



San Bernardino County

Legislation Text

File #: 5226, Agenda Item #: 11

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

December 7, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

End User License Agreement and Amendment to Agreement with CommuniCare Technology, Inc, dba Pulsara

RECOMMENDATION(S)

1. Approve Amendment No. 1 to Agreement No. 21-880 with CommuniCare Technology, Inc, dba Pulsara for equipment, software, and services for a communications system between Arrowhead Regional Medical Center, first responders and transport providers, extending the contract period by one year, for a total contract period of December 17, 2020 through December 31, 2022, at no additional cost.
2. Approve a non-financial End User License Agreement with CommuniCare Technology, Inc., dba Pulsara, including non-standard terms, to license the use of the software application referenced in Recommendation No. 1 for an indefinite period of time.

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

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

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

Pursue County Goals and Objectives by Working with Other Agencies and Stakeholders.

FINANCIAL IMPACT

Approval of the recommendation will not result in the use of Discretionary General Funding (Net County Cost). The amendment has no additional cost.

BACKGROUND INFORMATION

Approval of the amendment will allow Arrowhead Regional Medical Center (ARMC) to continue to work with CommuniCare Technology, Inc, dba Pulsara (Pulsara) for the Pulsara communications platform and fully implement a pilot project within San Bernardino County to link first responders and transport providers to the ARMC Emergency Department (ED).

On January 26, 2021 (Item No. 69), the Board of Supervisors (Board) approved the ratification of the Pulsara Business Associate Agreement approval and purchase quote signed by the Chief Executive Officer on December 18, 2020. Extensive work occurred between San Bernardino County (County) and the vendor to set up the Pulsara communications platform which became operational in late Spring of 2021. Operation of the platform was paused to evaluate project governance, various technical items and additional systems that can be integrated with Pulsara such as the current electronic Patient Care Record (ePCR) system used by

Inland Counties Emergency Medical Agency.

Once these items haven been brought to resolution, the Pulsara communications tool providing communication from ARMC to first responders and transport providers, will be restarted in early to mid-December 2021, with a full roll out of the pilot anticipated in January 2022. Approval of the amendment will extend the contract for an additional year allowing implementation of the pilot program and further review of the system and its benefits.

Pulsara is a single-source emergency medical Communications Platform-as-a-Service (CPaaS) meeting the U.S. Federal Government Cloud Smart NIST essential characteristics of:

- On-Demand service
- Broad network access
- Resource pooling
- Rapid Elasticity

As a single-source emergency medical communication system, the Pulsara Communications Platform-as-a-Service (CPaaS) includes the elements that meet the following requirements of the Federal Emergency Management Agency (FEMA) Approved Equipment List and Interagency Board for Emergency Preparedness (IAB) Standard Equipment List for Mission #04AP-10-EMCS:

- Aids in triage, treatment, and transport of victims by providing a framework for data capture and exchange.
- Using smartphone or tablet devices and Internet connectivity, these systems provide menu-based entry of critical patient information and interactive transmission of this data to hospital resources.
- Provides interactive video and telemedicine support to medical responders, as well as aid in the selection of transport destinations based upon patient requirements and destination facilities.
- Is Internet-based and requires network connectivity to run associated apps on phone or tablet.
- Includes 2-way video for communications, telemedicine, and selection of destination hospital based upon pre-loaded criteria.
- EMS agencies and destination hospitals will use compatible smart devices or browsers.
- Includes pre-loaded options for describing the patient types and symptoms and whether custom information can be loaded based upon local requirements.

Pulsara's End User License Agreement is Pulsara's standard commercial contract applicable to use of its software application (App), which includes terms that differ from the standard County contract and omits certain standard County contract terms. The non-standard and missing terms include the following:

1. Governing law is the State of Montana.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under Montana law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Montana law, which may result in fees that exceed the total contract amount.
2. Pulsara may modify the contract at any time without notice to the County and the County's continued use of the App after posting or delivery of the changes constitute the County's acceptance of the amended terms.
 - 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 the approval of the new terms by the Board. County Counsel cannot advise on whether and to what extent Montana law may affect the

enforceability of unilateral changes to the terms.

3. Pulsara may assign the contract without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Pulsara could assign the contract to a third party or business with which the County is legally prohibited from doing business due to issues of Federal debarment or suspension or conflict of interest, without the County's knowledge. County Counsel cannot advise on whether and to what extent Montana law may permit or restrict a party's right to assign without an express provision in the contract.
4. There is no provision in the contract addressing each party's responsibility for paying attorneys' fees.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, Montana 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 contract does not require Pulsara to indemnify the County, as required pursuant to County Policy 11-07, against any claims, including indemnification for claims arising from Pulsara's negligent or intentional acts and intellectual property infringement, and the County agrees to release Pulsara from all claims arising from any dispute with users of the Pulsara App.
 - County Policy requires that contractors indemnify the County, as appropriate. 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: If the County is sued for any claim, including intellectual property infringement based on its use of Pulsara's App, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. In addition, Pulsara requires the County to agree to a general release under California Civil Code §1542 for disputes with App users, which would include HIPAA violations. County Counsel cannot advise on whether and to what extent Montana law may allow the County to require Pulsara to defend or indemnify the County absent an express provision in the contract.
6. The County is required to defend, indemnify, and hold Pulsara harmless against all claims arising from the County's (1) provision of medical services and treatment of patient in connection with the County's use of the App; (2) breach of the County's representations, warranties, covenants or other agreements; (3) use of the App; (4) content provided to or transmitted using the App; and (5) breach of confidentiality.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Pulsara, 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 Pulsara without such limitations and the County would be responsible to defend and reimburse Pulsara for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Montana law may limit or expand this contract term.

7. The contract does not require Pulsara 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 Pulsara 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. Pulsara limits its total liability to the County for all claims and any loss related to the use of or inability to use the app to US\$5.00.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims would 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, Montana law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. The term of the contract is indefinite until terminated by either party.
 - 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 contract and the County is indefinitely bound to the terms and conditions of the contract until actively terminated by a party.
10. Venue is in the state and federal courts in Gallatin County and Yellowstone County, Montana.
 - 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 Gallatin County, Montana and Yellowstone County, Montana may result in additional expenses that exceed the amount of the contract.
11. Pulsara provides the software "AS IS" and "AS AVAILABLE" 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. County Counsel cannot advise on, whether and to what extent, Montana law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

ARMC recommends approval of the End User License Agreement, including the non-standard terms, as it is a unified communication platform that is anticipated to aid in shortening assessment and treatment times for critical stroke and trauma patients.

PROCUREMENT

The recommended amendment is the continuation of a COVID-19 procurement and ratification, as approved by the Board on December 18, 2020. County Purchasing concurs with the recommendation.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on November 23, 2021; Purchasing Department (Ariel Gill, Buyer, 777-0722) on November 10, 2021; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on November 10, 2021; Finance (Yael Verduzco,

Administrative Analyst, 387-5285) on November 29, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on November 29, 2021.