

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

June 28, 2022

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Master Agreement with Abbott Rapid Dx North America, LLC for Provision of COVID-19 Test Kits

RECOMMENDATION(S)

Approve a **Master Agreement No. 22-563** with Abbott Rapid Dx North America, LLC for purchase of ID NOW COVID-19 rapid test kits, in an amount not to exceed \$800,000, for a four-year period effective upon execution.

(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, with Abbott Rapid Dx North America, LLC (Abbott), will not result in the use of Discretionary General Funding (Net County Cost) as the not to exceed cost of \$800,000 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 are included in the Arrowhead Regional Medical Center (ARMC) 2021-22 recommended budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of the Master Agreement (Agreement) will allow ARMC to purchase ID NOW COVID-19 rapid test kits from Abbott. Abbott's ID NOW COVID-19 rapid test kits provide a portable, Polymerase Chain Reaction (PCR) test that can provide results in 15 minutes. Rapid testing provides the ability to screen patients for urgent surgeries or procedures, and provides faster clinical assessment for appropriate patient care. Having the option to offer such rapid tests to County residents will improve the efficiency of point-of-care testing at ARMC. Tests are ordered based on need and fulfilled based on vendor supplies. ARMC anticipates utilizing approximately 2,900 tests annually.

The Agreement with Abbott is based on its standard commercial agreement that has terms that differ from the standard County contract terms as follows:

1. The County cannot terminate the Agreement without cause, unless it gives at least 90 days written notice of non-renewal before the end of each contract year.

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- The County's standard contract permits either party to terminate the contract for convenience with 30 days written notice.
 - Potential Impact: The County is locked into this Agreement for four years and may not terminate the Agreement for convenience, unless the County gives at least 90 days written notice of non-renewal before the end of each contract year.
2. Payment terms are Net 30 days and past due balances are subject to a service charge of 1.5% per month or the highest rate allowed by law if lower than 1.5% per month.
- The 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. Failing to pay within 30 days will result in a material breach of the contract, which would allow Abbott to terminate the agreement and seek other legal remedies, including charging the County interest at a rate of 1.5% per month or the highest rate permitted by New York law (if such amount is lower than 1.5%).
3. Disclaimer of any warranty of non-infringement and no indemnity for infringement claims.
- There is no warranty requirement in the County standard contract. 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 disclaimer of a warranty of non-infringement, coupled with the lack of indemnity for intellectual property infringement means that, should the County be sued for intellectual property infringement based on its use of the Abbott's products, the County will be liable for the costs of defense and damages. While infringement claims against end users are rare, they have been known to occur, and the County could be responsible for defense costs and damages, which could exceed the total contract amount.
4. Abbott is not required to contractually indemnify the County under any circumstance.
- 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.
 - Potential Impact: Without a contractual indemnification obligation, Abbott may have no duty to defend or indemnify the County for any claims that may arise, which may render the County financially liable for such claims, regardless of the fault of Abbott in causing the claim. County Counsel cannot advise on whether, under New York law, Abbott would have an obligation to defend or indemnify the County absent an express indemnification provision in the Agreement.
5. The Agreement does not include any of the standard County insurance requirements.
- The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: The Agreement does not include any of the County standard insurance requirements. This means that the County has no assurance that Abbott

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will be financially responsible for claims that may arise from the County's use of Abbott's products, which could result in expenses to the County that exceed the total contract amount.

6. Abbott limits its liability to the amount paid by the County for the products giving rise to the claim, and disclaims any liability for punitive, consequential, incidental, indirect or special damages.
 - The standard County contract contains no limitations of liability.
 - Potential Impact: Abbott caps its liability to the County at the amounts paid by the County for the products giving rise to the claim, and limits liability for special, incidental, punitive, or consequential damages. Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.

7. Abbott may assign the Agreement to an affiliate without notice to the County and without the County's approval.
 - The County must approve any assignment of the contract.
 - Potential Impact: Abbott may assign the Agreement to an affiliate without notice to the County and without the County's approval. This could allow the Agreement to be assigned to a business with which the County is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge.

8. The Agreement 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 Agreement addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, New York law may affect a party's requirement to pay the prevailing party in a legal action where no specific provision is provided in the contract.

9. Governing law is New York, and venue is in the federal courts of the Northern District of Illinois.
 - The County standard contract requires California governing law and venue to be in the San Bernardino County Superior Court, San Bernardino District.
 - Potential Impact: The Agreement will be interpreted under New York law and any lawsuit arising under the Agreement must be filed in the federal courts of the Northern District of Illinois. Any questions, issues or claims arising under this Agreement 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. Additionally, any lawsuit that is filed will require the County to retain attorney licensed to practice before the federal court in the Northern District of Illinois.

ARMC recommends approval of the Agreement, including the non-standard terms, to provide for the health and safety of County residents by ensuring the hospital has access to necessary COVID-19 test kits.

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PROCUREMENT

The procurement is non-competitive based on functional specifications, as Abbott provides the only PCR rapid result COVID-19 test kits capable of yielding results in 15 minutes. County Purchasing supports this non-competitive procurement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Deputy County Counsel, 387-5455) on May 18, 2022; Purchasing Department (Ariel Gill, Buyer, 777-0722) on June 2, 2022; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on June 7, 2022; Finance (Jenny Yang, Administrative Analyst, 387-4884) on June 9, 2022; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-5423) on June 9, 2022.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Janice Rutherford Seconded: Col. Paul Cook (Ret.)
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Joe Baca, Jr.
Absent: Curt Hagman

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 28, 2022



cc: ARMC - Gilbert w/agree
Contractor - C/O ARMC w/agree
File - w/agree

CCM 07/14/2022