

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

October 27, 2020

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Amendment to Contract with Roche Diagnostics Corporation for Laboratory Equipment, Supplies, Reagents, Tests and Related Services

RECOMMENDATION(S)

1. Approve **Amendment No. 1** to **Contract No. 20-1060** (4400005710) with Roche Diagnostics Corporation, for laboratory equipment, supplies, reagents, tests, software and related services, increasing the total contract amount by \$61,260 from \$7,179,234 to \$7,240,494, with no changes to the contract period of January 23, 2018, through January 22, 2023.
2. Approve a non-financial End User License **Agreement No. 20-1061** with Data Innovations LLC, for use of software used in conjunction with Roche laboratory equipment.
3. Approve a non-financial End User License and Services **Agreement No. 20-1062** with InterSystems Corporation, for use of software used in conjunction with Roche laboratory equipment, for the period of October 27, 2020 through October 26, 2050.
(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 the recommendation will not result in the use of Discretionary General Funding (Net County Cost) as the additional cost of \$61,260 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) 2020-21 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of Recommendation No. 1 will allow for the expansion of capacity to the existing Roche Chemistry Data Innovations Middleware to interface with other laboratory analyzer systems, eliminating the need to purchase and install new middleware solution in order to interface with ARMC's new Electronic Health Record System, EPIC. Approvals of Recommendations No. 2 and 3 will allow for the use of software in conjunction with Roche laboratory equipment

Laboratory equipment offers clinical chemistry, immunochemistry (antibodies and antigens in the immune system) and other blood and tissue testing. Laboratory equipment, supplies,

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reagents (chemicals used for testing), tests and related service used by the ARMC laboratory provide for the safety, health and social service needs of county residents by ensuring accurate, efficient laboratory testing for use in the timely diagnosis and treatment of patients ultimately improving patient outcomes.

The Amendment modifies the terms of the IT Solutions Terms and Conditions for the Middleware. The Master Terms are silent as to governing law. Roche is located in the State of Indiana. Therefore, it is possible that Indiana law could be applied as the governing law of the contract. The Amendment, referenced in Recommendation No. 1, includes the following non-standard terms:

1. The license grant is perpetual.
 - 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 contract and the County is indefinitely bound to the terms and conditions of the contract until terminated.
2. Payment terms are net 30 date of invoice.
 - 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 Roche to stop shipment or terminate the contract and seek other legal remedies.
3. Roche's total liability for all damages arising out of the use or non-use of the software is limited to 3 times the value of the fees paid under the Amendment.
 - The County standard contract does not include a limitation of liability.
 - **Potential Impact:** Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. County Counsel cannot advise on whether, and to what extent, Indiana law may limit or expand the liability cap to the extent prohibited by applicable law.

The Roche IT Solutions Terms and Conditions for the Middleware references and incorporates the End User License Agreement (EULA) of a third party, Data Innovations LLC. The Data Innovations EULA, referenced in Recommendation No. 2, includes the following non-standard terms:

1. Governing law is the State of Vermont.
 - The County standard contract requires California governing law.
 - **Potential Impact:** The EULA will be interpreted under Vermont law. Any questions, issues or claims arising under the EULA will require the County to hire outside counsel competent to advise on Vermont law, which may result in fees that exceed the total contract amount.
2. Data Innovations can assign the EULA without notice and without County's consent.
 - The County must approve any assignment of the contract.
 - **Potential Impact:** Data Innovations may 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.

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3. The EULA is silent on 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: County Counsel cannot advise on, whether and to what extent, Vermont 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 contract.

4. The EULA requires the parties to attempt to mediate before filing a claim in court.
 - The County standard contract does not require mediation prior to bringing a lawsuit against the other party.
 - Potential Impact: Disputes that might otherwise be settled in small claims court would incur mediation costs that could exceed the costs of a small claims action and the cost of the contract.

5. The EULA does not require Data Innovations to indemnify the County, including for intellectual property infringement claims.
 - 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. The County standard contract 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: If any claim is made against the County, including intellectual property infringement claims based on its use of Data Innovations' software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Vermont law may allow the County to require Data Innovations to defend or indemnify it absent an express provision in the contract.

6. The EULA requires the County to indemnify, defend and hold Data Innovations harmless from claims asserted against Data Innovations, arising out of bodily injury (including death) or damage to property or persons which may be sustained by any third party that occurs in connection with County's operation of County business, to the extent that such injury or damage is caused in whole or in part by County's willful misconduct, grossly negligent acts, errors, or omissions.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Data Innovations, 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 brought against Data Innovations without such limitations and the County would be responsible to defend and reimburse Data Innovations for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Vermont law may limit or expand this contract term.

