

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

January 24, 2023

FROM

CHAD NOTTINGHAM, Deputy Executive Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreement with Dynamsoft Corporation for Software Licensing, Maintenance, and Support

RECOMMENDATION(S)

Approve non-financial Customer Sales License **Agreement No. 23-36**, including non-standard terms, with Dynamsoft Corporation for web-based document scanning software, in purchase amounts as authorized by County Policy for the period beginning January 24, 2023, and automatically renewing for additional three-year periods until terminated by either party. (Presenter: Chad Nottingham, Deputy Executive Officer, 387-4811)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

Operate in a Fiscally-Responsible and Business-Like Manner.

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The Customer Sales License Agreement (Agreement) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, in necessary.

BACKGROUND INFORMATION

ITD's Business Solutions Division (BSD) provides programming and consulting services to County departments for the development, enhancements, and maintenance of business solutions on a variety of hardware and software platforms. ITD maintains an Enterprise Content Management System called FileNet, which stores electronic documents including forms, images, scanned documents, and electronic files for business and historical purposes. ITD maintains a software solution called FileNet Capture Professional, an add-on software that integrates with the FileNet system, which is used to capture and index physical documents and convert them to electronic documents on the FileNet system. Dynamsoft Corporation's (Dynamsoft's) Dynamic Web TWAIN software will replace the FileNet Capture Professional software solution. This change in software will enable integration of ITD maintained web applications to the FileNet system and streamline the document conversion process by reducing the number of steps needed to complete the process.

The Agreement is Dynamsoft's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms.

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While negotiations were attempted, Dynamsoft would not agree to changes to their Agreement. The non-standard and missing terms include the following:

1. Dynamsoft may assign the Agreement without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Dynamsoft 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 would be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement.
2. The County is required to indemnify Dynamsoft against third party claims arising from (a) the County's breach or violation of applicable laws or regulations (including export laws or regulations), (b) County's combining the Dynamsoft products with any hardware or software not provided by Dynamsoft, (c) the use of the Dynamsoft products, or (d) any allegation or claim that any County product or bundled product infringes, misappropriates or violates any patent, copyright, trademark, or other intellectual property right.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Dynamsoft, 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 Dynamsoft without such limitations and the County would be responsible to defend and reimburse Dynamsoft for costs, expenses, and damages, which could exceed the total Agreement amount.
3. The Agreement does not require Dynamsoft to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - The County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The County has no assurance that Dynamsoft 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 total Agreement amount.
4. Dynamsoft's total aggregate liability to the County is limited to the fees actually received by Dynamsoft from the County in the 12 months preceding the event giving rise to the claim, excluding indemnity obligations, breach of confidentiality, violation of the other party's intellectual property, gross negligence and willful misconduct.
 - 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.
5. Payment terms are Net 30 from date of invoice with a late payment interest of 1.5% per month.
 - 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. Failure to pay within 30 days from invoice date will result in a material breach of the Agreement, which would allow Dynamsoft to terminate the Agreement and seek other legal remedies,

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including charging the County interest at a rate of 1.5% per month, which would exceed the Agreement amount.

6. The term of the Agreement begins on January 24, 2023, and continues for a period of three years, thereafter, automatically renewing for additional three-year terms unless either party notifies the other party of non-renewal, in writing, at least 30 days before the end of a term or is terminated by either party for an uncured breach.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the Agreement and the County is indefinitely bound to the terms and conditions of the Agreement until the County gives notice of non-renewal no less than 30 days prior to the end of the term.
7. The County may not terminate the Agreement for convenience.
 - 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 County can only terminate the Agreement for Dynamsoft's bankruptcy, improper assignment, or uncured breach. Any attempted termination by County without cause would result in payment liability for the full Agreement amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
8. The mandatory, sole and exclusive venue, for all disputes arising from the Agreement is in the courts in the City of Vancouver, British Columbia, Canada.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Vancouver, British Columbia, Canada may result in additional expenses that exceed the amount of the Agreement.

ITD recommends approval of the Agreement, including the non-standard terms, for the use of Dynamsoft's software, including future updates and patches related to security and performance issues, to replace the existing FileNet Capture Application and streamline the document conversion process.

PROCUREMENT

The Agreement, including non-standard terms, will 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 Dynamsoft does not substantively modify the terms of the Agreement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on December 15, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on December 28, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on December 21, 2022; Finance (Ivan Ramirez, Administrative Analyst III, 387-4020) on January 4, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on January 6, 2023.

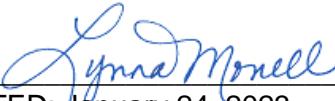
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: January 24, 2023



cc: IT - Johnson w/agree
Contractor - C/O IT w/agree
File - w/agree
CCM 01/25/2023