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Contract Number

13.40

SAP Number

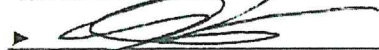
## Arrowhead Regional Medical Center

Department Contract Representative	William L. Gilbert
Telephone Number	(909) 580-6150
Contractor	Cepheid
Contractor Representative	Sean Burgess
Telephone Number	(858) 926-9407
Contract Term	January 1, 2023 through December 31, 2025
Original Contract Amount	NTE \$952,300
Amendment Amount	
Total Contract Amount	NTE \$952,300
Cost Center	7522

**Briefly describe the general nature of the contract:** Sales Agreement with Cepheid for COVID-19 test kits in the amount not-to-exceed \$952,300 for the retroactive contract term of January 1, 2023 through December 31, 2025.

**FOR COUNTY USE ONLY**

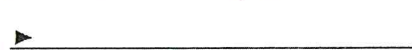
Approved as to Legal Form



Charles Phan, Deputy County Counsel

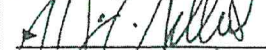
Date 12/13/2022

Reviewed for Contract Compliance



Date

Reviewed/Approved by Department



William L. Gilbert, Director

Date 1/11/23



**CEPHEID SALES AGREEMENT**  
**Cover Page**

<b><u>Customer:</u></b> San Bernardino County on behalf of Arrowhead Regional Medical Center 400 North Pepper Colton, CA 92324-1801 Ms. Billie Burch Phone: (909) 580-0062 Email: burchb@armc.sbcounty.gov	<b><u>GPO; IDN; Authorized Distributor (if not listed, N/A):</u></b> GPO: Vizient IDN: <N/A>  Distributor: <N/A>
<b><u>Agreement:</u></b> Effective Date: 1/1/2023 Initial Term: 36 months after Effective Date Sign by Date: 1/31/2023	<b><u>Addenda (if not listed, N/A):</u></b> Members Addendum <N/A>
<b><u>For Cepheid Internal Use</u></b> Type: EZ MYRA	

**I. Supply Commitment:**

500 Respiratory Tests (average per month)

**II. Purchase Commitment (for Reagent Products):**

\$284,100.00 Annual Spend

**III. Reagent Products:**

**Reagent Products Table**

Part Number	Reagent Product Description	# Tests/ Kit	Price/ Test	Price/ Kit
XPRSARS-COV2-10	EUA Xpert Xpress SARS-CoV-2	10	\$38.50	\$385.00
XP3SARS-COV2-10	EUA Xpert Xpress CoV-2 plus	10	\$38.50	\$385.00
XPCOV2/FLU/RSV-10	EUA Xpert Xpress SARS-CoV-2/Flu/RSV	10	\$68.00	\$680.00
XP3COV/FLU/RSV-10	EUA SARS-CoV-2/Flu/RSV plus	10	\$68.00	\$680.00

*[remainder of page intentionally left blank]*

## **Cepheid General Provisions**

This agreement is entered into by Customer and Cepheid as of the Effective Date and consists of the Cover Page, these Cepheid General Provisions, the Standard Terms (defined below), and any exhibits and Addenda attached hereto and/or incorporated herein by reference (collectively, this "Agreement"). Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Cover Page.

