

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

July 23, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Agreements With Microsoft Corporation for Azure Maps Geospatial Mapping Services

RECOMMENDATION(S)

1. Approve the following non-financial agreements with Microsoft Corporation for the use of geospatial mapping services, known as Azure Maps, beginning on date of first use, and continuing until terminated by either party.
 - a. Product Terms, **Contract No. 24-680**
 - b. Microsoft Customer Agreement, **Contract No. 24-681**
 - c. Microsoft Products and Services Data Processing Addendum, **Contract No. 24-682**
 - d. Service Level Agreement for Microsoft Online Services, **Contract No. 24-683**
2. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept the agreements in Recommendation No. 1 with Microsoft Corporation, and any future updates, as they pertain to changes in the use of Azure Maps, provided that such updated terms do not substantively modify the terms of the original agreements, subject to review by County Counsel.
3. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit printed copies of any updated terms to the agreements in Recommendation No. 1 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 Microsoft Product Terms, Microsoft Azure Legal Information, and Microsoft Customer Agreement (collectively, Agreements) with Microsoft Corporation (Microsoft) are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under the Agreements, 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's Geographic Information System (GIS) Division provides geographic data products and services to County departments and other regional entities. Many County departments utilize GIS to optimize their services to the public by using maps and visual representations of data

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that show where things are located and how they relate to each other geographically, which is known as geospatial visualizations. Geospatial visualization benefits from software that collects, processes, and analyzes data, which is known as an analytics platform. Analytics platforms are then used to enhance decision making when providing service to the public.

Azure Maps is an analytics platform that offers many services that provide geographical context to applications and dashboards as well as location-based tools and capabilities. These tools and capabilities increase functionality concerning map creation and rendering, spatial visualization, and geolocation services, including the ability to search for addresses, businesses, and other geographic information. These tools can also provide relevant information and increased data presentation options used for decision making as data can be more easily visualized and contextualized. Azure Maps can be utilized through Microsoft's Power Business Intelligence (Power BI) software which provides departments more options for developing dashboards and applications that provide interactive data visualization, reporting scenarios, and relevant information to the public and staff.

The Agreements are Microsoft's standard commercial contracts, which include terms that differ from the standard County contract and omit certain County standard contract terms. The Agreements are non-negotiable clickwrap agreements accepted when accessing the platform. The non-standard contract and missing terms include the following:

1. Governing law is the State of Washington.
 - (c) The County standard contract requires California governing law.
 - (d) Potential Impact: The Agreement will be interpreted under Washington State law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Washington State law, which may result in fees that exceed the total Agreement amount.
2. Microsoft may assign any rights Microsoft may have under the Agreement to receive payment and enforce Customer's payment obligations to an affiliate or third party, without prior notice to the County and without the County's approval, and all assignees may further assign such rights without further consent.
 - (c) The County standard contract requires that the County must approve any assignment of the contract.
 - (d) Potential Impact: Microsoft could assign the County's payment obligation 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 Agreement. County Counsel cannot advise on whether and to what extent Washington 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 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.
 - (d) Potential Impact: County Counsel cannot advise on, whether and to what extent, Washington law may affect a party's requirement to pay the prevailing party's attorneys' fees and costs in a legal action where no specific provision is provided in the Agreement.

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4. The County is required to defend Microsoft and its affiliates, to the extent permitted by applicable law, against any third-party claim to the extent it alleges that: (1) County data or non-Microsoft product hosted in an online service by Microsoft on County's behalf misappropriates a trade secret or directly infringes a patent, copyright, trademark, or other proprietary right of a third party; or (2) County's use of any Microsoft product or services deliverable, alone or in combination with anything else, violates the law or harms a third party. In addition, the County is required to defend Microsoft against any claim by an end user, third party, and/or regulatory authority arising from, or in connection with, the Azure Virtual Desktop Customer Solution that the County provides to end users, and pay the amount of any adverse final judgment or approved settlement resulting from such a claim.
 - (c) The County standard contract does not include any indemnification or defense by the County of a contractor.
 - (d) Potential Impact: By agreeing to defend and indemnify Microsoft, 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 Microsoft without such limitations and the County could be responsible to defend and reimburse Microsoft for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Washington law may limit or expand these Agreement terms.
5. The Agreement does not require Microsoft 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 Microsoft will be financially responsible for claims that may arise under the Agreement, which could result in expenses to the County that exceed the total Agreement amount.
6. Microsoft's maximum liability to the County is limited to direct damages finally awarded, in amounts as follows: (i) the amount paid by the County for a perpetual license or professional services; (ii) the amount paid by the County in the 12 months preceding the claim for subscription licenses; (iii) \$5,000 for products or professional services provided free of charge, and code that Customer is authorized to redistribute to third parties without separate payment to Microsoft. The limitations exclude liability arising out of (1) confidentiality obligations (except for all liability related to County data and professional service data; (2) indemnity obligations; or (3) violation of the other party's intellectual property rights. They do not exclude claims based on Microsoft's gross negligence, willful misconduct, or violation of law.
 - (c) The County standard contract does not include a limitation of liability.
 - (d) Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Washington law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
7. Payment terms are Net 30 with late payment interest of up to 2% monthly.
 - (c) County standard payment terms are Net 60 days with no interest or late payment penalties.
 - (d) Potential Impact: County standard processing time is 60 days or more. Failing to pay within 15 days after the thirty-day due date may result in a material breach of the

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Agreement, which could allow Microsoft to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of up to 2% monthly, which could exceed the Agreement amount.

ITD recommends approval of the Agreements, including non-standard terms, to allow ITD and other County departments the ability to utilize Azure Maps based on their specific business needs, such as creating maps and spatial visualizations that better contextualize geographical data.

PROCUREMENT

The Agreements, 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 Microsoft does not substantively modify the terms.

Azure Maps, unlike other analytic platforms, is native to Microsoft and can be used with Power BI as well as other Microsoft products with little to no extra customizations required by ITD staff. Utilizing Azure Maps in conjunction with Power BI and other software tools will provide additional data and information visualization that will help ITD best meet the needs of County departments and the public. 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 June 24, 2024; Purchasing (Christina Reddix, Buyer III, 387-2060) on June 24, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on June 10, 2024; Finance (Elias Duenas, Administrative Analyst, 387-4052) on July 2, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on July 3, 2024.

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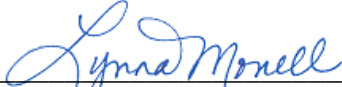
Record of Action of the Board of Supervisors
San Bernardino County

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: July 23, 2024



cc: IT - Thomas w/agrees
 Contractor - c/o IT w/agree
 File - w/agree
CCM 07/30/2024