

RESOLUTION NO. 2022-27

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA
APPROVING PURCHASE AGREEMENT BETWEEN THE CITY OF MARINA
AND THERMO SCIENTIFIC PORTABLE ANALYTICAL INSTRUMENTS INC, OF
TEWKSBURY, MASSACHUSETTS, FOR ONE (1) TRUNARC HANDHELD NARCOTICS
ANALYZER AND WARRANTY PLAN IN THE AMOUNT OF \$37,036.84 FOR MARINA
POLICE DEPARTMENT, WAIVING THE CITY'S FORMAL BID PROCESS, WITHOUT
COMPETITIVE BIDDING, FINDING THAT COMPETITIVE BIDDING WOULD BE
UNAVAILING, WOULD NOT PRODUCE AN ADVANTAGE AND WOULD NOT BE IN THE
PUBLIC INTEREST, AUTHORIZE FINANCE DIRECTOR TO MAKE NECESSARY
ACCOUNTING AND BUDGETARY ENTRIES AND AUTHORIZE THE CITY MANAGER TO
EXECUTE THE AGREEMENT ON BEHALF OF THE CITY SUBJECT TO FINAL REVIEW
AND APPROVAL BY THE CITY ATTORNEY

WHEREAS, the Marina Police Department identified the need to acquire a narcotics identification system that enhanced the safety of officers by limiting exposure to potentially dangerous illegal substances that can potentially be life threatening; and

WHEREAS: the Police Department identified the TruNarc Narcotic Handheld Narcotics Analyzer system produced by Thermo Scientific Portable Analytical Instruments, Inc, of Tewksbury, Massachusetts, as the system that provided the officer safety and narcotic testing capabilities required; and

WHEREAS, the TruNarc Handheld Narcotics Analyzer system offers an unlimited five year warranty, tests for almost five-hundred substances, including narcotics, stimulants, depressants, hallucinogens and analgesics: has a library of substances that can be tested, which is updated to include emerging drug threats; limits direct contact by officers with most substances; delivers clear, real-time results for presumptive evidence, and provides automated, tamper-proof records with scan results, including time-and-date stamps to help expedite prosecution; and

WHEREAS, the Thermo Scientific Portable Analytical Instruments agreement ("EXHIBIT A") also includes factory repair, loaner units when available and 24/7 technical support. Companion PC TruNarc admin. software, unlimited access to TruNarc eLearning course and free basic software updates to core narcotics library provided for the life of the instrument, and includes TruNarc on-site instructor led training for up to twelve students; and

WHEREAS, Municipal Code section 3.16.040 provides an exception to the requirement for competitive bidding when the City Council finds by resolution that competitive bidding would be unavailing, would not produce an advantage and would not be in the public interest.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Marina does hereby:

1. Approve the purchase of one (1) TruNarc Narcotic Handheld Narcotics Analyzer System and the TruNarc unlimited five-year warranty ("EXHIBIT A") in the amount of \$37,036.84 from Thermo Scientific Portable Analytical Instruments, Inc, of Tewksbury, Massachusetts, in the amount of \$37,036.84 without competitive bidding finding that competitive bidding would be unavailing, would not produce an advantage and would not be in the public interest; and
2. Approve expenditure of \$37,036.84 from the adopted Police Department FY 2021-2022 Budget, Expense Account #100.210.000.00-6400.740 – "Material & Suppl Special Dept Suppl."; and

3. Authorizes Finance Director to make necessary accounting and budgetary entries, and;
4. Authorize City Manager to execute purchase agreement on behalf of City subject to final review by the City Attorney.

PASSED AND ADOPTED by the City Council of the City of Marina at a regular meeting duly held on the 1st day of March 2022 by the following vote:

AYES, COUNCIL MEMBERS: Medina Dirksen, Burnett, Berkley, Delgado

NOES, COUNCIL MEMBERS: None

ABSENT, COUNCIL MEMBERS: Biala

ABSTAIN, COUNCIL MEMBERS: None

Bruce C. Delgado, Mayor

ATTEST:

Anita Sharp, Deputy City Clerk

EXHIBIT A

Sales Quotation

Quote Number	Created Date	Exp. Delivery Terms	Page
00258945	12/09/2021	ARO	1 / 7
Contact:	Phone	Payment Term	Valid To
Geno Ferrera	(951) 326-0405	Net 30	03/25/2022
Inco Terms		Shipping Method	
FOB Origin - Tewksbury ma.		Fed Ex	

Thermo Scientific Portable Analytical Instruments Inc.

