

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

**March 12, 2024**

**FROM**

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

**SUBJECT**

Non-Financial End User License Agreement with Dell Global B.V. (Singapore Branch) for RV Tools Software

**RECOMMENDATION(S)**

1. Approve non-financial End User License **Agreement No. 24-207**, including non-standard terms, with Dell Global B.V. (Singapore Branch) for the use of workload metric software for virtual servers, known as RV Tools, 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 End User License Agreement in Recommendation No. 1, with Dell Global B.V. (Singapore Branch), and any future updates, as they pertain to changes to the use of RV Tools 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 to the End User License Agreement in Recommendation No. 1 related to the use of the software that are 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**

**Improve County Government Operations.**

**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 End User License Agreement (EULA) with Dell Global B.V. (Singapore Branch) (Dell) for RV Tools is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the EULA, 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**

ITD manages the County's enterprise virtual server environment that provides application, database, and storage services to County departments. The benefits of a virtual server environment include reducing the physical hardware investment in the County's data centers, quicker deployment of virtual servers to meet increasing needs, and centralized security and management of the server platforms.

**Non-Financial End User License Agreement with Dell Global B.V.  
(Singapore Branch) for RV Tools Software  
March 12, 2024**

RV Tools is an open-source software utility that can connect to the County's virtual server environment and provide workload metrics, which are used for capacity planning. Currently, ITD collects this data manually, which is a time-consuming process that can be done more efficiently with the use of this tool. In addition to ITD's use, hardware and software vendors used by ITD frequently recommend and request the output from this tool, which allows them to better assist ITD with technical support, price quoting for their services, and new solution recommendations.

The EULA is Dell's standard commercial contract for RV Tools, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The EULA is a non-negotiable clickwrap agreement accepted when utilizing the software.

1. Governing law is the State of Texas.
  - The County standard contract requires California governing law.
  - Potential Impact: The EULA will be interpreted under Texas law. Any questions, issues or claims arising under the EULA will require the County to hire outside counsel competent to advise on Texas law, which may result in fees that exceed the total amount.
2. Dell may change the EULA terms without notice at any time.
  - 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 the contractor and County.
  - 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. County Counsel cannot advise on whether and to what extent Texas law may affect the enforceability of unilateral changes to the terms.
3. Dell may assign the EULA 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: Dell could assign the EULA 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 EULA. County Counsel cannot advise on whether and to what extent Texas law may permit or restrict a party's right to assign without an express provision in the EULA.
4. There is no provision in the EULA 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, Texas 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 EULA.
5. The EULA does not require Dell 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

**Non-Financial End User License Agreement with Dell Global B.V.  
(Singapore Branch) for RV Tools Software  
March 12, 2024**

or omissions of any person. 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: Dell is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Dell'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 Dell's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total EULA amount. County Counsel cannot advise on whether and to what extent Texas law may allow the County to require Dell to defend or indemnify it absent an express provision in the EULA.
6. The EULA does not require Dell 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 Dell will be financially responsible for claims that may arise under the EULA, which could result in expenses to the County that exceed the total EULA amount.
7. Dell's maximum liability to the County is limited to the amount the County paid for the application, with no exceptions. In addition, Dell disclaims all liability for any damages resulting from the County's use of third-party applications or development tools provided by Dell.
- The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the EULA amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. County's right to bring legal claims is limited to 18 months after the cause of action accrues if the law allows for specifying a shorter period.
- The County standard contract does not include a limit on the time to bring action.
  - Potential Impact: Limiting the County's ability to bring suit to 18 months amounts to a waiver of the statute of limitations for claims and shortens the period of time in which the County may file a lawsuit under the EULA. County Counsel cannot advise on, whether and to what extent, Texas law may allow parties to contractually agree to override the statute of limitations on claims.
9. Venue for disputes arising under the EULA is in the state and federal courts located within Travis or Williamson County, Texas.
- 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 Travis or Williamson County, Texas may result in additional expenses that exceed the amount of the EULA.

**Non-Financial End User License Agreement with Dell Global B.V.  
(Singapore Branch) for RV Tools Software  
March 12, 2024**

10. Dell provides the services and/or products “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 services and/or products is solely at its own risk. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ITD recommends approval of the EULA with Dell, including non-standard terms, to allow ITD and other County departments to utilize RV Tools to assist in capacity planning for virtual server environments.

**PROCUREMENT**

RV Tools, as an open-source software tool, is free to use. RV Tools is commonly used by technology vendors as it facilitates informed decision-making concerning potential expansion of virtualized environments. The EULA, 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 Dell does not substantively change the terms of the EULA.

RV Tools was selected as it meets the specific needs of ITD and the County at no cost and was recommended by ITD vendor VMWare to provide relevant data on current virtualization server environment resource usage and trends in order to effectively plan for additional capacity requirements. The Purchasing Department concurs with the non-competitive justification.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on February 2, 2024; Purchasing (Ariel Gill, Supervising Buyer, 387-2070) on February 9, 2024 Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on February 2, 2024; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on February 22, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on February 26, 2024.

**Non-Financial End User License Agreement with Dell Global B.V.  
(Singapore Branch) for RV Tools Software  
March 12, 2024**

Record of Action of the Board of Supervisors  
San Bernardino County

**APPROVED (CONSENT CALENDAR)**

Moved: Joe Baca, Jr. Seconded: Jesse Armendarez

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

Lynna Monell, CLERK OF THE BOARD

BY   
DATED: March 12, 2024



cc: IT - Thomas w/agree  
Contractor - c/o IT w/agree  
File - w/agree  
CCM 03/15/2024