Legislation Details (With Text)

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Title:	CONSIDER APPROVAL OF SOFTWARE LICENSE AGREEMENT WITH DOCUSIGN INC. FOR PURCHASE OF DOCUSIGN ESIGNATURE SOFTWARE (CITY COUNCIL)				
Sponsors:					
Indexes:					
Code sections:					
Attachments:	1. Docusign Corp Software License Agreement, 2. Docusign Quote				

Date	Ver.	Action By	Action	Result

Report to Mayor and City Council

Tuesday, June 16, 2020

Consent

SUBJECT:

CONSIDER APPROVAL OF SOFTWARE LICENSE AGREEMENT WITH DOCUSIGN INC. FOR PURCHASE OF DOCUSIGN ESIGNATURE SOFTWARE (CITY COUNCIL)

I. SUMMARY

Staff is seeking approval to purchase an eSignature software as directed by the Disaster Council. The eSignature software will be utilized for conformance of all official City documents (i.e., contracts, resolutions, and ordinances) that were approved only during the local emergency. Staff initiated negotiations with DocuSign, a leading eSignature company that offers a software allowing signatories to send and sign agreements securely from virtually any device. The cost for the software, annual maintenance and support agreement does not exceed the City Manager signing authority. However, since the agreement is not written in the standard City Attorney contract form, City Council approval is being sought.

II. RECOMMENDATION

TAKE the following actions:

1. APPROVE the attached Software License Agreement with DocuSign for purchase of the DocuSign eSignature Software for $3,122.00 (Exhibit No. 1); and

2. AUTHORIZE the Mayor to execute the Agreement upon approval as to form by the City

Attorney.

III. ALTERNATIVES

TAKE any other action the Council deems appropriate.

IV. BACKGROUND

On April 6, 2020, the Disaster Council authorized use of eSignatures for all official city documents that are approved during the local state of emergency. This software permits signatories to send, sign and route official documents electronically from virtually any device. With essential employees working from home, this software eliminates staff having to come into City Hall to sign official documents.

During the Disaster Council meeting, the City Attorney brought up the need for a secure software that will protect the integrity of the signatory signatures and official documents. To that end, the City initiated an agreement with one the leading eSignature software providers in the nation, DocuSign. DocuSign is a sole source provider for this software. City Clerk staff have researched and worked with DocuSign in the past, and recognize that DocuSign is a reputable consultant.

However, DocuSign rejected the City Attorney's standard contract form, which is designed to provide the highest level of protection to the City. Instead, DocuSign requires the City to execute DocuSign's form agreement (Exhibit No. 1).

Legal Issues

The proposed agreement consists of DocuSign's Master Services Agreement ("MSA"), the Service Schedule for the DocuSign Signature product ("Service Schedule"), and the City's Order Form (collectively, the "Agreement"). Although DocuSign does not normally agree to negotiate changes to the MSA, the City Attorney's office was able to successfully negotiate favorable changes to the insurance provisions. Otherwise, the MSA provisions remain unchanged from DocuSign's standard form. The City Attorney's office reviewed the Agreement and prepared the below list of legal issues to bring to the Council's attention. All section numbers referenced below refer to the MSA unless otherwise specified.

Prohibited Use. Section 2.2 of the MSA lists the types of conduct the City is prohibited from in using DocuSign's services, such as engaging in unauthorized or illegal use of the software (known as "DocuSign Signature"). While the restrictions appear reasonable, the City would normally seek to negotiate a higher standard of City knowledge/intent into the prohibited conduct, such that the City could only be liable for knowing or intentional violations. As currently worded, the City is strictly prohibited from committing the violations, meaning the City could be held responsible for improper actions of its authorized users of the software despite the City having no official knowledge or intent to engage in such conduct.

Suspension. Section 2.3 authorizes DocuSign to suspend any City use of the services that DocuSign reasonably or in good faith believes is in violation of the Agreement. Such a suspension would result in a loss of value to the City, because the City is obligated to pay

for the entire year of DocuSign services at the outset and would not be able to use the services during the suspension period, which is not subject to any maximum time limit.

