

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

November 16, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreements with Epic Systems Corporation for App Orchard and Third-Party Materials for Application Programming Interfaces

RECOMMENDATION(S)

1. Approve non-financial App Orchard Recipient **Agreement No. 21-864** with Epic Systems Corporation, including non-standard terms, for access to and use of materials published on the App Orchard website, for a period of one year, from November 16, 2021, through November 15, 2022, automatically renewing on an annual basis.
2. Approve **Agreement No. 21-865** to Receive Epic Provided Materials with Epic Systems Corporation, including non-standard terms, to license materials provided by the American Joint Committee on Cancer, at a cost of \$1,000 annually, for a period of one year, from November 16, 2021, through November 15, 2022, automatically renewing on an annual basis.
3. Delegate authority to the Director of Arrowhead Regional Medical Center to electronically accept the App Orchard Recipient Agreement in Recommendation No. 1 and the Agreement to Receive Epic Provided Materials in Recommendation No. 2.

(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 \$1,000 per year is funded by State Medi-Cal, Federal Medicare, private insurances, and other departmental revenue. Sufficient appropriation and revenue are included in the Arrowhead Regional Medical Center (ARMC) 2021-22 recommended budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of the recommendations will allow ARMC to take advantage of the Epic Systems Corporation (Epic) App Orchard product. App Orchard is a website hosted by Epic that assists non-Epic third parties to offer Epic systems components created by the third-party vendor. By accepting the application programming interface (API), ARMC will be allowed to use available reference materials within the Epic system as granted by the third-party vendor through Epic. Examples of these components or APIs include standalone desktop, web, or mobile software applications; reports, dashboards, or other analytics products; software, such as web applications, designed to load within an Epic application host; an Epic-specific connector to a

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stand-alone application or utility; and content designed to run within an Epic application host that interfaces with Epic Software.

American Joint Committee on Cancer (AJCC) established the way cancer research is communicated to the medical community. Clinicians and the surveillance community rely on the AJCC for the most comprehensive anatomic staging data available. Clinical anatomic staging assesses the extent of disease involving the primary tumor, regional lymph node status, and distant metastasis to yield an overall anatomic stage. Evidence-based anatomic staging continues to be the critical factor to understanding cancer and treating patients. New breakthroughs in oncologic, radiologic, pathologic and molecular science are opening up ever-more promising possibilities for precisely defining a prognosis and recommending a treatment based on a patient's individual data. By accessing the AJCC Cancer Staging System Content documentation, it will allow the hospital to accurately identify and aid in the collection of data to better serve the needs of County Residents.

The Epic App Orchard Recipient Agreement (Recipient Agreement) is Epic's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. The Recipient Agreement is silent on assignment.
 - The County must approve any assignment of the contract.
 - Potential Impact: Epic could assign the Recipient Agreement without notice and without the County's consent, including 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.
2. The Recipient Agreement does not require Epic 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: Epic is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Epic'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 Epic's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
3. The County is required to indemnify Epic against third party claims that arise out of or relate to the County's acquisition or use of an App or Epic Services, including claims that use of an App or Epic Services infringes any third-party intellectual property or proprietary rights or resulted in a data breach or other unauthorized use of PHI or other data in the County's system.

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- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Epic, 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 Epic without such limitations and the County would be responsible to defend and reimburse Epic for costs, expenses, and damages, which could exceed the total contract amount.
4. The Recipient Agreement does not require Epic 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 Epic will be financially responsible for claims that may arise from the County's use of the website, which could result in expenses to the County that exceed the total contract amount.
5. Epic limits its total liability to the County for any and all claims to a maximum of \$5,000.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited.
6. The term of the Recipient Agreement is automatically renewing.
- County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: The Recipient Agreement continues to renew on an annual basis until either party gives notice not to renew.
7. Venue is in the state and federal courts located in Wisconsin.
- 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 anywhere in the state of Wisconsin may result in additional expenses that exceed the amount of the contract.

