

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

June 11, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Master License Agreement and Software License Agreement with Syncfusion, Inc. for Portable Document File Conversion Software

RECOMMENDATION(S)

1. Approve the following agreements with Syncfusion, Inc., for the use of portable digital file conversion software, known as Essential Studio, for the retroactive contract period commencing on January 28, 2024 through January 27, 2025, with the option to renew for four additional one-year terms or automatically renewing if no termination notice is given:
 - a. Master License **Agreement No. 24-502**, in the total contract amount of \$8,340
 - b. Non-financial Essential Studio Software License **Agreement No. 24-503**, including non-standard terms
2. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept the Essential Studio Software License Agreement, with Syncfusion, Inc., and any future updates, as they pertain to changes in the use of the software, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original agreements.
3. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit printed copies of any updated terms to the Essential Studio Software License Agreement related to the use of the portable digital file conversion software that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of acceptance.

(Presenter: Lynn Fyhrlund, Chief Information Officer, 388-5501)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The Innovation and Technology Department's (ITD) operating costs are recovered via service rates approved annually by the Board of Supervisors (Board). The one-year cost for Syncfusion's Team Subscription is \$8,340 and provides ten licenses for developers. Sufficient appropriation is included in ITD's Business Solutions Development 2023-24 budget and will be included in future recommended budgets.

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BACKGROUND INFORMATION

ITD's Business Solutions Development Division facilitates the development, maintenance, support, and enhancement of business applications for County departments on a variety of hardware and software platforms.

Syncfusion's software, Essential Studio, is a programming toolset that converts different document formats to portable document format (PDF) files. In addition to the PDF conversion capability, Syncfusion provides both basic and complex PDF document editing and support features for Microsoft Office document formats such as Excel, Word, and PowerPoint as required in applications used by County departments.

On December 7, 2021 (Item No. 27), the Board approved Software License Agreement No. 21-924 with Syncfusion, including non-standard terms, for an indefinite contract period. ITD is purchasing new Syncfusion software licenses and is now required by the vendor to accept updated terms, which includes the Master License Agreement (MLA).

The Essential Studio Software License Agreement (Agreement) is Syncfusion's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The Agreement is a non-negotiable clickwrap agreement accepted when downloading the software. The non-standard contract and missing terms include the following:

1. Governing law is the State of North Carolina.
 - (c) The County standard contract requires California governing law.
 - (d) Potential Impact: The Agreement will be interpreted under North Carolina law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on North Carolina law, which may result in fees that exceed the total Agreement amount.
2. Syncfusion may assign the Agreement without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: Syncfusion could assign the Agreement 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. Should this occur, the County could be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement. County Counsel cannot advise on whether and to what extent North Carolina law may permit or restrict a party's right to assign without an express provision in the Agreement.
3. There is no provision in the Agreement addressing each party's responsibility for paying attorneys' fees, except that Syncfusion may recover attorneys' fees in any collection action against the County.
 - 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, North Carolina law may affect a party's requirement to pay the prevailing party's attorneys' fees and costs in a legal action where no specific provision is provided in the Agreement.

