

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

June 23, 2020

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreements with Stryker Sales Corporation for Lease and Service of Endoscopy Video Equipment

RECOMMENDATION(S)

1. Approve **Agreement No. 20-461** with Stryker Flex Financial, a division of Stryker Sales Corporation for the lease of endoscopy video equipment in the amount of \$983,825 plus applicable taxes, for a five-year period, effective upon delivery of equipment.
2. Approve Service **Agreement No. 20-462** with Stryker Sales Corporation for service of endoscopy video equipment in the amount of \$563,790, for a five-year period, effective from July 1, 2020 through June 30, 2025.

(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.
Operate in a Fiscally-Responsible and Business-Like Manner.**

FINANCIAL IMPACT

Approval of the Lease Agreement with Stryker Flex Financial (Stryker Financial) and Service Agreement with Stryker Sales Corporation (Stryker) will not result in the use of Discretionary General Funding (Net County Cost). The associated cost of \$1,547,615 plus applicable taxes (estimated to be \$76,247) for lease and service of the endoscopy video equipment are 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 the lease agreement with Stryker Financial will allow ARMC to use the latest technology in endoscopy video equipment in order for surgeons to continue to perform minimally invasive surgical procedures, which provides for the health and social services needs of County residents. These agreements provide for periodic updates and replacement of the video equipment without an increase in cost.

The approval of the service agreement with Stryker provides for the labor, parts and materials to maintain the endoscopy video equipment devices in good operating order, consistent with the manufacturer's requirements. The service agreement also provides for ongoing timely repairs

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by providing loaner equipment while repairs are completed; and includes 24-hour technical support, onsite training, utilization review, and support to assist with reduction of repair costs which allows ARMC to operate in a fiscally-responsible and business-like manner.

The lease and service agreements are Stryker's standard commercial agreements, negotiated by the County, which contain terms that differ from the standard County contract. The non-standard terms and their potential impact are as follows:

Lease Agreement

Warranty Limitation

Stryker Financial is leasing the equipment "as-is" and makes no express or implied warranties, including warranties of merchantability or fitness for a particular purpose, other than those expressed in the Agreement.

- The County standard contract provides that the vendor fully warrants its services and products.
- Potential Impact: The liability of Stryker Financial is limited by this disclaimer of warranty, and precludes any claims by the County against Stryker Financial based on an implied warranty theory of liability.

Attorney's Fees

If the County defaults on the Agreement, the County will have to pay all expenses, including reasonable attorney's fees, legal costs, cost of storage, and shipping incurred by Stryker Financial in the enforcement of its rights.

- The County standard contract has no such similar language that imposes these financial obligations on the County.
- Potential Impact: The County may be liable for attorney's fees and other expenses incurred by Stryker Financial in the event the County breaches the Agreement. ARMC staff who are responsible for the administration of this contract will need to be made aware of the terms so as to avoid default situations.

Limitations of Damages

Under the Agreement, the parties waive all rights to any indirect, punitive, special or consequential damages in connection with the Agreement or the leased equipment.

- The County's standard contract does not include a limitation of liability provision.
- Potential Impact: By agreeing to this provision, the County and Stryker Financial agree to forgo certain types of damages that they might otherwise be able to recover in a lawsuit against one another.

Termination

There is no termination for convenience without penalty clause in the Agreement, but if the County provides Stryker Financial with 60 days written notice, the County may terminate the Agreement if it does not appropriate funds sufficient to make all payments due during a fiscal year and it does not otherwise have funds available to lawfully make payments under the terms of the Agreement.

- The County's standard contract gives the County the right to terminate the Agreement, for any reason, with 30 days written notice.
- Potential Impact: The County may not terminate the Agreement for any reason during the term of the Agreement unless certain criteria, as

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discussed above, are met. Failing to make payments for any other reason would constitute a breach of the Agreement, entitling Stryker to all remedies available under the law and under the Agreement (including penalties and attorney's fees).

Penalties for Default

If the County defaults on the Agreement, Stryker Financial may (1) declare the entire balance of unpaid payments for the term immediately due, (2) sue the County for all amounts due and the fair market value of the equipment with certain reductions, and (3) charge interest on all monies due at the rate of 1% per month from the date of default until paid.

- The County's standard contract contains no such express remedies available to a vendor if the County defaults on the Agreement.
- Potential Impact: If the County defaults on the Agreement, in addition to what Stryker Financial may be able to recover under California law, Stryker Financial would be able to recover additional interest and other contractual penalties as set forth above.

Taxes

The County agrees to pay all taxes, includes sales, use and personal property, in connection with ownership and use of the equipment.

