

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

October 5, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Amendment to Agreement with Epic Systems Corporation for Additional Modules and Licensing

RECOMMENDATION(S)

1. Approve **Amendment No. 2** to **Agreement No. 19-557** with Epic Systems Corporation, including the incorporated additional terms to the contract identified below, increasing the estimated five-year not-to-exceed amount by \$9,974,190, from \$30,186,425 to \$40,160,615, for additional software modules, licensing, implementation services, go-live support and travel expenses related to the Electronic Health Records system, with no change to the term beginning August 6, 2019, with no termination date.
 - a. Epic-hosted Video Client End User License Agreement and Twilio Acceptable User Policy
 - b. Epic Microsoft Cloud Foundation Terms including the Microsoft online product licensing terms
 - c. National Committee For Quality Assurance End-User License Agreement - v.3.01.21
2. Direct the Clerk of the Board of Supervisors to maintain the confidentiality of the underlying attachments to Amendment No. 2 in compliance with the confidentiality provision of Agreement No. 19-557.
3. Designate the Director of Arrowhead Regional Medical Center as the authorized official to electronically accept the additional software terms identified in Recommendation No. 1, and to approve and sign non-financial documents as they pertain to changes to, or confirmation of, the scope of work of the project, subject to review by County Counsel, so long as such documents do not increase the not-to-exceed amount of \$40,160,615 or change the duration of the contract.
4. Direct the Director of Arrowhead Regional Medical Center to transmit copies of all documents in relation to these agreements to the Clerk of the Board of Supervisors within 30 days of execution.

(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

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The additional increase of the not-to-exceed amount of \$9,974,190 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

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replacement of the Affordable Care Act. Approval of the necessary appropriation and revenue adjustments are not requested at this time but will be included in a future quarterly countywide budget report presented to the Board of Supervisors (Board) for approval. Sufficient appropriation and revenue will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of the recommendations will allow Arrowhead Regional Medical Center (ARMC) to purchase and implement the Epic-hosted Video Client for telehealth and Compass Rose Comprehensive Care Coordination related to population health, on the Epic System (System), along with the appropriate implementation services for these software modules. In addition, the amendment includes the required licensing and maintenance to support users for the System. The majority of the cost for the amendment is for anticipated licensing of concurrent users of the System, which will be incurred incrementally over the duration of the contract as more users are assigned to the System, with a maximum of 5,000 concurrent users. The licensing increase allows for the current System user count to grow as needed, which aligns with the anticipated inclusion of other healthcare partners in San Bernardino County. The original contract only included minimal licensing needed for ARMC users. The amendment also includes Epic support during the actual transition to the new System platform, as it was not included in the original contract. Due to unforeseen delays to the original implementation timeline caused by COVID, ARMC has reassessed the need for additional support from Epic at go-live and deemed it necessary, as there is significant impact due to staffing shortages which would leave support gaps during go-live. The amendment also includes the provision of travel expenses for those individuals required from Epic to provide on-site support during the actual transition to the new System.

The additional modules, especially Compass Rose Comprehensive Care Coordination, will allow ARMC to collect the necessary data and complete the mandated reports pertaining to the Enhanced Care Management (ECM) as required under the new California Advancing and Innovating Medi-Cal (CalAIM) program. CalAIM is a multi-year initiative by Department of Health Care Services to improve the quality of life and health outcomes of those patients assigned by the Managed Care Programs to ARMC by implementing broad delivery system, program, and payment reform across the Medi-Cal program. Additional licensing is required to facilitate the required expansion into population health and allow ARMC the ability to exchange information and allow access to feed information into the System. The original contract was executed in 2019, and CalAIM was not created until 2020. ECM is a collaborative and interdisciplinary approach to provide intensive and comprehensive outreach and care management services to individuals. Payments for ECM will be based on level of care and metrics reached along with additional per member per month payments and additional incentive payments.

The System provides ARMC with a single fully integrated Electronic Health Records system to unify providers across the patient care areas, help improve performance for achieving and reporting quality and efficiency metrics and give ARMC flexibility to achieve a “One Person-One Record” vision with the patient engagement tools of online and mobile services, telemedicine, self-scheduling, payment options, and remote monitoring. The new System will improve patient safety by allowing the handoff of instantly queued information between hospital, patient’s provider group and outpatient clinics, which will increase the overall patient and provider satisfaction.

The Epic-hosted Video Client End User License Agreement (Epic EULA) and incorporated Twilio Acceptable User Policy is Epic’s standard commercial contract, which includes terms that

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differ from the standard County contract and omits certain County standard contract terms. Twilio is a third-party beneficiary under the Epic EULA, entitled to enforce the terms against the County. The non-standard and missing terms include the following:

1. Governing law is New York State.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under New York law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on New York law, which may result in fees that exceed the total contract amount.
2. Epic may revise the Epic EULA from time to 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: Epic may change the Epic EULA without notice at any time. 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. County Counsel cannot advise on whether and to what extent New York State law may affect the enforceability of unilateral changes to the terms.
3. Epic may assign the Epic EULA without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Epic may assign the Epic 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.
4. The Epic EULA 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 contract addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, New York State law 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.
5. The Epic EULA does not require either Epic or Twilio 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.

