

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

May 4, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

On-Site Inspection Service Agreement and Maintenance and Service Plan with Alcon Vision, LLC., for Ophthalmologic Equipment Including the Constellation LXT, Centurion Vision System, and Pure Point Laser

RECOMMENDATION(S)

1. Approve On-Site Inspection Service **Agreement No. 21-310** with Alcon Vision, LLC., for initial inspections of onsite ophthalmologic equipment including the Constellation LXT, Centurion Vision System, and Pure Point Laser in the amount of \$5,580.
2. Approve **(County Contract No. 21-311)** Maintenance and Service Plan with Alcon Vision, LLC., for ongoing maintenance, services, and parts, for ophthalmologic equipment including the Constellation LXT, Centurion Vision System, and Pure Point Laser, in the amount of \$77,940, from May 6, 2021 through May 5, 2024.

(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 \$83,520 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 these recommendations will provide ARMC with an initial inspection of equipment used in ARMC's Perioperative Services and provide an ongoing maintenance plan that includes service and parts for equipment. Specifically, this agreement provides for the maintenance of the Constellation LXT, Centurion Vision System, and Pure Point Laser machines. These machines are used by physicians when performing eye related procedures such as cataract and retina surgeries. The original manufacturer's warranty period has expired, and thus require an on-site inspection prior to beginning the ongoing maintenance and service plan. Together, these agreements will ensure that the equipment is in good operating condition and can continue to provide for the health, safety and social service needs of County residents.

On-Site Inspection Service Agreement and Maintenance and Service Plan with Alcon Vision, LLC., for Ophthalmologic Equipment Including the Constellation LXT, Centurion Vision System, and Pure Point Laser May 4, 2021

The Alcon Vision, LLC. (Alcon) terms of service are its standard terms and conditions, which differ from the standard County contract terms. The non-standard terms include the following:

Payment

Payment is due within 30 days of the date of invoice and late payment is subject to a service charge of the lesser of 1.5% per month or the maximum rate permitted under Texas law.

- County standard processing time is 60 days with no late payment penalty.
- 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 Alcon to terminate the contract and seek other legal remedies, including charging the County interest at the rate of the lesser of 1.5% per month or the maximum rate permitted under Texas law. County Counsel cannot advise on the maximum rate permitted under Texas law.

Termination

Either party may terminate the services with at least 60 days written notice, and each cancellation will result in a cancellation fee.

- The County standard contract provides that either party may terminate the contract with 30 days notice without any cancellation penalties.
- Potential Impact: If the County terminates the agreement prior to the expiration of the agreement, it may be contractually required to pay a cancellation fee.

Insurance

Alcon is required to maintain general liability insurance, but is not required to meet any of the County standard insurance requirements.

- The County's standard contract requires contractors to carry certain insurance coverage as determined by the County's Department of Risk Management, and for contractors to add the County as an insured in their policies and to waive the right to subrogation.
- Potential Impact: The agreement does not include County standard insurance requirements. This means that the County has no assurance of an insurance company that Alcon will be financially responsible for claims that may arise from the services provided, which could result in expenses in the County that exceed the total contract amount. No waiver of subrogation may allow Alcon's insurers, if any, to bring suit against the County. Not being added as an insured to Alcon's insurance policies mean that the County cannot directly turn to Alcon's insurers in pursuing a claim.

Assignment

Alcon is permitted to assign or subcontract its obligations under the terms.

- The County's standard contract requires contractors to obtain the consent of the County prior to assigning a contract.
- Potential Impact: Alcon may assign its obligations to a third-party without the County's consent. This could allow the work 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.

Attorney's Fees

The terms do not address attorney's fees and costs.

- The County standard contract requires each party to bear its own costs and attorney's fees, regardless of who is the prevailing party.

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- Potential Impact: There is no provision in the terms addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, Texas law may affect a party's requirement to pay the prevailing party's attorney's fees and costs in a legal action where no specific provision is provided in the contract.

Limitations of Liability

Alcon caps its liability to the County at the total amounts paid or payable during the 12 months preceding the date such liability was incurred.

- The standard County contract contains no limitations of liability.
- Potential Impact: Alcon caps its liability as discussed above. Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.

Limitations on Damages

Alcon disclaims any liability for lost profits, injury to goodwill, or any other special, incidental, or consequential damages.

- The standard County contract contains no limitations on damages.
- Potential Impact: In the event the County suffers any of the damages discussed above, the County may not be able to recover such damages against Alcon.

Governing Law and Venue

The terms are governed by Texas law, and is silent on the venue of any lawsuit that may arise.

- The standard County contract requires California governing law and any action to be brought in the San Bernardino County Superior Court.
- Potential Impact: The terms will be interpreted under Texas law. Any questions, issues or claims arising under the terms would require the County to hire outside counsel licensed and competent to advise on Texas law, which may result in fees that exceed the total contract amount. Having no express venue in the terms means that a lawsuit could be brought in Texas, which may also result in additional expenses that exceed the amount of the contract.

Indemnification

The terms do not require Alcon to indemnify the County.

- The standard County contract requires contractors to defend and indemnify the County from third-party claims arising out of the acts, errors or omissions of any person.
- Potential Impact: Alcon is not contractually required to defend or indemnify the County from any claims, including from claims arising out of Alcon's negligent or intentional acts. If the County is sued for any claim based on Alcon's conduct, 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 Texas law may allow the County to require Alcon to defend or indemnify the County absent an express provision in the terms.

ARMC recommends approval of the Inspection Service Agreement and Service Plan with Alcon as approval will enable ARMC to cost-effectively maintain and repair ophthalmologic equipment that is used to treat patients in San Bernardino County.

PROCUREMENT

**On-Site Inspection Service Agreement and Maintenance and Service Plan with Alcon Vision, LLC., for Ophthalmologic Equipment Including the Constellation LXT, Centurion Vision System, and Pure Point Laser
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This is a non-competitive procurement as the current equipment must be inspected and serviced by the original manufacturer, Alcon Vision, LLC.

ARMC recommends approval of these items as regular maintenance of ophthalmologic equipment ensures safe and efficient service to patients, providing for the health and social services needs of County residents.

Purchasing approves of the non-competitive nature of this procurement based on “specialized credentials/training/expertise.”

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Deputy County Counsel, 387-5455) on April 14, 2021; Purchasing Department (Ariel Gill, Buyer III, 777-0722) on April 14, 2021; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on April 12, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on April 15, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on April 18, 2021.

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

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Col. Paul Cook (Ret.)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: May 4, 2021



cc: ARMC- Gilbert w/agree
Contractor- C/O ARMC w/agree
File- w/agree
LA 05/7/2021