Late Fees/Penalties. Section 5.3 authorizes DocuSign, in the event City fails to make payment of an invoice in a timely fashion, to impose late charges of up to 1.5% of any unpaid balance per month, or the highest rate permitted by applicable law. It also provides that City is responsible for any reasonable attorneys' fees, costs, and expenses incurred by DocuSign to collect any amounts that are not paid when due, and it authorizes DocuSign, without limitation of any other remedies it may have, to suspend City's use of the services for City's failure to make timely payment of any amounts due under the Agreement until all past due payments are made.

Indemnification. Sections 9.1 to 9.2 provide for mutual indemnification. City is required to indemnify DocuSign for claims related to: (i) City's use of DocuSign services in violation of the Agreement or applicable law, (ii) City's breach of certain of the restrictions set forth in Section 2.2, and (iii) the nature and content of all City data processed by the DocuSign services. With respect to items (i) and (ii), the City Attorney would prefer if these obligations were limited to intentional or willful misconduct of City, as discussed in reference to Section 2.2 above. Additionally, DocuSign's indemnification obligations are limited. DocuSign agrees to indemnify City for: (i) claims related to breach of security safeguards that results in a breach of its confidentiality obligations, and (ii) claims related to DocuSign's infringement of third party intellectual property rights, although not where the alleged infringement is due to the combination of DocuSign Services with goods or services provided by third parties. Overall, the indemnification provision is not ideal for the City, but is fairly industry standard, and is actually more fair than many form indemnification provisions proposed by software service providers.

Indemnification Procedures. Section 9.3 provides that in the event the indemnification obligation of either party is triggered, the indemnifying party shall have control of the defense, with no option of the indemnified party to control the defense at the indemnifying party's expense. Additionally, the provision gives the indemnified party no right to settle the matter without the indemnifying party's consent, or to have any control over settlement of the matter unless the settlement includes payment of amounts by or admissions of liability on the part of the indemnified party. Overall, the provision offers little control to the indemnified party.

Insurance. The Agreement requires Docusign to provide workers compensation, commercial general liability, automobile liability, errors and omissions, and umbrella liability insurance coverage with limits meeting the Risk Management Division's standards. DocuSign has provided a certificate of insurance to the City reflecting that it maintains the foregoing insurance. The Agreement provides that City shall be named as an additional insured on the general liability policy, and that the general liability policy shall be primary and non-contributory. The general liability, auto, and workers compensation insurance policies shall include waiver of subrogation in favor of City.

Venue. Section 12 provides that in the event of a lawsuit arising between the parties related to the Agreement, San Francisco County shall be the venue for the court proceedings. The City generally requires venue to be in Los Angeles County.

Service Schedule. Section 7.1 of the Service Schedule contains a DocuSign warranty that

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proper use by City of the DocuSign Signature product will be sufficient to meet the definition of an “electronic signature” as defined in the E-SIGN Act, which is the federal law governing use of electronic signatures. However, there is also California law regarding electronic signatures (including digital signatures), and Section 2.1(c) of the Service Schedule provides that DocuSign is not responsible to determine whether any particular eDocument is subject to an exception to applicable electronic signature laws or whether it can be legally formed by electronic signatures. In other words, it is up to the City to decide which documents can legally be signed using electronic signatures and to refrain from using electronic signatures on documents that cannot. The City Clerk’s office will work with the City Attorney to address this issue, potentially via adoption of a policy to provide clear operational guidelines for staff to adhere to with respect to use of electronic signatures. However, adoption of such a policy is not essential prior to commencing use of DocuSign services. In the interim, the City Clerk’s office will consult with the City Attorney as needed to ensure all documents executed using DocuSign can legally be signed electronically.

V. FISCAL IMPACT

Funds have been allocated for this software in FY 2020/21 in account number 101-30-100-100-6004.

VI. EXHIBITS

1. DocuSign Corporation Software License Agreement.
2. Docusign Quote

1.

Prepared by: Kevin Kennedy, Information Technology Manager

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