

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

January 24, 2023

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreement With Cepheid for 4-Plex Test Kits and COVID-19 Only Test Kits

RECOMMENDATION(S)

Approve Sales **Agreement No. 23-26**, including non-standard terms, with Cepheid for COVID-19 test kits in the amount of \$952,300 for the retroactive contract term of January 1, 2023 through December 31, 2025.

(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 \$952,300 will be funded by State Medi-Cal, Federal Medicare, private insurances, and other department revenue. Funding sources may change in the future pending any legislative actively related to the repeal and/or replacement of the Affordable Care Act. Adequate appropriation and revenue are included in the Arrowhead Regional Medical Center (ARMC) 2022-23 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The recommended Sales Agreement (Agreement) will allow ARMC to purchase Cepheid's 4-Plex (4-Plex) test kits and XPRESS SARS-COV-2 (COVID-19 only) test kits, which are used by ARMC's Laboratory to provide clinicians rapid assessment of the presence of infection with COVID-19. Test results may be provided within 45 minutes. The 4-Plex test kit assesses the presence and differentiation of infection with COVID-19, Influenza (flu) A+B and Respiratory Syncytial Virus (RSV) to determine appropriate treatment and isolation status. The 4-Plex test is used during flu season as defined by the Centers for Disease Control and Prevention as October through March. The COVID-19 only test is used during non-flu season months to assess the presence of COVID-19 and determine appropriate treatment and isolation status, if required.

The tests detect viral DNA using Cepheid's proprietary technology to perform rapid testing and are the most sensitive, detecting very low levels of any virus present. This type of test can only be performed by licensed laboratory personnel, per regulatory requirements. This test differs from the COVID-19 antigen self-tests, which do not require any special training for the use or performance of the test. The antigen self-tests are less sensitive and not accurate for detecting low levels of the virus that appear early in COVID-19 infection.

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The 4-Plex test kits are \$680 per kit and COVID-19 only test kits are \$385 per kit for the first 12 months. The price of each kit may rise each year thereafter based on the lesser of 5% or the increase in the Producer Price Index. Each test kit contains 10 test cartridges and all the reagents needed to perform the tests listed. ARMC must purchase these test kits as they are the only kits compatible to the Cepheid COVID-19 testing equipment, which ARMC currently utilizes, and the test cartridges cannot be used on any other type of equipment.

The Agreement was scheduled to be presented to the Board of Supervisors (Board) at a prior meeting; however, Cepheid did not provide a signed Agreement until December 12, 2022. The Agreement is retroactively effective to January 1, 2023, to ensure that ARMC obtains the needed supply of 4-Plex test kits and COVID-19 only test kits for the term of the contract. ARMC ordered supply stock before December 31, 2022 to ensure there was adequate supplies available during the period prior to the Board approval date.

This item is being presented to the Board for approval at the earliest available meeting after completion of the required financial and legal reviews. Although the recommended Agreement is retroactively effective, no financial action will be taken until the Board has approved this item.

The Agreement is Cepheid's standard commercial sales agreement with terms negotiated by the parties that include the following non-standard contract terms or omit certain standard County terms:

1. The Agreement cannot be terminated for convenience.
 - The County standard contract permits the County to terminate the contract for any reason with 30 days written notice.
 - Potential Impact: The County is unable to terminate the Agreement without cause. Terminating the Agreement without cause would result in the County breaching the Agreement and would permit Cepheid to seek remedies against the County, including, but not limited to charging the County a termination fee equal to 50% of the amount the County would have paid if it had fully performed its purchase commitment obligations for the term of the Agreement.
2. Payment terms are Net 30 days.
 - County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. The Agreement requires payment within 30 days, though there is no interest rate associated with late payments in the Agreement.
3. Cepheid limits its liability for special, indirect, incident, consequential, or exemplary damages and except claims based on indemnification, gross negligence, willful misconduct or violations of law, Cepheid's aggregate liability is capped at 1.5 times the amount actually paid to Cepheid for the products that gave rise to the claim.
 - The County standard contract does not limit the vendor's liability for damages.
 - Potential Impact: In the event the County suffers any of the damages listed above, Cepheid may not have any responsibility to reimburse the County for such damages. Claims may exceed the liability cap, leaving the County financially liable for the excess.

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4. Cepheid agrees to indemnify the County for claims arising out of Cepheid's negligence, willful misconduct, or breach of applicable law, or any claim for personal injury or death resulting from a defective product.
 - The County's general indemnity provision requires the vendor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
 - Potential Impact: Cepheid's indemnity obligation is more limited compared to the standard County general indemnity obligation. If a claim arises that falls outside the scope of the indemnity provision in the Agreement, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount.

5. Venue is in Santa Clara County.
 - The County standard contract requires the venue for disputes be the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Santa Clara County, California may result in additional expenses that exceed the amount of the Agreement.

ARMC recommends approval of the Agreement, including the non-standard terms, as the test kits will provide for the safety, health and social service needs of County residents by providing rapid assessment of the presence of infection with COVID-19, flu A+B and RSV to determine appropriate treatment and isolation status for patients.

PROCUREMENT

The Purchasing Department supports this non-competitive procurement based on equipment compatibility as Cepheid's rapid result 4-Plex and COVID-19 only test kits are the only kits that can be used with ARMC's current equipment.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Deputy County Counsel, 387-5455) on December 13, 2022; Purchasing (Ariel Gill, Buyer, 777-0722) on November 21, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on December 1, 2022; ARMC Finance (Chen Wu, Finance Budget Officer, 580-3165) on December 29, 2022; Finance (Jenny Yang, Administrative Analyst, 387-4884) on January 4, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) January 4, 2023.

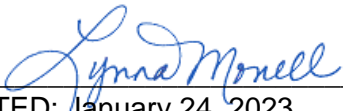
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: January 24, 2023



cc: ARMC- Gilbert w/agree
 Contractor- C/O ARMC w/agree
 File- w/agree
LA 01/24/2023