1. **Supply Commitment.** Notwithstanding anything to the contrary in the Standard Terms, Cepheid agrees to provide Customer with the Supply Commitment. The Supply Commitment will be measured and tracked on a quarterly basis, subject to an initial grace period of one month from the Effective Date. If Cepheid does not meet the Supply Commitment during any quarter, Cepheid will reduce Customer's Purchase Commitment for that year in a proportional amount. Such reduction shall be Customer's exclusive remedy if Cepheid does not meet the Supply Commitment. For purposes of this Agreement, "Respiratory Tests" means any Cepheid reagent test that detects Flu A, Flu B, RSV and/or SARS-CoV-2 and made available for purchase by Customer pursuant to this Agreement.
2. **Purchase Commitment.** Customer agrees to purchase the annual Purchase Commitment. The Purchase Commitment will be measured and tracked quarterly, subject to an initial grace period from the Effective Date through the first full calendar quarter. After the grace period, if Customer is not in compliance with the Purchase Commitment after any quarter, Customer shall make up the shortfall during the following quarter. If Customer fails to do so, Cepheid may invoice Customer for a fee equal to the shortfall for the preceding quarter. If, after the end of a year, Customer is not in compliance with the Purchase Commitment (taking into account all Reagent Product purchases and any shortfall fees previously paid by Customer during the relevant period), then Cepheid shall contact Customer to place an order for the shortfall. If Customer does not place such order within 30 days thereafter, Cepheid may terminate this Agreement for Customer's Default (defined below).
3. **Standard Terms.** This Agreement is subject to Cepheid's standard terms and conditions, attached hereto as Exhibit A.
4. **Orders and Prices.** All orders for Reagent Products shall be subject to the terms of this Agreement, and prices for Reagent Products shall be as set forth in the Cover Page ("Prices"), except to the extent either of the following applies to a specific order for a Reagent Product:
  - i. **Reagent Products Available Under GPO and/or IDN Agreement:** Customer acknowledges that one or more Reagent Products may not be available for purchase pursuant to a purchasing agreement between Cepheid and any GPO and/or IDN identified on the Cover Page ("Base Agreement"). However, if a specific Reagent Product is available for purchase pursuant to a Base Agreement: (a) the order for the Reagent Product shall be subject to the applicable terms of the Base Agreement; (b) such terms shall control as to the order; and (c) the Price for the Reagent Product is also based on Customer's eligible pricing under the Base Agreement and is subject to change based on eligibility requirements therein. Customer shall promptly inform Cepheid if a Base Agreement becomes inapplicable to Customer's orders for any Reagent Product for any reason, including if Customer or the applicable IDN ceases to participate under the Base Agreement. If a Base Agreement becomes inapplicable to Customer's orders for any Reagent Product for any reason, including if the Base Agreement expires or terminates, then: (I) if another agreement with the same GPO or IDN applies to Customer's orders (as applicable, "New Base Agreement"), the orders shall be subject to the terms of the New Base Agreement, except for pricing, which shall remain as set forth in this Agreement; or (II) if no New Base Agreement applies to Customer's orders, the orders shall be subject to the Standard Terms, and the parties shall promptly negotiate applicable Prices in good faith.
  - ii. **Reagent Products Purchased from a Cepheid-Authorized Distributor (not Available under GPO Agreement):** If a specific Reagent Product is available for purchase from any Distributor identified on the Cover Page: (a) the order for that Reagent Product shall be subject to the terms, including pricing, agreed upon between Customer and Distributor; and (b) such terms shall control as to the order. Customer acknowledges that Prices (if included in this Agreement) apply only to Reagent Products purchased directly from Cepheid. If Cepheid's distribution agreement with the Distributor becomes inapplicable to Customer's orders for any Reagent Product for any reason, including if such agreement expires or terminates, then: (I) Customer shall submit orders to Cepheid directly; (II) the orders shall be subject to the Standard terms; and (III) Cepheid shall honor Customer's then-current pricing with the Distributor for the remainder of the then-current Term.
5. **Price Changes.** After the first 12 months of this Agreement, Cepheid may increase Prices (if Prices are included in this Agreement) annually by the lesser of: (a) 5%; or (b) the percentage increase in the Producer Price Index – in vitro diagnostics substance manufacturing – NAICS code 325413, as published by the U.S. Department of Labor, Bureau of Labor Statistics or any successor agency that assumes responsibility for preparation of the index, over the 12-month period preceding the last day of the most recently ended month prior to the notice of Price increase. Cepheid shall provide Customer with at least 30 days' prior written notice (email acceptable) of Price increases.
6. **Product Changes.** Cepheid reserves the right to suspend or discontinue the manufacturing or sale of any product, and in no event shall such actions constitute a breach of this Agreement by Cepheid. If Cepheid suspends the sale of, or discontinues a Reagent Product, Cepheid shall use reasonable efforts to offer Customer a substitute product of substantially similar functionality as the affected Reagent Product, if available. Cepheid may elect to offer a substitute product through a sales quote. If Customer accepts the substitute



product, Customer shall submit an order pursuant to the sales quote. Upon Cepheid's acceptance of Customer's initial order for the substitute product, the product and corresponding price shall be deemed added to this Agreement.

7. **Term.** The term of this Agreement shall commence on the Effective Date, and unless earlier terminated in accordance with its terms or extended by mutual written agreement of the parties, shall remain in effect for the Initial Term (the "Term").