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7. The EULA does not require Data Innovations to meet the County's insurance standards.
 - 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 County has no assurance that Data Innovations will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.

8. The EULA caps Data Innovations' aggregate liability under or in connection with this Agreement for any and all causes whatsoever, at the fees paid for the Software in the six (6) months immediately preceding the breach for which the damages are claimed, and Data Innovations has no liability for any claims or damages of third parties.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, Vermont law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

9. The term of the EULA is indefinite.
 - 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 contract and the County is indefinitely bound to the terms and conditions of the contract.

10. The EULA does not provide for termination by County for cause or for convenience.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (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 has no explicit contractual right to terminate the EULA even if Data Innovations is in breach of the contract. County Counsel cannot advise on, whether and to what extent, Vermont law may permit the County to terminate the contract absent an express provision in the contract.

11. In the event mediation fails to resolve a dispute, then any party who engaged in good faith in the mediation process may pursue its rights under this Agreement in any court of competent jurisdiction in the State of Vermont.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Vermont may result in additional expenses that exceed the amount of the contract.

The Data Innovations EULA references and incorporates additional third party terms as Schedule A, InterSystems End User License & Services Agreement (EULSA). The InterSystems EULSA, referenced in Recommendation No. 3, includes the following non-standard terms:

1. Governing law is the State of Massachusetts.
 - The County standard contract requires California governing law.

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- Potential Impact: The EULSA will be interpreted under Massachusetts law. Any questions, issues or claims arising under the EULSA will require the County to hire outside counsel competent to advise on Massachusetts law, which may result in fees that exceed the total contract amount.
2. The EULSA is silent on assignment.
 - The County must approve any assignment of the contract.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, Massachusetts law may prevent a party from assigning a contract without notice or without the other party's consent absent an express provision in the contract.
 3. The EULSA is silent on 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: County Counsel cannot advise on, whether and to what extent, Massachusetts 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 contract.
 4. The EULSA does not require InterSystems to indemnify the County, including for intellectual property infringement claims.
 - 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. The County standard contract 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: If any claim is made against the County, including intellectual property infringement claims based on its use of InterSystems' software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Massachusetts law may allow the County to require InterSystems to defend or indemnify it absent an express provision in the contract.
 5. The EULSA does not require InterSystems to meet the County's insurance standards.
 - 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 County has no assurance that InterSystems will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.
 6. The EULSA caps InterSystems' liability to the license or services fees received by ISC for the specific software or services on which the liability arose.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on, whether

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and to what extent, Massachusetts law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

7. The term of the EULSA is thirty years.
 - County Policy 11-06SP does not permit contracts of greater than five years unless approved by the Board.
 - Potential Impact: The County is bound to the EULSA for 30 years.
8. The EULSA does not provide for termination for convenience.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (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 terminate the EULSA for InterSystems' uncured breach.
9. Venue under the EULSA is in Boston, Massachusetts.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Massachusetts may result in additional expenses that exceed the amount of the contract.

PROCUREMENT

On May 23, 2017 (Item No. 22), the Board of Supervisors (Board) authorized the Purchasing Agent to issue Master Blanket Purchase Order (PO) No. 151856 with Roche Diagnostics Corporation (Roche) in the amount of \$3,575,803, for the three-year period of July 1, 2017, through June 30, 2020. This PO is now identified as Contract No. 4400000779. On January 23, 2018 (Item No. 17), the Board authorized the Purchasing Agent to terminate Contract No. 4400000779 with Roche.

On January 23, 2018 (Item No. 17), the Board authorized the Purchasing Agent to issue Contract No. 4400005710 with Roche for laboratory equipment, supplies, reagents, tests and related services in the amount of \$7,179,234 for the five-year period of January 23, 2018, through January 22, 2023. The issuance of a new contract with Roche allowed ARMC to replace old instruments, receive a discounted charge for each test and increase capacity for infectious disease testing

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, County Counsel, 387-5455) on September 11, 2020; Purchasing Department (Michelle Churchill, Supervising Buyer, 387-2070) on September 11, 2020; ARMC Finance (Chen Wu, Finance Budget Officer, 580-3165) on September 8, 2020; Finance (Amanda Trussell, Principal Administrative Analyst, 387-5423) on October 5, 2020; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on October 9, 2020.

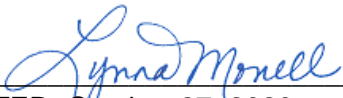
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Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Robert A. Lovingood Seconded: Josie Gonzales
Ayes: Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, Josie Gonzales

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: October 27, 2020



cc: ARMC - Gilbert w/agrees
Contractor - C/O ARMC w/agree
File - w/agree
CCM 11/3/2020