- The County's standard contract provides that the County is exempt from Federal excise taxes and no payment shall be made for any personal property taxes levied on Contractor.
- Potential Impact: The County would be contractually obligated to pay for taxes that are levied against Stryker Financial for the County's lease of the equipment for which the County may normally be exempt from payment.

Insurance

The Agreement does not require Stryker Financial to meet the County's insurance standards, including adding the County as an additional insured and waiver of subrogation rights.

- The County has an extensive list of insurance requirements relating to various insurance coverage and limits, and requires vendors to add the County as an insured and to waive subrogation of rights.
- Potential Impact: The Agreement is silent on any insurance requirements for Stryker Financial. This means the County has no assurance that Stryker Financial will have the financial support of an insurance company for any claims that may arise under the Agreement, which could result in the County bearing financial responsibility if Stryker Financial is unable to fulfill its obligations. Additionally, to the extent Stryker Financial has insurance, the policy will not provide direct coverage to the County as a named insured. Lastly, without a waiver of subrogation, Stryker Financial's insurers may bring suit against the County.

Indemnification

The Agreement does not require Stryker Financial to indemnify the County for any claims, including 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

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Rights) by any goods or services. The County standard contract general indemnity provision requires the contractor to indemnify, defend, and hold the County harmless from third party claims arising out of the acts, errors or omissions of any person.

- Potential Impact: Stryker Financial is not contractually required to defend, indemnify, and hold the County harmless from any claims, including claims arising out of Stryker Financial's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Stryker Financial's equipment, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. It should be noted, however, that the County may be able to pursue an implied indemnity claim even though the contract does not contain an indemnification provision.

Service Agreement

Insurance

The Service Agreement does not require Stryker to add the County as an additional insured and to waive of subrogation rights.

- The County's standard contract requires the vendor to add the County as an additional insured and to waive the subrogation of rights.
- Potential Impact: Although Stryker generally agrees in the Service Agreement to maintain the insurance coverage required by the County, Stryker will not be required to name the County as an additional insured or to waive subrogation of rights. This means that any applicable insurance policy that Stryker maintains will not provide direct coverage to the County as a named insured. Lastly, without a waiver of subrogation, Stryker's insurers may bring suit against the County.

Indemnification

The Service Agreement provides that Stryker will indemnify and hold harmless the County against claims brought by a third party only in claims that result from the gross negligence or willful misconduct of Stryker, but will not apply to any liability arising from (1) injury due to the negligence of any person other than Stryker, (2) failure or someone other than Stryker to follow instructions, (3) the use of equipment not purchased from Stryker or modifications/repairs of Stryker's equipment by someone other than Stryker, or (4) actions taken by Stryker's employees at the direction of the County. In the latter three circumstances, the County would indemnify Stryker for such claims resulting from the County's employee conduct.

- 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: Stryker is only required to defend, indemnify, and hold the County harmless from claims that arise out of Stryker's gross negligence or willful misconduct. If the County is sued for any claim outside of the scope of the indemnification claim, such as Stryker's ordinary negligence, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

Limitation of Liability

Limitations of liability to the County for all damages (other than third party damages related to Stryker's indemnity obligations) not to exceed the amount of service fees paid during the 12-

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month period immediately preceding the date the claim arose. Additionally, Stryker will not be liable for incidental, punitive, special, cover, exemplary, multiplied, consequential damages or attorneys' fees or costs.

- The County standard contract does not include a limitation of liability.
- Potential Impact: Stryker caps its liability for all claims arising under the contract, except its indemnification obligations. Claims could exceed the liability cap and the contract amount, leaving the County financially liable for the excess.

PROCUREMENT

This is non-competitive procurement based on compatibility with the system, equipment, and instruments currently being used. Current equipment that is leased from Stryker will continue to be covered by the Service with Stryker. There is cost savings to keeping current instruments, eliminating the need to purchase new endoscopy units. Stryker also services all of the new equipment and instruments and will replace or repair at no additional cost.

The County Purchasing Department supports the non-competitive procurement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Fiona Luke/Charles Phan, Deputy County Counsel, 387-5455) on June 8, 2020; Purchasing Department (Jackie Ambrose, Lead Buyer, 387-2060) on June 10, 2020; ARMC Finance (Chen Wu, Budget and Finance Officer, 909-580-3165) on June 9, 2020; Finance (Yael Verduzco, Administrative Analyst, 387-4773) on June 9, 2020; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on June 10, 2020.

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

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 23, 2020



cc: ARMC- Gilbert w/agree
 Contractor- C/O ARMC w/agree
 File- w/agree
la 06/24/2020