

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

March 1, 2022

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Adobe Value Incentive Plan for Large Government Agencies Agreement

RECOMMENDATION(S)

Approve Value Incentive Plan for Large Government Agencies **Agreement** with Adobe, Inc., including non-standard terms, to be accepted by the Purchasing Agent upon issuance of the Purchase Order, for an indefinite term, until terminated by either party, for licenses, support and maintenance of Adobe software products used for graphic design, video editing, web development applications, and editing PDF format files, consisting of:

1. Value Incentive Plan for Large Government Agencies. **Agreement No. 22-115.**
2. Adobe Value Incentive Plan Terms and Conditions. **Agreement No. 22-116.**
3. Adobe General Terms of Use. **Agreement No. 22-117.**
4. Adobe Developer Additional Terms. **Agreement No. 22-118.**
5. Adobe Fonts Service Additional Terms. **Agreement No. 22-119.**
6. Document Cloud Additional Terms of Use. **Agreement No. 22-120.**
7. Adobe Stock Additional Terms. **Agreement No. 22-121.**
8. Business Catalyst Additional Terms of Use. **Agreement No. 22-122.**
9. InDesign Server Additional Terms of Use. **Agreement No. 22-123.**
10. Software Additional Terms. **Agreement No. 22-124.**
11. Teams and Enterprise Additional Terms. **Agreement No. 22-125.**

(Presenter: Larry Ainsworth, 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 the Value Incentive Plan for Large Government Agencies Agreement (LGA) with Adobe, Inc. will not result in the use of Discretionary General Funding (Net County Cost). The LGA 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) and other County departments will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ITD and other County departments maintain perpetual licenses for several Adobe, Inc. (Adobe) proprietary software products, including Acrobat Pro, Photoshop, InDesign, Creative Suite, and Captivate, which are used for graphic design, video editing, web development applications, and editing PDF format files.

**Adobe Value Incentive Plan for Large Government Agencies Agreement
March 1, 2022**

On March 12, 2019 (Item No. 28), the Board of Supervisors (Board) approved the Value Incentive Plan for LGA Agreement No. 19-110 with Adobe for licenses, support and maintenance of Adobe software products used for graphic design, video editing, web development applications, and editing PDF format files.

On February 11, 2020 (Item No. 42), the Board approved Amendment No. 1 to the Value Incentive Plan for LGA No. 19-110 with Adobe, to revise the Agreement terms for licenses, support and maintenance of Adobe software products used for graphics design, video editing, web development applications, and editing PDF format files. The revisions updated the governing law for the Value Incentive Plan for LGA Agreement and amended terms in the Developer Additional Terms and VIP Program Guide.

On March 2, 2021 (Item No. 19), the Board approved Amendment No. 2 to non-financial Value Incentive Plan for LGA Agreement No. 19-110 with Adobe, Inc., to be accepted electronically, for licenses, support and maintenance of Adobe software products used for graphics design, video editing, web development applications, and editing PDF format files. The revisions included new non-standard terms including a limit on the time to make claims and indemnification or defense by the County of a Contractor.

Adobe has revised the LGA and the incorporated terms of other Adobe agreements (LGA Package) since the last approval. The Adobe LGA together with the Adobe Value Incentive Plan Terms and Conditions, Adobe General Terms of Use, Adobe Developer Additional Terms, Adobe Fonts Service Additional Terms, Document Cloud Additional Terms of Use, Adobe Stock Additional Terms, Business Catalyst Additional Terms of Use, InDesign Server Additional Terms of Use, Software Additional Terms, and Teams and Enterprise Additional Terms comprise Adobe's standard government 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. Adobe may assign the Agreement without notice to the County and without the County's approval.
 - The County must approve any assignment of the Agreement.
 - Potential Impact: Adobe 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.
2. The Agreement does not require Adobe to meet the County's insurance standards as required pursuant to 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 Agreement does not include County standard insurance requirements. This means that the County has no assurance that Adobe 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 Agreement amount.

3. The Agreement does not require Adobe to indemnify the County, 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 (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: If the County is sued for any claim, including intellectual property infringement based on its use of Adobe's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount.
4. To the extent permitted by applicable law, the County is required to indemnify Adobe and its subsidiaries, affiliates, officers, agents, employees, partners, and licensors against any claim arising out of the County's content, Creative Cloud Customer Fonts, use of the Services or Software (as applicable), or violation of the Terms. Adobe has the right to control the defense of any claim, action, or matter with counsel of its own choosing at the County's expense.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Adobe, 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 Adobe without such limitations and the County would be responsible to defend and reimburse Adobe for costs, expenses, and damages, which could exceed the total Agreement amount.
5. Adobe's total liability in any matter arising out of or related to the Terms is limited to the greater of (A) US \$100; or (B) the aggregate amount that the County paid for access to the Services and Software during the three-month period preceding the event giving rise to the liability.
 - 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. In addition, the County's liability under the Agreement is not similarly limited.
6. The term is indefinite until terminated by either party.
 - 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 Agreement and the County is indefinitely bound to the terms and conditions of the Agreement.

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ITD recommends approval of the LGA Package, including the non-standard terms, to allow ITD and other County departments to purchase licenses, support and maintenance of Adobe software products used for graphic design, video editing, web development applications, and editing PDF format files.

PROCUREMENT

The LGA Package, 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.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on January 24, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on January 25, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on January 25, 2022; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on February 10, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5426) on February 11, 2022.

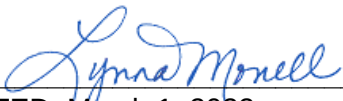
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 1, 2022



cc: ITD- Mancebo w/agree
Contractor- C/O ITD w/agree
File- w/agree
LA 03/2/2022