

80126

DATE: October 13, 2020

TO: Board of Acquisition and Contract

FROM: Marguerite Beirne
Chief Information Officer
Department of Information Technology

SUBJECT: Resolution Authorizing the County of Westchester to enter into an agreement with Smartsheet, Inc. (IT-1673) for the purchase of 25 licenses for project management software and related implementation services, for an amount not to exceed \$42,500.00, pursuant to an approved budget, for a three-year term commencing on October 27, 2020 and expiring on October 26, 2023.

Authority is respectfully requested from your Honorable Board for the County, acting by and through its Department of Information Technology (the “Department,”) to enter into an agreement with Smartsheet, Inc. (“Smartsheet”) for the purchase of 25 licenses for project management software (the “Software”) and related implementation services, for an amount not to exceed \$42,500.00, pursuant to an approved budget, for a three-year term commencing on October 27, 2020 and expiring on October 26, 2023.

Smartsheet is a cloud-based software solution that will be used by County Departments to manage projects more efficiently. The software is used to perform a wide variety of project management activities, including assigning tasks, tracking project progress, managing calendars, sharing documents, and managing other work, using a tabular user interface.

In addition to a provision whereby Smartsheet shall indemnify the County in certain legal actions, Smartsheet’s User Agreement contains the following provision requiring the County (referred to as “Customer”) to indemnify Smartsheet:

“By Customer. To the extent permitted by applicable law, Customer will defend Smartsheet and Smartsheet’s Affiliates providing the Services, and their respective officers, directors, and employees (“**Smartsheet Indemnified Parties**”) from and against any claims, demands, proceedings, investigations, or suits brought by a third party arising out of Customer Content or Customer’s use of the Services or Customizations in violation of applicable law (each, a “Claim

Against Smartsheet”). Customer will indemnify Smartsheet Indemnified Parties for any finally awarded damages or settlement amount approved by Customer in writing to the extent arising from a Claim against Smartsheet, and any reasonable attorneys’ fees of Smartsheet associated with initially responding to a Claim Against Smartsheet.”

Smartsheet’s User Agreement also contains the following provision regarding limitations of liability:

“To the extent permitted by law, neither party will be liable for any lost profits, goodwill, or revenues or for any incidental, consequential, special, indirect, cover, business interruption, or punitive damages in connection with any claim of any nature, whether in contract, tort, or under any theory of liability, arising under this agreement, even if a party has been given advance notice of such possible damages or if a party’s remedy otherwise fails of its essential purpose.

To the extent permitted by law, each party’s entire liability under this agreement will not exceed the fees paid by customer to Smartsheet under this agreement for the services giving rise to the liability during the twelve (12) months prior to the date on which the liability arose. The existence of more than one claim will not enlarge this limit.

The foregoing exclusions and liability limits in this section 9 shall not apply to damages or liability resulting from claims or obligations arising under sections 1.2 (restrictions) or 8 (indemnification), infringement or misappropriation by a party of the other party’s intellectual property rights, or customer’s obligation to pay for services or taxes under this agreement.”

The goal and objective of the proposed Agreement is to provide a software management tool that will increase productivity and the efficient management of County projects.

The Smartsheet software is proprietary to Smartsheet, Inc. which does not permit any other vendors to provide these licenses for its software. Accordingly, we recommend that this procurement be classified as a sole source procurement pursuant to Section 9 of the Westchester County Procurement Policy.

The proposed Agreement will be tracked and monitored by the staff of the Department.

I respectfully recommend approval of the attached Resolution.

MB/SEF/NEB/jrc

RESOLUTION

RESOLVED, that the County of Westchester (the “County”) is hereby authorized to enter into an agreement (the “Agreement”) with Smartsheet, Inc. (“Smartsheet”) for the purchase of 25 licenses for project management software and related implementation services, for an amount not to exceed \$42,500.00, pursuant to an approved budget, for a three-year term commencing on October 27, 2020 and expiring on October 26, 2023 (the “Agreement”); and be it further

RESOLVED, that the Agreement shall contain the following provision requiring the County (referred to as “Customer”) to indemnify Smartsheet:

“By Customer. To the extent permitted by applicable law, Customer will defend Smartsheet and Smartsheet’s Affiliates providing the Services, and their respective officers, directors, and employees (“**Smartsheet Indemnified Parties**”) from and against any claims, demands, proceedings, investigations, or suits brought by a third party arising out of Customer Content or Customer’s use of the Services or Customizations in violation of applicable law (each, a “Claim Against Smartsheet”). Customer will indemnify Smartsheet Indemnified Parties for any finally awarded damages or settlement amount approved by Customer in writing to the extent arising from a Claim Against Smartsheet, and any reasonable attorneys’ fees of Smartsheet associated with initially responding to a Claim Against Smartsheet.” ; and be it further

RESOLVED, that that the Agreement shall contain the following provision regarding limitations of liability;

“To the extent permitted by law, neither party will be liable for any lost profits, goodwill, or revenues or for any incidental, consequential, special, indirect, cover, business interruption, or punitive damages in connection with any claim of any nature, whether in contract, tort, or under any theory of liability, arising under this agreement, even if a party has been given advance notice of such possible damages or if a party’s remedy otherwise fails of its essential purpose.

To the extent permitted by law, each party’s entire liability under this agreement will not exceed the fees paid by customer to Smartsheet under this agreement for the services giving rise to the liability during the twelve (12) months prior to the date on which the liability arose. The existence of more than one claim will not enlarge this limit.

The foregoing exclusions and liability limits in this section 9 shall not apply to damages or liability resulting from claims or obligations arising under sections 1.2 (restrictions) or 8 (indemnification), infringement or misappropriation by a party of the other party’s intellectual property rights, or customer’s obligation to pay for services or taxes under this agreement.”; and be it further

RESOLVED, that pursuant to Section 9 of the Westchester County Procurement Policy, this procurement is deemed a sole source procurement; and be it further

RESOLVED, that this Agreement is subject to County appropriations; and be it further

RESOLVED, that this Agreement is also subject to further financial analysis of the impact of any New York State Budget (the “State Budget”) proposed and adopted during the term of this Agreement. The County shall retain the right, upon the occurrence of any release by the Governor of a proposed State Budget and/or the adoption of a State Budget or any amendments thereto, and for a reasonable period of time after such release(s) or adoption(s), to conduct an analysis of the impacts of any such State Budget on County finances. After such analysis, the County shall retain the right to either terminate this Agreement or to renegotiate the amounts and rates approved herein. If the County subsequently offers to pay a reduced amount to the Contractor, then the Contractor shall have the right to terminate this Agreement upon reasonable prior written notice; and be it further

RESOLVED, that the County Executive or his duly authorized designee is hereby authorized to execute and deliver any and all documents and to take all action necessary and appropriate to effectuate the purposes hereof.

Account to be
Charged/Credited

Agreement No. IT-1673

Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub-Object	Trust Account	Dollars
101	16	6420	4070		\$42,500.00

Budget Funding Year(s): 2020
(must match resolution)

Start Date: October 27, 2020

End Date: October 26, 2023

Funding Source
\$42,500.00
(must match resolution)

Tax Dollars: \$42,500.00
State Aid: _____
Federal Aid: _____
Other: _____