



San Bernardino County

Legislation Text

File #: 7923, Agenda Item #: 8

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

May 9, 2023

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreement with the American Burn Association for Software Licensing

RECOMMENDATION(S)

1. Approve a License Agreement with the American Burn Association, including non-standard terms, for access to the Burn Care Quality Platform full registry cloud-based software, in the annual amount of \$4,500 for the retroactive term effective January 1, 2023, and automatically renewing annually until terminated by either party.
2. Approve a Business Associate Agreement with the American Burn Association, including non-standard terms, for the retroactive period of January 1, 2023, and continuing for so long as the American Burn Association creates, uses, discloses, maintains, transmits or receives Personal Health Information from Arrowhead Regional Medical Center.

(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) as the cost of \$4,500 annually for software licensing use 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's (ARMC) 2022-23 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The License Agreement (Agreement) with the American Burn Association (ABA) will allow ARMC to access to the ABA Burn Care Quality Platform full registry cloud-based software. Patient data is entered directly into this registry, which collects the data and provides insight on burn care for patients. This platform provides reports designed to improve the quality and cost of burn care by collecting and exchanging information about burn injuries and outcomes. Reports may be provided to any provider in the organization that is affiliated and participating in approved research with a valid Institutional Review Board. The recommended Business Associate Agreement (BAA) with ABA will ensure the exchange of patient health information is protected. This item is retroactive to January 1, 2023, due to ARMC's use of the software for calendar year 2023. Although

the recommended Agreement is retroactively effective, no financial action will be taken until the Board of Supervisors (Board) has approved this item.

The ABA is a non-profit organization committed to promoting and supporting burn-related research, education, care, rehabilitation, and prevention. The ABA uses a multidisciplinary membership approach to enhance the ability to work toward common goals with other organizations on burn-related educational programs. This registry and the related reports assist in understanding processes that affect patient safety and quality of care, as well as advancing staffing effectiveness and patient safety efforts.

ABA invoices for services on a calendar year from January 1st through December 31st. ABA's annual fee for calendar year 2020 was \$2,500; payment for 2020 was made by credit card. For calendar year 2021, the annual fee increased from \$2,500 to \$3,500, requiring an agreement between ARMC and ABA for the services. A Purchase Order was established for payment of fees for calendar year 2021. Due to contract negotiations taking longer than expected, ABA services were not provided in calendar year 2022 so ARMC had no access to the platform.

This Agreement and BAA are being presented to the Board for approval at the earliest available meeting after completion of the required financial and legal reviews. Approval of this retroactive item will allow ARMC to continue to utilize the Burn Care Quality Analytics software.

The Agreement is the ABA'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 Illinois.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under Illinois state law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Illinois law, which may result in fees that exceed the total Agreement amount.
2. There is no provision in the Agreement 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, Illinois 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 Agreement.
3. The Agreement does not require the ABA to indemnify the County.
 - 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: The ABA is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from the ABA'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 the third-party software or

services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount. County Counsel cannot advise on whether and to what extent Illinois law may allow the County to require the ABA to defend or indemnify it absent an express provision in the Agreement.

4. The ABA disclaims all liability to the County, and in the event that a liability cannot be disclaimed, limits the maximum amount of liability to the annual participation fee paid to the ABA for the year in which the claim is made by the County.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. In addition, the County's liability under the Agreement is not similarly limited. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
5. The term of the Agreement is automatically renewing on an annual basis.
 - 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 Agreement and the County is indefinitely bound to the terms and conditions of the Agreement until the County gives notice of non-renewal no less than 30 days prior to the next renewal period or until the ABA terminates the Agreement upon written notice.
6. 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 allow the term to expire and not renew for a subsequent annual period. It cannot terminate the Agreement during the term. Any attempted termination by County without cause would result in payment liability for the full Agreement amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
7. There is no stated venue in the Agreement.
 - The County standard contract requires the venue for disputes be the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Contractor is located in Chicago, Illinois, which is in Cook County. Having no express venue in the Agreement means that Cook County, Illinois venue could be applied to this Agreement, which may result in additional expenses that exceed the amount of the Agreement.

The BAA is ABA's standard agreement, which includes terms that differ from the standard County contract and omits certain County standard terms. The non-standard and missing terms include the following:

1. The BAA does not require the ABA to meet the County's insurance requirements.
 - The County standard BAA requires the Contractor to provide appropriate liability insurance coverage to cover claims arising from the breach of the security, privacy, or confidentiality obligations under the Health Insurance Portability and Accountability Act (HIPAA) 45 C.F.R. Parts 160 and 164, Subparts A and E, in addition to any general and/or professional liability insurance coverage required under the Agreement.
 - Potential Impact: The BAA does not include County standard insurance requirements. This

means that the County has no assurance that the ABA will be financially responsible for claims that may arise under the BAA, which could result in expenses to the County that exceed the total Agreement amount.

ARMC recommends approval of the Agreement and BAA, including non-standard terms, to provide for the safety, health and social service needs of County residents by offering burn-related information and reports that assist in understanding processes that affect patient safety and quality of care.

PROCUREMENT

This is a noncompetitive procurement based on specialized credentials, as the ABA is the only vendor that offers this type of database, providing benchmarking performance against other local, similar sized, and types of facilities. ARMC has been procuring this burn care quality outcome registry since 2013. The Purchasing Department recognizes specialized credentials as an acceptable non-competitive justification and supports ARMC's participation in the ABA registry.

ABA staff have specialized knowledge, skill, and experience in burn rehabilitation and provide burn center verification to maintain quality by promoting patient safety, cost containment, regional education and outreach, injury prevention, innovation and research, and advocacy. ABA provides a mark of distinction for burn centers. The burn center verification is an indicator to accreditation organizations, government, insurances, and patients that the burn center provides high quality patient care to burn patients from the time of injury through rehabilitation.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on April 12, 2023; Purchasing (Ariel Gill, Buyer III, 777-0722) on April 12, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on April 14, 2023; ARMC Finance (Chen Wu, Finance Budget Officer, 580-3165) on April 17, 2023; Finance (Jenny Yang, Administrative Analyst, 387-4884) on April 20, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer 387-5423) on April 20, 2023.