

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

July 27, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreement with InMotion Hosting, Inc. for W3 Total Cache Wordpress Plugin

RECOMMENDATION(S)

Approve non-financial Boldgrid Terms of Service Agreement **County Contract No. 21-586** with InMotion Hosting, Inc. for W3 Total Cache Wordpress plugin, including non-standard terms, for an indefinite contract period.

(Presenter: Larry Ainsworth, 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 the Boldgrid Terms of Service Agreement (Agreement) with InMotion Hosting, Inc. (InMotion) will not result in the use of Discretionary General Funding (Net County Cost). This Agreement is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under this Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors for approval, if necessary.

BACKGROUND INFORMATION

ITD continues to modernize its existing platform for web content creation to provide enhanced functionality by using the open-source content management system, WordPress, for its templates and plugin architecture. A plugin is a third-party software component that enables customization by adding a specific feature to a website or application. By utilizing plugins, ITD can extend and expand the functionality of web content and application management platforms. The W3 Total Cache plugin enhances site performance and response time for WordPress sites.

The Agreement with InMotion 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. InMotion, in its sole and absolute discretion, may change or modify the Agreement at any time, and such changes or modifications become active immediately upon posting to the Websites, and use of the Services and/or Websites after such changes or modifications have been made constitutes acceptance.

- The County standard contract 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 Contractor and County.
 - Potential Impact: InMotion may change the Terms and Conditions and privacy policy without notice at any time. The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.
2. InMotion may assign its rights and obligations under the Agreement, and may engage subcontractors or agents in performing its duties and exercising its rights, without notice and without County's approval.
- The County must approve any assignment of the contract.
 - Potential Impact: InMotion may assign the contract or subcontract the services 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.
3. InMotion disclaims the warranty of non-infringement and provides no indemnification for claims made against the County based on InMotion's performance under the Agreement.
- There is no warranty requirement in the County standard contract. 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: The disclaimer of a warranty of non-infringement, coupled with the lack of indemnity for intellectual property infringement means that, should the County be sued for intellectual property infringement based on its use of InMotion's services, the County will be solely liable for the costs of defense and damages. While infringement claims against end users are rare, they have been known to occur, and the County could be responsible for defense costs and damages, which could exceed the total contract amount.
4. The County agrees to indemnify and hold InMotion harmless from all claims and expenses, including attorneys' fees and costs, arising out of the County's use of the Services, including but not limited to the County's violation of InMotion's Privacy Policy and/or the Agreement.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify InMotion, 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 InMotion without such limitations and the County would be responsible to defend and reimburse InMotion for costs, expenses, and damages, which could exceed the total contract amount.
5. The contract does not require InMotion to meet the County's insurance standards as required pursuant to County Policy 11-07.

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- 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 InMotion 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.
6. InMotion limits its liability under the Agreement to the County to the amount paid by the County in connection with the Services within the six months prior to the claim for all causes of action in the aggregate, whether based in contract, tort or any other legal theory (including strict liability), other than claims based on fraud or willful misconduct.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: No dollar value has been associated with this agreement, so it is not possible to provide an estimate of what the maximum amount could be. 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.
7. Neither party may bring a claim more than one year after the cause of action has arisen.
- The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the right to bring suit to one year 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 contract.
8. Unless the automatic renewal option is disabled, InMotion will automatically renew the service and will take payment from the payment method on file at InMotion's then-current rates.
- County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board of Supervisors (Board).
 - Potential Impact: There is no end term to the contract and the County is indefinitely bound to the terms and conditions of the contract.
9. Venue is in Los Angeles County, California.
- 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 Los Angeles County may result in additional expenses that exceed the amount of the contract.
10. The services are licensed "AS IS", without warranty of any kind.
- There is no warranty requirement in the County standard contract. The County expects its vendors and service providers to fully warrant the products and services they provide to the County.
 - Potential Impact: The County's use of the software is solely at its own risk.

ITD recommends approval of the Agreement, including the non-standard terms, to utilize this plugin to enhance site performance and response time for WordPress sites. Purchases

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exceeding \$200,000 will be presented to the Board for approval pursuant to County 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 June 21, 2021; Purchasing (Michelle Churchill, Supervising Buyer, 387-2070) on June 29, 2021; and Finance (Joon Cho, Administrative Analyst, 387-5402) on July 6, 2021; Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-3076) on July 6, 2021.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Dawn Rowe 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: July 27, 2021



cc: IT - Radimaker w/agree
 Contractor - C/O IT w/agree
 File - w/agree
CCM 08/4/2021