8. **Default and Termination.** Customer shall be deemed to be in default under this Agreement if: (i) Customer becomes insolvent, ceases to do business, or indicates that it will cease to do business during the Term; (ii) bankruptcy or receivership proceedings are instituted by or against Customer; or (iii) Customer materially breaches this Agreement and fails to cure such breach within 30 days after Cepheid provides written notice of the breach to Customer (each a "Default"). Upon the occurrence of a Default by Customer, Cepheid may terminate this Agreement upon written notice to Customer. If Cepheid terminates this Agreement due to Customer's Default, Cepheid may invoice Customer for a termination fee equal to 50% of the amount that Customer would have paid if Customer had fully performed its obligations to purchase the Purchase Commitment from the Effective Date through the then-current expiration date (the "Termination Fee"). The parties agree that it would be difficult to determine Cepheid's damages in the event of Customer's Default and that the Termination Fee is a reasonable estimate of such damages and shall not be deemed, a penalty or forfeiture.

9. **Confidential Information.** Each party shall keep confidential the terms of this Agreement (other than the Standard Terms), unless disclosure is required by law. Neither party shall disclose such information to any third party or use such information for any reason other than in connection with the performance of this Agreement; provided, however, that Cepheid may disclose such information to its affiliates for internal reporting purposes and Customer may disclose such information where required by law.

10. **Counterparts and Electronic Signatures.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including PDF or any electronic signature complying with the U.S. federal ESIGN Act of 2000, California's Uniform Electronic Transactions Act (Cal. Civ. Code § 1633.1, et seq.) (or other applicable law) or other transmission method, and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

11. **Prior Agreements.** This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior written and oral agreements, representations, and understandings between the parties concerning such subject matter, including the letter agreement between the parties, with an effective date of October 6, 2020.

12. **Sign by Date.** This Agreement shall not become effective unless Customer signs and returns an executed copy of this Agreement, along with any other documents specifically required by this Agreement (e.g., Customer's purchase order), to Cepheid on or before the "Sign by Date" identified in the Cover Page.

13. **Debarment and Suspension.** Cepheid hereby represents and warrants that it is not and at no time has been convicted of any criminal offense related to health care nor has been debarred, excluded, or otherwise ineligible for participation in any federal or state government health care program, including Medicare and Medicaid. Further, Cepheid represents and warrants that no proceedings or investigations are currently pending or to Cepheid's knowledge threatened by any federal or state agency seeking to exclude Cepheid from such programs or to sanction Cepheid for any violation of any rule or regulation of such programs.

14. **Insurance.** Cepheid shall comply with the insurance requirements set forth on Exhibit B which are incorporated herein by reference.

15. **Indemnification.** Cepheid agrees to indemnify, defend (with counsel reasonably approved by Customer) and hold harmless the Customer and its authorized officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability costs or expenses incurred by the Customer on account of any third-party claim (collectively, "Claims") to the extent arising out of: (i) Cepheid's negligence, willful misconduct, or breach of applicable law; or (ii) any Claims for personal injury or death resulting from a defective product, except where such indemnification is prohibited by law. Except as expressly provided in this Section, this indemnification provision shall apply regardless of the existence or degree of fault of indemnitees. Cepheid's indemnification obligation applies to the Customer's "active" as well as "passive" negligence but does not apply to the extent of any indemnitee's negligence, breach of this Agreement, or "willful misconduct" within the meaning of California Civil Code section 2782.

IN WITNESS WHEREOF, an authorized representative of each party has executed this Agreement.

		JAN 24 2023	
		<del>JAN 10 2023</del>	
CUSTOMER:	By <u>Dawn M. Rowe</u>	Dawn M. Rowe	Chair, Board of Supervisors
	Name	Title	Date
CEPHEID:	By <u>Gyamfuaa Edionseri</u>	Gyamfuaa Edionseri	Sr. Director, Contracts & Pricing
	Name	Title	Date
			Dec 9, 2022