2 Radcliff Rd
Tewksbury, Massachusetts 01876
United States

Submitted To:

Tina Nieto
Marina Police Department
211 Hillcrest Ave
Marina, California 93933-3534
United States

Phone: (831) 884-1235
Email: tnieto@cityofmarina.org

THANK YOU FOR YOUR INTEREST IN THERMO SCIENTIFIC INSTRUMENTATION

To Place an Order:

Contact: Geno Ferrera
Phone: (951) 326-0405
Fax:
Email: geno.ferrera@thermofisher.com
Additional instructions, terms & conditions on last page

Pos.	Product Code	Product Name	Sales Price	Quantity	Total Price
1.00	800-01045-01	TruNarc, Unlimited, Warranty - 5 Yrs, Train-12	USD 33,300.00	1.00	USD 33,300.00
		TruNarc Unlimited Model with 5 years of warranty. Includes factory repair, loaner units when available and 24/7 technical support. Companion PC TruNarc admin software, unlimited access to TruNarc eLearning course and free basic software updates to core narcotics library are provided for the life of the instrument. Includes TruNarc on-site instructor led training for up to 12 students within the Continental United States (CONUS) - expires 9 months after date of purchase.			
2.00	810-01462-01	TruNarc Solution Kit (Type H) - 100, English	USD 601.00	1.00	USD 601.00
		TruNarc Solution Kit (Type H) for identification of Heroin and other special narcotics. Kit includes 100 Test Sticks and 100 Solution Vials with Ethanol. Note that because of the Ethanol, this product ships as a Hazardous Goods shipment. The shelf life for Type H-sticks is approximately one year from shipment.			
			Subtotal:	USD 33,901.00	
			Tax:	USD 3,135.84	
			Total:	USD 37,036.84	

Excludes Taxes and Import Fees

When applicable, commodities, technology, or software to be provided in furtherance of this order shall be exported from the United States in accordance with applicable U.S export laws or regulations. Diversion contrary to US law prohibited. Unless otherwise agreed to in writing, Thermo Scientific Portable Analytical Instruments Inc. terms and conditions shall apply and take precedence.

A part of: **ThermoFisher**
SCIENTIFIC

Page 1 / 7

Fully Insured 2nd Day Federal Express delivery in U.S., Canada, and Puerto Rico

Important Note: Please issue POs to Thermo Scientific Portable Analytical Instruments Inc

Federal Tax ID No.: 01-0650031

CAGE CODE: 392A9

DUNS #: 11-289-3131

Bank of America ABA# for Wire Payments: 026 009 593

Bank of America ABA# for ACH Payments: 111 000 012

Beneficiary Account Number: 4426843850

When applicable, commodities, technology, or software to be provided in furtherance of this order shall be exported from the United States in accordance with applicable U.S export laws or regulations. Diversion contrary to US law prohibited. Unless otherwise agreed to in writing, Thermo Scientific Portable Analytical Instruments Inc. terms and conditions shall apply and take precedence.

A part of: **ThermoFisher**
S C I E N T I F I C

Page 2 / 7

Acceptance of Purchase

Quote: GF-00258945

By signing below, you (i) warrant that you are an authorized representative of your company, (ii) agree that the Thermo Scientific Portable Analytical Instruments Inc. Terms and Conditions of Sale attached hereto (the "Terms and Conditions") shall supersede any preprinted terms and conditions, in their entirety, contained in any purchase order that your company issues and (iii) the Terms and Conditions shall exclusively govern the transaction(s) contemplated hereby

Signature of authorized company representative	Date	Phone#
Print Name	Title	Email
Model #	Amount + S&H	Purchase Order Number

E-mail to: pai.sales.ops@thermofisher.com

Fax to: 1-877-680-2568

Order Processing Address:

geno.ferrera@thermofisher.com

Thermo Scientific Portable Analytical Instruments Inc

2 Radcliff Road

Tewksbury, MA 01876

Remit check Payment To:

Thermo Scientific Portable Analytical Instruments Inc

PO Box 415918

Boston, MA 02241-415918

Payment Details

Method of Payment

- ☐ Net 30 (Attach Credit Application & Credit References)
- ☐ Credit Card
- ☐ Check
- ☐ Wire Transfer

Sales Tax Application

- ☐ Yes Apply Sales Tax
- ☐ No

- If no, you must provide a copy of your tax exemption certificate along with your purchase order.

****Please contact your customer service representative with your credit card information. (Do not send any credit card info via email or fax.)****

Address Verification

Please make corrections if necessary below:

Bill to:

Marina Police Department
211 Hillcrest Ave
Marina, California 93933-3534
United States

Ship to:

Marina Police Department

Additional Options / Accessories

Please use the space below to note any additional options and/or accessories you wish to add from the attached sheets that are not included in the above quotation.

When applicable, commodities, technology, or software to be provided in furtherance of this order shall be exported from the United States in accordance with applicable U.S export laws or regulations. Diversion contrary to US law prohibited. Unless otherwise agreed to in writing, Thermo Scientific Portable Analytical Instruments Inc. terms and conditions shall apply and take precedence.

