

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

September 12, 2023

**FROM**

**LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department**

**SUBJECT**

Non-Financial Developer Agreement and Developer Program License Agreement with Apple, Inc. for Application Software Development and Distribution

**RECOMMENDATION(S)**

1. Ratify action taken by the Chief Executive Officer on July 11, 2023, to electronically accept the following non-financial agreements, including non-standard terms, with Apple, Inc., with the revision date of June 5, 2023, for application software development and distribution utilizing Apple's App Store for use on Apple-branded products, beginning upon acceptance and continuing until terminated by either party:
  - a. Apple Developer Agreement, **Contract No. 23-1012**
  - b. Apple Developer Program License Agreement, **Contract No. 23-1013**
2. Authorize the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to electronically accept updates to the Apple Developer Agreement and the Apple Developer Program License Agreement and any applicable licenses, 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, Assistant Chief Information Officer, or IT Division Chief to transmit any non-substantive updated terms and any applicable licenses that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of acceptance or execution.

(Presenter: Lynn Fyhrlund, 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 this item will not result in the use of Discretionary General Funding (Net County Cost). The Apple Developer Agreement (Agreement) and Apple Developer Program License Agreement (License) are non-financial in nature and pertain solely to the non-financial aspects that govern the publication and distribution of County software applications through the Apple, Inc. (Apple) App Store.

**BACKGROUND INFORMATION**

Several County departments develop software applications used in the provision of County services based on individual department missions. There are various distribution outlets that provide access to a wide variety of software applications, including the Apple App Store (App Store). Apple requires registration as an Apple Developer under the terms of its License to

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publish and support software applications, publicly or privately, via the App Store. Apple Developer is a program that provides ITD with development tools, application programming interfaces and other resources to create, manage and deploy applications in the App Store for consumers to utilize.

On June 22, 2021 (Item No. 48), the Board of Supervisors (Board) approved Apple Developer Program License Agreement No. 21-463, with a revision date of June 10, 2016, including non-standard terms, with Apple for the creation of an Apple Developer Account (Account) to assist with the development and distribution of applications offered through the App Store specifically for Apple-branded devices. The Board also designated the Chief Information Officer, or designee, to sign documents and accept online agreements as they pertain to changes to the Apple Developer Program License, subject to review by County Counsel, provided that such documents do not substantively modify the terms applicable to the County.

On December 6, 2022 (Item No. 28), the Board approved iOS and iPadOS Software License Agreement No. 22-1228, with a revision date of August 7, 2022, including non-standard terms, with Apple for Mobile Device Management (MDM); macOS Ventura Software License Agreement No. 22-1229, with a revision date of July 8, 2022, including non-standard terms, with Apple for MDM; and tvOS Software License Agreement No. 22-1230, with a revision date of July 27, 2020, including non-standard terms, with Apple for MDM, for software that enables ITD to enroll, manage content, and support Apple-branded devices operating in a MDM environment within the County, retroactive to October 27, 2022. These agreements automatically renew for successive one-year periods until terminated by either party.

On December 6, 2022 (Item No. 28), the Board also designated the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to be able to electronically accept updates to these agreements and any applicable licenses, subject to review by County Counsel, provided that such updated terms and applicable licenses do not substantively modify the terms of the original agreement accepted by the County. Item No. 28 also authorized the Chief Executive Officer, upon consultation with County Counsel, to approve agreements with non-standard language as identified in County Policy 11-05, Section B., as it relates to licensing agreements with Apple, for software that enables ITD to enroll, manage content, and support Apple-branded devices operating in an MDM environment within the County, subject to ratification by the Board at the next available Board meeting.

On June 26, 2023, ITD was notified of the requirement to electronically accept the terms listed in Recommendation No. 1 in the Apple Developer portal. ITD was also notified that the department would lose access to the Apple Developer portal and would no longer be able to develop or distribute new applications until an administrator electronically accepted the terms listed in Recommendation No. 1. ITD was not required to accept the Agreement terms in Recommendation No. 1.a. when the Account was initially approved and set up. The License in Recommendation No. 1.b. is a new agreement presented to ITD for approval to continue to utilize Apple Developer services. On July 11, 2023, the Chief Executive Officer, upon consultation with County Counsel, approved the terms listed in Recommendation No. 1 to be electronically accepted. Furthermore, Apple has informed ITD that future product-specific terms and updates associated with the Account will be required with possibly a short notice period of two weeks or less and may include product-specific agreements or terms for software that ITD does not currently utilize nor ever intends to utilize. However, ITD will be required to

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electronically accept all product specific agreements or terms that are associated with the Account to access the Account.

