

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

April 6, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Agreement with Becton Dickinson for the Rental of the Totalys SlidePrep Instrument and the Purchase of Supplies, Reagents, and Service Plan

RECOMMENDATION(S)

Approve an Acquisition **Agreement No. 21-265** with Becton Dickinson for the rental of the Totalys SlidePrep Instrument and the purchase of supplies, reagents, and service plan, necessary for the function of the Totalys SlidePrep Instrument, for the contract period of April 6, 2021 through April 5, 2026, at a not-to-exceed contract amount of \$251,748.
(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 not-to-exceed cost of \$251,748 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 is included in the Arrowhead Regional Medical Center's (ARMC) 2020-21 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Approval of this recommendation will allow ARMC to rent a Becton Dickinson (BD) Totalys SlidePrep Instrument (SlidePrep) and purchases supplies, reagents, and the associated service plan. Currently, the ARMC laboratory has an older model SlidePrep that BD no longer services. ARMC recommends performing a replacement-in-kind with BD's newer model to ensure continuity of care and adequate equipment support. The BD SlidePrep is a fully automated instrument that prepares patient specimens for analysis by licensed cytology technologists and pathologists. The processor requires minimal hands-on time allowing staff to perform other tasks. The test results are reported to the provider for patient diagnosis, care and treatment. The BD Slideprep instrument concentrates the cells from a patient specimen onto a slide with minimal effect on the cells and with less interfering substances. Un-distorted cells provide a better specimen for the cytologist and pathologist to read, review, and report accurate findings for the detection of cancer and other abnormalities.

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The Agreement with BD is based on its standard commercial agreement with terms that differ from the standard County contract terms, including the following:

Payment

The payment terms are Net 30 days, and a late payment penalty of the greater of 1% per month or the maximum allowed by law may apply if payment is past due by 60 days or more.

- 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 60 days would result in a penalty.

General Indemnification

Each party must defend and indemnify the other party for any claims that result from the indemnifying party's negligence or willful misconduct and breach of its representations and covenants in the Agreement. The County must also indemnify BD to the extent any claims arise solely from the negligence or willful misconduct of any the County's healthcare providers in performing services at ARMC.

- The standard County contract does not contractually obligate the County to indemnify the vendor under any circumstances.
- Potential Impact: By agreeing to indemnify BD, 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 BD without such limitations and the County would be responsible to defend and reimburse BD for costs, expenses, and damages, which could exceed the total contract amount. It should be noted that BD is similarly obligated to defend, indemnify, and hold harmless the County.

Limitations of Liability

Except for claims based on indemnification related to death/bodily injuries, property damage, or BD's fraud, gross negligence, or willful misconduct, BD caps its liability to the County at the greater of \$1 million or two times the amount of all fees paid or to be paid under the Agreement during the 12 months preceding the event giving rise to liability.

- The standard County contract contains no limitations of liability.
- Potential Impact: Except for certain claims as set forth above, BD caps its liability to the County at the higher of \$1 million or two times the amount of all fees paid or to be paid during the 12 months prior to the event giving rise to the claim. Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess.

Termination

The County may terminate the Agreement without cause with 90 days advance written notice, but if the County does so prior to the expiration date of the Agreement, the County will be contractually obligated to pay BD an aggregate amount equal to the purchase price under the Agreement for all unpurchased consumables remaining on the term of the Agreement as determined by BD.

- The County's standard contract permits either party to terminate the contract for convenience with 30 days written notice.

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- Potential Impact: If the County seeks to terminate the Agreement without cause, it must provide at least 90 days advance written notice, and doing so will require the County to pay an amount equal to what it would have paid under the Agreement to meet its purchase commitment for consumables.

Governing Law and Venue

The Agreement is silent on which state's law applies and where any action arising under the Agreement must be venued.

- The County's standard contract requires that the contract be interpreted under California law, and that any action arising under the contract be brought in the San Bernardino County Superior Court.
- Potential Impact: Without an explicit provision on governing law and venue, there is a potential that the Agreement may be interpreted under New Jersey law and that BD may attempt to bring any lawsuit arising under the agreement in New Jersey, where it is based. Ultimately, however, it will be up to the parties to litigate these issues, which may result in fees and expenses to the County that would not have had to be incurred if such issues were made explicit in the Agreement.

PROCUREMENT

This is a non-competitive procurement due to functional specifications. Currently, ARMC has an older model SlidePrep instrument that BD no longer services. ARMC recommends performing a replacement-in-kind with BD's newer model to ensure continuity of care and adequate equipment support. Changing to a different SlidePrep system is unfeasible as it would require re-training all pathology and ARMC clinic staff who analyze and collect the specimens. Replacement of this equipment from the same manufacturer will save time and money on re-training and reduce the chance of potential health and safety risks to patients.

County Purchasing approves this non-competitive procurement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Deputy County Counsel, 387-5465) on March 18, 2021; Purchasing Department (Ariel Gill, Buyer, 777-0722) on March 23, 2021; ARMC Finance (Chen Wu, Finance Budget Officer, 580-3165) on March 16, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on March 19, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on March 21, 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: April 6, 2021



cc: ARMC- Gilbert w/agree
Contractor- C/O ARMC w/agree
File- w/agree
LA 04/8/2021