

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

March 26, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreement with Progress Software Corporation for Progress Telerik Fiddler Classic Software

RECOMMENDATION(S)

1. Approve the non-financial Progress Telerik Fiddler Classic Terms and Conditions **(Agreement No. 24-287)** with Progress Software Corporation, including non-standard terms, for debugging software code within computer applications, for the period commencing on the date of first use of the software and continuing until terminated.
2. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept updates to the Progress Telerik Fiddler Classic Terms and Conditions, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original agreement.
3. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit any non-substantive updated terms 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

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 Progress Telerik Fiddler Classic Terms and Conditions (Agreement) with Progress Software Corporation (Progress) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, 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

The County has several computer systems that use Microsoft operating systems, applications and related hardware and software products such as Microsoft Outlook, Exchange, SharePoint, and Active Directory. One of ITD's responsibilities is to ensure that the operating systems and software applications used by County departments operate correctly and seamlessly with each other and to identify any errors or issues within the software coding that could affect use of the applications that County departments depend on to provide services to the public. Microsoft's technical support team has requested that ITD utilize the Progress Telerik Fiddler Classic (Fiddler Classic) software from Progress to help identify, debug, and correct software coding

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used in Microsoft computer applications and systems. Debugging is the process of detecting and removing existing and potential errors in software code that can cause software to behave unexpectedly or crash. ITD can improve the quality, reliability, performance, and security of software products and services through the use of debugging software.

The Fiddler Classic software is the software tool recommended by Microsoft to provide support and debugging assistance for Microsoft programs currently in use on County devices.

The Agreement are Progress' standard terms, which omits certain County standard contract terms. Progress is unwilling to negotiate these terms. The Agreement is a non-negotiable clickwrap agreement accepted by click-to-accept. The non-standard and missing terms include the following:

1. The Agreement is silent on governing law.
 - The County standard contract requires California governing law.
 - Potential Impact: Having no specified governing law in the Agreement results in uncertainty over which state's laws will govern the interpretation of the Agreement and leads to ambiguity in interpretation of the Agreement terms. Progress is a Delaware Corporation headquartered in Burlington, Massachusetts. The Agreement could be interpreted under any state law depending on where the claim is brought, including Massachusetts or California. Any questions, issues or claims arising under this Agreement could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total Agreement amount.
2. The Agreement is silent on assignment.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: Progress could assign the Agreement 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 non-California 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.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, non-California 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.
4. The Agreement does not require Progress to indemnify the County, as required by County Policies 11-05 and 11-07, including for intellectual property infringement claims.
 - The County standard contract indemnity provision requires the contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person. The standard contract provision for intellectual property indemnity is: Contractor will indemnify, defend, and hold harmless County and its officers, employees, agents and volunteers, from any and all third party claims, costs

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(including without limitation reasonable attorneys' fees), and losses for infringement of any United States patent, copyright, trademark or trade secret (Intellectual Property Rights) by any goods or services.

- Potential Impact: Progress is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Progress's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Progress's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount. County Counsel cannot advise on whether and to what extent non-California law may allow the County to require Progress to defend or indemnify it absent an express provision in the Agreement.
5. The Agreement does not require Progress 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 Progress 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. Progress's maximum liability to the County is limited to \$0.
- The County standard contract does not include a limitation of liability.
 - 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, non-California law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
7. The Agreement is silent on venue.
- County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Progress is a Delaware Corporation headquartered in Burlington, Massachusetts. Having no express venue in the Agreement means that Massachusetts venue could be applied to disputes arising under the Agreement, which may result in additional expenses that exceed the amount of the Agreement.
8. Progress 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. County Counsel cannot advise on, whether and to what extent, non-California law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ITD recommends approval of the Agreement, including non-standard terms, to provide ITD with the necessary software debugging tool to improve troubleshooting results, as well as streamline and solve computer software related problems when County employees are experiencing technical computer issues. ITD also recommends authorizing the Chief Information Officer (CIO) or Assistant Chief Information Officer (ACIO) to electronically accept non-substantive updates to the Agreement, as necessary as Progress does not provide notice when the Agreement will be

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updated. The ability to accept the Agreement by the CIO or ACIO will expedite approval of non-substantive updates to the Agreement to mitigate potential delays with the use of the software debugging services, which will allow ITD Service Desk staff to problem solve Microsoft issues in a more expedient manner.

PROCUREMENT

There is no cost associated with the use of the Fiddler Classic software tool. The Agreement, including non-standard terms, may be used to accompany future purchase orders issued to Progress for software to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment, and Services, provided that Progress does not substantively modify the terms of the Agreement.

Microsoft's technical support team recommended the use of the Fiddler Classic software tool to assist with Microsoft-related support requests from the County. ITD contacted two additional vendors who provide similar services, but these vendors were not able to provide the level of software debugging support necessary to meet ITD's needs.

Purchasing agrees with the non-competitive selection process utilized by ITD and acknowledges that ITD will conform to Policy 11-04, as noted above, for any purchases of additional software that are offered by Progress.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on February 16, 2024; Purchasing (Christine Reddix, Buyer III, 387-2233) on February 9, 2024; Risk Management (Greg Ustaszewski, Staff Analyst II, 386-9008) on February 8, 2024; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on March 6, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 10, 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.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: March 26, 2024



cc: IT - McClane w/agree
Contractor - c/o IT w/agree
File - w/agree
CCM 03/29/2024