

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

August 22, 2023

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreements for Electronic Health Record Services and for a Required Platform

RECOMMENDATION(S)

1. Approve non-financial **Master Agreement No. 23-882** with SureTest, Inc., including non-standard terms, to provide support services for the Electronic Health Record system for the three-year term of August 22, 2023 through August 21, 2026.
2. Approve Work Order (**County Contract No. 23-883**) with SureTest, Inc. for development and testing of the Electronic Health Record application, in the amount of \$1,560,000, beginning on August 22, 2023 through August 21, 2026.
3. Approve non-financial End User License **Agreement No. 23-884**, including non-standard terms, with Keysight Technologies for a platform license for Eggplant software necessary for SureTest, Inc. to perform the services, for the term beginning upon download and continuing until terminated by either party.

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

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

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

FINANCIAL IMPACT

This item will not result in the use of Discretionary General Funding (Net County Cost). The cost of \$1,560,000 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. Adequate appropriation and revenue have been included in the Arrowhead Regional Medical Center (ARMC) 2023-24 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

In 2021, ARMC completed the implementation of the Epic electronic health record (EHR) system.

The Master Agreement and Work Order with SureTest, Inc. (SureTest), along with the End User License Agreement (EULA) with Keysight Technologies will allow ARMC to test and validate system updates and upgrades to the EHR system. SureTest provides a test automation solution that decreases manual testing, increases quality, and reduces the risk of workflow breakdowns getting into the EHR production environment.

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SureTest will develop and implement automated testing with services that include a host of technical applications and will support future upgrades to the EHR system that include platform licenses, software, development, deployment, monitoring, and continual maintenance of the test automation. SureTest utilizes SureWorks Library, a key automation value to develop customized scripts and Eggplant, which uses image recognition that enhances the test automation tool.

SureTest delivers a managed technology solution that will automate a significant portion of manual testing by building a library of automated test scripts specific to ARMC's unique EHR system workflow. SureTest is also responsible for keeping the test scripts updated and running them in the test environment on a scheduled basis. The automation validates that system updates, quarterly upgrades, and internally requested updates are tested adequately, validating the changes do not create unintended negative impacts on patient care and billing. The automation will free up capacity for ARMC Epic Analyst to focus on internal customers and optimize the investments made in Epic.

The SureTest Master Agreement is SureTest'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 standard, SureTest would not agree to all County standard terms. The non-standard and missing terms include the following:

1. The SureTest Master 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 (Board) 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 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 SureTest.
2. SureTest limits its indemnification obligations to claims alleging that the deliverables, including reports, documentation, software, designs, specification and other tangible materials infringe a validly existing United States patent or copyright, or other intellectual property right of a third party, excluding all client products and services and third-party products or services or works of authorship or inventions.
 - 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: The limit of SureTest's indemnification obligation means that any claim that meets the limiting conditions or is not affected by these conditions are excluded from SureTest's indemnification obligations.
3. SureTest limits its liability to the County to \$1,000,000, excluding its indemnification obligations, gross negligence, willful misconduct or violation of law.
 - The County standard contract does not include a limitation of liability.

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- Potential Impact: Claims could exceed the liability cap and the Master Agreement amount leaving the County financially liable for the excess.

The Keysight Technologies (Keysight) EULA is Keysight's standard commercial contract, 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 download of the software. The non-standard and missing terms include the following:

1. Keysight may assign the EULA without notice to the County and without the County's approval.
 - In the County standard contract the County must approve any assignment of the contract.
 - Potential Impact: Keysight 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 terminates the EULA.
2. 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 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 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 Keysight.
3. The EULA does not require Keysight 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 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: Keysight is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Keysight'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 Keysight's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total EULA amount.
4. The EULA does not require Keysight to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - 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.

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- Potential Impact: The County has no assurance that Keysight will be financially responsible for claims that may arise under the EULA, which could result in expenses to the County that exceed the total EULA amount.
5. Keysight disclaims liability for all direct and indirect liability if the software is provided at no charge.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: All claims would be solely the County's financial liability.
 6. The term of the EULA is indefinite or perpetual depending on the software being licensed.
 - 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 EULA and the County is indefinitely bound to the terms and conditions of the EULA until terminated by the County by ceasing use and removing the software from its systems.
 7. Venue for disputes arising under the EULA is in state and federal courts in San Francisco County and 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 San Francisco, California may result in additional expenses that exceed the amount of the EULA.
 8. Keysight 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 agreements, including non-standard terms, to provide for the safety, health and social services needs of County residents by continuing to implement a "One Patient - One Record" system for County healthcare needs.

PROCUREMENT

Purchasing supports the non-competitive procurement of SureTest's test automation solution based on the proprietary nature of the software. SureTest automation is compatible with Epic which will allow the team to find any broken scripts. It will also enhance security to workflows. ARMC requires test automation to assist with future build outs on the current EHR and SureTest's solution will ensure that upgrades, build outs, and testing are successful.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on July 28, 2023; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on August 2, 2023; Risk Management (Victor Tordesillas, 386-8623) on August 3, 2023; Purchasing (Ariel Gill, Buyer III, 777-0722) on August 2, 2023; Finance (Jenny Yang, Administrative Analyst, 387-4884) on August 2, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on August 3, 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: Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.
Absent: Col. Paul Cook (Ret.)

Lynna Monell, CLERK OF THE BOARD

BY



DATED: August 22, 2023



cc: ARMC - Gilbert w/agrees
Contractor - c/o ARMC w/agree
File - w/agree

CCM 08/24/2023