

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

December 19, 2023

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Terms of Use Agreement with Autodesk, Inc. for AutoCAD Software

RECOMMENDATION(S)

1. Approve non-financial Terms of Use **Agreement No. 23-1390** with Autodesk, Inc., including non-standard terms, for the use of two-dimensional and three-dimensional computer-aided design software, known as AutoCAD software, 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 the Terms of Use Agreement in Recommendation No. 1 with Autodesk, Inc., and any future updates and non-substantive amendments to the Terms of Use Agreement for use of the AutoCAD software, 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 updated terms and non-substantive amendments to the Terms of Use Agreement in Recommendation No. 1 related to use of the AutoCAD software, that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of execution.
(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 Terms of Use Agreement (TOU) with Autodesk, Inc. (Autodesk), are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under the TOU, 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

ITD provides telephone services to County departments including single line, voicemail, local, long distance, telephone service specialist consulting services, software changes and labor services for telephone, data, cabling, repair, and other specialized services. ITD staff utilize AutoCAD software as part of the installation planning process to create, design, and modify floorplans and building schematics for new and existing County buildings.

AutoCAD is a two-dimensional and three-dimensional computer-aided design software application developed by Autodesk. It is a general drafting and design application used by

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architects, project managers, engineers, graphic designers, city planners, and other professionals to prepare technical drawings. ITD utilizes floorplans and building schematics created in Autodesk to plan the design, location, and installation of indoor and outdoor cabling and fiber optic infrastructure related to telephone and data networks. These floorplans and building schematics are also a key tool in planning the total length and amount of telephone and data cable and other telecommunication hardware needed for a particular installation, resulting in less waste and more efficient use of consumable telecommunication parts and materials.

Approval of Recommendation No. 1 will allow ITD to utilize AutoCAD software to create technical plans for new telephone and computer line installation for County departments.

ITD recommends authorizing the Chief Information Officer or Assistant Chief Information Officer to electronically accept the TOU with Autodesk, including future updates and any non-substantive amendments, as they pertain to changes to the use of software, subject to review by County Counsel as noted in Recommendation No. 2. Should there be any changes to the TOU that are considered substantive, ITD will return to the Board of Supervisors for approval as per County policy.

The TOU is AutoDesk's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The TOU is a non-negotiable clickwrap agreement accepted by click-to-accept or upon download of the software. The non-standard and missing terms include the following:

1. Autodesk may change the TOU terms without notice at any time.
 - (c) County Policy 11-06 requires that any changes to the contract to 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.
 - (d) Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without approval of the new terms by the Board.

2. Autodesk may assign the TOU without notice to the County and without the County's approval.
 - (c) The County standard contract requires that the County must approve any assignment of the contract.
 - (d) Potential Impact: Autodesk could assign the TOU 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 TOU.

3. In arbitration decision, the arbitrator may award attorneys' fees and costs.
 - (c) The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - (d) Potential Impact: If either party institutes any legal proceedings related to the TOU, the arbitrator may determine that the prevailing party is entitled to recover reasonable attorneys' fees, which could exceed the total TOU amount.

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4. All disputes arising under the TOU must be settled by 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 TOU amount.

5. The County is required to indemnify Autodesk against any claim arising out of: (1) County content; (2) County's use of Autodesk software, including any output or results produced; and (3) County's breach of the TOU.
 - (c) The County standard contract does not include any indemnification or defense by the County of a contractor.
 - (d) Potential Impact: By agreeing to indemnify Autodesk, 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 Autodesk without such limitations and the County could be responsible to defend and reimburse Autodesk for costs, expenses, and damages, which could exceed the total TOU amount.

6. The TOU does not require Autodesk to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.
 - (c) 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 County policy and in the County standard contract.
 - (d) Potential Impact: The County has no assurance that Autodesk will be financially responsible for claims that may arise under the TOU, which could result in expenses to the County that exceed the total TOU amount.

7. Autodesk's aggregate maximum liability to the County is limited to the greater of the amount paid by the County in the one-year period prior to the event giving rise to the claim or \$1,000, including its indemnification obligations, but excluding death or personal injury caused by Autodesk's willful misconduct or gross negligence of claims caused by Autodesk's fraud.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the TOU amount leaving the County financially liable for the excess.

8. The County may not terminate the TOU for convenience.
 - County Policy 11-05 requires that the County have the right to terminate the contract, for any reason, with a 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: The County can only terminate the TOU during the term for an uncured breach by Autodesk. Any attempted termination by County without cause could result in payment liability for the full TOU amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.

ITD recommends approval of the AutoDesk's TOU, including the non-standard terms, to provide ITD with the necessary tools to design and modify floorplans and building schematics for telephone and computer cabling installation as necessary throughout County departments.

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PROCUREMENT

The TOU, including non-standard terms, will be used to accompany future purchase orders issued to authorized resellers for AutoCAD software to be approved, as necessary, per County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

Purchasing approves of this non-competitive procurement as ITD has been utilizing AutoCAD for over a decade as it continues to meet the needs of the department. AutoCAD was originally purchased by ITD, through an authorized reseller, to better collaborate with architects and designers who utilized the AutoCAD software for the design and creation of schematic plans for telephone and cabling installation for County building projects. To switch to a new computer-aided drafting software vendor would be cost prohibitive for ITD as the staff and engineers who work for ITD have been trained and utilizing the AutoCAD software for years. Additionally, all drawings and schematics that have been saved are in an AutoCAD format. To move to a new software platform would result in additional costs associated with the data migration as well as potential compatibility issues from one software platform to another.

AutoCAD remains a cost-effective option at this time and therefore a competitive process to consider an alternative computer-aided drafting software was not completed. ITD will complete a competitive bid process for the purchase of AutoCAD from authorized resellers as per County policy.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on November 1, 2023; Purchasing (Ariel Gill, Supervising Buyer, 777-0722) on November 3, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on November 6, 2023; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) on November 14, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on November 16, 2023.

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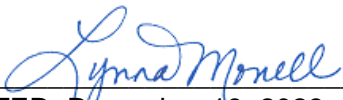
Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Curt Hagman Seconded: Col. Paul Cook (Ret.)

Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: December 19, 2023



cc: IT - McClane w/agree
Contractor c/o IT w/agree
File - w/agree

MA 01/10/2024