

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

August 20, 2024

FROM

ANDREW GOLDFRACH, ARMC Chief Executive Officer, Arrowhead Regional Medical Center

SUBJECT

Agreements for BACTEC FX Equipment, Consumables, Accessories, and Software with Becton, Dickinson and Company

RECOMMENDATION(S)

1. Approve **Agreement No. 24-754** with Becton, Dickinson and Company, including non-standard terms, for the BD BACTEC FX Blood Culture System, accessories, consumables, software, service, and training in the amount not-to-exceed \$1,300,000, for the period of August 20, 2024 through August 19, 2029.
2. Approve non-financial End User License **Agreement No. 24-753**, including non-standard terms, with Cylance Inc. for the use of the CylancePROTECT® anti-malware end point security software, for the period commencing on the date of first use of the software and continuing until terminated.

(Presenter: Andrew Goldfrach, ARMC Chief Executive Officer, 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 \$1,300,000 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 have been included in the Arrowhead Regional Medical Center (ARMC) 2024-25 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The Agreement with the Becton, Dickinson and Company (BD) for a Bactec Blood Culture System (System), the most widely used system in the United States, to analyze patient specimens for the presence of bloodstream bacterial and fungal pathogens will expedite treatment and management of infections. Blood cultures are essential in the diagnosis and treatment of the causative agents of bloodstream infections and sepsis. Bacterial and fungal sepsis constitutes one of the most serious infectious diseases and the expeditious detection and identification of blood borne bacterial and fungal pathogens are critical for selection and administration of appropriate antimicrobial medications to successfully treat the patient's infection, with shorter patient length of stay and better outcome and survival.

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This Agreement with BD is based on a reagent rental concept, which enables ARMC to borrow and use the System at no cost as long as ARMC meets the minimum annual commitment for the purchase of reagents. The cost of the System, accessories, service, software, and training are absorbed in the minimum consumable cost as ARMC consumption exceeds the minimum requirements. The Cylance Inc. (Cylance) software will minimize risk and impact to ARMC and ensure data has been backed up and stored according to ARMC's individual processes and disaster recovery procedures. The software is required to operate the System.

The Agreement with BD is its standard commercial agreement, negotiated by the parties, which includes terms that differ from the standard County contract as follows:

1. BD limits its indemnity obligations to claims arising from its negligence/willful misconduct, any defects in the equipment or products (collectively, Goods) provided, intellectual property infringement of its Goods, and breach of its representations under the Agreement.
 - The County's standard general 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: Cylance's indemnity obligation is more limited compared to the standard County general indemnity obligation. In the event a claim arises that falls outside the scope of Cylance's limited indemnity obligation, the County could be financially responsible for the defense of the claim and any resulting judgment/settlement.
2. BD is not required to indemnify the County for intellectual property infringement claims which arise (a) from the use of the Goods with products not furnished or approved by BD, (b) modification of the Goods, except as authorized by BD, or (c) use of the Goods other than in accordance with the documentation provided relating to the Goods.
 - The County's standard intellectual property infringement indemnity provision does not include any carveouts of the contractor's responsibility to indemnify the County.
 - Potential Impact: In the event an intellectual property infringement claim is filed against the County and one of the carveout situations apply, the County could be solely responsible for the cost of the defense of the claim and any resulting judgment/settlement.
3. 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. Failing to pay within 30 days may result in a material breach of the Agreement, which would allow BD to terminate the Agreement and pursue any other legally available remedies.
4. Except for claims based on indemnity, gross negligence, violations of law, and willful misconduct, BD limits its liability to two times the amount of all fees paid and will be paid by the County under the Agreement during the 12-month period immediately preceding the event giving rise to the claim.
 - 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.

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5. There is no termination for convenience without penalty.
 - 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: Upon any termination by the County without cause, the County is required to pay an amount equal to the purchase price under the Agreement for all unpurchased consumables remaining on the Agreement.
6. BD may assign the Agreement without the County's consent to an affiliate or a successor that acquires substantially all of BD's assets, so long as the assignee is not legally prohibited from doing business with the County.
 - The County standard contract requires the contractor to obtain the County's consent prior to assigning the contract.
 - Potential Impact: BD will be able to assign the Agreement without the County's consent under certain circumstances.
7. Venue is in the state or federal courts of California.
 - Under the standard County contract, venue is in the San Bernardino County Superior Court, San Bernardino District.
 - Potential Impact: A lawsuit may potentially be filed anywhere in California, which may result in expenses to the County that would not have been incurred if the lawsuit was brought in San Bernardino County.

The End User License Agreement (EULA) with Cylance is its standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The EULA is a non-negotiable clickwrap agreement accepted when the software is first used. The non-standard and missing terms include the following:

1. Cylance may assign the EULA without notice to the County and without the County's approval.
 - The County standard contract requires the contractor to obtain the County's consent prior to assigning the contract.
 - Potential Impact: Cylance could assign the EULA to a third party or business with which the County is legally prohibited from doing business due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge. Should this occur, the County could be out of compliance with the law until it becomes aware of the assignment and terminates the EULA.
2. The County is required to indemnify Cylance from any claims that arise that relate to any of the County's files or the County's use of the Cylance software, except for any intellectual property infringement claims for which Cylance owes a duty of indemnity to the County.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Cylance, 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

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brought against Cylance without such limitations and the County could be responsible to defend and reimburse Cylance for costs, expenses, and damages.

3. Cylance disclaims liability for damages from all claims except for claims based on indemnification, fraud, misrepresentation, or gross negligence.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Cylance will have no liability on any claims that the County may have except for claims based on indemnification, fraud, misrepresentation, or gross negligence.
4. The EULA does not require Cylance to meet the County's insurance standards as required pursuant to County Policies 11-05, 11-07 and 11-07SP.
 - County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that Cylance will be financially responsible for claims that may arise under the EULA, which could result in expenses to the County.
5. The EULA requires all disputes to be resolved through binding arbitration in Orange County.
 - The County standard contract does not require arbitration.
 - Potential Impact: Binding arbitration decisions are not appealable. In addition, disputes that might otherwise be settled in small claims court would incur arbitration costs that could exceed the costs of a small claims action, and the Agreement amount.

ARMC recommends approval of the Agreements, including the non-standard terms, for ARMC to continue to provide clinically relevant testing services for the diagnosis and treatment of patients with blood stream infection and septicemia.

PROCUREMENT

Purchasing supports this non-competitive procurement based on system compatibility, as the laboratory workplace is already utilizing this equipment, products, and software system.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Supervising Deputy County Counsel, 387-5455) on July 18, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on July 19, 2024; Purchasing (Veronica Pedace, Buyer III, 387-2464) on July 19, 2024; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on July 26, 2024; Finance (Jenny Yang, Administrative Analyst, 387-4884) on July 30, 2024; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on August 5, 2024.

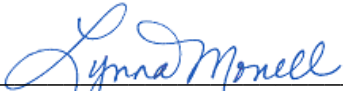
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Record of Action of the Board of Supervisors
San Bernardino County

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: August 20, 2024



cc: ARMC - Goldfrach w/agree
Contractor - c/o ARMC w/agree
File - w/agree
MBA 08/20/2024