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

March 29, 2022

FROM
BOB DUTTON, Assessor-Recorder-County Clerk

SUBJECT
Non-Financial Agreements with Docker, Inc. for Software Application Containerization Services

RECOMMENDATION(S)
1. Approve a non-financial Terms of Service **Agreement No. 22-228** with Docker, Inc., including non-standard terms, to be accepted electronically, for software application containerization services for the period of March 29, 2022 through March 28, 2027.
2. Approve a non-financial Software End User License **Agreement No. 22-229** with Docker, Inc., including non-standard terms, to be accepted electronically, for use of Docker licensed software for the period of March 29, 2022 through March 28, 2027.
3. Approve a non-financial Subscription Service **Agreement No. 22-230** with Docker, Inc., including non-standard terms, to be accepted electronically, for Docker software subscription services for the period of March 29, 2022 through March 28, 2027.
4. Authorize the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to electronically accept the Terms of Service Agreement, End User License Agreement, and Subscription Service Agreement related to Docker, Inc. software application containerization services, subject to review by County Counsel.

(Presenter: Bob Dutton, Assessor-Recorder-County Clerk, 382-3254)

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 additional Discretionary General Funding (Net County Cost). The Docker, Inc. (Docker) Terms of Service Agreement, Software End User License Agreement, and Subscription Service Agreement (Agreements) are non-financial in nature and do not commit the County to make any purchases. When future purchases are made under these Agreements, County purchasing policies will be adhered to and the Assessor-Recorder-County Clerk Department (ARC) will return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION
Docker provides software containerization subscription services that are used to package together software code with all its necessary components. When software code is contained, it can easily be moved and run consistently in any environment and on any infrastructure, independent of that environment or infrastructure operation system. This service is necessary for the Assessor Information Management System (AIMS) Project because the development of

AIMS has created an architectural design that highly leverages Docker software code and its components.

During the initial phases of development, this software solution was considered an open-source product. This type of software product is available to programmers through public licenses that allow the user to use, modify, and distribute the software with its original rights without needing a license. As Array Information Technology, Inc. (former developer) and CGI Technologies and Solutions Inc. (CGI T&S) (current developer) have been developing AIMS, they were able to utilize the open-source product, but recent changes have taken this software from its original open-source model and created a new pricing/licensing model. As a result of this change, a license will need to be purchased by ARC for software containerizing subscription services and ARC will need to be identified as the licensee, instead of CGI T&S, since this software will be running in ARC's environment. Without this licensing, a new solution would have to be implemented, forcing the rearchitecting, rebuilding, and redeployment of the current solution. Such an undertaking would potentially create a significant delay in the timeline of the AIMS Project and increase costs related to labor in implementing an alternative solution.

Approval of these Agreements, including non-standard terms, would authorize future purchases of Docker software containerizing subscription services, subject to County purchasing policies, and approval of Recommendation No. 4 would authorize the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to electronically accept the Agreements for Docker's software application containerization services, subject to County Counsel review, for the period of March 29, 2022 through March 28, 2027.

The Agreements are Docker's standard commercial contracts, which govern the County's use of Docker's software application containerization services. The Agreements include terms and conditions that differ from the standard County contract and omit certain County standard contract terms. The non-standard and missing terms include the following:

1. All three Agreements do not require Docker to indemnify the County as required by County Policy 11-07.
   - The County standard contract indemnity provision requires the contractor to indemnify, defend, and hold harmless the County and its authorized officers, employees, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability arising out of these Agreements from any cause whatsoever, including acts, errors, and omissions of any person and for any costs or expenses incurred by the County on account of any claim except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of indemnitees. The contractor's indemnification obligation applies to the County's "active", as well as, "passive" negligence, but does not apply to the County's "sole negligence" or "willful misconduct" within the mean of Civil Code Section 2782.
   - Potential Impact: Docker is not required to indemnify, defend, and hold harmless the County and its authorized officers, employees, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability arising out of these Agreements from any cause whatsoever, including acts, errors, and omissions of any person and for any costs or expenses incurred by the County on account of any claim except where such indemnification is prohibited by law. If the County is sued for any claim based on the County's use of the Docker software

application containerization services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

2. All three Agreements do not require Docker to meet the County's insurance standards required by County Policy 11-07.
   - The County standard contract requires contractors to carry appropriate insurance standards as provided in County Policy 11-07.
   - <u>Potential Impact</u>: The Agreements do not include County standard insurance requirements. This means the County has no assurance that Docker will be financially responsible for claims that may arise from the County's use of the services, which could result in expenses to the County that exceed the total contract amount.