A part of: **ThermoFisher**
S C I E N T I F I C

Page 3 / 7

THERMO SCIENTIFIC PORTABLE ANALYTICAL INSTRUMENTS INC – TERMS AND CONDITIONS OF SALE

Last revised November 2019

UNLESS OTHERWISE EXPRESSLY AGREED IN WRITING, ALL SALES ARE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

1. **GENERAL.** Thermo Scientific Portable Analytical Instruments Inc ("Seller") hereby offers for sale to the buyer named on the face hereof ("Buyer") the products listed on the face hereof (the "Products") on the express condition that Buyer agrees to accept and be bound by the terms and conditions set forth herein. Any provisions contained in any document issued by Buyer are expressly rejected and if the terms and conditions in this agreement (the "Agreement") differ from the terms of Buyer's offer, this document shall be construed as a counter offer and shall not be effective as an acceptance of Buyer's document. Buyer's receipt of Products or Seller's commencement of the services provided hereunder will constitute Buyer's acceptance of this Agreement. This is the complete and exclusive statement of the contract between Seller and Buyer with respect to Buyer's purchase of the Products. No waiver, consent, modification, amendment or change of the terms contained herein shall be binding unless in writing and signed by Seller and Buyer. Seller's failure to object to terms contained in any subsequent communication from Buyer will not be a waiver or modification of the terms set forth herein. All orders are subject to acceptance in writing by an authorized representative of Seller.

2. **PRICE.** All prices published by Seller or quoted by Seller's representatives may be changed at any time without notice. All prices quoted by Seller or Seller's representatives are valid for thirty (30) days, unless otherwise stated in writing. All prices for the Products will be as specified by Seller or, if no price has been specified or quoted, will be Seller's price in effect at the time of shipment. All prices are subject to adjustment on account of specifications, quantities, raw materials, cost of production, shipment arrangements or other terms or conditions, which are not part of Seller's original price quotation.

3. **TAXES AND OTHER CHARGES.** Prices for the Products exclude all sales, value added and other taxes and duties imposed with respect to the sale, delivery, or use of any Products covered hereby, all of which taxes and duties must be paid by Buyer. If Buyer claims any exemption, Buyer must provide a valid, signed certificate or letter of exemption for each respective jurisdiction. Buyer shall be solely responsible for obtaining any and all necessary licenses, registrations, certificates, permits, approvals or other authorizations required by federal, state or local statute, law or regulation pertaining to the use or possession of the products contemplated herein that include radioactive isotopes, or x-ray tubes if any.

Buyer shall pay Seller such surcharges, or other fees, in respect of the sale of Products hereunder as Seller deems necessary and appropriate (in Seller's sole, good-faith, reasonable discretion) to account for changes in the cost to product, develop, market, or sell the Products to Buyer hereunder (whether as the result of the imposition of tariffs or otherwise). All such surcharges must be paid by Buyer in accordance with the payment terms set forth herein. Buyer agrees that such surcharges, or other fees, or any termination thereof, shall take effect immediately upon written notice thereof by Seller to Buyer. In the event that Seller's quote and/or order acknowledgement set forth surcharges, those documents shall be considered adequate written notice to Buyer that said surcharges are Buyer's responsibility. Any such surcharges shall not constitute an increase in the Price(s) of any Products or Services sold under this Agreement.

4. **TERMS OF PAYMENT.** Seller may invoice Buyer upon shipment for the price and all other charges payable by Buyer in accordance with the terms on the face hereof. If no payment terms are stated on the face hereof, payment shall be net thirty (30) days from the date of invoice. If Buyer fails to pay any amounts when due, Buyer shall pay Seller interest thereon at a periodic rate of one and one-half percent (1.5%) per month (or, if lower, the highest rate permitted by law), together with all costs and expenses (including without limitation reasonable attorneys' fees and disbursements and court costs) incurred by Seller in collecting such overdue amounts or otherwise enforcing Seller's rights hereunder. Seller reserves the right to require from Buyer full or partial payment in advance, or other security that is satisfactory to Seller, at any time that Seller believes in good faith that Buyer's financial condition does not justify the terms of payment specified. All payments shall be made in U.S. Dollars.

5. **DELIVERY CANCELLATION OR CHANGES BY BUYER.** The Products will be shipped to the destination specified by Buyer, F.O.B. shipping point. Seller will have the right, at its election, to make partial shipments of the Products and to invoice each shipment separately. Seller reserves the right to stop delivery of Products in transit and to withhold shipments in whole or in part if Buyer fails to make any payment to Seller when due or otherwise fails to perform its obligations hereunder. All shipping dates are approximate only, and Seller will not be liable for any loss or damage resulting from any delay in delivery or failure to deliver which is due to any cause beyond Seller's reasonable control. In the event of a delay due to any cause beyond Seller's reasonable control, Seller reserves the right to terminate the order or to reschedule the shipment within a reasonable period of time, and Buyer will not be entitled to refuse delivery or otherwise be relieved of any obligations as the result of such delay. Products as to which delivery is delayed due to any cause within Buyer's control may be placed in storage by Seller at Buyer's risk and expense and for Buyer's account. Orders in process may be canceled only with Seller's written consent and upon payment of Seller's cancellation charges. Orders in process may not be changed except with Seller's written consent and upon agreement by the parties as an appropriate adjustment in the purchase price therefor. Credit will not be allowed for Products returned without prior written consent of seller.

6. **RETURN OF PRODUCTS/RESTOCKING CHARGE.** Buyer must obtain permission from Seller prior to returning Products. The request must be received within ten (10) days of receipt of the Products. Older items, service parts, and discontinued items cannot be returned for credit. In order to obtain a RMA number, Buyer must contact Seller's customer support. Seller, in its discretion, may impose a twenty (20%) percent restocking charge of the price paid for any item authorized for return for credit.

