



Edwin Lee  
Mayor

Barbara A. Garcia  
Director of Health

October 20, 2017

Angela Calvillo, Clerk of the Board  
Board of Supervisors  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco, CA 94102-4689

Dear Ms. Calvillo:

**A. Agreement and Associated Documents:** Attached please find the proposed resolution and associated documents for Board of Supervisor's (Board) approval, which authorizes the Director of Public Health (DPH) and the Director of the Office of Contract Administration/Purchaser to enter into an Agreement with Epic City Government, LLC (Epic) in the amount of \$167,384,597, including a DPH contingency amount of \$17,934,064, for the delivery of software, services, and hosting for an Electronic Health Records (EHR) system, for a ten-year term from the effective date.

**B. Non-Disclosure:** During contract negotiations, Epic identified portions of the Agreement that Epic asserts constitute, contain, or reveal valuable trade secrets or other information belonging to Epic that is exempt from disclosure under the California Public Records Act and Chapter 67 of the San Francisco Administrative Code, pursuant to which DPH requests that the Board lodge a redacted copy of the Agreement in the file available to the public and an unredacted copy of the Agreement in the Board's confidential file for review in its entirety by the Board and any advisors to the Board (Sunshine Agreement).

*The Sunshine Agreement does not require Board Approval and is effective as of the date executed. A copy of the Sunshine Agreement will accompany each form of Agreement.*

**C. Contract Terms for Approval:** The following terms of the Agreement are subject to Board approval:

1. **Anticipated Expenditures in Excess of \$10,000,000:** We are submitting this contract for approval under San Francisco Charter Section 9.118, because it includes anticipated expenditures in excess of Ten Million (\$10,000,000), and an anticipated term in excess of ten (10) years.

2. **Time to file suit:** In addition, in order to prevent delayed resolution of any dispute that may arise under the Agreement, Epic and DPH have agreed that DPH must commence any action in a court of law for any matter arising out of or relating to the Agreement within two years of the date DPH becomes aware of the cause of action. We are requesting approval of this two-year term, because is shorter than the four-year statute of limitations otherwise applicable to a breach of contract cause of action.

**D. Additional Non-Standard Contract Terms:** The following additional terms of the Agreement are made within the discretion of DPH and do not need Board Approval, but are non-standard. Accordingly, we wish to bring these to the Board's attention:

1. **Interest or Late Fees** – In order to ensure timely progress payments and to compensate Epic for delayed payments of uncontested amounts, the City has agreed to pay interest in the amount of .05%, if uncontested amounts are unpaid 3 months from invoice date.

No late fees accrue on unpaid contested amounts. Interest, if any becomes due, will be paid from the DPH contingency through a revision to the program budget.

2. **Graduated Payments** – Epic has agreed to accept graduated payments for software implementation. This will enable the City to retain final payment until after confirmation that the deliverables are satisfactory to the City.

3. **Insurance** – Concerned about the insurance market, Epic requested, and the Risk Manager approved, an insurance program calling for Epic to maintain \$30 million in Cyber and Tech Errors and Omissions, but allowing Epic to reduce that coverage to account for market changes. At no time may Epic provide less coverage than what can be procured for \$2,000,000 across its customer base. Epic must provide backup information in support of any change sufficient to demonstrate the commercial unreasonableness of procuring increased coverage.

*In order to ensure that DPH at all times has adequate coverage for a City data breach, whether related to Epic or not, DPH is currently working with the Risk Manager's Office for the procurement of DPH's own Cyber insurance policy.*

4. **Med Mal Indemnity** – Because of the complexity of the provision of medical services, the City has agreed to accept responsibility for all decisions of its medical professionals and for decisions related to software configuration and use. In this regard, the City has agreed to provide medical malpractice indemnity to Epic, unless Epic's negligence or willful misconduct with respect to a software error is more than 50% at fault and City personnel have operated the software correctly.

5. **Data Breach** – The Agreement is silent on data breach. This provides the City with the right to bring an action for damages against Epic, should a breach be deemed to be Epic's responsibility. The parties have agreed that the City and Epic will participate in a dispute resolution process at Epic before the City commences suit and that any suit must be brought within two years of the City's discovery of the breach.

6. **Cap** – Except for claims covered by an express indemnity provision, both parties' liability cap is limited to amounts paid during the first twenty-six months (up to \$44,323,076). After that liability under the software license liability is capped at the annual maintenance fees paid under the license. Liability for hosting is limited to hosting fees paid for the last 18 months.

7. **Termination** – Only City may terminate the Agreement for convenience or cause and Epic may not stop work during a dispute. Upon termination by the City for a failure in hosting, Epic will provide transition project management and technical services at no cost. Upon termination by the City for any reason, Epic will provide the City with a two-year termination transition period. Epic retains the right to terminate a single component of program property in the event that Epic is unable to satisfactorily resolve a related infringement claim. In that event, Epic may terminate solely that software component and must repay the City the associated license fees.

8. **Dispute Resolution Procedure** – The parties have agreed to conduct a dispute resolution session at Epic before filing suit. Lawsuits will be venued in San Francisco and subject to California law.

9. **Parent Guarantee** – Epic City Government, LLC, is a wholly owned subsidiary of Epic Systems Corporation. Epic Systems Corporation has agreed to provide a parent

guarantee for the entire agreement, ensuring the City that adequate resources will be available to make the City whole in the event of a contract dispute.

**E. Accompanying Documents:** The following is a list of accompanying documents:

1. **Resolution:** Resolution authorizing the Agreement;
2. **Contract:** EHR Agreement between Epic and DPH;
3. **Forms:** Form SFEC-126: Notification Of Contract Approval (Mayor and Board of Supervisors).

Please contact Jacquie Hale, Director of the DPH Office of Contract Management and Compliance, at 554-2609 if further information is needed.

Sincerely,



Barbara A. Garcia  
Director of Health

cc: Greg Wagner, Chief Financial Officer, DPH  
Michelle Ruggels, Director, DPH Business Office  
Jacquie Hale, DPH Office of Contract Management and Compliance

