

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

December 19, 2023

FROM

STEPHENIE SHEA, Registrar of Voters

SUBJECT

Licensing Agreements with Apple, Inc. for Management of Electronic Poll Books

RECOMMENDATION(S)

Ratify the action approved by the Chief Executive Officer on December 11, 2023, and approve non-financial Volume Content Terms licensing **Agreement No. 23-1381** with Apple Inc., with the revision date of July 27, 2023, including non-standard terms, for the mobile device management of electronic poll books, automatically renewing for successive one-year terms until terminated by either party.

(Presenter: Stephenie Shea, Registrar of Voters, 387-2100)

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) as these are non-financial agreements.

BACKGROUND INFORMATION

Approval of the recommended Apple Inc. (Apple) agreements will enable the Registrar of Voters (ROV) to continue to securely and efficiently check in voters at polling places with electronic poll books for the March 5, 2024, Presidential Primary Election and subsequent elections. The poll books are the only equipment connected to the internet to provide real-time check-in information at polling places to support election security and curb voters from voting multiple times. The election management system is not connected to the internet.

On October 22, 2019 (Item No. 39), the Board of Supervisors (Board) approved the purchase of 3,000 State-certified electronic poll books from KNOWiNK, LLC, which use Apple iPad hardware.

On November 5, 2019 (Item No. 37), the Board approved non-financial Apple Business Manager Agreement No. 19-734 with Apple.

On August 25, 2020 (Item No. 59), the Board approved replacement Agreement No. 20-884 with Apple reflecting the Board's approval of Apple's updated non-standard terms reflecting a revision date of April 15, 2020.

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On March 1, 2022 (Item No. 52), the Board approved licensing agreements with Apple for iOS, iPadOS, tvOS, MacOS, Apple Business Manager, automatically renewing for successive one-year periods with no term limit, for compatibility and mobile device management of electronic poll books.

On November 15, 2022 (Item No. 85), the Board approved agreements to Apple's updated non-standard terms, and authorized the Chief Executive Officer (CEO), upon consultation with County Counsel, to approve contracts with non-standard language as identified in County Policy 11-05, Section B., as it relates to licensing agreements with Apple, Inc., subject to ratification at the next available Board meeting.

The recommended Agreements with Apple will remain in effect until either the poll books are replaced with different State-certified poll books or Apple substantially amends the Agreements, whichever occurs first.

Per County Policy 11-05, the Board must approve non-standard or missing contract terms. The Volume Content Terms (VCT) is being presented for approval of the non-standard terms for the first time. This Agreement was approved by the CEO, upon consultation with County Counsel, on December 11, 2023, per the authority delegated to the CEO by the Board on November 15, 2022 (Item No. 85) The VCT is requested to be ratified by the Board due to non-standard terms.

The Volume Content License and incorporated Media Services Terms and Conditions are Apples's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard terms. The Agreement is a non-negotiable clickwrap agreement, accepted by click-to-accept. The non-standard and missing terms include the following:

1. The Agreement does not require Apple to indemnify the County, as required by County Policies 11-05 and 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 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.
2. The County is required to indemnify Apple against claims incurred by an Apple arising from the County's breach of any certification, covenant, obligation, representation or warranty made in the Agreement and the County's use of the Volume Content Service.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.

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- 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 could be responsible to defend and reimburse Apple for costs, expenses, and damages, which could exceed the total Agreement amount.
3. The Agreement does not require Apple 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 County policy and 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.
 4. Apple disclaims all liability for personal injury and its maximum liability to the County for all other damages is limited to \$250, without any exclusions or exceptions, including intellectual property infringement, gross negligence, willful misconduct, or violation of law.
 - 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.
 5. Apple provides the software "AS IS" and disclaims all warranties of any kind.
 - County Policy 11-05 requires a contractor to fully warrant its services and products.
 - Potential Impact: The County's use of the software is solely at its own risk.

ROV recommends approval of the updated Agreements with Apple, including the non-standard terms, as Apple software and services are required for compatibility with the KNOWiNK State-certified electronic poll books, and will improve County government operations. The recommended updated Apple Business Manager Agreement allows ROV to continue to use and manage electronic poll books, which use Apple iPads to check in voters on Election Day.

PROCUREMENT

N/A

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on November 13, 2023; Finance (Elias Duenas, Administrative Analyst, 387-4052) on November 15, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on November 16, 2023.

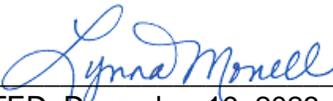
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: December 19, 2023



cc: ROV - Shea w/agree
Contractor - c/o ROV w/agree
File - w/agree
CCM 01/8/2024