7. **TITLE AND RISK OF LOSS.** Notwithstanding the trade terms indicated above and subject to Seller's right to stop delivery of Products in transit, title to and risk of loss of the Products will pass to Buyer upon delivery of possession of the Products by Seller to the carrier irrespective of which Party's carrier is used for the transport or the manner of payment ascribed to the transport; provided, however, that title to any software incorporated within or forming a part of the Products shall at all times remain with Seller or the licensor(s) thereof, as the case may be.

8. **WARRANTY.** Seller warrants that the Products will operate or perform substantially in conformance with Seller's published specifications and be free from defects in material and workmanship, when subjected to normal, proper and intended usage by properly trained personnel, for the period of time set forth in the product documentation, published specifications or package inserts. If a period of time is not specified in Seller's product documentation, published specifications or package inserts, the warranty period shall be one (1) year from the date of shipment to Buyer for equipment and ninety (90) days for all other products (the "Warranty Period"). During the Warranty Period, Seller agrees, in its sole discretion, to repair or replace, Products and/or provide additional parts or services as reasonably necessary to cause the same to perform in substantial conformance with said published specifications; provided that Buyer shall (a) promptly notify Seller in writing upon the discovery of any defect, which notice shall include the product model and serial number (if applicable) and details of the warranty claim; and (b) after Seller's review, Seller will provide Buyer with service data and /or a Return Material Authorization ("RMA"), which may include biohazard decontamination procedures and other product-specific handling instructions, then, if applicable, Buyer may return the defective Products to Seller with all costs prepaid by Buyer. Replacement parts may be new or refurbished, at the election of Seller. All replaced parts shall become

the property of Seller. Shipment to Buyer of repaired or replacement Products shall be made in accordance with the Delivery provisions of the Seller's Terms and Conditions of Sale. Consumables are expressly excluded from this warranty. If Seller elects to repair defective device instruments, Seller may, in its sole discretion, provide a replacement loaner instrument to Buyer as necessary for use while the instruments are being repaired. Notwithstanding the foregoing, Products supplied by Seller that are obtained by Seller from an original manufacturer or third party supplier are not warranted by Seller, but Seller agrees to assign to Buyer any warranty rights in such Product that Seller may have from the original manufacturer or third party supplier, to the extent such assignment is allowed by such original manufacturer or third party supplier. In no event shall Seller have any obligation to make repairs, replacements or corrections required, in whole or in part, as the result of (i) normal wear and tear, (ii) accident, disaster or event of force majeure, (iii) misuse, fault or negligence of or by Buyer, (iv) use of the Products in a manner for which they were not designed, (v) causes external to the Products such as, but not limited to, power failure or electrical power surges, (vi) improper storage and handling of the Products or (vii) use of the Products in combination with equipment or software not supplied by Seller. If Seller determines that Products for which Buyer has requested warranty services are not covered by the warranty hereunder, Buyer shall pay or reimburse Seller for all costs of investigating and responding to such request at Seller's then prevailing time and materials rates. If Seller provides repair services or replacement parts that are not covered by this Warranty shall pay Seller therefor at Seller's then prevailing time and materials rates.

ANY INSTALLATION, MAINTENANCE, REPAIR, SERVICE, RELOCATION OR ALTERATION TO OR OF, OR OTHER TAMPERING WITH, THE PRODUCTS PERFORMED BY ANY PERSON OR ENTITY OTHER THAN SELLER WITHOUT SELLER'S PRIOR WRITTEN APPROVAL, OR ANY USE OF REPLACEMENT PARTS NOT SUPPLIED BY SELLER, SHALL IMMEDIATELY VOID AND CANCEL ALL WARRANTIES WITH RESPECT TO THE AFFECTED PRODUCTS. THE OBLIGATIONS CREATED BY THIS WARRANTY STATEMENT TO REPAIR OR REPLACE A DEFECTIVE PRODUCT SHALL BE THE SOLE REMEDY OF BUYER IN THE EVENT OF A DEFECTIVE PRODUCT. EXCEPT AS EXPRESSLY PROVIDED IN THIS WARRANTY STATEMENT, SELLER DISCLAIMS ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THE PRODUCTS, INCLUDING WITHOUT LIMITATION ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. SELLER DOES NOT WARRANT THAT THE PRODUCTS ARE ERROR-FREE OR WILL ACCOMPLISH ANY PARTICULAR RESULT.

9. INDEMNIFICATION

9.1. **By Seller.** Seller agrees to indemnify, defend and save Buyer, its officer, directors, and employees from and against any and all damages, liabilities, actions, causes of action, suits, claims, demands, losses, costs and expenses (including without limitation reasonable attorney's fees) ("Indemnified Items") for (i) injury to or death of persons or damage to property to the extent caused by the negligence or willful misconduct of Seller, its employees, agents or representatives or contractors in connection with the performance of services at Buyer's premises under this Agreement and (ii) claims that a Product infringes any valid United States patent, copyright or trade secret; provided, however, Seller shall have no liability under this Section to the extent any such Indemnified Items are caused by either (i) the negligence or willful misconduct of Buyer, its employees, agents or representatives or contractors, (ii) by any third party, (iii) use of a Product in combination with equipment or software not supplied by Seller where the Product would not itself be infringing, (iv) compliance with Buyer's designs, specifications or instructions, (v) use of the Product in an application or environment for which it was not designed or (vi) modifications of the Product by anyone other than Seller without Seller's prior written approval. Buyer shall provide Seller prompt written notice of any third party claim covered by Seller's indemnification obligations hereunder. Seller shall have the right to assume exclusive control of the defense of such claim or, at the option of the Seller, to settle the same. Buyer agrees to cooperate reasonably with Seller in connection with the performance by Seller of its obligations in this Section.

