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# MEMORANDUM

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Date: June 4, 2020

To: Julie Castañeda  
Clerk of the Board of Supervisors

From: C.H. Huckelberry   
County Administrator

Re: **June 9, 2020, Board of Supervisors Meeting**

Please place on the June 9, 2020 Board of Supervisors Meeting under the Emergency portion of the Agenda entitled:

Approval of the Intergovernmental Agreement with Arizona State University for COVID-19 saliva testing using the Biodesign Institute.

CHH/mp

Attachment

c: Jan Leshner, Chief Deputy County Administrator  
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer,  
Health and Community Services  
Carmine DeBonis, Jr., Deputy County Administrator for Public Works  
Dr. Terry Cullen, Public Health Director, Pima County Health Department

JUN04'20H0409PCCLKF-BD

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## INTERGOVERNMENTAL AGREEMENT

This Intergovernmental Agreement ("Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2020 (the "Effective Date") by and between Pima County, a political subdivision of the State of Arizona ("County"), and The Arizona Board of Regents for and on behalf of Arizona State University ("ASU").

### RECITALS

- A. A.R.S. §§ 11-951, et. seq. provide that public agencies may enter into governmental agreements for the provisions of services or joint cooperative action.
- B. ASU's Biodesign Institute has available a high-throughput testing laboratory for COVID-19 testing. This testing is certified by the Clinical Laboratory Improvement Amendments (CLIA) process.
- C. County desires to engage ASU to test samples from individuals as directed by County, through its Health Department, and to perform COVID-19 testing, using the Biodesign laboratory (the "Services").
- D. County desires to engage ASU as a public-health partner in testing potential COVID-19 positive individuals in a timely manner to assist in their treatment and isolation, preventing further spread of COVID-19.
- E. ASU's Biodesign Institute desires to provide the testing services as set forth in this Agreement.
- F. The performance of the Services is consistent, compatible, and beneficial to the role and mission of ASU.

### AGREEMENT

1. **Scope of Work.** ASU's Biodesign Institute will use reasonable efforts to provide the Services. The parties agree that ASU will have discretion to involve its students in the conduct and performance of the Services to the extent permitted by law. ASU's performance of the Services and its obligations under this Agreement are subject to and governed by the regulations and policies of the Arizona Board of Regents. County will collect specimens and have them delivered to ASU by courier for testing. Each specimen will be de-identified prior to delivery and assigned a code so that it may subsequently be re-identified by County. County and ASU will cooperate to arrange a mutually agreeable schedule for delivery of specimens. ASU shall provide written test results by secure electronic means to Dr. Theresa Cullen, Pima County Health Department Director, and County will report any positive test results to the authorities as required by applicable law. County shall be responsible for reporting all test results to individuals tested; ASU shall have no such obligation. ASU will use the specimens provided by County for lab testing only and may retain the test specimens and copies of the test results for internal quality control or other similar uses, but may not reuse the test specimens or test results for any purpose without the express written consent of County.

2. **Scheduling Services.** The scheduling of the Services will be arranged to avoid conflict with ASU's educational and research programs. ASU will control the scheduling of the Services, but will make commercially reasonable efforts to meet the 48-hour timeline established by County.
3. **Term and Termination.**
  - 3.1 The term of this Agreement will be one year commencing on the Effective Date and will terminate as provided herein. The parties may modify or extend this Agreement at any time by mutual written consent.
  - 3.2 Either party may terminate this Agreement at any time by giving the other party not less than fifteen (15) days prior written notice. If this Agreement is terminated by County, County will remain responsible for payment to ASU for all Services performed through the date of termination and for reimbursement to ASU of all non-cancelable commitments incurred in the performance of the Services. Upon termination, property purchased in furtherance of this Agreement will remain the property of the purchasing party, unless expressly specified otherwise.
4. **Compensation and Invoicing.**
  - 4.1 **Rate Schedule.** County acknowledges and agrees that the rates herein are subject to change from time to time but that rates set forth on a Scope of Work will not change while work thereunder is in progress. In consideration for the Services, County will pay ASU as follows:
    - 4.1.1 Sampling - For all of ASU's reasonably incurred expenses to perform the sampling, including without limitation, salary, materials and supplies, transportation costs, etc.
    - 4.1.2 Laboratory Test - \$100 per test performed.
  - 4.2 County will remit the amount of the contract price due for Services rendered under this Agreement upon receipt of invoices from ASU issued monthly for the duration of the period of performance. Invoices are due and payable within 30 days and are payable in full regardless of whether County is reimbursed for the testing, whether by patients, patient representatives, or third-party payors, including any government health care program. County will send checks or paper remittance advices to:

