



San Bernardino County

Legislation Text

File #: 5222, Agenda Item #: 27

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

December 7, 2021

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Software License Agreement with Syncfusion, Inc. for PDF Conversion Software

RECOMMENDATION(S)

1. Approve a non-financial Essential Studio Software License Agreement with Syncfusion, Inc., including non-standard terms, to license software that converts different document formats to portable document format files, for an indefinite contract period.
 2. Authorize the Chief Information Officer, or designee, to electronically accept the Syncfusion, Inc. Essential Studio Software License Agreement, subject to review by County Counsel.
- (Presenter: Larry Ainsworth, Chief Information Officer, 388-5501)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

Operate in a Fiscally-Responsible and Business-Like Manner.

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

FINANCIAL IMPACT

Approval of the Master License Agreement (Agreement) with Syncfusion, Inc. (Syncfusion) will not result in the use of Discretionary General Funding (Net County Cost). This Agreement is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under this Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors for approval, if necessary.

BACKGROUND INFORMATION

ITD's Business Solutions Development (BSD) division provides programming and consulting services to County departments for the development, enhancement, and maintenance of business solutions on a variety of hardware and software platforms. Syncfusion's software, Essential Studio, converts different document formats to portable document format (PDF) files. In addition to the PDF conversion feature, Syncfusion's programming toolset provides both basic and complex PDF document manipulation and support for office document formats such as Excel, Word, and PowerPoint as required in applications used by County departments.

The Syncfusion Essential Studio Software License Agreement is Syncfusion's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract

terms. The non-standard and missing terms include the following:

1. Governing law is the State of North Carolina.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under North Carolina law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on North Carolina law, which may result in fees that exceed the total contract amount.
2. All disputes arising under the Agreement must be settled by binding arbitration in Raleigh, North Carolina.
 - The County standard contract does not require arbitration.
 - Potential Impact: The contract requires binding arbitration for all disputes between the parties. 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, requiring arbitration to take place in Raleigh, North Carolina may result in additional expenses that exceed the amount of the contract.
3. The contract is silent about Syncfusion's right to assign the contract.
 - The County must approve any assignment of the contract.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, North Carolina law may permit or restrict a party's right to assign a contract where no specific provision is provided in the contract.
4. The contract 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: County Counsel cannot advise on, whether and to what extent, North Carolina 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.
5. Syncfusion has the right, no more than twice a year, to audit County's books of account and records, and examine all other documents and materials relating to the Agreement. If the result of any audit demonstrates that County's payments were less than the amount which should have been paid, the County will pay any discrepancy, and, if the discrepancy is in an amount equal to three percent (3%) or more of the payments made with respect to payments due, County shall reimburse Syncfusion for the cost of such audit.
 - The County standard contract does not permit Contractors to audit the County's compliance.
 - Potential Impact: If an audit determines that the County's use of the software exceeds the number of licenses purchased, Syncfusion may demand payments of additional fees and reimbursement of audit costs, which will result in costs that exceed the total contract amount.
6. Syncfusion will only defend and indemnify the County against any claim of U.S. copyright infringement, subject to the limitation of liability. Syncfusion will not indemnify the County for patent, trademark, or trade secret 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: If the County is sued for any claim other than copyright infringement, based on its use of Syncfusion's software or services, the County will be solely liable for the costs of defense and damages, which could exceed the total contract amount. In addition, Syncfusion's indemnity obligations are subject to the limitation of liability.

7. The County is required protect, indemnify, hold harmless, and defend Syncfusion of and from any loss, cost, damage, or expense, including attorneys' fees, arising from any claim asserted against Syncfusion that is in any way associated with the County's use of the licensed programs.

- The County standard contract does not include any indemnification or defense by the County of a Contractor.
- Potential Impact: By agreeing to indemnify Syncfusion, 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 Syncfusion without such limitations and the County would be responsible to defend and reimburse Syncfusion for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, North Carolina law may limit or expand this contract term.

8. The contract does not require Syncfusion 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 contract does not include County standard insurance requirements. This means that the County has no assurance that Syncfusion 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.

9. Syncfusion's total liability to the County is limited to the total of all amounts paid for the licensed programs or services in the 12-month period preceding the date that the County provides written notice to Syncfusion of the claim.

- The County standard contract does not include a limitation of liability.
- Potential Impact: Since this is presented as a "non-financial" agreement, it is impossible to estimate the potential limit, which could be \$0. This limitation also applies to Syncfusion's indemnification obligations. Claims would likely exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, North Carolina law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

10. County's right to bring legal claims is limited to one year after the event giving rise to the cause of action.

- 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 from the time the claim arises 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. Syncfusion has no such limitation on the time in which it can bring a claim other than the Statute of Limitations for such claim.

11. Payments are Net 30, and subject to eighteen percent (18%) annual interest, calculated from the date

when payment was due until payment is made. In addition, the County agrees to pay Syncfusion's cost of collecting any past-due amounts under the Agreement, including but not limited to reasonable attorneys' fees.

- 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 within 30 days will result in a material breach of the contract, which would allow Syncfusion to terminate the contract and seek other legal remedies, including charging the County which would exceed the contract amount.

12. The term of the contract is indefinite.

- 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 the County discontinues use of the software.

13. Venue is in Wake County, North Carolina.

- 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 Wake County, North Carolina may result in additional expenses that exceed the amount of the contract.

ITD recommends approval of the Agreement with Syncfusion, including the non-standard terms, to continue to support County departmental applications that convert different document formats to PDF files.

PROCUREMENT

The Syncfusion Agreement, including non-standard terms, will be used to accompany future purchase orders to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on October 25, 2021; Purchasing (Michelle Churchill, Lead Buyer, 387-2090) on September 30, 2021; Risk Management (Victor Tordesillas, Director, 386-8623) on November 29, 2021; Finance (Sofia Almeida, Administrative Analyst, 387-5402) on November 10, 2021; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on November 15, 2021.