**EXHIBIT A**  
**CEPHEID TERMS AND CONDITIONS**

1. **Customer Contract.** If customer ("Customer") has a written agreement with Cepheid that incorporates these Cepheid Terms and Conditions (these "Terms") by reference ("Customer Contract"), these Terms shall apply to and form part of such Customer Contract, and all references in these Terms to the "Agreement" shall refer to these Terms and such Customer Contract, collectively. If Customer does not have a Customer Contract, then: (i) these Terms, as posted on Cepheid's website at the time Customer submits its purchase order or electronic order (collectively, "Order"), shall apply to Customer's Order; (ii) upon Cepheid's acceptance of Customer's purchase order or Customer's submission of an electronic order, Customer's Order, together with these Terms and the applicable Cepheid Sales Quote ("Quote"), shall constitute a contract between the Customer and Cepheid, which shall exclusively govern Customer's Order (collectively, the "Agreement"); and (iii) by submitting its Order, Customer expressly agrees to the terms and conditions of the Agreement.
2. **Orders.** All Orders are subject to acceptance by Cepheid, which acceptance shall be limited to the terms and conditions of the Quote and Agreement, as applicable. Unless otherwise agreed to in a writing signed by both parties, the following shall be void, shall have no binding effect, and are expressly rejected by Cepheid: (i) any shipment or delivery dates in Customer's Order; (ii) any other terms or conditions in Customer's Order that are in addition to or inconsistent with the Agreement; and (iii) any other agreement, document, terms, or conditions concerning the subject matter of the Agreement. Notwithstanding anything to the contrary in these Terms, Customer shall be responsible for ensuring that all Orders are submitted in conformance with any applicable Quote and the Agreement.
3. **Products.** As used in these Terms, "Reagent Products" means Cepheid reagent and ancillary consumable products, "Instruments" means Cepheid instruments and instrument accessories, and "Products" means Reagent Products and Instruments, collectively. Customer may purchase Products that have been cleared or approved by the United States Food and Drug Administration ("FDA") and/or Products that have not, but: (i) have received Emergency Use Authorization from FDA permitting particular distribution and use ("EUA"); or (ii) are distributed by Cepheid for purposes of "research use only" ("RUO") or "investigational use only" ("IUO"). Customer acknowledges that: (a) requirements under Applicable Law (defined below) for EUA, RUO, and IUO Products may differ, or be exempt from, those applicable to medical devices cleared or approved by FDA; (b) Products labeled "research use only" or "investigational use only" are not being sold by Cepheid for Customer's use for clinical diagnostic purposes; and (c) subsequent versions of EUA, RUO, or IUO Products (including those with similar or modified intended use claims or performance characteristics) that may, in the future, be authorized, cleared, or approved by FDA may be offered by Cepheid on different terms, including at different prices.
4. **Price.** The sales prices for the Products shall be the prices stated in the Quote or Customer Contract, as applicable. Any "price per test" in the Agreement may be rounded. Cepheid may, in its reasonable discretion, provide initial Instrument training to Customer. The following shall be added to the invoice: (i) the reasonable cost of packing, crating, and shipping, which shall be prepaid; and (ii) applicable taxes, including any sales, use, or other local taxes required to be collected on the sale. If Customer is eligible for a tax exemption, Customer must maintain a valid tax exemption certificate on file with Cepheid.
5. **Delivery, Title, and Risk of Loss.** Products shall be packed in Cepheid's standard shipping packages and shipped by method and carrier to be selected by Cepheid, unless otherwise agreed upon by Cepheid in writing. Cepheid shall use reasonable efforts to effect shipment of Products on or before quoted, estimated, or requested dates, but makes no representations, warranties, or guarantees as to shipment or delivery dates. Cepheid may make deliveries in installments, and each installment shall be deemed a separate sale, for which a separate invoice shall be rendered by Cepheid. Deliveries shall be made F.O.B. Destination. Title and risk of loss with respect to Products purchased by Customer from Cepheid, except software, shall pass from Cepheid to Customer upon delivery to Customer.
6. **Supply.** Except as otherwise agreed to by Cepheid in the Customer Contract, Cepheid makes no guarantees or representations concerning the availability of the Products at any time and reserves the right, in its sole discretion, to: (i) reject or cancel any Order; (ii) apportion among its various customers the Products then available for delivery; (iii) determine shipment and delivery dates, which may be before or after any shipment or delivery dates included in Customer's Order; and (iv) offer Customer alternate quantities of Products or substitute products of substantially similar functionality as the Products ordered, which offer Customer may reject in Customer's sole discretion. In the event of any of the foregoing, Cepheid shall promptly notify Customer in writing (email acceptable). Customer acknowledges and agrees that in no event shall any of the foregoing constitute a breach of any obligation to Customer by Cepheid.