KE Finance  
Arizona State University  
PO Box 876011  
Tempe, AZ 85287-6011
  - 4.3 ASU reserves the right to subject invoices not paid within thirty (30) days of the date the invoice is transmitted to County to a 1.5% per month late fee on the unpaid balance for any amounts not in dispute. ASU reserves the right to discontinue the Services if County fails to make payments when due. In the event of non-payment, ASU may terminate all further work on the Services and seek full payment from County for all work performed and all expenses incurred including allocable costs, pursuant to the termination clause

of this Agreement including the collection of payment. Should it become necessary for ASU to commence collection proceedings or retain an attorney to enforce any of the terms of this Agreement, County will pay all reasonable attorneys' fees and the costs of collection incurred by ASU.

5. **No Warranty, Limitation of Liability.**

5.1 County agrees that ASU does not make any representation or warranty for the accuracy of the Services. County further agrees that all Services are provided on an "AS-IS" and as available basis. ASU assumes no responsibility for the accuracy or lack of accuracy of any testing provided under the Services. County agrees to assume any risk for the inaccuracy of such testing.

5.2 **TO THE FULLEST EXTENT PERMITTED BY LAW, ASU and ASU'S BIODESIGN INSTITUTE DISCLAIM ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, RELATED TO THE SERVICES INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY THIRD-PARTY INTELLECTUAL PROPERTY OR PROPRIETARY RIGHTS.**

5.3 **Limitation of Liability.** County agrees, to the fullest extent permitted by law: 1) ASU shall not be liable to County for any consequential, incidental, indirect, special, reliance, punitive, or exemplary damages or losses, whether in contract, tort, or otherwise, that arise in any way out of this Agreement or the Services; and 2) IN NO EVENT WILL THE AGGREGATE LIABILITY OF ASU TO COUNTY IN ANY MATTER ARISING FROM, RELATING TO OR CONNECTED WITH THIS AGREEMENT OR THE SERVICES EXCEED \$100.

6. **Federal and State Patient Privacy Laws.** ASU Biodesign Institute is not a Covered Entity nor a Business Associate under the Health Insurance Portability and Accountability Act ("HIPAA").

7. **Disclaimers.** County agrees that ASU may obtain a signed disclaimer in the form substantially similar to that attached as Exhibit A, from any individual that ASU obtains a sample from.

8. **Authorization to Take Sample.** County represents and warrants to ASU that it has obtained all necessary authorizations and consents to take the samples and that the individuals to be tested have consented to be tested for COVID-19.

9. **Indemnification.** To the extent permitted by law, County will indemnify, defend, save and hold harmless the State of Arizona, its departments, agencies, boards, commissions, universities, and its and their officials, agents, and employees (collectively, "Indemnitee") for, from, and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys' fees, and costs of claim processing, investigation, and litigation) arising out of or in any way related to this Agreement or the Services. County will be responsible for primary loss investigation, defense, and judgment costs where this Indemnification is applicable.

10. **No University Endorsements.** In no event will County (or its successors, employees, agents and contractors) state or imply in any publication, advertisement or other medium that ASU has approved, endorsed or tested any product or service. In no event will ASU's performance of any

Services hereunder be considered a test of the effectiveness or the basis for any endorsement of a product or service.

