

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

April 6, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreement with Surescripts, LLC for Electronic Prescribing Software

RECOMMENDATION(S)

1. Approve Connectivity **Agreement No. 21-266** with Surescripts, LLC, for electronic medication prescribing software compatible with the new electronic health record system, in the amount of \$738,300 for a two-year period, from the execution date through June 30, 2023, automatically renewing annually thereafter.
2. Direct the Clerk of the Board of Supervisors to maintain the confidentiality of certain portions of the Connectivity Agreement in compliance with the confidentiality provision of the Agreement and the Non-disclosure Agreement 20-316 approved by the Board on June 2, 2020.

(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 cost of \$738,300 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) 2020-21 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Arrowhead Regional Medical Center currently has a contract for electronic prescribing with DrFirst. The new Epic Corporation (Epic) electronic health record system (EHR) requires a compatible electronic prescription application. ARMC requested that Epic provide their list of third-party vendors able to provide the compatible electronic prescription application. Surescripts, LLC was the only company identified by Epic that is able to integrate with the Epic EHR.

Electronic prescribing allows ARMC physicians to seamlessly send electronic prescriptions to patient pharmacies. It eliminates paper prescriptions thus reducing the ability for prescriptions to be stolen or altered. Simultaneously, it increases patient medication adherence and convenience. Physicians will continue to use the two-part authentication system for all controlled substances.

Agreement with Surescripts, LLC for Electronic Prescribing Software
April 6, 2021

In the past 12 months, ARMC patients have had 22,930 prescriptions filled at Walmart, Sam's Club, and other chain pharmacies. Beginning January 2020, Walmart began the transition of requiring opioid prescriptions to be sent electronically. Implementing Surescripts will allow our patients the convenience of continuing to fill their prescriptions at these pharmacies and many other pharmacies of choice.

Surescripts considers all of its information, materials, processes, ideas, and techniques, including information relating to services it provides; processes therefor; employee and customer information; accounting data; statistical data; development and marketing plans; strategies; forecasts; any and all information and documentation deemed confidential or a trade secret under any federal, state, or local statute or regulation; any documentation provided by Surescripts under the Agreement; and certain terms of the Agreement, its trade secret information, as defined by California Civil Code Section 3426.1, and subject to non-disclosure pursuant to California Government Code Section 6254.7. In addition to the confidentiality provision in the Connectivity Agreement, the Board approved a Non-disclosure Agreement on June 2, 2020 (Item No. 5), which Surescripts asserts continues to protect its proprietary information. The Connectivity Agreement includes a process for responding to Public Records Act requests.

The Surescripts Connectivity Agreement is its standard commercial contract, as negotiated by the parties, and includes terms that differ from the standard San Bernardino County (County) contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. The County is required to indemnify Surescripts for all third party claims and expenses arising from the County's breach of the agreement or violation of law, except for claims caused by Surescripts' gross negligence or willful misconduct. In addition, the County is obligated to indemnify Surescripts and third party data providers against third party claims and expenses arising from any breach by County or an end user of any confidentiality or privacy obligations or misuse of data.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Surescripts and third parties, 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 Surescripts or identified third parties without such limitations and the County would be responsible to defend and reimburse Surescripts and third parties for costs, expenses, and damages, which could exceed the total contract amount.
2. Neither Party may institute an action in any form arising out of or in connection with the Agreement more than three (3) years after the cause of action has arisen, or in the case of nonpayment, more than three (3) years from the date of last payment or promise to pay
 - The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the County's ability to bring suit to three years amounts to a waiver of the Statute of Limitations for claims and shortens the period of time in which the County may file a lawsuit under the contract.

3. The County agrees to pay Surescripts upon receipt of each monthly invoice, and agrees further to pay a one percent (1%) per month service charge on all undisputed invoices that are not paid within sixty (60) days of receipt.
 - County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: Failing to pay within 60 days will result in a material breach of the contract, which would allow Surescripts to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1% per month, which would exceed the contract amount.
4. The term of the contract automatically renews on an annual basis after the initial two year term.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board of Supervisors.
 - Potential Impact: There is no end term to the contract and the County is indefinitely bound to the terms and conditions of the contract.
5. There is no termination for convenience during the initial term and any renewal term without Surescripts mutual consent.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (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 contract during the initial term and renewal term with Surescripts mutual consent or for an uncured breach by Surescripts. County can give 60 days' written notice prior to the end of the initial term or any renewal term in order to terminate the agreement. Any attempted termination by County without cause during a term would result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
6. There is no stated venue in the contract.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Contractor is a Delaware limited liability company located in Arlington County, Virginia. Having no express venue in the contract means that Delaware or Arlington County, VA venue could be applied to this contract, which may result in additional expenses that exceed the amount of the contract.

ARMC recommends approval of the Connectivity Agreement with Surescripts, LLC to continue providing for the safety, health, and social service needs of county residents.

PROCUREMENT

This is a non-competitive procurement as Surescripts, LLC is the only vendor that will integrate with the Epic EHR. The EHR integrates Rcopia Engine Services with Complete Physician Order Entry software included in Epic's Healthcare Information System. Epic has a strategic alliance with Surescripts to integrate Surescripts medication history and e-prescribing technologies.

Purchasing supports the functional justification for this non-competitive procurement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on March 9, 2021; County Purchasing (Ariel Gill, Buyer III, 777-0722) on March 10, 2021; Finance Budget Officer (Chen Wu, Finance Budget Officer, 580-3165) on March 10, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on March 18, 2021; and County Finance and Administration (Matthew Erickson, County Chief Finance Officer, 387-5423) on March 21, 2021.

Agreement with Surescripts, LLC for Electronic Prescribing Software
April 6, 2021

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

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: April 6, 2021



cc: ARMC- Gilbert w/agree
Contractor- C/O ARMC w/agree
File- BAI only
File- Confidential w/agree
LA 04/8/2021