



San Bernardino County

Legislation Text

File #: 7061, Agenda Item #: 85

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

November 15, 2022

FROM

MICHAEL JIMENEZ, Interim Registrar of Voters, Registrar of Voters

SUBJECT

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

RECOMMENDATION(S)

1. Ratify the action approved by the Chief Executive Officer on October 17, 2022, and approve non-financial Apple Business Manager licensing agreement with Apple Inc., including non-standard terms, with the revision date of March 31, 2022, for the mobile device management of electronic poll books, automatically renewing for successive one-year terms until terminated by either party.
2. Ratify the action approved by the Chief Executive Officer on October 17, 2022, and approve non-financial AppleCare+ for Business Essentials Terms and Conditions, including non-standard terms, for hardware services and technical support services for Apple TV, iPad, iPhone, Mac, and other Apple devices, with the revision date of May 12, 2022, for support of electronic poll books, automatically renewing for successive one-year terms until terminated by either party.
3. Authorize the Registrar of Voters or the Chief Deputy Registrar of Voters to electronically execute the agreements for iOS, iPadOS, MacOS, tvOS, AppleCare+, and Apple Business Manager with Apple, Inc., and any subsequent non-substantive amendments or to terminate the Agreements on behalf of the County, subject to review by County Counsel.
4. Direct the Registrar of Voters or the Chief Deputy Registrar of Voters to transmit all documents and amendments in relation to these agreements for iOS, iPadOS, MacOS, tvOS, AppleCare+, and Apple Business Manager to the Clerk of the Board of Supervisors within 30 days of execution.
5. Authorize the Chief Executive Officer, 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., for compatibility with electronic poll books, subject to ratification by the Board of Supervisors at the next available Board meeting.

(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 item will not result in the use of Discretionary General Funding (Net County Cost) as these are non-financial Agreements.

BACKGROUND INFORMATION

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, Inc.'s (Apple) iPad hardware. On November 5, 2019 (Item No. 37), the Board approved non-financial Apple Business Manager (ABM) 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 with a revision date of April 15, 2020. 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.

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 ABM Agreement includes updated contract terms that are non-standard. The AppleCare+ for Business Essentials Agreement is being presented for approval of the non-standard terms for the first time. Both of these Agreements were approved by the Chief Executive Officer (CEO), upon consultation with County Counsel, on October 17, 2022, per the authority delegated to the CEO by the Board on March 1, 2022 (Item No. 52). The Agreements are requested to be ratified by the Board due to substantive changes, including terms that differ from the standard County contract.

The ABM Agreement is Apple's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The updated ABM has been substantively modified to, among other changes, incorporate the AppleCare+ for Business Essential Terms and Conditions (BETC).

The ABM Agreement is a non-negotiable clickwrap agreement accepted by click-to-accept when the terms and conditions must be accepted, or when devices are being set-up. The non-standard and missing terms include the following:

1. Apple may assign the ABM without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Apple could assign the ABM 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 ABM Agreement.
2. The ABM Agreement does not require Apple 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 the 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 the 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.

3. The County is required to defend, indemnify, and hold Apple harmless against claims arising from the:
(a) County's breach of any certification, covenant, obligation, representation or warranty made in the ABM Agreement; (b) the County's use of the Apple service; (c) the County's use, deployment or management of authorized devices, device enrollment settings, and/or Mobile Device Management Servers; (d) provision, management, and/or use of authorized devices, administrator accounts, managed Apple IDs, Apple Business Essentials, or Content, and/or any other use of the Service; and/or (e) County's use or management of personal data.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to defend and 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 would be responsible to defend and reimburse Apple for costs, expenses, and damages, which could exceed the total agreement amount.
4. The ABM Agreement does not require Apple 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 Apple 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 agreement amount.
5. Apple's maximum liability to the County under the ABM Agreement is limited to \$50.
 - 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.
6. The term of the ABM Agreement is automatically renewed for successive one-year terms unless terminated by either party upon 30 days prior written notice.
 - 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 ABM Agreement and the County is indefinitely bound to the terms and conditions of the ABM Agreement until the County gives notice of termination.
7. Venue is in state and federal courts in Northern California.
 - 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 Northern California may result in additional expenses that exceed the amount of the agreement.
8. Apple provides the software "AS IS" and "AS AVAILABLE" and disclaims all warranties of any kind.
 - 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.

The BETC is Apple's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The BETC is a non-negotiable clickwrap agreement accepted by click-to-accept when the terms and conditions must be accepted, or when the devices are being set-up. The non-standard and missing terms include the following:

1. Apple may change the terms of the BETC upon 60 days' prior written notice to the County.
 - 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 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.
2. Apple may assign the BETC without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Apple could assign the BETC 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 agreement.
3. The BETC does not require Apple 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 the 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 the 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.
4. The BETC does not require Apple 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 Apple 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 agreement amount.
5. Apple's maximum liability to the County under the BETC is limited to the amounts paid by the County for the service plan ordered by the County.
 - 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.

6. The term of the BETC is automatically renewed on a month-to-month basis unless canceled by the County at any time.
 - 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 BETC and the County is indefinitely bound to the terms and conditions of the BETC until the County gives notice of termination.
7. There is no stated venue in the contract.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: AppleCare Service Company is an Arizona corporation with a registered office in Phoenix, Arizona, and is doing business in Texas. Apple is located in Cupertino, California. Having no express venue in the contract means that venue could be applied to any of these locations for disputes arising under the BETC, which may result in additional expenses that exceed the amount of the agreement.

On March 1, 2022 (Item No. 52), under Recommendation No. 5, the Board authorized the Registrar of Voters (ROV) or Chief Deputy ROV to electronically execute the Agreements for iOS, iPadOS, MacOS, tvOS, and ABM Agreement with Apple, and any subsequent non-substantive amendments. County Counsel reviewed the updated terms dated July 8, 2022 for iOS, iPadOS, and MacOS on October 27, 2022 and concluded that the updates were not substantive in nature. As a result, the ROV approved the non-substantive updated terms under the authority delegated to the ROV on March 1, 2022 (Item No. 52).

Approval of the Apple Agreements, including non-standard terms, is recommended as these will enable the ROV to continue to securely and efficiently check in voters at polling places with electronic poll books for the November 8, 2022 General Election and subsequent elections.

PROCUREMENT

As the result of a competitive procurement process, the Board approved a contract with KNOWiNK on October 22, 2019 (Item No. 39), for the purchase of State-certified electronic poll books, including software and hardware components, licensing, warranty, training, and election support services in an amount not to exceed \$7,140,534 for the five-year period of October 22, 2019 through October 21, 2024. The Agreements with Apple are required to utilize the Apple products required under the KNOWiNK contract.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on October 27, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on October 27, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on October 28, 2022; Finance (Elias Duenas, Administrative Analyst, 387-4052) on October 27, 2022; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on October 27, 2022.