

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

October 8, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Customer Agreement with Amazon Web Services, Inc. for Cloud Services and Storage

RECOMMENDATION(S)

1. Approve non-financial **Customer Agreement No. 24-971** with Amazon Web Services, Inc., including non-standard terms, simultaneously terminating Agreement No. 20-1028, for cloud services and storage retroactively effective May 17, 2024, through October 26, 2030.
2. Authorize the Purchasing Agent to issue Purchase Orders to Amazon Web Services for amounts not-to-exceed \$3,500,000 in aggregate for cloud services and storage for the period of May 17, 2024, through October 26, 2030.
3. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept the Customer Agreement with Amazon Web Services, Inc., and any future updates as they pertain to changes in the Customer Agreement, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original Customer Agreement.
4. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit printed copies of any updated terms to the Customer Agreement related to the cloud services and storage that is 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). Operating costs are recovered via service rates approved annually by the Board of Supervisors (Board). The not-to-exceed amount of \$3,500,000 is the amount the Innovation and Technology Department (ITD) estimates that it will need to purchase cloud services and storage on a fee-for-service basis for the remaining duration of the Customer Agreement (Agreement) with Amazon Web Services (AWS) for cloud services and storage. The County will only be charged for actual metered usage of AWS services. Sufficient appropriation is available in the ITD Computer Operations 2024-25 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

ITD manages the County's enterprise server, storage, and networking infrastructure, which support department applications that provide services, such as the Auditor-Controller Cloud Project and will be used for future ITD projects. AWS provides on-demand cloud computing

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platforms and application programming interfaces. The cloud computing platform provides secure, on-demand information technology resources, delivered over the internet, which allows for users to access remote servers to deploy and manage software and databases without the need to purchase additional hardware.

On October 27, 2020 (Item No. 52), the Board approved Agreement No. 20-1028 and authorized the Purchasing Agent to issue a Purchase Order in the amount of \$3,500,000 to AWS for cloud services and storage for the period of October 27, 2020, through October 26, 2030.

The terms of the Agreement are accepted upon clicking "I Accept" or use of any of the AWS services. Upon ITD's annual review of the terms in August, it was determined that AWS had issued a new Agreement on May 17, 2024, which now requires Board review and approval. Since ITD has continued using the cloud service and storage, once approved by the Board, the effective date of the Agreement will be retroactive to May 17, 2024 and will supersede the previously approved Agreement No. 20-1028.

The Agreement is AWS' standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The Agreement is a non-negotiable clickwrap, accepted by click-to-accept or use any of the services. The non-standard and missing terms include the following:

1. Governing law is the State of Washington.
 - (c) The County standard contract requires California governing law.
 - (d) Potential Impact: The Agreement will be interpreted under Washington law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Washington law, which may result in fees that exceed the total Agreement amount.
2. AWS may assign the Agreement 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: AWS 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 Washington 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.
 - (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: County Counsel cannot advise on, whether and to what extent, Washington 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.

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4. All disputes, except for small claims disputes, arising under the Agreement 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 Agreement amount. County Counsel cannot advise on whether and to what extent such arbitration provisions may be enforceable against a government entity under Washington law.
5. The County is required to indemnify AWS against third-party claims arising from: (a) the County's use of the cloud services and storage; (b) breach of the Agreement or violation of applicable law, by the County, its End Users, or County content; or (c) a dispute between the County and any End User.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify AWS, 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 AWS without such limitations and the County could be responsible to defend and reimburse AWS for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Washington law may limit or expand this Agreement term.
6. The Agreement does not require AWS 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 AWS 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.
7. AWS' maximum liability to the County is limited to the amount paid by the County to AWS for the services that gave rise to the claim in the 12 months prior to the claim, without any limitation, including indemnification obligations, gross negligence, willful misconduct, or violations of law.
 - 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, Washington law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. Late payments are subject to interest of 1.5% per month or suspension of the account.
 - 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 make timely payment may result in a material breach of the Agreement, which could allow AWS to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 1.5% per month, which could exceed the Agreement amount.

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9. Venue for disputes arising under the Agreement is in the state of Federal courts in King County, Washington.
- County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in King County, Washington may result in additional expenses that exceed the amount of the Agreement.

ITD recommends approval of the Agreement, including the non-standard terms, with no change to the existing Purchase Order amount of \$3,500,000 to allow ITD to continue utilizing AWS' cloud services and storage for the remainder of the Board-approved term ending October 26, 2030.

PROCUREMENT

The Agreement, including non-standard terms, will be used to accompany future purchases to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services.

No other procurement action is related to this item. Due to the cost of additional professional services and ITD staff time that would be required to manage a data migration to a new vendor, as well as the risk of lost or corrupted data during a migration if a new vendor was selected. Purchasing Department concurs with the recommendation to continue with AWS for cloud services and storage through October 26, 2030.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on September 4, 2024; Purchasing (Jessica Barajas, Supervising Buyer, 387-2065) on August 30, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on August 29, 2024; Finance (Iliana Rodriguez, Administrative Analyst, 387-4025) on September 19, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on September 23, 2024.

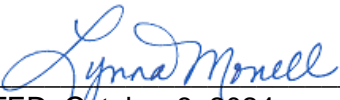
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: October 8, 2024



cc: IT - Thomas w/agree
Contractor - c/o IT w/agree
File - w/agree
CCM 10/11/2024