

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

February 6, 2024

**FROM**

**LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department**

**SUBJECT**

Non-Financial Agreements with Microsoft Corporation for Azure Database Migration Service and Data Migration Assistant

**RECOMMENDATION(S)**

1. Approve non-financial Microsoft Data Migration Assistant License Terms, including non-standard terms (**County Contract No. 24-127**), with Microsoft Corporation, for access to free products, downloads, and tools, effective upon acceptance of the online terms and continuing until Microsoft Azure Data Migration Assistant is no longer in use by the County.
2. Approve non-financial Microsoft Azure App Service Migration Assistant License Terms, including non-standard terms (**County Contract No. 24-128**), with Microsoft Corporation, for access to free products, downloads, and tools, effective upon acceptance of the online terms and continuing until Microsoft Azure Data Migration Assistant is no longer in use by the County.
3. Authorize the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to electronically accept the agreements, referenced in Recommendation Nos. 1 and 2, with Microsoft Corporation, and any future updates, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original agreements.
4. Direct the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to transmit printed copies of any updated terms to the agreements referenced in Recommendation Nos. 1 and 2 related to the use of software that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of electronic 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 Microsoft Data Migration Assistant License Terms and Microsoft Azure App Service Migration Assistant License Terms (collectively, Agreements) with Microsoft Corporation (Microsoft) that accompany the Azure cloud subscription platform are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under these Agreements, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

**BACKGROUND INFORMATION**

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The County utilizes a Microsoft Structured Query Language (SQL) Server, which is a traditional on-premises database management system installed on physical or virtual hardware and is a powerful relational database management system that stores, manages, and retrieves data. SQL is a standard programming language for interacting with relational databases. ITD is responsible for maintaining the hardware and software; security of the SQL Server system; and network infrastructure to meet various County department's applications, database, and data storage needs. ITD continues to enhance its cloud services by utilizing Microsoft's Azure cloud environment. Azure SQL is a cloud-based database management system hosted and managed by Microsoft. Microsoft Azure offers the County a cloud environment platform that is cost efficient, and offers increased flexibility, scalability, and ease of management.

ITD has identified several Microsoft Azure migration assistance tools that would assist with data migration tasks. The Data Migration Service is a fully managed service designed to enable seamless migrations from multiple database sources to Azure data platforms with minimal downtime. The Data Migration Assistant is a part of the Microsoft Azure platform that plays a crucial role in assessing on-premises SQL Server instances for migration to Azure. It detects compatibility issues that can impact database functionality during upgrades or when migrating data from on-premises SQL Server to Azure SQL Database.

On May 23, 2023 (Item No. 40), the Board approved County departments continue to participate in the California County Information Service Directors Association Enterprise Agreement, including non-standard terms, between Riverside County and Microsoft, for the period of July 1, 2023, through June 30, 2026. The Microsoft Azure platform license terms are included in this existing Microsoft agreement. However, they do not include the proposed Agreements' license terms to authorize the County to use the Microsoft Azure Data Migration Assistant.

The Agreements are Microsoft's standard commercial contracts, which include terms that differ from the standard County contract and omit certain County standard contract terms. Microsoft is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Governing law for both Agreements is the State of Washington.
  - The County standard contract requires California governing law.
  - Potential Impact: The Agreements will be interpreted under Washington law. Any questions, issues or claims arising under the Agreements will require the County to hire outside counsel competent to advise on Washington law, which may result in fees that exceed the total amount of the Agreements.
  
2. Microsoft may assign the Agreements 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: Microsoft could assign the Agreements 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 Agreements. 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 Agreements.

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3. There is no provision in the Agreements addressing each party's responsibility for paying attorneys' fees.
  - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
  - 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 Agreements.
4. The Agreements do not require Microsoft to indemnify the County, as required by County Policies 11-05 and 11-07, 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. If applicable, add: 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: Microsoft is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Microsoft's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Microsoft's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreements amount. County Counsel cannot advise on whether and to what extent Washington law may allow the County to require Microsoft to defend or indemnify it absent an express provision in the Agreements.
5. The Agreements do not require Microsoft 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 County policy and in the County standard contract.
  - Potential Impact: The County has no assurance that Microsoft will be financially responsible for claims that may arise under the Agreements, which could result in expenses to the County that exceed the total amount of the Agreements.
6. Microsoft's maximum liability to the County is limited to \$5.00 without any exclusions.
  - The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the amount of the Agreements, 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.
7. Venue for disputes arising under the Agreements is 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 Agreements.

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8. Microsoft provides the software “AS IS” and disclaims all warranties of any kind.
  - County Policy 11-05 requires a contractor to fully warrant its services and products.
  - Potential Impact: The County’s use of the software is solely at its own risk. County Counsel cannot advise on whether and to what extent, Washington law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ITD recommends approval of the Agreements, including non-standard terms, in order to enable efficient and secure migration of on-premises applications and resources to ITD’s Azure cloud environment.

**PROCUREMENT**

ITD has made a significant investment in developing the County’s Azure cloud environment and the free migration tools offered by Microsoft will help to ensure successful migration of County resources to the cloud environment. The Agreements, 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 Microsoft does not substantively modify the terms of the Agreements.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on December 15, 2023; Purchasing (Christina Reddix, Buyer III, 387-2060) on December 15, 2023; Risk Management (Greg Utaszewski, Staff Analyst II, 382-3211) on December 18, 2023; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on January 18, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on January 22, 2024.

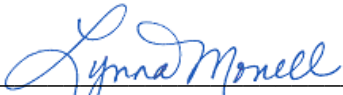
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Record of Action of the Board of Supervisors  
San Bernardino County

**APPROVED (CONSENT CALENDAR)**

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

Lynna Monell, CLERK OF THE BOARD

BY   
DATED: February 6, 2024



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

CCM 02/12/2024