Notwithstanding the above, Seller's infringement related indemnification obligations shall be extinguished and relieved if Seller, at its discretion and at its own expense (a) procures for Buyer the right, at no additional expense to Buyer, to continue using the Product; (b) replaces or modifies the Product so that it becomes non-infringing, provided the modification or replacement does not adversely affect the specifications of the Product; or (c) in the event (a) and (b) are not practical, refund to Buyer the amortized amounts paid by Buyer with respect thereto, based on a five (5) year amortization schedule. THE FOREGOING INDEMNIFICATION PROVISION STATES SELLER'S ENTIRE LIABILITY TO BUYER FOR THE CLAIMS DESCRIBED HEREIN.

9.2. **By Buyer.** Buyer shall indemnify, defend with competent and experienced counsel and hold harmless Seller, its parent, subsidiaries, affiliates and divisions, and their respective officers, directors, shareholders and employees, from and against any and all damages, liabilities, actions, causes of action, suits, claims, demands, losses, costs and expenses (including without limitation reasonable attorneys' fees and disbursements and court costs) to the extent arising from or in connection with (i) the negligence or willful misconduct of Buyer, its agents, employees, representatives or contractors; (ii) use of a Product in combination with equipment or software not supplied by Seller where the Product itself would not be infringing; (iii) Seller's compliance with designs, specifications or instructions supplied to Seller by Buyer; (iv) use of a Product in an application or environment for which it was not designed; or (v) modifications of a Product by anyone other than Seller without Seller's prior written approval.

10. **SOFTWARE.** With respect to any software products incorporated in or forming a part of the Products hereunder, Seller and Buyer intend and agree that such software products are being licensed and not sold, and that the words "purchase", "sell" or similar or derivative words are understood and agreed to mean "license", and that the word "Buyer" or similar or derivative words are understood and agreed to mean "licensee". Notwithstanding anything to the contrary contained herein, Seller or its licensor, as the case may be, retains all rights and interest in software products provided hereunder. Seller hereby grants to Buyer a royalty-free, non-exclusive, nontransferable license, without power to sublicense, to use software provided hereunder solely for Buyer's own internal business purposes on the hardware products provided hereunder and to use the related documentation solely for Buyer's own internal business purposes. This license terminates when Buyer's lawful possession of the hardware products provided hereunder ceases, unless earlier terminated as provided herein. Buyer agrees to hold in confidence and not to sell, transfer, license, loan or otherwise make available in any form to third parties the software products and related documentation provided hereunder. Buyer may not disassemble, decompile or reverse engineer, copy, modify, enhance or otherwise change or supplement the software products provided hereunder without Seller's prior written consent. Seller will be entitled to terminate this license if Buyer fails to comply with any term or condition herein. Buyer agrees, upon termination of this license, immediately to return to Seller all software products and related documentation provided hereunder and all copies and portions thereof.

11. **LIMITATION OF LIABILITY.** NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, THE LIABILITY OF SELLER UNDER THESE TERMS AND CONDITIONS (WHETHER BY REASON OF BREACH OF CONTRACT, TORT, INDEMNIFICATION, OR OTHERWISE, BUT EXCLUDING LIABILITY OF SELLER FOR BREACH OF WARRANTY (THE SOLE REMEDY FOR WHICH SHALL BE AS PROVIDED UNDER SECTION 8 ABOVE)) SHALL NOT EXCEED AN AMOUNT EQUAL TO THE LESSER OF (A) THE TOTAL PURCHASE PRICE THEREFORE PAID BY BUYER TO SELLER WITH RESPECT TO THE PRODUCT(S) GIVING RISE TO SUCH LIABILITY OR (B)

ONE MILLION DOLLARS (\$1,000,000). NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, IN NO EVENT SHALL SELLER BE LIABLE FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF USE OF FACILITIES OR EQUIPMENT, LOSS OF REVENUE, LOSS OF DATA, LOSS OF PROFITS OR LOSS OF GOODWILL), REGARDLESS OF WHETHER SELLER (a) HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES OR (b) IS NEGLIGENT

