

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

February 8, 2022

FROM

BOB DUTTON, Assessor-Recorder-County Clerk

SUBJECT

Non-Financial End User License Agreement with Key Metric Software LLC for Use of Foldersizes Software

RECOMMENDATION(S)

1. Approve a non-financial End User License **Agreement No. 22-77** with Key Metric Software LLC, including non-standard terms, to be accepted electronically, for use of Foldersizes software for the period of February 8, 2022 through February 7, 2027.
2. Authorize the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to electronically accept the End User License Agreement related to the use of Foldersizes software, subject to review by County Counsel.

(Presenter: Bob Dutton, Assessor-Recorder-County Clerk, 382-3254)

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 additional Discretionary General Funding (Net County Cost). The End User License Agreement (EULA) is non-financial in nature and does not commit the County to make any purchases. When future purchases are made under this EULA, County purchasing policies will be adhered to and the Assessor-Recorder-County Clerk Department (ARC) will return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

The ARC utilizes computer servers to store data for various software applications that support daily operations. Recently, the ARC's Information Technology (IT) personnel noticed that a vital server was unpredictably losing storage capacity, which directly impacted business operations. The server is now under constant observation and monitoring by ARC IT personnel to ensure efficient operation and maintain a state of readiness. ARC IT personnel have been actively investigating the issue and are required to examine millions of folders and files to determine the location of data consumption. The vendor that provides active support for this server recommended that ARC use a software called TreeSize by Jam Software to quickly examine the file structure and diagnose the problem. ARC contacted Jam Software for more information, but after unsuccessful negotiations with this vendor over non-standard terms governed by German law, ARC sought a suitable alternate vendor based in the United States to provide this urgent service.

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The vendor that provides support to the server found a suitable alternative and recommended a product called Foldersizes software by Key Metric Software LLC (Key Metric). Foldersizes is a network-enabled disk space analyzer for Windows that can quickly isolate large, old, temporary, and duplicate files. Approval of Key Metric's EULA, including non-standard terms, would authorize future purchases and downloads of the Foldersizes software, subject to County purchasing policies, and approval of Recommendation No. 2 would authorize the Assessor-Recorder-County Clerk or Departmental Information Systems (IS) Administrator to electronically accept the EULA for the Foldersizes software, subject to County Counsel review for a period of February 8, 2022 through February 7, 2027.

This EULA is Key Metric's standard commercial contract, which governs the County's use of the Foldersizes software. The EULA includes terms and conditions that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. The EULA is silent on governing law and venue.
 - The County standard contract requires California governing law and venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
 - Potential Impact: A court deciding a case between parties residing in different states must determine which state law applies. Typically, if the contract does not address choice of law, the court will use the law of the state in which the transaction was completed or where a substantial portion of the subject matter of the agreement shall occur. There is no guarantee that a court would determine the appropriate governing law and venue for disputes in this case would be California. Key Metric's office is located in Michigan. Therefore, if a court determines governing law and venue in Michigan is appropriate, the County may have to hire counsel competent to advise on Michigan law, which may result in additional fees. Having a venue in Michigan may also result in additional expenses that exceed the amount of the Agreement.
2. The EULA does not require Key Metric to meet the County's indemnification standards required by County Policy 11-07.
 - The County standard contract does not include any indemnification by the County of a contractor.
 - Potential Impact: Without an indemnification clause, neither Key Metric or the County contractually claim compensation for specific damages or expenses. County Counsel cannot advise on, whether and to what extent, Michigan law may limit or expand this provision.
3. The EULA does not require Key Metric to meet the County's insurance standards required by County Policy 11-07.
 - The County standard contract requires contractors to carry appropriate insurance standards as provided in County Policy 11-07.
 - Potential Impact: The Agreement does not include County standard insurance requirements. This means the County has no assurance that Key Metric 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

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total contract amount. County Counsel cannot advise on, whether and to what extent, Michigan law may limit or expand this provision.

4. Key Metric or its licensors, suppliers or resellers shall not be liable under any legal theory, tort, contract, strict liability, or otherwise, to the County for any indirect, special, incidental, or consequential damages of any character including, without limitation, damages for lost profits, loss of goodwill, work stoppage, computer failure or malfunction, or any and all other commercial damages or losses.
 - The County's standard contract does not include a limitation of liability.
 - Potential Impact: The County will be financially liable for any claim arising from this EULA. County Counsel cannot advise on, whether and to what extent, Michigan law may limit or expand this Agreement provision, should Michigan law be deemed the appropriate governing law.
5. Key Metric disclaims all warranties of any kind, whether expressed or implied including but not limited to warranties of title, non-infringement or implied warranties of merchantability or fitness for a particular purpose or otherwise.
 - The County standard contract requires the contractor to fully warrant its services and products.
 - Potential Impact: The County would be unable to obtain any recovery for warranty breaches. County Counsel cannot advise on, whether and to what extent, Michigan law may limit or expand this Agreement provision, should Michigan law be deemed appropriate governing law.
6. There is no termination for convenience term in the EULA.
 - The County standard contract gives the County 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 EULA states Key Metric may terminate the agreement immediately upon notice to the County in the event that Key Metric has reason to believe the County has breached the terms and conditions of the EULA. This may abruptly interfere with ARC's ability to identify issues on one of ARC's vital computer servers. County Counsel cannot advise on, whether and to what extent, Michigan law may limit or expand this Agreement provision, should Michigan law be deemed appropriate governing law.

The recommended EULA, including non-standard terms, will allow ARC to operate in a fiscally-responsible and business-like manner, and improve County government operations by enabling ARC to purchase a subscription for use of Foldersizes software, which will provide a resource for diagnosing a file and disk management storage issue on one of ARC's vital computer servers.

PROCUREMENT

The EULA, including non-standard terms, will be used to make future purchases to be approved as necessary, in accordance with County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

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County Policy 11-05 requires departments to obtain Board approval for procurement of goods and services with non-standard terms and conditions.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Stephanie Gutierrez, Deputy County Counsel, 387-5455) on January 13, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on January 14, 2022; Risk Management (Victor Tordesillas, Director, 386-8621) on January 14, 2022; Finance (Carl Lofton, Finance Analyst, 387-5404) on January 21, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Director, 387-5423) on January 24, 2022.

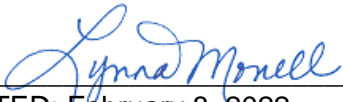
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: February 8, 2022



cc: Assessor- Gaeta w/agree
Contractor- C/O Assessor w/agree
File- w/agree
LA 02/9/2022