7. **Acceptance of Products.** Customer shall inspect all Products within thirty (30) days of receipt thereof. Any Instrument that is defective may be rejected by Customer, provided: (i) it is (or has been) a standard product offered by Cepheid; and (ii) it has not been used, abused, or damaged by Customer or Customer's agents. Any Reagent Product shipped by Cepheid in damaged packaging, or with damage to the Reagent Product's container, in each case that compromises the integrity of the Reagent Product, may be returned to Cepheid at Cepheid's cost. Any Product shipped by Cepheid in error shall be purchased by Customer (unless Cepheid informs Customer that it does not agree to sell such Product to Customer) or returned to Cepheid unused, in its original packaging, and in its original condition at Cepheid's cost. To reject or return a Product described in this section, Customer must notify Cepheid in writing of the reason for the rejection or return within thirty (30) days of receipt of the Product. If Cepheid determines in its reasonable discretion that the Product may be rejected or returned for the reasons set forth in this section, Customer shall obtain a Return Material Authorization number and promptly return the Product to Cepheid, freight collect. Except with respect to Products shipped in error, Cepheid shall promptly repair or replace the Product with conforming Product or return the purchase price of the Product (which return may be in the form of a credit). Any Products not properly and timely rejected and/or returned in accordance with this section, including Products shipped in error, shall be deemed accepted by Customer, and Customer shall be invoiced accordingly. Except as expressly set forth in this section, all sales are final, and Products are not returnable or refundable.
8. **Payment Terms.** Payment terms are net thirty (30) days from date on Cepheid's invoice to Customer. Customer's obligation to pay for Products is not conditioned on Customer's inspection of the Products.
9. **Customer's Financial Condition.** Cepheid's obligations under the Agreement are subject to Cepheid's approval at all times of Customer's financial condition. If the financial condition of Customer at any time becomes unsatisfactory to Cepheid or if Customer fails to make any payment when due, Cepheid may: (i) defer or decline to provide any Product to Customer; and/or (ii) revoke any open account credit of Customer.
10. **Own Use.** Customer shall use Products solely for its own use and shall not sell or redistribute, or permit the sale or redistribution of, Products to any third party, except as approved in writing in advance by an authorized representative of Cepheid.
11. **Limited Warranty.** Cepheid warrants that the GeneXpert® instruments: (i) shall be free from defects in material and workmanship for a period of one year after shipment; (ii) conform to Cepheid's published specifications for the GeneXpert instruments; and (iii) are free of liens and encumbrances when shipped. Cepheid does not warrant any defects in any GeneXpert instruments caused by: (a) improper use, installation, removal, or testing; (b) Customer's failure to provide a suitable operating environment for the GeneXpert instruments; (c) use of the GeneXpert instruments for purposes other than that for which they were designed; (d) unauthorized attachments; (e) unusual physical or electrical stress; (f) modifications or repairs performed by anyone other than Cepheid or a Cepheid authorized service provider; or (g) any other abuse, misuse, or neglect of the GeneXpert instruments. It is Customer's responsibility to determine, and Customer shall assume the risk for the suitability of Products for Customer's use and distribution and that such use and distribution is in compliance with all applicable laws, rules, regulations, regulatory guidance, and industry codes, including, without limitation, the Social Security Act, state and federal fraud and abuse laws, and export control laws and regulations (collectively, "Applicable Law"), the Products' labeling, inserts, and manuals, and other Product-related information and materials published by Cepheid or any regulatory authority. This warranty extends to Customer only, and not to Customer's customers or any other third party. Except as expressly set forth in these Terms, Products are sold "AS IS." THERE ARE NO WARRANTIES AS TO PRODUCTS WHICH EXTEND BEYOND THE FACE HEREOF. CEPHEID DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, REGARDING PRODUCTS, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. CUSTOMER'S EXCLUSIVE REMEDY UNDER THIS WARRANTY IS LIMITED TO REPAIR OR REPLACEMENT OF THE INSTRUMENT. In the event of