12. EXPORT RESTRICTIONS. Buyer acknowledges that each Product and any related software and technology, including technical information supplied by Seller or contained in documents (collectively "Items"), is subject to export controls of the U.S. government. The export controls may include, but are not limited to, those of the Export Administration Regulations of the U.S. Department of Commerce (the "EAR"), which may restrict or require licenses for the export of Items from the United States and their re-export from other countries. Buyer shall comply with the EAR and all other applicable laws, regulations, laws, treaties, and agreements relating to the export, re-export, and import of any Item. Buyer shall not, without first obtaining the required license to do so from the appropriate U.S. government agency; (i) export or re-export any Item, or (ii) export, re-export, distribute or supply any Item to any restricted or embargoed country or to a person or entity whose privilege to participate in exports has been denied or restricted by the U.S. government. Buyer shall, if requested by Seller, provide information on the end user and end use of any Item exported by the Buyer or to be exported by the Buyer. Buyer shall cooperate fully with Seller in any official or unofficial audit or inspection related to applicable export or import control laws or regulations, and shall indemnify and hold Seller harmless from, or in connection with, any violation of this Section by Buyer or its employees, consultants, or agents

13. HAZARDOUS MATERIALS. Some Products may require special packaging, labeling, marking and handling. Carriers may add additional freight charges for the handling or transporting of these materials. The consolidating of such material with other Products may be prohibited. Additional freight charges will be billed per Seller's shipping terms. Be sure to advise Seller of shipping instructions for these hazardous materials to reduce your freight costs

14. MISCELLANEOUS. (a) Buyer may not delegate any duties nor assign any rights or claims hereunder without Seller's prior written consent, and any such attempted delegation or assignment shall be void. (b) The rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of the State of Seller's manufacturing location, without reference to its choice of law provisions. Each party hereby irrevocably consents to the exclusive jurisdiction of the state and federal courts located in the county and state of Seller's manufacturing location, in any action arising out of or relating to this Agreement. (c) Both parties waive any right they may have under applicable law or otherwise to a trial by jury. Any action arising under this Agreement must be brought within one (1) year from the date that the cause of action arose. (d) The application to this Agreement of the U.N. Convention on Contracts for the International Sale of Goods is hereby expressly excluded. (e) In the event that any one or more provisions contained herein shall be held by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall remain in full force and effect, unless the revision materially changes the bargain. (f) Seller's failure to enforce, or Seller's waiver of a breach of, any provision contained herein shall not constitute a waiver of any other breach or of such provision. (g) Unless otherwise expressly stated on the Product or in the documentation accompanying the Product, the Product is intended for non-clinical, non-diagnostic, non-therapeutic use only and is not to be used for any other purpose, including without limitation, unauthorized commercial uses, in vitro diagnostic uses, ex vivo or in vivo therapeutic uses, or any type of consumption by or application to humans or animals. (h) Buyer agrees that all pricing, discounts and technical information that Seller provides to Buyer are the confidential and proprietary information of Seller. Buyer agrees to (1) keep such information confidential and not disclose such information to any third party, and (2) use such information solely for Buyer's internal purposes and in connection with the Products supplied hereunder. Nothing herein shall restrict the use of information available to the general public. (i) Any notice or communication required or permitted hereunder shall be in writing and shall be deemed received when personally delivered or three (3) business days after being sent by certified mail, postage prepaid, to a party at the address specified herein or at such other address as either party may from time to time designate to the other (j) Seller hereby rejects and disclaims any rights of Buyer contained, or obligations imposed upon Seller, in any document provided, referenced or otherwise submitted by Buyer, in each case, that Seller has not expressly included in these [terms and conditions] or a writing manually executed by Seller (including, without limitation, any rights of Buyer in respect of designs, specifications, source code or intellectual property, owned, created, developed or licensed, by Seller; any rights to items or services not specifically identified in Seller's quotation; any audit rights or financial offset rights of Buyer; any penalties or liquidated damages imposed upon Seller; any obligation by Seller to comply with Health Insurance Portability and Accountability Act of 1996 (as amended), Current Good Manufacturing Practice regulations (as amended), the requirements, as amended, of the Customs-Trade Partnership Against Terrorism or any code of conduct, quality program, information security program, background or drug screening program or other guidelines, programs or policies, in each case, promulgated or required by Buyer; any obligation that Seller comply with any law that, under law, would not otherwise apply to Seller in respect of the transaction(s) contemplated hereby; any right of Buyer to withhold all, or any portion, of the purchase price of any products or services provided hereunder for any period of time; any right of Buyer, itself or through any third party, to remediate any defects in, replace or re-perform, any products or services provided hereunder at Seller's cost or expense; any obligation of Seller to waive, or require its insurers to waive, any rights of subrogation; any obligation of Seller that would impair, restrict or prohibit Seller's ability to freely conduct any business with any person or in any geography or market; any early-payment, or other, discount; any obligation of Seller to maintain a supply of spares, or otherwise make any services available, for any particular period of time; any representation, warranty or other obligation of Seller to provide pricing comparable to, or more favorable than, the pricing that Seller provides to others; any restriction of, or prohibition on, Seller's ability to modify, change or discontinue any of its products, processes or services; or any waiver by Seller of any right to enforce any of the terms hereof).

15. SOFTWARE-AS-A-SERVICE TRANSACTIONS. IF YOU ARE PURCHASING ANY PRODUCTS PROVIDED BY SELLER HEREUNDER AND DESCRIBED IN THE RELEVANT QUOTATION OR PURCHASE ORDER AS A SUBSCRIPTION TO ANY THERMO FISHER SOFTWARE-AS-A-SERVICE OFFERING (ANY SUCH PRODUCT, HEREINAFTER, A "SUBSCRIPTION"), THEN IN RESPECT OF SUCH SUBSCRIPTION(S) ONLY

(a) The following terms and conditions of this Agreement shall not apply: Sections 6-7, 9.1, and 13.

