

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

March 12, 2024

FROM

DEREK ARMSTRONG, Director, Economic Development Department

SUBJECT

Non-Financial Sister City Agreement with Wuxi, China for Establishment of Diplomatic Relations

RECOMMENDATION(S)

Approve a non-financial Sister City **Agreement No. 24-198**, including non-standard terms, with Wuxi, China for the establishment of diplomatic relations for a term of five years, with automatic renewal for an indefinite term unless terminated six months prior to expiration.

(Presenter: Derek Armstrong, Director, 387-4385)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Promote the Countywide Vision.

Create, Maintain and Grow Jobs and Economic Value in the County.

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost), as the Sister City Agreement is non-financial in nature.

BACKGROUND INFORMATION

San Bernardino County (County) is an increasingly important gateway for international trade and, therefore, potential recipient of foreign direct investment. Led by, and with the support of the Board of Supervisors (Board), Economic Development Department (ED) has established a trade and investment program to attract foreign direct investment and promote the County as a prime location investment destination, setting the groundwork to create new jobs, increase capital availability for local businesses, contribute to higher economic productivity and growth, and increase global competitiveness.

A Memorandum of Understanding (MOU) template was approved by the Board on May 24, 2016 (Item No. 73), for the establishment of trade and investment cooperative relationship building with international agencies. The MOU is a statement of mutual intent to support cooperation and communication to promote business, including advanced manufacturing, logistics, warehouse and distribution, transportation and infrastructure, healthcare, agriculture, education, clean energy and tourism.

On January 24, 2017 (Item No. 71), the Board approved out-of-country travel for County representatives to visit China. The Board also approved MOU No. 17-949 to establish international trade and investment cooperation with Wuxi, China, which was signed in China on February 20, 2017, and expired on February 20, 2022.

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On November 15, 2022 (Item No. 36), the Board approved a new five-year MOU No. 22-1109 for the continuation of international trade and investment cooperation with Wuxi, China, which was executed on April 6, 2023.

On September 26, 2023 (Item No. 32), the Board approved out-of-country travel for County representatives to visit China. As a result of this trip, the County was given the opportunity to formalize the current MOU No. 22-1109 into a Sister City Agreement (Agreement). In the interest of continuing and strengthening the County's partnership with Wuxi, China, and its local municipal districts, it is recommended that the County enter into the Agreement. A formalized Sister City status establishes a platform for continuous collaboration, creating a framework for joint initiatives that can boost tourism, trade, and innovation.

This Agreement is with the city of Wuxi in China, with no apparent presence within the United States, and the terms and conditions of the Agreement are potentially governed by the laws of China. County Counsel is unable to approve the Agreement as to legal form because County Counsel is not sufficiently knowledgeable about the requirements for forming an enforceable Agreement under China's law. As such, the non-standard and missing terms in this Agreement include:

1. Wuxi may assign the Agreement without notice to the County and without the County's approval.
 - County Policy 11-05 requires that the County approve any assignment of the contract.
 - Potential Impact: Wuxi 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 is able to terminate the Agreement. County Counsel cannot advise on whether and to what extent China's law may permit or restrict a party's right to assign without an express provision in the Agreement.
2. There is no provision in the Agreement addressing each party's responsibility for paying attorneys' fees.
 - County Policy 11-05 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, China's 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.
3. The Agreement is silent on governing law.
 - The County standard contract requires California governing law pursuant to County Policy 11-05.
 - Potential Impact: Having no specified governing law in the Agreement results in uncertainty over the interpretation of the Agreement and leads to ambiguity in interpretation of the Agreement terms with Wuxi. The Agreement could be interpreted under China's law. Any questions, issues or claims arising under this Agreement could require the County to hire outside counsel competent to advise on China's law, which may result in fees to the County.

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4. The Agreement does not require Wuxi to indemnify the County, as required by County Policies 11-05 and 11-07.
 - 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.
 - Potential Impact: Wuxi is not required to defend, indemnify or hold the County harmless from any claims. County Counsel cannot advise on whether and to what extent China's law may allow the County to require Wuxi to defend or indemnify it absent an express provision in the Agreement.
5. The Agreement does not require Wuxi 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 Wuxi will be financially responsible for claims that may arise under the Agreement, which could result in expenses to the County.
6. The term of the Agreement is automatically renewing after the five-year term for an indefinite term unless terminated by either party six months prior to its expiration of the initial five-year term.
 - County Policies 11-05 and 11-06SP1 do not permit indefinite term or automatically renewing contracts except for end user license agreements, software/hardware licenses and subscriptions, and master service agreements or 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 unless the County gives notice of non-renewal no less than six months prior to the expiration of the initial five-year term.
7. The County may not terminate the Agreement for convenience.
 - 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.
 - Potential Impact: The County can only terminate the Agreement during the initial five-year term of the Agreement by providing notice of termination six months prior to the expiration of the initial term of the Agreement.
8. There is no stated venue for disputes in the Agreement.
 - County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Wuxi is located in China. Having no express venue in the Agreement means that Wuxi, China venue could be applied to disputes arising under this Agreement, which may result in expenses to the County.
9. Wuxi may change the Agreement terms without notice at any time.

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- County Policy 11-06 requires 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 the 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. County Counsel cannot advise on whether and to what extent China's law may affect the enforceability of unilateral changes to the terms.

Per Policy 11-05, non-standard contract language must be approved by the Board. Because County Counsel is not able to advise on China's law, there is no specific analysis of possible legal impacts from any Agreement provisions, including those that appear to be inconsistent with County Policy 11-05. If the Board approves the Agreement, it is likely subject to the exclusive jurisdiction of the courts located in China, to resolve any legal matter arising from the Agreement.

In the interest of continuing and strengthening the County's partnership with Wuxi, China, and its local municipal districts, ED recommends approval of this Agreement, including non-standard terms.

PROCUREMENT

N/A

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Dawn Martin, Deputy County Counsel, 387-5455) on January 24, 2024; Finance (Carl Lofton, Administrative Analyst, 387-5404) on February 7, 2024; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on February 9, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Jesse Armendarez

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 12, 2024



cc: EDA - Armstrong w/agree for sign
Contractor - c/o EDA w/agree
File - w/agree
CCM 03/13/2024