11. **Use of Names or Logos.** Neither party will use any names, service marks, trademarks, trade names, logos or other identifying names, domain names or identifying marks of the other party ("Marks"), or the name of any representative or employee of the other party in any sales promotion work or advertising, or any form of publicity, without the prior written permission of the party that owns the Marks in each instance. Use of any party's Marks must comply with the owning party's requirements, including using the "®" indication of a registered trademark where applicable.
12. **Similar Research.** Nothing in this Agreement will be construed to limit the freedom of ASU or of its researchers from engaging in similar services made under other grants, contracts or agreements with parties other than County.
13. **Export Controls.** County will notify ASU in writing if any technological information or data provided to ASU under this Agreement is subject to export controls under U.S. law or if technological information or data that County is requesting ASU to produce during the course of work under this Agreement is expected to be subject to such controls. County will notify ASU of the applicable export controls (for example, Commerce Control List designations, reasons for control, countries for which an export license is required). ASU will have the right to decline export controlled information or tasks requiring production of such information.
14. **Independent Contractor.** Each party is an independent contractor and is independent of the other party. Under no circumstances will any employees of one party be deemed the employees of the other party for any purpose. This Agreement does not create a partnership, joint venture or agency relationship between the parties of any kind or nature. This Agreement does not create any fiduciary or other obligation between the parties, except for those obligations expressly and specifically set forth herein. Neither party will have any right, power, or authority under this Agreement to act as a legal representative of the other party, and neither party will have any power to obligate or bind the other or to make any representations, express or implied, on behalf of or in the name of the other in any manner or for any purpose whatsoever contrary to the provisions of this Agreement. Each party acknowledges that the relationship of the parties hereunder is non-exclusive.
15. **No Referral Obligation.** The parties each represent and warrant on behalf of itself, that the aggregate benefit given or received under this Agreement has been determined in advance through a process of arms-length negotiations that was intended to achieve an exchange of goods and/or services consistent with fair market value under the circumstances, and that any benefit given or received under this Agreement is not intended to induce, does not require, and is not contingent upon, the admission, recommendation or referral of any patient, directly or indirectly, and further, is not determined in any manner that takes into account the value of business generated between the parties. Nothing herein restricts or is intended to restrict the parties from making referrals for goods or services to any individual or entity. The parties represent and warrant that this Agreement does not involve the counseling or promotion of a business arrangement that violates federal or state law.

16. **Notices.** All notices, requests, demands and other communications hereunder will be deemed to have been duly given on the date of delivery if the same shall be in writing and be delivered (a) personally, (b) by registered or certified mail, postage prepaid, (c) by email or facsimile transmission, with a copy by regular mail or (d) by overnight delivery service and addressed to the recipient's business address.
17. **Force Majeure.** Neither Party is responsible for a failure to perform any obligation under this Agreement if such failure to perform is directly caused by a Force Majeure Event. A "Force Majeure Event" shall mean an event or circumstance that is beyond the reasonable control and without the fault or negligence of the Party impacted (other than for obligations to make payments when due under this Agreement), and that could not have been prevented by the reasonable diligence of the party. Without in any way limiting the foregoing, a Force Majeure Event may include, but are not restricted to (a) acts of God or of a public enemy, (b) acts of the Government in either its sovereign or contractual capacity, (c) fires, (d) floods, (e) epidemics or pandemics, (f) quarantine restrictions, (g) strikes, (h) freight embargoes; (i) failure or disruption of utilities or critical electronic systems, (j) mass health issues or disease, and (k) unusually severe weather. In the event that a Party is impacted by a Force Majeure Event, that Party will give prompt notice to the other Party and take commercially practical actions to mitigate the impacts of the Force Majeure Event.
18. **Applicable Law.** Any dispute regarding or arising under this Agreement, or the interpretation of this Agreement, will be subject to and resolved in accordance with the laws of the State of Arizona, without regard to its conflicts of laws principles.
19. **Dispute Resolution.** In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties hereto will use their reasonable efforts to settle the dispute, claim, question, or disagreement. To this effect, they will consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. In the event of litigation, as required by Arizona Revised Statutes ("A.R.S.") §12-1518, the parties agree to make use of arbitration in all contracts that are subject to mandatory arbitration pursuant to rules adopted under A.R.S. §12-133.
20. **Medicare Access to Books and Records.** For the purposes of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any regulations promulgated pursuant thereto, ASU agrees that until the expiration of four (4) years after the furnishing of the Services, it will make available, upon written request to the Secretary of the US Department of Health and Human Services or upon request to the Comptroller General, or any of their duly authorized representatives, the contracts, and books, documents and records of ASU necessary to certify the nature and extent of such costs
21. **Assignment.** Neither party will assign or transfer any interest in this Agreement without the prior written approval of the other party. Any attempted assignment in violation of this provision will be null and void. Subject to the foregoing, this Agreement will be binding upon the permitted successors and permitted assigns or other permitted transferees of the parties.
22. **Recitals and Exhibits.** All recitals herein, and all exhibits attached hereto and referred to herein, are integral and material parts of this Agreement.

