



# San Bernardino County

## Legislation Text

---

**File #: 6518, Agenda Item #: 48**

---

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

**August 9, 2022**

#### **FROM**

**MICHAEL JIMENEZ, Interim Registrar of Voters, Registrar of Voters**

#### **SUBJECT**

Agreement and Non-Standard Terms for Group Text Functions for Assignment Coordination

#### **RECOMMENDATION(S)**

Approve the Microsoft Services Agreement for GroupMe with Skype Communications, S.à.r.l, including non-standard terms, to manage and coordinate teams in various locations via group messaging, at no cost, for a period beginning upon acceptance by the County and continuing until canceled by the County.  
(Presenter: Michael Jimenez, Interim Registrar of Voters, 387-2100)

#### **COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES**

**Improve County Government Operations.**

#### **FINANCIAL IMPACT**

Approval of this recommended Agreement does not require the use of additional Discretionary General Funding (Net County Cost). There is no cost to use the GroupMe application.

#### **BACKGROUND INFORMATION**

On Election Day, the Registrar of Voters (ROV) uses temporary and full-time staff from different County departments for various driving assignments across the county. While many applications exist for group messaging, GroupMe would allow ROV to manage and coordinate these teams in various locations and allow ROV staff to break the group conversation into subgroups should teams complete their assignments at different times. GroupMe also allows the ROV staff to utilize their computers to message the teams without needing a separate device. In addition, temporary staff often do not have County email accounts due to their length of employment, so an application that can be downloaded on a County-issued mobile phone for the short-term would alleviate the need to create County accounts for temporary staff. Per County Policy 11-05, the Board of Supervisors (Board) must approve missing or non-standard contract terms.

The Microsoft Services Agreement for GroupMe is Microsoft'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 contract accepted by creating an account or using the services. GroupMe is a Skype-branded product. The Services Agreement indicates that the contracting party for Skype-branded services is Skype Communications S.à.r.l, 23 - 29 Rives de Clausen, L-2165 Luxembourg, and references to Microsoft in the contract mean this entity. The non-standard and missing terms include the following:

1. Skype may change the terms of the Agreement at any time by providing notice. Using the Services after the changes become effective constitutes acceptance of the new 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. All disputes arising under the contract must be settled by binding individual arbitration under the Federal Arbitration Act.
  - The County standard contract does not require arbitration.
  - Potential Impact: Arbitration decisions are not appealable. In addition, disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action, and the contract amount.
3. Skype may assign the contract without notice to the County and without the County's approval.
  - The County must approve any assignment of the contract.
  - Potential Impact: Skype could assign the contract 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 contract.
4. The contract does not require Skype 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: Skype is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Skype'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 Skype's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
5. The contract does not require Skype to meet the County's insurance standards as required pursuant to County Policy 11-07.
  - The 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 Skype will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.
6. Skype's maximum liability to the Count is limited to direct damages up to an amount equal to the County's services fee for the month during which the loss of beach occurred, or up to \$10 if the services are free.

- The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.
7. All claims by either party, except intellectual property disputes, must be filed within one year from when it first could be filed, or be permanently barred.
- 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 contract.
8. The term of the contract is indefinite beginning upon creation of a Skype account or through use of the services.
- 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 contract and the County is indefinitely bound to the terms and conditions of the contract until and continuing until canceled by closing the account and ceasing use of the service.
9. Venue is in King County, Washington.
- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
  - Potential Impact: Having a venue in King County, Washington may result in additional expenses that exceed the amount of the contract.
10. Skype provides the software "AS IS" "WITH ALL FAULTS" and "AS AVAILABLE". The County bears the entire risk of using the services.
- 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 is solely at its own risk.

ROV recommends approval of the recommended Agreement with Skype, including the non-standard terms because it would benefit the County and allow it to manage the communication of various teams on assignment across the county on Election Day.

## **PROCUREMENT**

The recommended Agreement is the result of a non-competitive procurement. ROV selected the software that would best meet its needs based on group messaging features. County Policy 11-04 states that any non-competitive procurement under \$200,000 may be approved by the Purchasing Agent. This Agreement is being presented to the Board due to non-standard terms or missing terms.

## **REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on June 23, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on June 27, 2022; Finance (Elias Duenas, Administrative Analyst, 387-4052) on June 27, 2022; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on June 27, 2022.