3. The Software End User License Agreement (EULA) and Subscription Service Agreement are silent on Dispute Resolution.
   - The County standard contract requires the parties use their best efforts to settle disputes through negotiation with each other in good faith.
   - <u>Potential Impact</u>: The County has no assurance that Docker would use best efforts to settle disputes outside litigation. This may result in expenses to the County that exceed the total contract amount.

4. The EULA and Terms of Service Agreement contain a limitation of liability, which sets Docker's liability limit to $100.
   - The County standard contract does not include a limitation of liability.
   - <u>Potential Impact</u>: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.

In addition, Docker's Subscription Service Agreement:

1. Limits Docker's total liability so it does not exceed the amounts paid by the County for the relevant service under the applicable order form in a 12-month period immediately preceding the event giving rise to the liability.
   - The County standard contract does not include a limitation of liability.
   - <u>Potential Impact</u>: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.

2. Requires that the Agreement remain in effect until the term for which the service is granted under this Agreement has expired.
   - The County standard contract gives the County the right to terminate the contract, for any reason, with 30 days 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.
   - <u>Potential Impact</u>: The County would only be able to terminate this Agreement and any Order Form incorporating the terms of this Agreement, if Docker materially breaches and fails to cure such breach within 30 days of receiving written notice thereof. This means the County will not be able to easily switch vendors in the event of unsatisfactory service.

3. Sets payment terms at Net 30 days from date of invoice with late payment interest of 1.5% per month.
   - The 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 by the due date will result in a material breach of the contract, which would allow Docker to charge the County interest at a rate of 1.5% per month and to disable the County's access to the services.

In addition, Docker's Terms of Service Agreement:

1. Requires the County to be responsible for paying all reasonable expenses and attorney's fees Docker incurs collecting late amounts.
   - 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 Docker institutes legal proceedings related to the collection of late amounts, Docker will be entitled to recover reasonable attorney's fee, which could exceed the total contract amount.

2. Is silent on governing law and venue.
   - The County standard contract requires California governing law and venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
   - Potential Impact: Docker's office is located in Palo Alto, CA. Typically, if the contract does not address choice of law, the court will use the law of the state in which the transaction was completed or where a substantial portion of the subject matter of the agreement shall occur. It is reasonable to expect that that the court would determine that the appropriate governing law and venue for disputes in this case would be Santa Clara County, California, but there is no guarantee. Having a venue that is not in San Bernardino County, California may also result in additional expenses that exceed the total contract amount.

3. Requires the County and Docker to resolve every dispute arising in connection with these Terms using binding arbitration.
   - The County standard contract does not require arbitration.
   - Potential Impact: Disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action. Arbitration decisions are not appealable.

In addition, Docker's EULA:

1. States that Docker may assign the entirety of its rights and obligations under this EULA without the County's consent.
   - The County standard contract requires the County's approval of any assignment.
   - Potential Impact: Docker may assign the EULA to a third party or business with without the County's knowledge or approval. This could lead to the County having policy, conflict of interest, or other issues with the assignee.

2. Is silent on termination for convenience without any obligation.

- The County standard contract gives the County the right to terminate the contract, for any reason, with 30 days 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.
- <u>Potential Impact:</u> The County can terminate the contract on a prospective basis; however, such termination will have no effect on orders placed prior to its effective date and such order will remain in full force and effect under the terms of the EULA.

PROCUREMENT

The Agreements, including non-standard terms, will be used to make future purchases to be approved as necessary, in accordance with County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

Additionally, County Policy 11-05 requires departments to obtain Board approval for procurement of goods and services with non-standard terms and conditions.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Stephanie Gutierrez, Deputy County Counsel, 387-5455) on February 17, 2022; Innovation and Technology Department (Larry Ainsworth, Chief Information Officer, 388-5501) on February 25, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on March 1, 2022; Risk Management (Victor Tordesillas, Director, 386-8621) on March 1, 2022; Finance (Carl Lofton, Finance Analyst, 387-5404) on March 10, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 14, 2022.

Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY _____
DATED: March 29, 2022

cc: ARC - Gaeta w/agree
        Contractor - C/O ARC w/agree
        File - w/agree
CCM   03/31/2022