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4. Syncfusion has the right to audit County's use of the software to ensure compliance with the terms of the Agreement during the contract term and for two years thereafter. If the audit reveals any underpayments of any fees payable under the Agreement, County shall pay the difference within 15 days after Syncfusion's demand and, if the discrepancy is 3% or greater, County will pay the costs of the audit.
 - The County standard contract does not permit contractors to audit the County's compliance.
 - Potential Impact: If an audit determines that the County's use of the software exceeds the number of licenses purchased, Syncfusion may demand payments of additional fees plus reimbursement of audit costs, which may result in fees that exceed the total Agreement amount.
5. All disputes arising under the Agreement must be settled by binding arbitration held in Raleigh, North Carolina.
 - The County standard contract does not require arbitration.
 - Potential Impact: Binding arbitration decisions are not appealable. In addition, disputes that might otherwise be settled in small claims court would incur arbitration costs that could exceed the costs of a small claims action, and the Agreement amount. County Counsel cannot advise on whether and to what extent such arbitration provisions may be enforceable against a government entity under North Carolina law.
6. Syncfusion limits its indemnification obligations in the Agreement claims that a licensed product infringes a U.S. copyright, but not any patent, trade secret, trademark or other intellectual property right. In addition, Syncfusion provides no indemnification for the following products and services: (1) open programming extension; (2) optional samples of code; or (3) County's use of frameworks that may be components of Syncfusion programs, including Javascript Angular, React, and Vue.
 - 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: The exclusions to Syncfusion's indemnification obligations means that the County will be solely liable for the costs of defense and damages for any claim arising from the excluded types of claims and products or services, which could exceed the total Agreement amount.
7. The County is required to indemnify Syncfusion against claims based on: (a) the County's use of the licensed programs; (b) operation and maintenance of the computer equipment and third party software used with the licensed programs; (c) County's design, repair and configuration of the equipment, machinery, systems and products; and (d) implementation of designs developed by the County using the licensed programs.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Syncfusion, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be

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barred against the County, time limited, or expense limited could be brought against Syncfusion without such limitations and the County could be responsible to defend and reimburse Syncfusion for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, North Carolina law may limit or expand this Agreement term.

8. The Agreement does not require Syncfusion to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.
 - County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that Syncfusion will be financially responsible for claims that may arise under the Agreement, which could result in expenses to the County that exceed the total Agreement amount.
9. Syncfusion's maximum liability to the County is limited to the amounts received by Syncfusion from the County in the 12 months prior to the date that County provides written notice of the claim to Syncfusion, with no exclusions.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, North Carolina law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
10. County's right to bring legal claims is limited to one year.
 - The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the County's ability to bring suit to one year, amounts to a waiver of the statute of limitations for claims and shortens the period of time in which the County may file a lawsuit under the Agreement. Syncfusion's right to bring claims is not similarly limited, so Syncfusion may bring claims any time within the statute of limitations. County Counsel cannot advise on, whether and to what extent, North Carolina law may allow parties to contractually agree to override the statute of limitations on claims.
11. Payment terms are Net 30 with late payment interest of 18% annually calculated daily.
 - 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 30 days may result in a material breach of the Agreement, which could allow Syncfusion to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 18% annually, calculated daily, which could exceed the Agreement amount.
12. The County may not terminate the Agreement for convenience. In addition, the County agrees to a non-cancelable payment obligation and non-refundable fees.
 - County Policy 11-05 requires that the County have the right to terminate the contract, for any reason, with a 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.

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- Potential Impact: The County can only terminate the Agreement during the term for an uncured breach by Syncfusion. Any attempted termination by County without cause could result in payment liability for the full Agreement amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.

13. Venue for disputes arising under the Agreement, other than those required to arbitrate, is in Wake County, North Carolina.

- County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
- Potential Impact: Having a venue in Wake County, North Carolina may result in additional expenses that exceed the amount of the Agreement.

ITD recommends approval of the MLA and Agreement with Syncfusion, including non-standard terms, to allow ITD to continue modifying and adjusting PDF files as required for optimal performance within County applications.

PROCUREMENT

The Agreement, including non-standard terms, and MLA 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, provided that Syncfusion does not substantively modify the Agreements.

Essential Studio was initially purchased in 2021 but the Agreement was updated to its most recent version in 2024 which incorporates the new MLA and requires Board approval. Essential Studio was selected as no other comparative software fully meets the needs of the County. The Purchasing Department concurs with the non-competitive justification.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on April 26, 2024; Purchasing (Christina Reddix, Buyer III, 387-2060) on April 26, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on April 26, 2024; Finance (Elias Duenas, Administrative Analyst, 387-4052) on May 20, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on May 24, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Curt Hagman
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 11, 2024



cc: ITD - Thomas w/ agree
Contractor c/o ITD w/ agree
File w/ agree
JLL 06/26/2024