any conflict

between the terms of this warranty in the Agreement, including the limitations of liability set forth in the Agreement, and those in any other document, the terms of the warranty in the Agreement shall control.

12. **LIMITATION OF LIABILITY.** IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR EXEMPLARY LOSS OR DAMAGE (INCLUDING, WITHOUT LIMITATION, LOSS OF USE, DATA, PROFITS, OR GOODWILL) ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT, WHETHER ARISING IN CONTRACT, TORT (INCLUDING ACTIVE, PASSIVE, OR IMPUTED NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE. THE FOREGOING LIMITATION APPLIES EVEN IF THE PARTY WAS ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE OR ANY REMEDY HAS FAILED OF ITS ESSENTIAL PURPOSE. EXCEPT FOR CLAIMS BASED ON INDEMNIFICATION, GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR VIOLATIONS OF LAW, IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY TO THE OTHER PARTY ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT EXCEED ONE AND HALF (1.5) TIMES THE AMOUNT ACTUALLY PAID TO CEPHEID BY CUSTOMER FOR THE PRODUCTS THAT ARE THE SUBJECT OF OR GAVE RISE TO THE CLAIM.

13. **Patents.** Cepheid shall settle or defend any suit or proceeding brought against Customer if and to the extent the suit or proceeding is based on a claim that any Cepheid Products as sold directly infringe any issued United States patent, copyright, trademark, or trade secret. Cepheid shall pay all damages and costs finally awarded against Customer on account of any actual infringement. Customer shall: (i) within ten days after receipt by Customer of a communication, notice, or other action relating to an alleged infringement, inform Cepheid in writing of the event and furnish to Cepheid a copy of any communication; and (ii) give Cepheid all authority (including the right to exclusive control of the defense of any suit or proceeding), information and assistance necessary to settle or defend the suit or proceeding, provided that Cepheid may not settle the claim or suit absent the written consent of Customer unless such settlement (a) includes a release of all claims pending against Customer, (b) contains no admission of liability or wrongdoing by Customer, and (c) imposes no obligations upon Customer other than an obligation to stop using the products that are the subject of the claim. Customer's failure to timely provide or delay in providing such notice will relieve Cepheid of its obligations only if and to the extent such delay or failure materially prejudices Cepheid's ability to defend such lawsuit or claim. Cepheid shall not be bound in any manner by any settlement made without its prior express written consent. In the event Cepheid Products are held to constitute infringement and their use is enjoined, Cepheid may, at its option: (a) obtain for Customer the right to continue using the Cepheid Products; (b) modify the Cepheid Products so that they become non-infringing; or (c) remove the Cepheid Products and grant Customer a credit. Cepheid has no obligations under this section if the alleged infringement arises out of: (1) Cepheid's compliance with Customer's specifications; (2) Customer's addition to or modification of a Cepheid Product; or (3) Customer's use of a Cepheid Product with products provided by parties other than Cepheid. Cepheid's obligations under this section do not apply to any alleged infringement occurring after Customer has received notice of the alleged infringement unless Cepheid subsequently gives Customer express written consent for the continuing alleged infringement. Cepheid shall not be liable for any incidental or consequential damages arising out of a patent infringement. The foregoing states the sole and exclusive liability of Cepheid with respect to patent infringement and is in lieu of any and all other warranties, expressed or implied, in regard thereto.

14. **Disclosure Requirements.** The parties intend and believe the Agreement, and any discounts in price, rebates, and other price reductions (collectively, "Discounts") provided hereunder, comply with the federal Anti-Kickback Statute at 42 U.S.C. § 1320a-7b(b) and discount safe harbor at 42 C.F.R. § 1001.952(h). Each party will maintain all documents concerning the Discounts and provide such documents and other related information upon request by any state or federal agency. Customer acknowledges that Cepheid may supply Instruments and other Products and/or services identified in the Agreement as part of Customer's purchase of Products under the Agreement. Customer agrees to fully and accurately report all Discounts when required and as appropriately allocated among equipment, other products and/or services, as applicable. Upon Customer's request, Cepheid will provide Customer with further information regarding the Discounts and the allocation of Customer's purchase price for products and services, as applicable.

15. **Compliance with Applicable Law.** Each party represents and warrants to the other party that it shall perform its obligations under the Agreement, and the activities contemplated thereunder, including any use, or distribution of the Products, in compliance with Applicable Law, the Products' labeling, inserts, and manuals, and other Product-related information and materials published by any regulatory authority. Each party agrees to defend, indemnify, and hold harmless the other party from and against all losses, liabilities, and expenses (including reasonable attorneys' fees and costs) to the extent arising from any breach of the foregoing.

16. **Errors.** Prior to the Customer Contract being fully executed, any errors in or with such Customer Contract shall be subject to correction by Cepheid.

17. **Force Majeure.** Neither party shall be liable, nor be deemed to have defaulted under or breached the Agreement, for any failure or delay in fulfilling or performing any obligation under the Agreement when such failure or delay arises or results from an event or circumstance beyond the reasonable control of the party and without its fault or negligence, including, without limitation, the following: (i) acts of God, (ii) flood, fire, earthquakes, pandemics, or epidemics; (iii) shortages of supplies, infrastructure, or transportation; (iv) law, rule, regulation, or action by any governmental authority; (v) national, regional, or global emergency; or (vi) labor stoppages or slowdowns or other industrial disturbances.

