



San Bernardino County

Legislation Text

File #: 4306, Agenda Item #: 46

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

MaxMind End User License Agreement

RECOMMENDATION(S)

1. Approve End User License Agreement with MaxMind, Inc., including non-standard terms, to purchase future database subscription services for the period of June 8, 2021 through June 7, 2026.
2. Authorize the Purchasing Agent to electronically accept the 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 End User License Agreement (EULA) will not result in the use of Discretionary General Funding (Net County Cost). This EULA is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under this EULA, 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 location services, also commonly known as geo-based services, that are useful from a cybersecurity standpoint, allowing ITD to identify and classify internet traffic attempting to access the County's internet network firewall. A database subscription with MaxMind, Inc. (MaxMind) will allow ITD to import data from the geo-based Internet Protocol (IP) addresses into the County's firewall system and in-turn block certain geo-locations from the network, providing protection to the County's wide area network and other mission critical information technology systems.

MaxMind's EULA is their 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. The EULA is governed and interpreted by the laws of the Commonwealth of Massachusetts.
 - The County standard contract requires California governing law.

- Potential Impact: The contract will be interpreted under Massachusetts law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Massachusetts law, which may result in fees that exceed the total contract amount.
2. MaxMind may amend the EULA at any time. Any such amendment becomes binding and effective upon the earlier of (i) thirty (30) days after posting of the amended EULA on the Website or (ii) the date that MaxMind provides notice to the County except that changes to charges and payment terms may be made only upon 30 days' prior written notice to the County. The County may immediately terminate the EULA upon written notice to MaxMind if a change is unacceptable to the County. Any continued use of the services following notice of a change shall constitute the County's acceptance of the change.
- 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: MaxMind may change the 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. MaxMind may assign its rights and obligations under the EULA without notice to and the consent of the County.
- The County must approve any assignment of the contract.
 - Potential Impact: MaxMind 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 EULA does not address attorneys' fees and costs.
- The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If either party institutes any legal proceedings related to the Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Massachusetts 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. The contract does not require MaxMind 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: MaxMind is not required to defend, indemnify, or hold the County harmless from any claims, including indemnification for claims arising from MaxMind'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 MaxMind's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Massachusetts law may allow the County to require MaxMind to defend or indemnify it absent an express provision in the contract.
6. The County is obligated to indemnify and hold MaxMind and its affiliates harmless from and against all

liability resulting from the County's breach of any of the terms of the EULA.

- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify MaxMind, 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 MaxMind without such limitations and the County would be responsible to defend and reimburse MaxMind for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Massachusetts law may limit or expand this contract term.
7. The contract does not require MaxMind 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 MaxMind 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. MaxMind's total liability under the EULA is limited to the amount of fees actually paid by the County during the twelve months immediately preceding the event giving rise to the liability without exception.
- 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, Massachusetts law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. The contract has no term.
- 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.
10. The EULA does not provide any termination provision for the County.
- 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 would have to rely on Massachusetts law regarding contract termination rights. County Counsel cannot advise on, whether and to what extent, Massachusetts law may permit termination for convenience or for cause, such as bankruptcy or MaxMind's breach of the EULA.
11. Venue is in the state and federal courts in Boston, Massachusetts.
- 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 Boston, Massachusetts may result in additional expenses that exceed the amount of the contract.
12. The MaxMind services are provided on an "AS-IS", "AS-AVAILABLE" basis 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. County Counsel cannot advise on, whether and to what extent, Massachusetts law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

MaxMind's EULA references and incorporates the MaxMind Invoicing and Vendor Portal Policy, which includes additional terms that differ from the standard County contract. The additional non-standard terms include the following:

1. Payment terms are 30 days from issuance of invoice with late payment interest of 1% calculated daily. MaxMind provides a five-day grace period.
 - 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 thirty-five days will result in a material breach of the contract, which would allow MaxMind to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1% monthly, accruing on a daily basis, which would exceed the contract amount.
2. MaxMind is entitled to recover attorneys' fees and costs in any collection action.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If MaxMind institutes a collection action against the County, the contract entitles them to recover reasonable attorney fees and costs, which could exceed the total contract amount.

Approval of the EULA with MaxMind will allow ITD to make future database subscription purchases to enhance the existing online protections currently in place for the County's wide area network and other mission critical information technology systems. Purchases exceeding \$200,000 will be presented to the Board for approval pursuant to County Policy 11-04.

PROCUREMENT

The End User License 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 May 6, 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.