

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

July 28, 2020

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreement with American Medical Association to utilize the Current Procedural Terminology Code Sets

RECOMMENDATION(S)

Approve the American Medical Association Internal **User License Agreement No. 20-602** in the total contract amount of \$33,946.50, to license access to current procedural terminology code sets for the contract period beginning July 29, 2020 and continuing indefinitely.

(Presenter: William L. Gilbert, Director, 580-6150)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Provide for the Safety, Health and Social Service Needs of County Residents.

FINANCIAL IMPACT

Approval of the recommendation will not result in the use of Discretionary General Funding (Net County Cost). The cost of \$33,946.50 from July 29, 2020 through December 31, 2020 is funded by State Medi-Cal, Federal Medicare, private insurances, and other departmental revenue. Funding sources may change in the future pending any legislative activity related to the repeal and/or replacement of the Affordable Care Act. This contract will require an annual amendment reflecting updated licensing costs that correlate with the number of hospital end-users.

BACKGROUND INFORMATION

Approval of this item will allow Arrowhead Regional Medical Center (ARMC) the use of the American Medical Association (AMA) Current Procedural Terminology code sets (CPT), which provide uniform language for coding medical services and procedures offering doctors and health care workers the ability to streamline reporting, and increase accuracy and efficiency in the delivery of health care services.

AMA only provides Current Procedural Terminology royalty rates on an annual basis that are determined by bed and billing provider formulas. For that reason, although this contract is indefinite, future amendments are anticipated that will reflect royalty fees in alignment with the bed and billing formula associated with that calendar year. This \$33,946.50 quote reflects cost for the remaining months of the 2020 year.

The American Medical Association Internal User License Agreement is its standard commercial license, as negotiated by the County, which contains terms that differ from the standard County contract. The non-standard terms include the following:

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1. Governing law is the State of Illinois.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under Illinois law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Illinois law, which may result in fees that exceed the total contract amount.
2. The AMA is entitled to attorneys' fees and costs if it prevails in any action against the County.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If the AMA institutes legal proceedings against the County related to breach of the Agreement, the AMA will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount. County Counsel cannot advise on whether, and to what extent, Illinois law may allow the County to recover attorneys' fees if it is not expressly so stated in the contract.
3. There are no restrictions on the AMA's right to assign the contract.
 - Under the County standard contract, the County must approve any assignment of the contract.
 - Potential Impact: The AMA may assign the contract to a third party without notice to the County and without the County's approval. County Counsel cannot advise on, whether and to what extent, Illinois law may affect the AMA's right to assign.
4. AMA has the right to audit County's use of the software to ensure compliance with the terms of the Agreement. If the audit reveals an aggregate under payment for the audited period in excess of five percent (5%), the County will reimburse the AMA its reasonable audit costs and immediately pay the underpaid royalties plus interest of the prime rate plus 1% per year.
 - 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, AMA may demand payments of additional fees plus interest, and reimbursement of audit costs, which will result in fees that exceed the total contract amount.
5. The contract does not require the AMA to indemnify the County, including for intellectual property infringement claims.
 - The County standard contract general 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 County 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, including intellectual property infringement based on its use of the AMA's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total

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contract amount. County Counsel cannot advise on whether and to what extent Illinois law may allow the County to require the AMA to defend or indemnify it absent an express provision in the contract.

6. The contract does not require AMA to meet the County's insurance standards.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: This means that the County has no assurance that AMA 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.
7. AMA's entire liability for any claim related to the subject matter of this Agreement, whether in contract, warranty, tort, or any other legal theory, shall be limited to the total amount Licensee paid to use the Licensed Content provided hereunder, upon which the liability is based.
 - 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. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. Payment is due upon contract execution and are non-refundable.
 - County standard payment terms are be Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. Failing to make timely payment will result in a material breach of the contract, which would allow AMA to terminate the contract and seek other legal remedies, which would exceed the contract amount.
9. 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.
10. County's use of the software is at County's sole risk to the extent permitted by applicable law.
 - There is no warranty requirement in the County standard contract.
 - Potential Impact: The County's use of the software is solely at its own risk. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ARMC recommends approval of the contract with the AMA, including the non-standard terms, which will allow ARMC to operate in a fiscally-responsible and business-like manner while providing continuity of medical terminology that increases the safety, health and social service needs of County residents.

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PROCUREMENT

The procurement of AMA-CPT codes stems from a non-competitive bid. CPT is created and maintained by the American Medical Association, the sole source of this proprietary product, providing terminology the most widely accepted medical nomenclature used across the United States of America to report medical, surgical, radiology, laboratory, anesthesiology, genomic sequencing, evaluation and management (E/M) services under public and private health insurance programs. Purchasing supports this non-competitive procurement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, County Counsel, 387-5455) on June 08, 2020; Purchasing Department (Ariel Gill, Buyer II, 777-0722) on July 10, 2020; ARMC Finance Budget Officer (Chen Wu, ARMC Finance Budget Officer, 580-3165) on July 13, 2020; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on July 13, 2020; and County Finance and Administration (Matthew Erickson, Chief Financial Officer, 387-5423) on July 14, 2020.

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Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Josie Gonzales Seconded: Robert A. Lovingood
Ayes: Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, Josie Gonzales

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: July 28, 2020



cc: ARMC- Gilbert w/agree
 Contractor- C/O ARMC w/agree
 File- w/agree
la 07/29/2020