



# San Bernardino County

## Legislation Text

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**File #: 5164, Agenda Item #: 28**

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

**December 7, 2021**

#### **FROM**

**MELISSA RUSSO, Director, Museum**

#### **SUBJECT**

**TED Talks Video License**

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

Approve licensing agreement with Executive Interview Limited, the appointed licensing partner of TED Conferences LLC, including non-standard terms, for permission to exhibit two TED Talks videos to be used in a future museum exhibit, in the amount of \$2,000 for the length of 24 months beginning after the agreement has been executed and the videos are received.

(Presenter: Melissa Russo, Director, 798-8601)

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

**Promote the Countywide Vision.**

**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 total cost of the licensing for the two TED Talks videos is \$2,000. Adequate appropriation has been included in the San Bernardino County Museum's (Museum) 2021-22 budget.

#### **BACKGROUND INFORMATION**

The Museum is developing and installing new exhibits in the Hall of Biodiversity at the Redlands museum campus, and proposes to include two videos created and owned by TED Conferences LLC (TED), the creator of TED Talks, related to the exhibit themes of museum collections care and biomimicry. *How Did Feathers Evolve* and *The Hidden Worlds Within Natural History Museums* will be exhibited for 24 months and will be used to engage visitors, add depth of content, and reinforce exhibit themes.

TED has granted licensing rights for these videos to Executive Interviews Limited (EI), an organization based in the United Kingdom. In order for the Museum to use these videos, San Bernardino County (County) is required to enter into a licensing agreement (Agreement) with EI. As the owner of the material, TED may enforce the terms of the Agreement as if it were a party. EI and TED do not permit changes to their standard licensing agreement.

The Agreement contains the following non-standard terms, which require Board of Supervisors approval.

1. The Agreement is governed by the laws of the State of New York.
  - The standard County contract requires California governing law.
  - Potential Impact: The contract will be interpreted according to the laws of the State of New York. Any questions, issues or claims arising under the Agreement will require the County to hire outside counsel to advise on New York law.
2. Venue is in the State of New York and requires binding arbitration, without the right to appeal.
  - The County standard contract requires venue for disputes to be in the Superior Court of California, San Bernardino County, San Bernardino District, and County policy authorizes only nonbinding dispute resolution.
  - Potential Impact: The County may incur additional expenses as a result of the New York venue. Additionally, the County will be subject to binding arbitration, without the right to appeal.
3. The County is required to indemnify EI and TED from any claims arising out of its breach of the license agreement, or the County's negligence or willful misconduct.
  - The County standard contract does not include any indemnification or defense by the County of a vendor.
  - Potential Impact: By agreeing to indemnify EI and TED, the County may 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 EI and TED, and the County would be responsible to defend and reimburse EI and TED for costs, expenses and damages. County Counsel cannot advise on whether and to what extent New York law may limit or expand this contract provision.
4. The Agreement contains a disclaimer of the warranty of non-infringement and does not require EI and TED to indemnify the County for intellectual property infringement claims.
  - County policy for technology contracts requires the vendor to either provide a warranty of non-infringement or intellectual property indemnity to the County.
  - Potential Impact: If the County is sued for any claim, including intellectual property infringement based on its use of the TED Talks videos, the County may be solely liable for the costs of defense and damages. County Counsel cannot advise on the enforceability of the disclaimer of warranty of non-infringement under New York law, or the extent to which New York law may allow the County to require EI and TED to defend or indemnify it absent an express intellectual property indemnity provision in the contract.
5. Neither EI nor TED shall be liable for any damages under any theory of liability resulting from the County's use of the materials.
  - Standard County policy provides that the vendor may not limit its liability.
  - Potential Impact: Given the limitation of liability, the County's use of the materials may be at the County's sole risk of loss. County Counsel cannot advise as to the enforceability of this provision under New York law.
6. EI is licensing the materials from TED, and at TED's request, may assign the Agreement to TED or terminate the agreement.
  - Standard County policy requires the County's prior consent for an assignment.
  - Potential Impact: EI may assign the Agreement to TED without the County's prior consent. TED is the creator and owner of the materials.
7. The Agreement does not contain the standard County insurance requirements.
  - Standard County policy requires inclusion of the standard County insurance requirements in contracts unless otherwise approved by the Risk Management Department.

- **Potential Impact:** The County is uninformed as to the insurance put in place by EI, and therefore cannot evaluate its adequacy in terms of providing protection to the County.
8. The Agreement does not address attorneys' fees and costs.
- The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
  - **Potential Impact:** There is no provision in the contract addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, New York 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 contract.

The Museum recommends approval of these license agreements, including all non-standard terms, as the licensed videos will add depth of content and additional learning opportunities to Museum exhibits, improving the guest experience and creating new learning opportunities for County residents.

### **PROCUREMENT**

EI is the only authorized appointed provider and distributor of TED Talks video licensing. TED Talks is the industry leader in providing influential and educational videos in various topics. Purchasing concurs with the non-competitive justification in establishing this agreement with Executive Interviews.

### **REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Katherine Hardy, Deputy County Counsel, 387-5437) on November 16, 2021; Risk Management (Victor Tordesillas, Deputy Director, 387-5564) on November 22, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on November 16, 2021; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on November 16, 2021; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on November 16, 2021.