



San Bernardino County

Legislation Text

File #: 4278, Agenda Item #: 45

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

June 8, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Terms of Use and End User License Agreement with LogZilla Corporation

RECOMMENDATION(S)

1. Approve Terms of Use and End User License Agreement with LogZilla Corporation, including non-standard terms, for future purchases of software maintenance and support services for the period of August 3, 2021 through August 2, 2026.
2. Authorize the Purchasing Agent to electronically accept the Terms of Use and End User License Agreement, as approved.

(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 Terms of Use Agreement and End User License Agreement will not result in the use of Discretionary General Funding (Net County Cost). These terms are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under these terms, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ITD utilizes centralized log management software manufactured by the LogZilla Corporation (LogZilla) to collect network system logs into a single location. Network system logs contain records of activities and events that occur on the network, and LogZilla software allows for network incident investigation and troubleshooting. LogZilla provides manufacturer direct software maintenance, which ensures the County utilizes the most up-to-date software.

LogZilla's Terms of Use (TOU) and End User License Agreement (EULA) together are LogZilla's standard commercial contract, which collectively include 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 the State of Texas.
 - The County standard contract requires California governing law.

- Potential Impact: The contract will be interpreted under Texas State law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Texas law, which may result in fees that exceed the total contract amount.
2. LogZilla can change the terms of the contract at any time without notice.
 - The County standard contract requires that any changes to the contract 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: LogZilla may change the terms of the TOU and EULA 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.
 3. LogZilla may assign the contract without notice and without the County's consent.
 - The County must approve any assignment of the contract.
 - Potential Impact: LogZilla 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.
 4. The contract is silent on attorneys' fees.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, Texas law may affect a party's requirement to pay the prevailing party's attorney fees and costs in a legal action where no specific provision is provided in the contract.
 5. LogZilla disclaims the warranty of non-infringement and provides no indemnification for claims made against the County.
 - 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 LogZilla software or services, the County will be 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 would exceed the total contract amount.
 6. The County is responsible for its use of the Service, and will defend and indemnify LogZilla from and against every claim and expense, including reasonable attorney fees and costs, arising out of or in any way connected with: (a) County's access to, use of, or alleged use of, the Service; (b) County's violation of the contract, any representation, warranty, or agreement referenced in the contract, or any applicable law or regulation; (c) County's violation of any third-party right, including any intellectual property right or publicity, confidentiality, other property, or privacy right; or (d) any dispute or issue between the County and any third party. LogZilla reserves the right to assume the exclusive defense and control of any matter otherwise subject to indemnification by the County (without limiting the County's indemnification obligations), and the County agrees to cooperate with LogZilla in defense of that claim.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.

- Potential Impact: By agreeing to indemnify LogZilla, 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 LogZilla without such limitations and the County would be responsible to defend and reimburse LogZilla for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand this contract term.
7. The contract does not require LogZilla 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 LogZilla 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.
8. LogZilla's aggregate maximum liability to the County is the greater of the amount paid for access to and use of the service in the 12 months prior to the event giving rise to the claim or \$100.
- 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, Texas law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. Payment terms are Net 30 date of invoice with a 1% per month late payment interest penalty.
- The County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: The County's standard processing time is 60 days or more. Failing to make timely payments will result in a material breach of the contract, which would allow LogZilla to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1% monthly, which would exceed the contract amount.
10. The contract term automatically renews on an annual basis unless County gives notice of non-renewal.
- 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.
11. The County may not terminate the contract and agrees to a non-cancelable payment obligation and non-refundable fees.
- The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (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 prevent the automatic renewal of the contract by providing notice at least 30 days prior to the end of the then-current term. Any attempted termination by the County would result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
12. Venue is Travis County, Texas.
- 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 Travis County, Texas may result in additional expenses that exceed the amount of the contract.

13. Use of the software, service and all materials and content are provided in an "AS IS" and "AS AVAILABLE" basis, without warranty of any kind. The County assumes all risk for any damage that may result from the County's use of or access to the service, dealing with any other service user and any materials or content available through the service.

- 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. County Counsel cannot advise on, whether and to what extent, Texas law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ITD previously purchased LogZilla software maintenance under the Purchasing Agent's authority pursuant to County Policy 11-04. Approval of the TOU and EULA with LogZilla will allow ITD to continue to receive manufacturer direct maintenance services. Purchases exceeding \$200,000 will be presented to the Board for approval pursuant to County Policy 11-04.

PROCUREMENT

The TOU and EULA, 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 May 10, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148; and Leo Gomez, Purchasing Manager, 387-2063) on May 11, 2021; Finance (Carolina Mendoza, Administrative Analyst, 387-0294) on May 18, 2021; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on May 18, 2021.