23. **Severability.** If any provision of this Agreement shall for any reason be found invalid, illegal, unenforceable, or in conflict with any valid controlling law: (a) such provision will be separated from this Agreement; (b) such invalidity, illegality, unenforceability, or conflict will not affect any other provision hereof; and (c) this Agreement will be interpreted and construed as if such provision, to the extent the same shall have been held invalid, illegal, unenforceable, or in conflict, had never been contained herein.
24. **Waiver.** The waiver of a breach hereunder may be effected only by a writing signed by the waiving party and will not constitute, or be held to be, a waiver of any other or subsequent breach or to affect in any way the effectiveness or enforceability of the provision in question.
25. **Modification.** Any modification or amendment of this Agreement will be effective only if made in writing and signed by both parties.
26. **No Third Party Beneficiaries.** Nothing in this Agreement, express or implied, is intended or will be construed to confer upon any person or entity, other than the parties and their respective successors and assigns permitted by this Agreement, any right, remedy or claim under or by reason of this Agreement.
27. **Merger and Integration.** This Agreement contains the entire understanding between the parties concerning the subject matter of this Agreement and supersedes any and all prior understandings, agreements, representations, and warranties, express or implied, written or oral, between the parties concerning the subject matter of this Agreement.
28. **Nondiscrimination.** The parties agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration and nondiscrimination, including the Americans with Disabilities Act.
29. **Conflict of Interest.** In accordance with A.R.S. § 38-511, either party may cancel this Agreement within three years after the execution of this Agreement, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of that party, at any time while this Agreement or any extension thereof is in effect, is an employee or agent of any other party to this Agreement in any capacity or a consultant to any other party with respect to the subject matter of this Agreement.
30. **Failure of Legislature to appropriate.** In accordance with A.R.S. § 35-154, if ASU's performance under this Agreement depends on the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then ASU may provide written notice of this to County and cancel this Agreement without further obligation of ASU. Appropriation is a legislative act and is beyond the control of ASU. Additionally, notwithstanding any other provision in this IGA, County may terminate this IGA if for any reason the Pima County Board of Supervisors does not appropriate sufficient monies for the purpose of maintaining the IGA. In the event of such termination, County shall have any further obligation to ASU other than to pay for any Services already rendered.
31. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which taken together will constitute one and the same

instrument, and photocopy, facsimile, electronic and other copies will have the same effect for all purposes as an ink-signed original.

**[SIGNATURES ON NEXT PAGE.]**



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives on the respective dates entered below.

THE ARIZONA BOARD OF REGENTS  
FOR AND ON BEHALF OF  
ARIZONA STATE UNIVERSITY

PIMA COUNTY

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

#### INTERGOVERNMENTAL AGREEMENT DETERMINATION

In accordance with A.R.S. § 11-952, this Agreement has been reviewed by the undersigned who have determined that this Agreement is in appropriate form and is within the powers and authority of the respective parties.

Pima County

The Arizona Board of Regents for and on Behalf  
of Arizona State University

By: \_\_\_\_\_



Deputy County Attorney  
**ANDREW FLAGG**

By: \_\_\_\_\_

Counsel for ASU

Date: \_\_\_\_\_

6/4/2020

Date: \_\_\_\_\_

**EXHIBIT A**

**Patient Disclaimer**

By signing below, you understand and agree to the following:

1. The Arizona Board of Regents for and on behalf of Arizona State University ("ASU") and The Biodesign Institute make no representation and assume no responsibility for the accuracy of the testing – all testing results are provided on an "AS-IS" and as available basis.
2. ASU and The Biodesign Institute **TO THE FULLEST EXTENT PERMITTED BY LAW, DISCLAIM ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, RELATED TO THE COVID-19 TESTING INCLUDING WITHOUT LIMITATION ANY WARRANTY OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY THIRD PARTY INTELLECTUAL PROPERTY OR PROPRIETARY RIGHTS.**
3. To the fullest extent permitted by applicable law, ASU and The Biodesign Institute do not warrant the accuracy or completeness of the testing provided by the Biodesign Institute.
4. Limitation of Liability. You hereby agree that to the fullest extent permitted by law:
  - a. ASU and The Biodesign Institute shall not be liable to you, or any of your heirs or assigns, for any consequential, incidental, indirect, special, reliance, punitive, or exemplary damages or losses, whether in contract, tort, or otherwise.
  - b. **IN NO EVENT WILL THE AGGREGATE LIABILITY OF ASU OR THE BIODESIGN INSTITUTE IN ANY MATTER ARISING FROM, RELATING TO OR CONNECTED WITH THIS MATTER EXCEED \$100.**

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_