1 and 2 related to the use of the software, that are electronically accepted, to the Clerk of the Board of Supervisors within 30 days of execution.

(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 End User License Agreement (EULA) with Dell Products, L.P. (Dell) for Live Optics software, and the Terms of Service (TOS) with Hewlett Packard Enterprise, Inc. (HPE) for HPE CloudPhysics software, are non-financial in nature, and do not commit the County to make any purchases. If future purchases are made under the EULA or TOS, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors for approval, if necessary.

**BACKGROUND INFORMATION**

ITD manages the County's enterprise server, storage, and networking infrastructure, which support department applications that provide critical services to the public, by collecting relevant operating and performance data and analyzing the data for potential changes within the information technology (IT) environments. ITD is seeking to utilize two no cost analytic software tools in Dell Live Optics and HPE CloudPhysics to gain a more in-depth view of the IT infrastructure and cloud environment and analyze current operating and performance data.

Live Optics and CloudPhysics can assist in ensuring the County is running its physical and cloud IT infrastructure with the most optimal configuration. These tools can also offer cost-saving opportunities by measuring the output of hardware and suggesting more cost-effective configurations or cloud migration strategies.

The EULA is Dell's standard commercial contract for Live Optics, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The EULA is a non-negotiable clickwrap agreement accepted when utilizing the software. The non-standard and missing terms include the following:

1. Governing law is the State of Texas.
  - (c) The County standard contract requires California governing law.
  - (d) Potential Impact: The EULA will be interpreted under Texas law. Any questions, issues or claims arising under the EULA will require the County to hire outside counsel competent to advise on Texas law, which may result in fees that exceed the total EULA amount.
2. All disputes arising under the EULA must be settled by binding arbitration conducted in Austin, Texas.
  - (c) The County standard contract does not require arbitration.
  - (d) Potential Impact: Binding arbitration decisions are not appealable. In addition, disputes that might otherwise be settled in small claims court would incur arbitration costs that could exceed the costs of a small claims action, and the EULA amount. County Counsel cannot advise on whether and to what extent such arbitration provisions may be enforceable against a government entity under Texas law.
3. Dell may assign the EULA without notice to the County and without the County's approval.
  - (c) The County standard contract requires that the County must approve any assignment of the contract.
  - (d) Potential Impact: Dell could assign the EULA 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 EULA. County Counsel cannot advise on whether and to what extent Texas law may permit or restrict a party's right to assign without an express provision in the EULA.
4. There is no provision in the EULA addressing each party's responsibility for paying attorneys' fees.
  - (c) The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.

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- (d) Potential Impact: If either party institutes any legal proceedings related to the EULA, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total EULA amount.
- 5. The County is required to defend and indemnify Dell for claims arising from: (i) modifications of the Live Optics Software that were not performed by or on behalf of Dell; (ii) the County's unauthorized use of the Live Optics Software, or the combination or operation of the Live Optics Software in connection with a third-party product, Live Optics Software or service; (iii) the County's failure to incorporate Live Optics Software updates or upgrades; (iv) Dell's compliance with County specifications or directions, including the incorporation of any Live Optics Software or other materials or processes provided by or requested by the County; or (v) that arises from the County's breach of the EULA.
  - (c) The County standard contract does not include any indemnification or defense by the County of a contractor.
  - (d) Potential Impact: By agreeing to indemnify Dell, 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 Dell without such limitations and the County could be responsible to defend and reimburse Dell for costs, expenses, and damages, which could exceed the total EULA amount. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand this EULA term.
- 6. The EULA does not require Dell to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.
  - (c) 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.
  - (d) Potential Impact: The County has no assurance that Dell will be financially responsible for claims that may arise under the EULA, which could result in expenses to the County that exceed the total EULA amount.
- 7. Dell's maximum liability to the County is limited to the total amount received by Dell for the software license during the 12 months prior to the claim, without any exclusions.
  - (c) The County standard contract does not include a limitation of liability.
  - (d) Potential Impact: Claims could exceed the liability cap and the EULA amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
- 8. The venue for disputes arising under the EULA is in Austin, Texas.
  - (c) County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
  - (d) Potential Impact: Having a venue in Austin, Texas may result in additional expenses that exceed the amount of the EULA.

The TOS is HPE's standard commercial contract for HPE CloudPhysics, which includes terms that differ from the standard County contract and omits certain standard contract terms. The TOS is a non-negotiable clickwrap agreement accepted when utilizing the software. The non-standard and missing terms include the following:

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1. HPE may assign the TOS 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: HPE could assign the TOS 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 TOS.
2. The County must pay HPE's reasonable attorneys' fees and costs incurred to collect fees and charges under the TOS.
  - 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 HPE institutes a collection action against the County under the TOS, HPE will be entitled to recover reasonable attorneys' fees and costs, which could exceed the total TOS amount.
3. The County is required to defend and indemnify HPE against third party claims alleging that County data or County's use of the service (i) infringes or misappropriates the intellectual property rights or rights or privacy of a third party; (ii) violates applicable law, or (iii) breaches any agreement between the County and a third party.
  - (e) The County standard contract does not include any indemnification or defense by the County of a contractor.
  - (f) Potential Impact: By agreeing to indemnify HPE, 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 HPE without such limitations and the County could be responsible to defend and reimburse HPE for costs, expenses, and damages, which could exceed the total TOS amount.
4. The TOS does not require HPE to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.
  - (g) 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.
  - (h) Potential Impact: The County has no assurance that HPE will be financially responsible for claims that may arise under the TOS, which could result in expenses to the County that exceed the total TOS amount.
5. HPE's maximum liability to the County is limited to the total amount paid for the services in the 12 months preceding the claim.
  - The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the TOS amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
6. Payment terms are Net 30 with late payment interest of 1.5% monthly, and are non-cancelable and non-refundable.

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- 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 pay within 30 days of invoice may result in a material breach of the Agreement, which could allow HPE to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 1.5% monthly, which could exceed the TOS amount.

ITD recommends approval of the EULA with Dell for Live Optics software, and the TOS with HPE for HPE CloudPhysics software, including non-standard terms, to allow ITD to utilize no cost software tools with Live Optics and HPE CloudPhysics for greater optimization of the County's IT infrastructure.

**PROCUREMENT**

Live Optics and CloudPhysics are open-source software tools that have no cost to use. The EULA and TOS, 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, provided that Dell or HPE do not substantively change the terms of their respective agreements.

The two no cost software tools were selected after an informal solicitation analysis by ITD of each software tool as a result of recommendations from current hardware manufacturers that ITD regularly works with for the purchase of various hardware and software used for the IT environment. These manufacturers frequently request the performance data and analysis that is provided as an output by both Live Optics and CloudPhysics software tools. The Purchasing Department concurs with the non-competitive justification.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on April 2, 2024; Purchasing (Christina Reddix, Buyer III, 387-2233) on March 28, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on April 2, 2024; Finance (Elias Duenas, Administrative Analyst, 387-4052) on April 10, 2024; County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on April 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: Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.  
Absent: Col. Paul Cook (Ret.)

Lynna Monell, CLERK OF THE BOARD

BY   
DATED: May 7, 2024



cc: IT - Thomas w/agrees  
Contractor - c/o IT w/agree  
File - w/agree  
CCM 05/10/2024