(b) The following terms and conditions of this Agreement shall be modified as set forth below:

(i) Section 5 shall be replaced in its entirety with the following:

5. CANCELLATION OR CHANGES BY BUYER. Seller reserves the right to suspend or terminate the Buyer's Subscription(s), in whole or in part, if Buyer fails to make any payment to Seller when due, otherwise fails to perform its obligations hereunder, or fails to comply with the Seller's Terms of Use agreement agreed to by Buyer and governing Buyer's use of the Subscription(s), as in effect from time to time (the "Terms of Use"). Seller will not be liable for any loss or damage resulting from any delay in activation of the Subscription(s) or failure to activate the Subscription(s) which is due to any cause beyond Seller's reasonable control. In the event of a delay due to any cause beyond Seller's reasonable control, Seller reserves the right to terminate the order or to reschedule the activation of the Subscription(s) within a reasonable period of time, and Buyer will not be entitled to refuse payment or otherwise be relieved of any obligations as the result of such delay. Orders in process may be canceled only with Seller's written consent and upon

payment of Seller's cancellation charges. Orders in process may not be changed except with Seller's written consent and upon agreement by the parties as an appropriate adjustment in the purchase price therefor.

(ii) Section 8 shall be replaced in its entirety with the following:

8. **WARRANTY.** BUYER AGREES AND ACKNOWLEDGES THAT THE SUBSCRIPTIONS ARE SOLD "AS-IS", WITH NO WARRANTIES EXPRESSED OR IMPLIED. SELLER DISCLAIMS ALL EXPRESS OR IMPLIED WARRANTIES, ORAL OR WRITTEN, WITH RESPECT TO THE SUBSCRIPTIONS, INCLUDING WITHOUT LIMITATION ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.

(iii) Section 10 shall be replaced in its entirety with the following:

10. **SOFTWARE.** This Agreement shall not be construed to grant to Buyer any patent license, know-how license or any other rights except as specifically provided herein. Buyer agrees and acknowledges that, by virtue of its purchase of the Subscriptions hereunder, it does not acquire any intellectual property rights (whether by license, assignment, or otherwise) of Seller, including without limitation any rights to the Subscriptions or related software or hardware systems (except for the limited right to use the Subscription subject to the terms and conditions set forth herein). Buyer shall not reverse engineer or copy the design, algorithms, or code, or any components thereof, of any information related to the Subscriptions for any purpose.

(iv) In Section 11, the language "ONE MILLION DOLLARS (\$1,000,000)" shall be replaced with "TEN THOUSAND DOLLARS (\$10,000)".

(c) The following additional terms and conditions shall apply

TERMS OF USE. Buyer hereby acknowledges and agrees that it shall comply with all terms and conditions of the Terms of Use, and that Buyer's use of the Subscription in violation of any such terms and/or conditions shall entitle Seller, without prejudice to any other remedies that may be available to Seller at law or in equity, to terminate Buyer's use of the Subscription(s) effective immediately. Buyer further agrees and acknowledges that it shall not be entitled to any refund of any portion of the purchase price paid in respect of Subscription(s) cancelled by Seller pursuant to Seller's rights under this Section and/or the Terms of Use. Buyer's rights to use these Subscription will begin upon Seller's transmission to Buyer of Subscription link and end 12 months from this date unless otherwise terminated by Seller. In the event of any conflict between this Agreement and the Terms of Use, the Terms of Use shall control.

February 17, 2022

Item No. **8f(5)**

Honorable Mayor and Members
of the Marina City Council

City Council Meeting
of March 1, 2022

CITY COUNCIL CONSIDER ADOPTING RESOLUTION NO. 2022-, APPROVING PURCHASE OF ONE (1) TRUNARC HANDHELD NARCOTICS ANALYZER IN THE AMOUNT OF \$37,036.84 FROM THERMO SCIENTIFIC PORTABLE ANALYTICAL INSTRUMENTS INC, OF TEWKSBURY, MASSACHUSETTS, UTILIZING FUNDS SET ASIDE IN THE POLICE DEPARTMENT FY 2021-2022 BUDGET FOR PURCHASE OF SAID EQUIPMENT AND WARRANTY PLAN, WAIVING CITY'S FORMAL BID PROCESS, WITHOUT COMPETITIVE BIDDING, FINDING THAT COMPETITIVE BIDDING WOULD BE UNAVAILING, WOULD NOT PRODUCE AN ADVANTAGE AND WOULD NOT BE IN THE PUBLIC INTEREST, AUTHORIZE FINANCE DIRECTOR TO MAKE NECESSARY ACCOUNTING AND BUDGETARY ENTRIES AND AUTHORIZE CITY MANAGER TO EXECUTE PURCHASE AGREEMENT ON BEHALF OF CITY SUBJECT TO FINAL REVIEW AND APPROVAL BY THE CITY ATTORNEY

