

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

May 21, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Software Services Agreement with Figma for Figma Enterprise Software

RECOMMENDATION(S)

1. Approve non-financial Software Services **Agreement No. 24-419** with Figma, including non-standard terms, for the use of a cloud-based graphic and user interface design application known as Figma Enterprise Software, for the period commencing on the subscription start date of the first order and continuing until all orders expire or are terminated.
2. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept updates to the Figma Software Services Agreement, 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 printed copies of any non-substantive updated terms to the Figma Software Services Agreement 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 Software Services Agreement (Agreement) with Figma 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 for approval, if necessary.

BACKGROUND INFORMATION

The ITD Business Solutions Development Division facilitates the development, maintenance, support, and enhancement of business applications for County departments on a variety of operating systems and software platforms. This includes the design, development, enhancement, and maintenance of internal County and public-facing websites. An important aspect of website development is user experience (UX) and user interface (UI). UX design is how a user interacts with a product, making it as smooth and easy as possible, while UI design is focused on the look and feel of the product.

ITD has been utilizing Adobe XD, for online design and UX and UI to create and share designs for websites and mobile applications, since 2019. Recently, Adobe, Inc. (Adobe) notified ITD

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that Adobe XD would no longer be available for new users, only provide a maintenance mode, and that Adobe would not invest in ongoing development or new features for the product. Adobe will continue to support existing Adobe XD users by addressing bugs and updating any security or privacy needs in maintenance mode, however, the maintenance mode will not continue in perpetuity, and eventually Adobe will discontinue support of the tool.

Figma is a cloud-based graphic design application, providing real time design collaboration that allows users to create, edit, prototype, and handoff digital projects for websites and mobile applications, focusing on both UX and UI. Figma Enterprise Software will be used to replace the Adobe XD design tool, which will allow ITD staff to continue to create and update County websites and applications.

The Agreement is Figma's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. Figma is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Figma may assign the Agreement, in whole, in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of such party's assets without notice and without the County's consent.
 - (c) The County standard contract requires that the County must approve any assignment of the contract.
 - (d) Potential Impact: Figma 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.
2. All disputes under the contract must be resolved through binding arbitration.
 - (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 Agreement amount.
3. The prevailing party in arbitration is entitled to receive reimbursement of its reasonable expenses (including reasonable attorneys' fees, expert witness fees and all other expenses) incurred in connection with the arbitration.
 - 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 either party institutes any legal proceedings related to the Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees and costs, which could exceed the total Agreement amount.
4. The County is required to defend and indemnify Figma against any claim based on County materials or use of the Figma Platform by County in violation of the Agreement.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Figma, 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 Figma without such limitations and the County could be responsible to defend and reimburse

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Figma for costs, expenses, and damages, which could exceed the total Agreement amount.

5. The Agreement does not require Figma 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 Figma 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. Figma's maximum liability to the County is the amount of fees paid and payable under the County's applicable order form in the 12 months prior to the damage occurring, except for damages resulting from Figma's willful misconduct or gross negligence or infringement of the County's intellectual property rights.
 - 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.
7. Payment terms are Net 30 date of invoice with late payment interest of 1.5%.
 - 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 the date of invoice may result in a material breach of the Agreement, which could allow Figma to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 1.5%, which could exceed the Agreement amount.

ITD recommends approval of the Agreement with Figma, including non-standard terms, to provide ITD with the design tools necessary to continue to produce UX- and UI-designed County websites and applications for both County staff and the public, as well as authorizing the Chief Information Officer or Assistant Chief Information Officer to electronically accept non-substantive updates to the Agreement, reducing potential delays with the use of the Figma product.

PROCUREMENT

The Agreement, including non-standard terms, may 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 Figma does not substantively modify the terms of the Agreement.

Figma was selected based on a review by ITD staff of several online design tools and was determined to be the best suited product to provide ITD with the design tools necessary to create, produce, and share UX and UI designs for County websites and applications.

The Purchasing Department agrees with the informal solicitation 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 Figma.

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REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on April 15, 2024; Purchasing (Christina Reddix, Buyer III, 387-2060) on March 21, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst, 386-9008) on March 20, 2024; Finance (Elias Duenas, Administrative Analyst, 387-4052) on April 24, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on May 6, 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: May 21, 2024



cc: IT - McClane w/agree
Contractor - c/o IT w/agree
File - w/agree
CCM 05/24/2024