

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

August 25, 2020

FROM

LARRY AINSWORTH, Chief Information Officer, Information Services Department

SUBJECT

SurveyMonkey Terms of Use for Products and Services

RECOMMENDATION(S)

Authorize the Purchasing Agent, or their designee, to electronically accept **(County Contract No. 20-868)** Terms of Use and Amendment to SurveyMonkey Terms of Use Applicable to Other Government Entities in the U.S. with SurveyMonkey Inc. for products, services, websites and applications for the period of August 25, 2020, through September 25, 2025.

(Presenter: Jake Cordova, Information Services Division Chief, 388-0503)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of SurveyMonkey Terms of Use (TOU) and Amendment to SurveyMonkey Terms of Use Applicable to Other Government Entities in the U.S. (Amendment) will not result in the use of Discretionary General Funding (Net County Cost) as these documents do not require the County to make any purchases of SurveyMonkey products or services. However, after approval, the terms within these documents will be used to accompany future purchases by County departments to be approved, as necessary, per County Policy 11-04.

BACKGROUND INFORMATION

SurveyMonkey is an online survey development cloud-based software as a service company. Information Services Department (ISD) and other County departments utilize SurveyMonkey products and services for departmental and operational related surveys. The TOU and Amendment are SurveyMonkey's standard commercial agreements. SurveyMonkey will not negotiate these terms. The TOU and Amendment include non-standard terms and omit County standard terms as follows:

1. SurveyMonkey may change the Terms at any time. If an amendment is material, as determined in SurveyMonkey's sole discretion, SurveyMonkey will notify the County by email, posting to SurveyMonkey's blog or upon account login. Changes will be effective no sooner than the day they are publicly posted. By continuing to use the services, the County agrees to be bound by the updated terms.
 - The County standard contract requires that any changes to the contract be reduced to writing, executed and attached to the original Contract and approved by the person(s) authorized to do so on behalf of Contractor and County.

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- Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board of Supervisors (Board).
2. SurveyMonkey may assign the contract without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: SurveyMonkey 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.
 3. SurveyMonkey disclaims the warranty of non-infringement and provides no indemnification for claims made against the County.
 - There is no warranty requirement in the County standard contract. 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: The disclaimer of a warranty of non-infringement, coupled with the lack of indemnity for intellectual property infringement means that, should the County be sued for intellectual property infringement based on its use of SurveyMonkey's software or services, the County will be liable for the costs of defense and damages. While infringement claims against end users are rare, they have been known to occur, and the County could be responsible for defense costs and damages, which could exceed the total contract amount.
 4. Limitations of liability to the County for all damages to the lesser of the amount paid by the County for use of the services at issue during the 12 months prior to the event giving rise to the liability, and US \$200.00.
 - 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.
 5. The contract does not require SurveyMonkey to meet the County's insurance standards.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: This means that the County has no assurance that SurveyMonkey 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. SurveyMonkey provides the software "AS IS" and disclaims all warranties of any kind.
 - There is no warranty requirement in the County standard contract. The standard contract provision for intellectual property indemnity is: Contractor will indemnify,

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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: The County's use of the software is solely at its own risk.

ISD recommends approval of the TOU and Amendment, including the non-standard terms which are typical in the IT industry, to allow the County to use SurveyMonkey products and services.

PROCUREMENT

The terms of the TOU and Amendment, including the non-standard terms, will be used to accompany future purchases to be approved, as necessary, per County Policy 11-04.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5487) on July 23, 2020; Purchasing (Jessica Barajas, Lead Buyer, 388-5546) on July 28, 2020; Finance (Joon Cho, Administrative Analyst, 387-5402) on July 31, 2020; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on July 31, 2020.

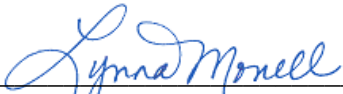
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Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Josie Gonzales Seconded: Robert A. Lovingood
Ayes: Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, Josie Gonzales

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: August 25, 2020



cc: ISD- Mancebo w/agree
 Contractor- C/O ISD w/agree
 File- w/agree
la 09/4/2020