

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

May 4, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Hewlett Packard Enterprise Customer Terms

RECOMMENDATION(S)

Approve Customer Terms **Agreement No. 21-307** with Hewlett Packard Enterprise, including non-standard terms, to purchase future hardware maintenance and support services for the period of May 15, 2021, through May 14, 2026.

(Presenter: Jake Cordova, Assistant Chief Information Officer, 388-0503)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

FINANCIAL IMPACT

Approval of the Customer Terms Agreement (Agreement) will not result in the use of Discretionary General Funding (Net County Cost). This Agreement does not commit the County to make any purchases, but does provide the terms and conditions under which future purchases can be made. If future purchases are made under this Agreement, departments will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

The Innovation and Technology Department (ITD) utilizes hardware manufactured by Aruba, a Hewlett Packard Enterprise (HPE) company, to provide wireless connectivity services for the County. Aruba provides manufacturer direct maintenance and support services, as well as technical phone/on-line support to troubleshoot hardware or software issues.

HPE's Customer Terms agreement is HPE's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. HPE may assign the contract without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: HPE may assign the contract 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.

2. The contract does not require HPE to indemnify the County, 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. 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: HPE is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from HPE'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 HPE's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
3. The contract does not require HPE 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 contract does not include County standard insurance requirements. This means that the County has no assurance that HPE 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 contract amount.
4. Limitation of liability of HPE to County limited to the greater of \$1,000,000 or the amount payable by County to HPE for the relevant Order excluding liability for unauthorized use of intellectual property, death or bodily injury caused by negligence, acts of fraud, willful repudiation of the Agreement, or any liability which may not be excluded or limited by applicable law.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited.
5. Payment terms are thirty (30) days from invoice date. HPE may suspend or cancel performance of open Orders or services if Customer fails to make payments when due.
 - 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 payments will allow HPE to suspend or cancel performance and result in a material breach of the contract, which would allow HPE to terminate the contract and seek other legal remedies, which would exceed the contract amount.

Approval of the Agreement with HPE will allow ITD to make future purchases to continue to receive manufacturer direct maintenance and support services. Purchases exceeding \$200,000 will be presented to the Board pursuant to Policy 11-04.

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.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on April 9, 2021; Purchasing (Leo Gomez, Purchasing Manager, 387-2063 on April 12, 2021; Finance (Monique Amis, Administrative Analyst, 387-4883) on April 16, 2021; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on April 16, 2021.

Hewlett Packard Enterprise Customer Terms
May 4, 2021

Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Col. Paul Cook (Ret.)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: May 4, 2021



cc: IT - Radimaker w/agree
Contractor - C/O IT w/agree
File - w/agree

CCM 05/5/2021