18. **Governing Law, Venue, and Attorney's Fees.** The Agreement shall be governed and construed in accordance with the laws of the State of California, without regard to conflict of laws principles. Any dispute or claim arising out of or related to the Agreement shall be brought in the Santa Clara County Superior Court, and each party hereby submits to the exclusive jurisdiction of such courts. If any legal action is instituted to enforce any party's rights hereunder, each party shall bear its own costs and attorney fees, regardless of who is the prevailing party. The foregoing, however, shall not apply to those costs and attorney fees directly arising from a third-party legal action against a party hereto and payable as an indemnification obligation.

19. **Assignment.** Neither party may transfer or assign the Agreement or any of its rights, duties, or obligations under the Agreement, without the prior written consent of the other party, which consent shall not be unreasonably withheld.

20. **Miscellaneous.** The parties hereto are independent contractors. The Agreement: (i) constitutes the final, complete, and exclusive agreement of the parties concerning the subject matter of the Agreement; (ii) supersedes all prior written and oral agreements, representations, and understandings between Cepheid and Customer concerning such subject matter; (iii) supersedes all terms and conditions set forth in an Order, except as expressly set forth in these Terms; and (iv) except as otherwise provided in the Customer Contract, may be modified only by a writing signed by the parties. Each party represents to the other party that in entering the Agreement, it is not relying upon any representation, agreement, warranty, or statement, other than those expressly set forth in the Agreement. Any right or obligation of the parties in the Agreement which, by its express terms or nature and context is intended to survive termination or expiration of the Agreement, will so survive. Expiration or termination of the Agreement shall not affect any right or obligation of a party which accrued prior to such expiration or termination. No right or remedy referred to in the Agreement is intended to or shall be exclusive, but each shall be cumulative and in addition to any other right or remedy referred to in the Agreement or otherwise available at law or in equity. No provision of the Agreement shall be deemed waived unless such waiver is in writing and signed by an authorized representative of the party against whom it is sought to be enforced. No delay or failure to exercise or enforce any right or provision of the Agreement shall be considered a waiver thereof or of any right thereafter to exercise and enforce that or any other right or provision. If any provision of the Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions shall not be affected thereby, and the parties shall use reasonable efforts to substitute a provision that best effectuates the intent of the parties with respect to such invalid or unenforceable provision.

## **EXHIBIT B**

### **INSURANCE REQUIREMENTS**

Cepheid agrees to provide insurance set forth in accordance with the requirements herein for the term of the Agreement. If Cepheid uses existing coverage to comply with these requirements and that coverage does not meet the specified requirements, Cepheid agrees to amend, supplement or endorse the existing coverage to do so.

1. Without in anyway affecting any indemnity obligations provided and in addition thereto, Cepheid shall secure and maintain throughout the contract term the following types of insurance with limits as shown:

- a. Workers' Compensation/Employer's Liability – A program of Workers' Compensation insurance or a state-approved, self-insurance program in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employer's Liability with \$250,000 limits covering all persons including volunteers providing services on behalf of Cepheid and all risks to such persons under this contract. If Cepheid has no employees, it may certify or warrant to Customer that it does not currently have any employees or individuals who are defined as "employees" under the Labor Code and the requirement for Workers' Compensation coverage will be waived by Customer's Director of Risk Management. With respect to contractors that are non-profit corporations organized under California or Federal law, volunteers for such entities are required to be covered by Workers' Compensation insurance.
- b. Commercial/General Liability Insurance – Cepheid shall carry General Liability Insurance covering all operations performed by or on behalf of Cepheid providing coverage for bodily injury and property damage with a combined single limit of not less than one million dollars (\$1,000,000), per occurrence. The policy coverage shall include:
  - i. Premises operations and mobile equipment.
  - ii. Products and completed operations.
  - iii. Broad form property damage (including completed operations).
  - iv. Explosion, collapse and underground hazards.
  - v. Personal injury.
  - vi. Contractual liability.
  - vii. \$2,000,000 general aggregate limit.
- c. Automobile Liability Insurance – Primary insurance coverage shall be written on ISO Business Auto coverage form for all owned, hired and non-owned automobiles or symbol 1 (any auto). The policy shall have a combined single limit of not less than one million dollars (\$1,000,000) for bodily injury and property damage, per occurrence. If Cepheid is transporting one or more non-employee passengers in performance of contract services, the automobile liability policy shall have a combined single limit of two million dollars (\$2,000,000) for bodily injury and property damage per occurrence. If Cepheid owns no autos, a non-owned auto endorsement to the General Liability policy described above is acceptable.
- d. Umbrella Liability Insurance – An umbrella (over primary) or excess policy may be used to comply with limits or other primary coverage requirements. When used, the umbrella policy shall apply to bodily injury/property damage, personal injury/advertising injury and shall include a "dropdown" provision providing primary coverage for any liability not covered by the primary policy. The coverage shall also apply to automobile liability.
- e. Professional Liability – Professional Liability Insurance with limits of not less than one million (\$1,000,000) per claim and two million (\$2,000,000) aggregate limits  

or

Errors and Omissions Liability Insurance – Errors and Omissions Liability Insurance with limits of not less than one million (\$1,000,000) and two million (\$2,000,000) aggregate limits