The Agreement is Apple'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 by click-to-accept. The non-standard and missing terms include the following:

1. Apple reserves the right, at its discretion, to modify the Agreement, including any rules and policies at any time, continued use of the Site constitutes acceptance of any new or additional terms.
  - The County standard contract requires that any changes to the contract to 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: The County could be agreeing to new terms without review by anyone, including County Counsel, and without approval of the new terms by the Board.
2. Apple 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: Apple 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 would be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement.
3. The Agreement does not contain the standard contract provisions regarding Government Code section 84308 (Senate Bill 1439) and the disclosure of campaign contributions to a member of the Board or other County elected officer.
  - Under the County standard contract the contractor states it has disclosed campaign contributions of more than \$250 to any member of the Board or other County elected officer and completed a form providing additional information.
  - Potential Impact: The County may have difficulty gathering information about campaign contributions made by Apple.
4. The Agreement does not require Apple to indemnify the County, as required by County Policy 11- 07, 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: Apple is not required to defend, indemnify, or hold the County harmless from any claims, including indemnification for claims arising from Apple's negligent or

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intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Apple's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount.

5. The Agreement does not require Apple to meet the County's insurance standards as required pursuant to County Policy 11-07.
  - 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 Apple 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.
6. Apple disclaims all liability for personal injury and limits its maximum liability for all damages \$50.
  - 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.
7. The Agreement term is indefinite beginning upon acceptance and continuing until terminated by either party.
  - 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 Agreement and the County is indefinitely bound to the terms and conditions of the Agreement until terminated by either party providing written notice.
8. Apple provides the service "AS-IS" and "AS AVAILABLE" and cannot ensure that any content (including files, information, or other data) that the County accesses or downloads from the services will be free of viruses, contamination, or destructive features.
  - 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 service is solely at its own risk.

The License is Apple's standard commercial contract, which includes terms that differ from the standard County contract and omit certain County standard contract terms. The License is a non-negotiable clickwrap agreement accepted by click-to-accept. The non-standard and missing terms include the following:

1. The License does not contain the standard contract provisions regarding Government Code section 84308 (Senate Bill 1439) and the disclosure of campaign contributions to a member of the Board or other County elected officer.
  - Under the County standard contract the contractor states it has disclosed campaign contributions of more than \$250 to any member of the Board or other County elected officer and completed a form providing additional information.

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- Potential Impact: The County may have difficulty gathering information about campaign contributions made by Apple.
2. In addition to the original indemnification, the County agrees to indemnify Apple for claims arising from the County's corresponding products, configuration profiles, and any mobile device management customer claims about the County's mobile device management compatible products, as well as any claims that the County's mobile device management compatible products violate or infringe any third-party intellectual property right.
    - The County standard contract does not include any indemnification or defense by the County of a contractor.
    - Potential Impact: By agreeing to indemnify Apple, 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 Apple without such limitations and the County would be responsible to defend and reimburse Apple for costs, expenses, and damages, which could exceed the total License amount.
  3. In addition to the original limitation of liability, Apple further disclaims all liability for damages arising from the County's use of mobile device management or configuration profiles.
    - The County standard contract does not include a limitation of liability.
    - Potential Impact: Claims could exceed the liability cap and the License amount leaving the County financially liable for the excess.
  4. The License term automatically renews on an annual basis beginning upon acceptance and continuing until not renewed by the County or terminated by Apple.
    - 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 License and the County is indefinitely bound to the terms and conditions of the License until terminated by Apple or the County stops paying for the annual renewal and using the account.

ITD recommends approval of the Agreement and License with Apple referenced in Recommendation No. 1, including the non-standard terms, to allow for the continued use of Apple's Developer program software development tools, application programming interfaces, and technical resources utilized by ITD to create and distribute applications offered through the App Store. Recommendation No. 2 authorizes of the Chief Information Officer, Assistant Chief Information Officer, or IT Division Chief to electronically accept future updates to the terms and any licenses applicable to the Apple Developer program, subject to review by County Counsel, provided that such updated terms and applicable licenses do not substantively modify the terms, and is necessary to avoid disruptions to County operations.

**PROCUREMENT**

There is no procurement activity related to these agreements. Apple is the only company that provides the Apple Developer program to develop and deploy applications offered through the App Store for use on Apple-branded devices. The Purchasing Department concurs with this non-competitive justification. Approval of the agreements will support future purchase orders for Apple-branded devices, to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services.

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**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on July 31, 2023; Purchasing (Tevan Stremel, Buyer III, 387-2098) on July 27, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on August 1, 2023; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) on August 24, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on August 27, 2023.

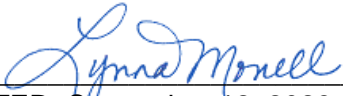
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Record of Action of the Board of Supervisors  
San Bernardino County

**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: September 12, 2023



cc: IT - McClane w/agrees  
Contractor - c/o IT w/agree  
File - w/agree  
CCM 09/25/2023