



San Bernardino County

Legislation Text

File #: 4904, Agenda Item #: 9

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

October 5, 2021

FROM

WILLIAM L. GILBERT, Director, Arrowhead Regional Medical Center

SUBJECT

Custom Product Stocking Agreement with Terumo Cardiovascular Systems Corporation for Open Heart Packs

RECOMMENDATION(S)

Approve Custom Product Stocking Agreement with Terumo Cardiovascular Systems Corporation, for the provision of open heart packs, in an amount not to exceed \$250,000, for the contract term of October 5, 2021 through October 4, 2026.

(Presenter: William L. Gilbert, Director, 580-6150)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

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 not-to-exceed cost of \$250,000 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) 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

Cardiothoracic surgery is a new service that will be offered at ARMC. The Custom Product Stocking Agreement with Terumo Cardiovascular Systems Corporation (Terumo) ensures that the ARMC cardiothoracic team will have access to sufficient equipment stored at the hospital to perform open-heart surgeries. The hospital is currently awaiting the California Department of Public Health survey for final approval to start performing open-heart surgeries. Therefore, these packs are needed before the start of the program as California Department of Public Health requires that on the survey day, the hospital has all the necessary items to perform the surgery. Once the new Cardiac Surgery Program begins at ARMC, the hospital will no longer need to rely on other hospitals to provide cardiac surgery care to County residents. Furthermore, the in-house program will result in cost savings, prevention of delayed care and eliminate the risk involved with transporting patients to other hospital facilities.

The Agreement is Terumo's standard commercial Stocking Agreement, negotiated by the parties, with the

following non-standard County contract terms:

1. The Agreement is silent on governing law and venue.
 - The County standard contract requires California governing law and venue to be in the San Bernardino County Superior Court, San Bernardino District.
 - Potential Impact: The agreement is silent on governing law and venue. This results in uncertainty over which state's laws will govern the interpretation of the agreement, and leads to ambiguity in interpretation of the agreement terms. Terumo appears to be a corporation based in Michigan. The agreement could be interpreted under any state law depending on where the claim is brought, including Michigan and California. Any questions, issues or claims arising under this agreement could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total contract amount. Additionally, having a venue in another state may result in additional expenses that exceed the amount of the agreement.
2. The Agreement does not address 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: There is no provision in the agreement addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, non-California state law may affect a party's requirement to pay the prevailing party in a legal action where no specific provision is provided in the agreement.
3. The Agreement does not require Terumo 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: Terumo is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Terumo'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 Terumo's products, the County may be solely liable for the costs of defense and damages. County Counsel cannot advise on whether and to what extent Michigan law may allow the County to require Terumo to defend or indemnify it absent an express provision in the agreement.
4. Either party may terminate the Agreement for any reason with 90 days written notice, but upon termination, the County is required to purchase all custom products (not to exceed the 90 days stocking level) which is in Terumo's inventory.
 - The standard County contract permits either party to terminate the contract for any reason with 30 days notice with no other obligation other than those that were incurred prior to the date of termination.
 - Potential Impact: ARMC must be mindful of the additional notice period when considering terminating the agreement, and will be required to purchase all remaining custom products in Terumo's inventory up to a total of 18 products.

ARMC recommends approval of the Stocking Agreement, including the non-standard terms, with Terumo as it

will provide for the safety, health, and social services needs of County residents through the provisions of essential cardiac surgery care supplies.

PROCUREMENT

Purchasing approves this non-competitive procurement based on system/equipment compatibility as the Terumo open heart pack products are customizable for use with the Terumo perfusion equipment already purchased for the ARMC Cardiovascular Program.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Charles Phan, Deputy County Counsel, 387-5455) on September 9, 2021; Purchasing (Ariel Gill, Buyer III, 777-0722) on September 21, 2021; ARMC Finance (Chen Wu, Finance and Budget Officer, 580-3165) on September 14, 2021; Finance (Yael Verduzco, Administrative Analyst, 387-5285) on September 16, 2021; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on September 19, 2021.