RECOMMENDATION:

It is recommended that the City Council:

1. Consider adopting Resolution No. 2022-, approving purchase of one (1) TruNarc Narcotic Handheld Narcotics Analyzer in the amount of \$37,036.84 from Thermo Scientific Portable Analytical Instruments, Inc, of Tewksbury, Massachusetts, utilizing funds set aside in the Police Department FY 2021-2022 Budget for purchase of said equipment and warranty plan, and;
2. Consider waiving the City's formal bid process, without competitive bidding, finding that competitive bidding would be unavailing, would produce an advantage and would not be in the public interest, and;
3. Authorize Finance Director to make necessary accounting and budgetary entries, and;
4. Authorize City Manager to execute purchase agreement on behalf of City subject to final review by the City Attorney.

BACKGROUND:

Police departments across the nation are experiencing incidents of officers being exposed to potentially dangerous illegal substances that can potentially be life threatening. The simple act of testing unknown substances is hazardous and potentially life threatening . Officers routinely test potentially illegal substances in the course of their duties and safety during these procedures is paramount.

In order to provide a safer substance testing procedure, the Police Department has been researching and searching for a system that can provide the needed safety and have the ability to

identify many substances. The result of the search was the identification of the Thermo Scientific Portable Analytical Instruments, TruNarc Narcotic Handheld Narcotics Analyzer. TruNarc offers the following advantages over the current testing method:

1. Tests for almost five-hundred substances, including narcotics, stimulants, depressants, hallucinogens, and analgesics.
2. TruNarc has a library of substances that can be tested, which is updated to include emerging drug threats.
3. Requires no direct contact by officers with most substances.
4. Delivers clear, real-time results for presumptive evidence.
5. Provides automated, tamper-proof records with scan results, including time-and-date stamps to help expedite prosecution.

There are fifty-six California law enforcement agencies who are currently utilizing the TruNarc system. Almost all of the agencies district attorney's offices consider TruNarc results as valid as testing done by departments of justice. As such, prosecution is faster, and fees charged to cities by departments of justice disappear as they are no longer needed.

Some of the other benefits of using TruNarc are that little known substances are being identified almost instantly, the need for officers to handle potentially lethal narcotics is greatly reduced and valuable department of justice lab time is freed up for higher priority cases.

The Police Department does not require any additional funding to purchase the TruNarc system as funding has been set aside in the Department's FY 2021-2022 Budget as a result of a donation made to the Department from the Annemarie Shein Trust, Resolution #2001-122.

ANALYSIS:

Staff extensively researched TruNarc and like systems. Staff found TruNarc is unique and able to provide the safety, services, and performance the Department requires. There is no other comparable system(s).

The cost of this project is \$37,036.84 and includes an unlimited five-year warranty and the TruNarc Solution Kit for identification of heroin and other special narcotics. For more details of the sale, see the attached quote and Thermo Scientific Portable Analytical Instruments Inc – Terms and Conditions of Sale (“**EXHIBIT A**”).

The TruNarc warranty is advantageous in that it includes factory repair, loaner units when available and 24/7 technical support. Companion PC TruNarc admin. software, unlimited access to TruNarc eLearning course and free basic software updates to a core narcotics library are provided for the life of the instrument. The warranty also includes TruNarc on-site instructor led training for up to twelve students.

Marina Municipal Code Chapter 3.16, Section 3.16.040, Bidding Required – Exceptions provides that bidding procedures shall be dispensed with when the City Council finds by resolution that competitive bidding would be unavailing, would not produce an advantage and would not be in the public interest.

The choice of using Thermo Scientific Portable Analytical Instruments Inc. as sole source provider is predicated on the fact that Thermo Scientific Portable Analytical Instruments Inc. is the only company that offers the services and products required by the Police Department.

For the City to use the competitive bidding process it is unlikely it would significantly lower the price and it would result in a delay of two (2) to three (3) months from City Council approval to call for bids, item bid document specification preparation, bid advertising, opening, City Council awarding of bids, et cetera.

Based on the ease of implementation, police officer safety, and the lack of narcotic identification systems that offer the services and ease of use as Thermo Scientific Portable Analytical Instruments Inc, a competitive bidding process would be unavailing, would not produce an advantage and would not be in the public interest.

FISCAL IMPACT:

Should Council approve this request, the purchase of the TruNarc system and the five-year warranty will cost \$37,036.84. No City funds are required to make this purchase as it will be paid for by a donation from the Annemarie Shein Trust, Resolution #2021-122. The Trust funds are located in the Police Department FY 2021-2022 Budget, Revenue Account #100.210.000.00-5870.700 – Contributions Police. The expenditure of funds to purchase the TruNarc system will be done through the FY 2021-2022 Police Department Budget, Expense Account #100.210.000.00-6400.740 – Material & Suppl Special Dept Suppl.

CONCLUSION:

This request is submitted for City Council consideration and possible action.

Respectfully submitted,

Richard J. Janicki, Jr.
Management Analyst
Police Department
City of Marina

REVIEWED/CONCUR:

Tina Nieto
Chief of Police
City of Marina

Layne Long
City Manager
City of Marina