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- Potential Impact: Neither Epic nor Twilio is required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from the Epic EULA. If the County is sued for any claim arising from the use of the Epic and Twilio Video Client, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent New York State law may allow the County to require Epic or Twilio to defend or indemnify it absent an express provision in the contract.
6. The County agrees to defend, indemnify, and hold Epic and Twilio harmless against any claim arising out of (i) the County's activities under the EULA, (ii) the County's acts of omission in connection with its use of the Epic-hosted Video Client Services, (iii) any End User's acts or omission in connection with the End User's use of the Epic-hosted Video Client Services, and (iv) any violation of the usage restrictions by the County of an End User. Epic and Twilio may retain separate counsel for themselves at the County's expense. The County is liable to Epic and Twilio for any costs and attorneys' fees incurred to establish or enforce their rights to indemnification.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Epic and Twilio, 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 and/or Twilio without such limitations and the County would be responsible to defend and reimburse Epic and/or Twilio for costs, expenses, and damages, which could exceed the total contract amount. In addition, Epic and/or Twilio may retain its own attorney(s) and the County is responsible for reimbursing Epic and Twilio for their attorneys' fees in addition to the County paying its own attorneys' fees hired to defend Epic and/or Twilio. County Counsel cannot advise on, whether and to what extent, New York State law may limit or expand this contract term.
7. The contract 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 contract does not include County standard insurance requirements. This means that the County has no assurance that Epic 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.
8. Both Epic and Twilio maximum liability to the County is limited to the amounts paid in the 12 months preceding the claim.
- 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. County Counsel cannot advise on, whether and to what extent, New York State law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

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9. There is no stated venue in the contract.
 - The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
 - Potential Impact: Having no express venue in the contract means that venue could be applied anywhere one or more of the parties do business, which may result in additional expenses that exceed the amount of the contract.
10. The services are provided “as is” without warranty 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. County Counsel cannot advise on, whether and to what extent, New York State law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

The Epic Microsoft Cloud Foundation Terms are Microsoft’s standard online terms that Epic is required to pass through to Epic’s clients and supplement Epic Cloud Foundation Terms, which include terms that differ from the standard County contract and omit certain County standard contract terms. The non-standard and missing terms include the following:

1. Epic’s total liability to the County for claims related to the use of the Microsoft cloud foundation is limited to \$25,000.
 - 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.

The National Committee For Quality Assurance (NCQA) End-User License Agreement - v.3.01.21 (NCQA EULA) is the NCQA’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. Governing law is the District of Columbia.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under D.C. law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on D.C. law, which may result in fees that exceed the total contract amount.
2. NCQA may revise the NCQA EULA from time to time without notice.
 - 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: NCQA may change the NCQA EULA without notice at any time. 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. County Counsel cannot advise on whether and to what extent D.C. law may affect the enforceability of unilateral changes to the terms.

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3. All disputes must be resolved through binding arbitration conducted in Washington, D.C.
 - The County standard contract does not require arbitration.
 - Potential Impact: The contract requires binding arbitration for all disputes between the parties. Disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action. Arbitration decisions are not appealable. The arbitration is to take place in Washington, D.C., which will result in additional expenses that may exceed the amount of the contract.
4. NCQA may assign the NCQA EULA without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: NCQA may assign the NCQA 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.
5. The NCQA EULA 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 NCQA EULA addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, D.C. law 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.
6. The NCQA EULA does not require either NCQA 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: NCQA is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from NCQA EULA. If the County is sued for any claim arising from the County's use of the NCQA information and materials the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent D.C. law may allow the County to require NCQA to defend or indemnify it absent an express provision in the contract.
7. The County will defend and indemnify NCQA against any claim arising out of (i) the County's access to and use of the data, (ii) the County's violation of the NCQA EULA or any law, (iii) the County's violation of any third party right, and (iv) any dispute between

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the County and any third party. NCQA reserves the right to assume the defense and control of any indemnified matter.

- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify NCQA, 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 NCQA without such limitations and the County would be responsible to defend and reimburse NCQA for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, D.C. law may limit or expand this contract term.
8. The contract does not require NCQA 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 NCQA 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.
9. NCQA's maximum liability to the County is limited to actual direct damages not to exceed \$10,000.
- 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. County Counsel cannot advise on, whether and to what extent, D.C. law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
10. The information and materials are provided without warranty 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 NCQA information and materials are at the County's own risk. County Counsel cannot advise on, whether and to what extent, D.C. law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ARMC recommends approval of this Amendment, 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 a "One Patient - One Record" system for County healthcare needs.

On August 6, 2019 (Item No. 9), the Board approved agreement No. 19-557 with Epic Systems Corporation (Epic) in the not-to exceed amount of \$29,738,425 beginning August 6, 2019, with no termination date for the purchase, installation, and maintenance of a fully integrated Electronic Health Records system, as the result of a formal procurement process. On March 9,

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2021 (Item No. 3), the Board approved Amendment No. 1 to Agreement No. 19-557 with Epic increasing the estimated five-year not-to exceed amount by \$448,000, from \$29,738,425 to \$30,186,425, for additional implementation services and travel expenses related to the System with no change to the term beginning August 6, 2019, with no termination date. Currently, the Epic system is on track to “go-live” on February 12, 2022.

PROCUREMENT

This recommended amendment is 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 September 29, 2021; Purchasing Department (Ariel Gill, Buyer, 777-0722) on August 31, 2021; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on August 31, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on September 8, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on September 8, 2021.

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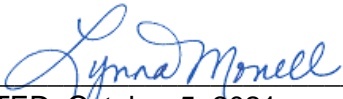
Record of Action of the Board of Supervisors
San Bernardino County

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: October 5, 2021



cc: ARMC- Gilbert w/agree
Contractor- C/O ARMC w/agree
File- BAI only
File- Confidential
LA 10/8/2021