



# San Bernardino County

## Legislation Text

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**File #: 3149, Agenda Item #: 52**

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

**October 27, 2020**

**FROM**

**LARRY AINSWORTH, Chief Information Officer, Information Services Department**

**SUBJECT**

Amazon Web Services Customer Agreement for Cloud Services and Storage

**RECOMMENDATION(S)**

1. Approve an indefinite term AWS Customer Agreement with Amazon Web Services, Inc. to be accepted electronically for cloud services and storage.
2. Authorize the Purchasing Agent to issue a Purchase Order in the amount of \$3,500,000 to Amazon Web Services for cloud services and storage for the period of October 27, 2020 through October 26, 2030.
3. Designate the Chief Information Officer or their designee, as the authorized official to sign documents and accept online agreements as they pertain to changes to the AWS cloud services and storage, subject to review by County Counsel, provided that such documents do not result in a change to the not-to-exceed contract amount, substantively modify the terms applicable to the County, or change the duration of the agreement.
4. Direct the Chief Information Officer to transmit all documents related to this agreement to the Clerk of the Board of Supervisors within 30 days of execution.

(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 Agreement (Agreement) with Amazon Web Services (AWS) for cloud services and storage will not result in the use of Discretionary General Funding (Net County Cost). The not-to-exceed amount of \$3,500,000 is the amount ISD estimated that it will need to purchase cloud services and storage on a fee-for-service basis for the next ten years. The County will only be charged for actual metered usage of AWS services. Sufficient appropriation is available in the Information Services Department (ISD) Computer Operations 2020-21 budget and will be included in future recommended budgets. Operating costs are recovered via service rates approved annually by the Board of Supervisors (Board).

**BACKGROUND INFORMATION**

AWS provides on-demand cloud computing platforms and application programming interfaces on a metered fee-for-service basis. The cloud computing platform provides secure, on-demand IT resources, such as storage and databases, delivered over the internet which would allow environments to be built without having to purchase additional hardware.

The AWS Customer Agreement is AWS' standard commercial agreement, 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. Governing law is State of Washington.
  - The County standard contract requires California governing law.
  - Potential Impact: The contract will be interpreted under Washington State law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise the County regarding Washington State law, which may result in fees that exceed the total contract amount.
  
2. AWS may modify the Agreement (including any Policies) at any time by posting a revised version on the AWS Site or by otherwise notifying the County in accordance with the Agreement. By continuing to use the Service Offerings after the effective date of any modifications to this Agreement, the County agrees to be bound by the modified terms. It is the County's responsibility to check the AWS site regularly for modifications to the Agreement.
  - 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: AWS may change the Agreement terms and policies without notice at any time. The County could be bound to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.
  
3. Disputes will be resolved by binding arbitration, rather than in court, except that the County may assert claims in small claims court if the claims qualify under Washington State law. AWS will reimburse those fees for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous, and will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous.
  - The County standard contract does not require arbitration.
  - Potential Impact: Arbitration decisions are not appealable.
  
4. AWS may assign the Agreement without County's consent and without notice in connection with a merger, acquisition or sale of all or substantially all of AWS' assets, or to any affiliate or as part of a corporate reorganization. Effective upon assignment, AWS is fully released from all of its obligations and duties to perform under the Agreement.
  - The County must approve any assignment of the contract.
  - Potential Impact: AWS 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. In addition, the assignment could result in the County being barred from bringing a claim against AWS for any liability that arises prior to the assignment effective date.
  
5. The County agrees to defend, indemnify, and hold AWS harmless against third party claims concerning: (a) County's use of the Service Offerings (including any activities under its AWS account and use by its employees and personnel); (b) breach of the Agreement or violation of applicable law by County, its end users or County content; and (c) disputes between County and any end user. County will reimburse AWS for reasonable attorneys' fees, as well as AWS employee and contractor time and materials spent responding to any third party subpoena or other compulsory legal order or process associated with third party claims at AWS' then-current hourly rates. In addition, County agrees to defend AWS against any third-party claim alleging that County content infringes or misappropriates that third party's intellectual property rights, and will pay the amount of any adverse final judgment or settlement.

- The County standard contract does not include any indemnification or defense by the County of a Contractor.
  - Potential Impact: By agreeing to indemnify AWS, 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 AWS without such limitations and the County would be responsible to defend and reimburse AWS for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Washington State law may limit or expand this contract term.
6. The agreement does not require AWS to meet the County's standard insurance requirements, including cyber liability insurance.
- The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
  - Potential Impact: The County has no assurance that AWS will be financially responsible for claims that may arise from the County's use of the services, which could result in expenses to the County that exceed the total contract amount.
7. AWS disclaims all liability to County, and even in the event that AWS is held liable its total aggregate liability will not exceed the amount actually paid by the County to AWS for the service that gave rise to the claim during the 12 months before the liability arose.
- 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. County Counsel cannot advise on, whether and to what extent, Washington State law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. Payment terms are as stated on the AWS site with 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. Failing to pay within the required time will result in a material breach of the contract, which would allow AWS to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1.5% per month, which would exceed the contract amount.
9. The term of the contract is indefinite.
- 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 contract and the County is indefinitely bound to the terms and conditions of the contract until either party gives notice of termination.
10. Venue is in the State or Federal courts in King County, Washington.
- 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 King County, Washington may result in additional expenses that exceed the amount of the contract.
11. The AWS service offerings are provided "AS IS" without warranty of any kind.
- There is no warranty requirement in the County standard contract.
  - Potential Impact: The County's use of the software is solely at its own risk. County Counsel cannot advise on, whether and to what extent, Washington State law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ISD recommends approval of the Agreement, including the non-standard terms which are typical in the IT industry, to allow ISD to purchase cloud services from AWS. Entering into an indefinite term agreement with AWS streamlines the process for the purchase of fee-for-service cloud services to meet the needs of the County.

Designating the Chief Information Officer or their designee, as the authorized official to sign future documents to confirm fee-for-service AWS cloud services, will allow ISD to order and implement services in a timely manner on the County AWS cloud system during the term of the Agreement. Such documents will be subject to review and approval by County Counsel.

#### **PROCUREMENT**

AWS sells cloud services directly and through partners which host the County's data on their own infrastructure. ISD recommends purchasing AWS cloud services directly from AWS as a non-competitive agreement, rather than through partners, due to the cost of additional professional services and ISD staff time that would be required to manage the data migration between partner tenants, and the risk of lost or distorted data during migration if a different partner were selected in the future. The Purchasing Department concurs with the recommendation of a non-competitive purchase of Cloud Services and Storage with AWS due to minimizing the risk of data loss and prevention of potential additional costs related to future data migration.

The terms of the AWS Customer Agreement, including the non-standard terms, will be used to accompany future purchases 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, 387-5487) on September 25, 2020; Purchasing (Jessica Barajas, Lead Buyer, 388-5546) on September 29, 2020; Finance (Monique Amis, Administrative Analyst, 387-4883) on October 14, 2020; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on October 15, 2020.