If insurance coverage is provided on a "claims made" policy, the "retroactive date" shall be shown and must be before the date of the start of the contract work. The claims made insurance shall be maintained or "tail" coverage provided for a minimum of two (2) years after contract completion.

2. **Additional Insured.** All policies, except for Worker's Compensation, Errors and Omissions and Professional Liability policies shall contain additional endorsements naming Customer and its officers, employees, agents and volunteers as additional named insured with respect to liabilities arising out of the performance of services hereunder. The additional insured endorsements shall not limit the scope of coverage for Customer to vicarious liability but shall allow coverage for Customer to the full extent provided by the policy. Such additional insured coverage shall be at least as broad as Additional Insured (Form B) endorsement form ISO, CG 2010.11 85.
3. **Waiver of Subrogation Rights.** Cepheid shall require the carriers of required coverages to waive all rights of subrogation against Customer, its officers, employees, agents, volunteers, contractors and subcontractors. All general or auto liability insurance coverage provided shall not prohibit Cepheid and Cepheid's employees or agents from waiving the right of subrogation prior to a loss or claim. Cepheid hereby waives all rights of subrogation against Customer.
4. **Policies Primary and Non-Contributory.** All policies, except Professional Liability and Errors & Omissions, required herein are to be primary and non-contributory with any insurance or self-insurance programs carried or administered by Customer.



5. **Severability of Interests.** Cepheid agrees to ensure that coverage provided to meet these requirements is applicable separately to each insured and there will be no cross liability exclusions that preclude coverage for suits between Cepheid and Customer or between Customer and any other insured or additional insured under the policy.
6. **Proof of Coverage.** Cepheid shall furnish Certificates of Insurance to Arrowhead Regional Medical Center evidencing the insurance coverage at the time the Contract is executed, additional endorsements, as required shall be provided prior to the commencement of performance of services hereunder, which certificates shall provide that such insurance shall not be terminated or expire without thirty (30) days written notice to Arrowhead Regional Medical Center, and Cepheid shall maintain such insurance from the time Cepheid commences performance of services hereunder until the completion of such services. Within fifteen (15) days of the commencement of this contract, Cepheid shall furnish a copy of the Declaration page for all applicable policies and will provide complete certified copies of the policies and endorsements immediately upon request.
7. **Acceptability of Insurance Carrier.** Unless otherwise approved by Risk Management, insurance shall be written by insurers authorized to do business in the State of California and with a minimum "Best" Insurance Guide rating of "A- VII".
8. **Deductibles and Self-Insured Retention.** Any and all self-insured retentions in excess of \$10,000 shall be declared to and approved by Customer's Department of Risk Management.
9. **Failure to Procure Coverage.** In the event that any policy of insurance required under this contract does not comply with the requirements, is not procured, or is canceled and not replaced, Customer has the right but not the obligation or duty to cancel the contract or obtain insurance if it deems necessary and any premiums paid by Customer will be promptly reimbursed by Cepheid or Customer payments to Cepheid will be reduced to pay for Customer purchased insurance.
10. **Insurance Review.** Insurance requirements are subject to periodic review by Customer. The Customer's Director of Risk Management or designee is authorized, but not required, to reduce, waive or suspend any insurance requirements whenever Risk Management determines that any of the required insurance is not available, is unreasonably priced, or is not needed to protect the interests of Customer. In addition, if the Department of Risk Management determines that heretofore unreasonably priced or unavailable types of insurance coverage or coverage limits become reasonably priced or available, the Director of Risk Management or designee is authorized, but not required, to change the above insurance requirements to require additional types of insurance coverage or higher coverage limits, provided that any such change is reasonable in light of past claims against Customer, inflation, or any other item reasonably related to Customer's risk. Any change requiring additional types of insurance coverage or higher coverage limits must be made by amendment to this contract. Cepheid agrees to execute any such amendment within thirty (30) days of receipt. Any failure, actual or alleged, on the part of Customer to monitor or enforce compliance with any of the insurance and indemnification requirements will not be deemed as a waiver of any rights on the part of Customer.