

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

May 18, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

End User License and Services Agreement with Ivanti, Inc.

RECOMMENDATION(S)

Approve End User License and Services **Agreement No. 21-325** with Ivanti, Inc., including non-standard terms, for future purchases of Ivanti software, support, and maintenance services for the period of May 18, 2021, through May 17, 2026.

(Presenter: Larry Ainsworth, 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 the End User License and Services Agreement (Agreement) will not result in the use of Discretionary General Funding (Net County Cost). The Agreement is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under this Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary. The cost for Ivanti software, support, and maintenance services is included in the ITD Computer Operations 2020-21 Adopted Budget and will be included in future recommended budgets. Operating costs are recovered via service rates approved annually by the Board.

BACKGROUND INFORMATION

ITD maintains Ivanti software licenses to automate the process of deploying patches, including security and software updates, to ITD servers and desktops.

Ivanti's End User License and Services Agreement is Ivanti's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. Governing law is the State of Utah.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under Utah law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Utah law, which may result in fees that exceed the total contract amount.

2. Ivanti may assign the contract by merger, sale of assets, sale of stock, or otherwise without notice to and consent of the County.
 - The County must approve any assignment of the contract.
 - Potential Impact: Ivanti may assign the contract 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. County Counsel cannot advise on whether and to what extent Utah law may limit or expand this term.
3. Ivanti is entitled to recover attorney and collection fees arising from Ivanti's efforts to collect any unpaid balance of the County.
 - 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 Ivanti institutes a collection action for late or non-payment, Ivanti will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Utah law may limit or expand this term.
4. County agrees to indemnify Ivanti against any third party claim arising out of (i) County's unauthorized use of the Software and related services; (ii) Ivanti's compliance with County's designs, specifications or instructions; (iii) County's unauthorized modification of the Software or Software as a Service (SaaS) Offering; and (iv) County's instructions or failure to comply with Ivanti's Data Processing Addendum.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Ivanti, 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 Ivanti without such limitations and the County would be responsible to defend and reimburse Ivanti for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Utah law may limit or expand these obligations.
5. The contract does not require Ivanti to meet the County's insurance standards as required by County Policy 11-07.
 - The County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Ivanti will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.
6. Limitation of liability by Ivanti, its affiliates, licensors and resellers, in the aggregate, to the amount paid for the affected software, SaaS offering, support and maintenance, or professional services in the twelve month period before the event giving rise to the claim.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. County Counsel cannot

advise on, whether and to what extent, Utah law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

7. Fees are payable in advance for each annual period within 30 days from date of invoice. Late payments are subject to 1.5% monthly late payment interest accruing daily until the balance is paid in full and Ivanti may suspend access to SaaS services.
 - 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 in 30 days from the invoice date will result in a material breach of the contract, which would allow Ivanti to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1.5%, which would exceed the contract amount.
8. The Agreement automatically renews for additional terms of one year. The County must provide notice of non-renewal ninety days prior to the end of any term. Ivanti may assess and invoice the County for any upcoming renewal fees if the County does not provide Ivanti with written notice of its intent to not to renew the Agreement, and the County is obligated to pay such invoice.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the contract and the County is indefinitely bound to the terms and conditions of the contract. Failing to provide notice at least ninety days prior to the end of the term results in payment liability for the full renewal period.
9. There is no termination for convenience. If the County attempts to terminate the Agreement before the end of the initial term or any renewal term for any reason other than a material breach of the Agreement by Ivanti, then Ivanti may assess and invoice the County for all unpaid fees for the remainder of the initial term or renewal term.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (30) day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: County can only terminate the contract during the initial term or any renewal term for an uncured breach by Ivanti. Any attempted termination by County without cause will result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding. County Counsel cannot advise on whether and to what extent Utah law may limit or expand this term.
10. Venue is in the State and Federal courts within Salt Lake County, Utah.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Salt Lake County, Utah may result in additional expenses that exceed the amount of the contract.

ITD previously procured Ivanti software, support, and maintenance services under the Purchasing Agent's authority pursuant to County Policy 11-04. Purchases exceeding \$200,000 will be presented to the Board pursuant to Policy 11-04. Approval of the Agreement with Ivanti

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May 18, 2021

will allow ITD to continue deploying necessary software updates to servers and desktops via patches.

PROCUREMENT

The Agreement, including the 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, Deputy County Counsel, 387-5455) on April 16, 2021; Purchasing (Leo Gomez, Purchasing Manager, 387-2063) on April 16, 2021; Finance (Joon Cho, Administrative Analyst, 387-5402) on April 27, 2021; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on April 27, 2021.

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May 18, 2021**

Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: May 18, 2021



cc: ITD- Mancebo w/agree
Contractor- C/O ITD w/agree
File- w/agree
LA 05/19/2021