

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

September 12, 2023

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreements with Procedural Learning Safety Collaborative, dba Society for Improving Medical Professional Learning for Access of Technology Platform

RECOMMENDATION(S)

1. Approve a non-financial Network Participant **Agreement No. 23-1003**, including non-standard terms, with Procedural Learning Safety Collaborative, dba Society for Improving Medical Professional Learning, for access to an online application for the collection and analysis of resident physician performance and assessment data, effective September 12, 2023 through September 11, 2024, with options to extend for four subsequent one-year periods.
2. Approve a non-financial End User License **Agreement No. 23-1004**, including non-standard terms, with Procedural Learning Safety Collaborative, dba Society for Improving Medical Professional Learning, for the County's use of the website and services accessible through the site and the mobile application, effective for as long as the website and mobile application are in use.
3. Designate the Director of Arrowhead Regional Medical Center to electronically accept the End User License Agreement in Recommendation No. 2 and accept updates to the End User License Agreement, provided that such updates do not substantively modify the terms, subject to review by County Counsel.
4. Direct the Director of Arrowhead Regional Medical Center to transmit printed copies of any updated terms to the End User License Agreement that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of electronic acceptance.

(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). The Network Participant Agreement (Agreement) and the End User License Agreement (EULA) with Procedural Learning Safety Collaborative, dba Society for Improving Medical Professional Learning (SIMPL), which is a non-profit entity that utilizes donations and resources from founding members and universities to provide this online application, are non-financial in nature.

BACKGROUND INFORMATION

**Agreements with Procedural Learning Safety Collaborative, dba
Society for Improving Medical Professional Learning for Access of
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September 12, 2023**

The recommended Agreement and EULA will allow Arrowhead Regional Medical Center's (ARMC) surgical resident physicians (residents) and faculty access to the SIMPL online and mobile application (app) to evaluate the performance of residents after every procedure performed. Each evaluation, provided by the attending physicians, consists of three questions plus the option to dictate formative feedback. Aggregated evaluation data is accessible to faculty who will use it to review resident experience with various procedures. This information is used for review and discussion with the resident prior to operations to better individualize teaching and supervision in the operating room. Use of this new app will allow ARMC residents to be provided feedback and guidance to ensure the resident meets the requirements for the American Board of Surgery exam.

The Agreement is SIMPL's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. While the parties negotiated certain contract terms to County standards, SIMPL would not agree to some County standard terms. The non-standard and missing terms include the following:

1. The Agreement does not contain the standard contract provisions regarding Government Code section 84308 (Senate Bill 1439) and the disclosure of campaign contributions to a member of the Board of Supervisors or other County elected officer.
 - Under the County standard contract the contractor states it has disclosed campaign contributions of more than \$250 to any member of the Board of Supervisors or other County elected officer and completed a form providing additional information.
 - Potential Impact: The County may have difficulty gathering information about campaign contributions made by SIMPL.
2. SIMPL's maximum liability to the County is limited to \$10,000, excluding SIMPL's indemnification and insurance obligations, gross negligence, willful misconduct, and violation of law.
 - 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.
3. Venue for disputes arising under the Agreement is in Federal and State court in the Northern District of 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 the Northern District of California may result in additional expenses that exceed the amount of the Agreement.

The EULA is SIMPL's standard commercial licensing agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The EULA is a non-negotiable clickwrap agreement accepted upon use of the SIMPL website and mobile app (Services). The non-standard and missing terms include the following:

1. Governing law of the EULA is the Commonwealth of Massachusetts, the Federal Arbitration Act, and federal arbitration law.
 - The County standard contract requires California governing law.

**Agreements with Procedural Learning Safety Collaborative, dba
Society for Improving Medical Professional Learning for Access of
Technology Platform
September 12, 2023**

- Potential Impact: The EULA will be interpreted under Massachusetts law. Any questions, issues or claims arising under the EULA will require the County to hire outside counsel competent to advise on Massachusetts law, which may result in fees that exceed the total EULA amount.
2. SIMPL may change the EULA terms without notice at any time.
 - 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 approval of the new terms by the Board. County Counsel cannot advise on whether and to what extent Massachusetts law may affect the enforceability of unilateral changes to the EULA.
 3. SIMPL may assign the EULA without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: SIMPL could assign the EULA 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 ceases all use of the Services, which would terminate the EULA. County Counsel cannot advise on whether and to what extent Massachusetts law may permit or restrict a party's right to assign without an express provision in the contract.
 4. All disputes arising under the EULA must be settled by binding arbitration, except for disputes that qualify for small claims court.
 - The County standard contract does not require arbitration.
 - Potential Impact: Arbitration decisions are not appealable. County Counsel cannot advise on whether and to what extent such arbitration provisions may be enforceable against a government entity under Massachusetts law.
 5. The EULA does not contain the standard contract provisions regarding Government Code section 84308 (Senate Bill 1439) and the disclosure of campaign contributions to a member of the Board of Supervisors or other County elected officer.
 - Under the County standard contract the contractor states it has disclosed campaign contributions of more than \$250 to any member of the Board of Supervisors or other County elected officer and completed a form providing additional information.
 - Potential Impact: The County may have difficulty gathering information about campaign contributions made by SIMPL.
 6. The EULA does not require SIMPL 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

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September 12, 2023**

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: SIMPL is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from SIMPL'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 the Services, the County may be solely liable for the costs of defense and damages, which could exceed the total EULA amount. County Counsel cannot advise on whether and to what extent Massachusetts law may allow the County to require SIMPL to defend or indemnify it absent an express provision in the contract.
7. SIMPL's maximum liability to the County under the EULA is limited to \$100, without any exclusions.
- 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.
8. The venue for arbitration is in San Bernardino County, but the venue for all other disputes is in the state and federal courts located in Boston, Massachusetts.
- The County standard contract requires the venue for disputes be the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in the Northern District of California may result in additional expenses that exceed the amount of the Agreement.

ARMC recommends the approval of the Agreement and EULA, including non-standard terms, to improve educational and clinical outcomes of ARMC's residents, which also results in improved patient experience and care.

PROCUREMENT

Not applicable.

REVIEW BY OTHERS

This item has been reviewed by (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on August 8, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on August 10, 2023; ARMC Finance (Chen Wu, Budget and Finance Officer, 580-3165) on August 18, 2023; Finance (Jenny Yang, Administrative Analyst, 387-4884) on August 22, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on August 23, 2023.

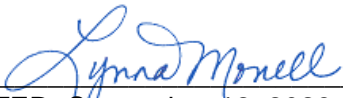
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: September 12, 2023



cc: ARMC - Gilbert w/agree
Contractor - c/o ARMC w/agree
File - w/agree
CCM 09/15/2023