

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

March 29, 2022

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

License Agreement with California Mediterranean, LLC dba EMR Direct for Use of Web Based Direct Messaging Software and Digital Certificates

RECOMMENDATION(S)

1. Approve Direct License **Agreement No. 22-226** with California Mediterranean, LLC dba EMR Direct, including non-standard terms, for access to direct messaging and software certifications that allow for the encrypted and secure exchange of health information in purchase amounts as authorized by County Policy, effective upon acceptance of software license agreement and continuing until terminated by either party.
2. Authorize the Arrowhead Regional Medical Center Director to electronically accept the software license agreement in Recommendation No. 1 related to the exchange of patient information with a broader set of other healthcare providers through the electronic health record.

(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 this item will not result in the use of Discretionary General Funding (Net County Cost). Any cost associated with the license will be 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. Adequate appropriation and revenue have been included in the Arrowhead Regional Medical Center (ARMC) 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of the agreement will allow Arrowhead Regional Medical Center (ARMC) to attain access to a secure direct messaging system for the exchange of Electronic Health Records (EHR) from any web browser or through the Epic Systems Corporation (Epic) software platform. The encrypted connection is enabled through a Secure Sockets Layer (SSL) certification. SSLs ensures all data passed between the parties remains private and secure. Direct Messaging connects hospitals, clinics, healthcare providers, patients, and other healthcare businesses. This exchange of information will enable health care professionals to make decisions and coordinate the sharing of information between different points of care.

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The California Mediterranean, LLC dba EMR Direct (EMR Direct) License Agreement (Agreement) is EMR Direct's standard commercial contract terms, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The Agreement is a non-negotiable clickwrap agreement, accepted electronically by click-to-accept, first use of the system, or upon issuance of access codes. The non-standard and missing terms include the following:

1. EMR Direct may modify the Agreement without written notice to the County by posting the change on the website, and the County's continued use of the system after posting constitutes acceptance of the amended 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 the approval of the new terms by the Board of Supervisors (Board).
2. EMR Direct may assign the Agreement without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: EMR Direct 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.
3. The Agreement does not require EMR Direct to indemnify the County, 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: If the County is sued for any claim, including intellectual property infringement based on its use of EMR Direct's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
4. The County agrees to indemnify, defend, and hold EMR Direct harmless against all claims, damages, and expenses related to the County's use of the system, except for claims arising out of or related to EMR Direct's gross negligence, willful misconduct or fraud in providing the system.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify EMR Direct, 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

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brought against EMR Direct without such limitations and the County would be responsible to defend and reimburse EMR Direct for costs, expenses, and damages, which could exceed the total contract amount.

5. The Agreement does not require EMR Direct 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 EMR Direct 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. EMR Direct limits its aggregate liability to the County to the net amount that EMR Direct has actually received from the County in the 12 months preceding the first claim made by the County regardless of the number of actions arising out of the services, except for liability for death or personal injury to the extent applicable law prohibits such limitation.
 - 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.
7. The term of the Agreement begins upon the earliest of acceptance of the Agreement, first use of the system, or upon issuance of access codes, and continues until expiration or revocation of all codes issued or termination by either party, whichever occurs earlier. Either party may terminate the Agreement by providing 60 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 contract and the County is indefinitely bound to the terms and conditions of the contract.
8. Venue is in the state and federal courts located in San Diego, 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 San Diego, California may result in additional expenses that exceed the amount of the contract.
9. EMR Direct provides the software "AS IS" 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.

ARMC recommends approval of the EMR Direct License Agreement, including the non-standard terms, to provide for the safety, health and social services needs of County residents. The indefinite aspect of this agreement is tied to the continuing use of the SSL certification for the

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exchange of electronic health data using the available exchange functions within the Epic electronic health record system.

On August 6, 2019 (Item No. 9), the Board approved agreement No. 19-557 with Epic Systems Corporation (Epic) with no termination date for the purchase, installation, and maintenance of a fully integrated Electronic Health Records system. Approval of the recommendations will allow ARMC to attain SSL certification for the exchange of encrypted EHR from any web browser or through the Epic software platform between different points of care.

PROCUREMENT

The recommended agreements are the continuation of a competitively procured agreement, as they are required as part of the Epic electronic health record procurement, as approved by the Board on August 6, 2019 (Item No. 9).

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on February 7, 2022; Purchasing Department (Ariel Gill, Buyer, 777-0722) on March 1, 2022; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on February 23, 2022; and County Finance and Administration (Diane Atkeson, Deputy Executive Officer, 387-5423) on February 25, 2022.

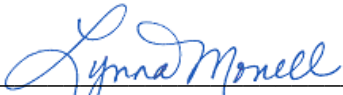
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Dawn Rowe
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 29, 2022



cc: ARMC - Gilbert w/agree
Contractor - C/O ARMC w/agree
File - w/agree
CCM 03/31/2022