The Agreement to Receive Epic Provided Materials AJCC (Sublicense) is Epic's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. The Sublicense is silent on governing law.
- The County standard contract requires California governing law.
 - Potential Impact: Having no identified law governing the interpretation of the Sublicense results in uncertainty over which state's laws will govern its interpretation and leads to ambiguity in interpretation of the terms. The Sublicense could be interpreted under any state law depending on where the claim is brought. Any questions, issues or claims arising under the Sublicense could require the County to hire outside counsel competent to advise on the

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applicable state law, which may result in fees that exceed the total contract amount.

2. The Sublicense is silent as to Epic's right to assign.
 - The County must approve any assignment of the contract.
 - Potential Impact: Epic could assign the Sublicense without notice and without the County's consent, including 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 Sublicense does not address attorneys' fees and costs.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: There is no provision in the Sublicense addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, the laws of any state other than California may affect a party's requirement to pay the prevailing party's attorneys' fees and costs in a legal action where no specific provision is provided in the contract. In California, remaining silent means that each party will bear its own costs in any contract action.
4. The Sublicense does not require Epic to indemnify the County, including for intellectual property infringement claims.
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he 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: Epic is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Epic'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 Epic's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.
5. The County is required to indemnify Epic against any third-party claims that arise out of or relate to the Epic-provided materials, including without limitation any claims that the County's use of the Epic-provided materials infringes any third-party intellectual property or proprietary rights, as well as any claims that Epic was negligent in the creation of or provision of the Epic-provided materials to the County.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Epic, the County could be contractually waiving the protection of sovereign immunity. Claims that may

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otherwise be barred against the County, time limited, or expense limited could be brought against Epic without such limitations and the County would be responsible to defend and reimburse Epic for costs, expenses, and damages, which could exceed the total contract amount.

6. The Sublicense does not require Epic 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 Epic will be financially responsible for claims that may arise from the County's use of the website, which could result in expenses to the County that exceed the total contract amount.
7. Epic limits its total liability to the County under the Sublicense to the greater of the amount paid in the previous 12 months or \$200.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Sublicense amount leaving the County financially liable for the excess. In addition, the County's liability under the Sublicense is not similarly limited.
8. Payment terms are as indicate on the invoice with late payment interest of 1.5% per month, calculated daily and compounded monthly.
 - County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. Failing to pay by the due date stated in the invoice will result in a material breach of the Sublicense, which would allow Epic to terminate the Sublicense and seek other legal remedies, including charging the County interest at a rate of 1.5%, collecting attorneys fees, court costs, and collection agency fees, which would exceed the Sublicense amount, and to revoke the County's license keys to the materials.
9. The term of the Sublicense is automatically renewing.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: The Sublicense continues to renew on an annual basis until either party gives notice not to renew.
10. There is no termination for convenience.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a 30 day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: The County can only terminate the Sublicense during the term of an uncured breach by Epic. Any attempted termination by County without cause could result in payment liability for the full Sublicense amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.

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11. There is no stated venue in the Sublicense.

- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
- Potential Impact: Having no express venue in the Sublicense means that legal action may be brought in any appropriate venue, which may result in additional expenses that exceed the amount of the Sublicense.

12. Epic 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 recommendations, including the non-standard terms, to provide for the safety, health and social services needs of County Residents.

Approval of the recommendations will allow ARMC to continue to implement an electronic health record and establish the base of a “One Patient - One Record” system for County healthcare needs.

PROCUREMENT

The recommended agreements are the continuation of a competitively procured agreement, as approved by the Board on August 6, 2019 (Item No. 9). County Purchasing concurs with this recommendation.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on October 15, 2021; Purchasing Department (Ariel Gill, Buyer, 777-0722) on October 19, 2021; Risk Management (Victor Tordesillas, Director, 386-8655) on November 3, 2021; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on October 15, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on October 27, 2021; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-5423) on October 28, 2021.

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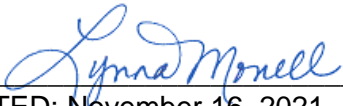
Record of Action of the Board of Supervisors
San Bernardino County

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: November 16, 2021



cc: ARMC- Gilbert w/agree
Contractor- C/O ARMC w/agree
File- w/agree
LA 11/19/2021