



HISTORIC
FRANKLIN
TENNESSEE

ITEM #31
BOMA
03/22/2011

MEMORANDUM

March 3, 2011

TO: Board of Mayor and Aldermen

FROM: City Administrator Eric S. Stuckey
Assistant City Administrator Russell Truell
Fire Chief Rocky Garzarek
Purchasing Manager Brian Wilcox

SUBJECT: Consideration of sole-source purchase from Masimo Corporation in Irvine, California in the amount of \$34,842 for Rad-57 monitors to be used by the City's Fire Department.

Purpose

The purpose of this procurement is to purchase up to six (6) Rad-57 monitors with the technology to measure carboxyhemoglobin, methemoglobin, oxygen saturation, and pulse rates on patients treated by the Franklin Fire Department and fire suppression personnel engaged in firefighting or other hazardous materials type operations. This purchase is for new equipment for use in the Franklin Fire Department.

Background

On May 25, 2010, the Fire Department submitted a grant application through the Assistance to Firefighter Grant program. The procurement is intended to enhance the safety and well-being of fire department personnel as they perform operations in hazardous atmospheres by monitoring the levels of Carbon Monoxide in the Firefighters' blood that may have been inhaled while working in these environments. This technology is also very beneficial to the citizens and visitors of the City who request medical care from the department. The symptoms of Carbon Monoxide poisoning very closely mimic the symptoms of influenza and this monitor is the only way to distinguish the difference between the two in the pre-hospital setting. The Masimo Corporation is the only vendor of this non-invasive technology. On February 18, 2011, the department received an approved award notification.

The purchase of six (6) Rad-57 monitors will be 80% funded by the Assistance to Firefighters Grant program.

A price quote reflective of these amounts is attached for your review.

Financial Impact

The Masimo Corporation is the sole-source vendor of this technology and has indicated that in writing. They are offering discounted pricing based on the quantity listed in the quote. A sole-source letter is attached.

If the quoted pricing is accepted by the City, then the total value of the order would be \$34,842 including shipping. \$27,873.60 will be provided by the Assistance to Firefighters Grant program and \$6968.40 will be funded by the general fund and absorbed in the Fire Department's FY11 budget. The vendor has indicated in writing that the quoted unit pricing is the best municipal pricing available at this time and in the foreseeable future for the quantity indicated, and staff believes the unit pricing to be reasonable for this industry at this time.

Recommendation

Staff recommends that the City accept the pricing quoted by Masimo Corporation and approve the sole-source purchase for the items mentioned in the amount of \$34,842. Purchasing Manager Brian Wilcox is of the opinion that this proposed sole-source purchase appears to be justified and the Fire Department's recommendation appears to be made in a fair and impartial manner.



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Requisition

Form No. 3

Request for authorization to execute a purchase, the total value of which is equal to or more than \$10,000

Request Date: March 23, 2011

Requisitioning Department: Fire

Item Description: Qty: 6 Carbon monoxide monitors

Basis for pricing:

- pricing established by previous City of Franklin competitive process (details, including date and description, attached); or
- pricing established by previous process of another governmental agency (details, including date and description, attached); or
- pricing established by another process (details, including date and description, attached).

Vendor: Masimo Corporation (sole-source; approved by BOMA 3/22/2011; agenda item no. __)

Date of Pricing: 2/18/2011

Total Value of Purchase: \$34,842.00

Budget Amount: not separately budgeted; 80% funded by the Assistance to Firefighters Grant program

Budget Justification: The procurement is intended to enhance the safety and well-being of fire department personnel as they perform operations in hazardous atmospheres.

General Ledger Account No.: 110-83530-42200

Intended method of payment:

- invoice to be paid by conventional check to be issued by Accounts Payable^{1 2}; or
- invoice to be paid by purchasing card³ issued by City to:

Todd Horton

Recommended for Approval: _____
(Authorized representative of requisitioning department)

Recommended for Approval: _____
(Purchasing Manager)

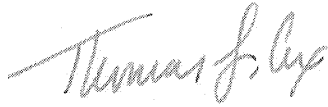
Approved: _____
(Assistant City Administrator or City Administrator)

Along with attached Agreement & Exhibits

¹ If the vendor has not done business with the City of Franklin within the last two (2) years, please ask the vendor to complete the City of Franklin Vendor Information Form and IRS Form W-9 (both forms available at Inside the City > Finance > Shared Documents > Finance (Payroll and AP) > Accounts Payable) and to return them to the Purchasing Office.

² Please ask the vendor to address invoices to: City of Franklin Accounts Payable, P.O. Box 295, Franklin, TN 37065-0295.

³ Please ask the Purchasing Office to adjust the single-transaction limit and, if necessary, the monthly credit limit on the identified card.



PLEASE INDICATE BILLING ADDRESS, IF DIFFERENT THAN PHYSICAL ADDRESS:

Billing Address: City of Franklin Accounts Payable, P.O. Box 295, Franklin, TN 37065-0295
 Physical Address: City of Franklin Fire Department Headquarters, City Hall, 109 3rd Ave. South, Franklin, TN 37064
 Billing City, State, Zip: Franklin, TN 37065-0295
 Accounts Payable Contact: Accounts Payable Technician
 Phone Number: 6151791-1457
 Email: dawnw@franklintn.gov or matt.reinders@franklintn.gov
 Purchasing Contact: Purchasing Technician
 Phone Number: 6151550-6692
 Signature & Date:

Sales Tax Exempt: Yes No If yes, a tax exemption certificate must be attached to this form ("Exhibit No. 1").

Terms: Net 30 days.
 Delivery: 7-10 days from receipt of order unless otherwise noted.
 F.O.B.: Franklin, TN shipping charges prepaid and billed to customer.
 Warranty: 12 months for serial numbered capital equipment.
 6 months for reusable sensors and accessories.
 6 months for disposable sensors.
 12 months for Rainbow cables and sensors.
 Quotation Validity: 60 days.
 Sales Tax: Prices quoted do not include sales tax. City of Franklin is exempt from sales tax.

TERMS AND CONDITIONS OF PURCHASE

TERMS AND CONDITIONS: The City of Franklin standard procurement terms and conditions attached hereto ("Exhibit No. 2") shall, control the purchase of the products and services set forth in this Quotation.

TECHNICAL INFORMATION: All technical specifications, drawings, notes, instructions or information referred to on the face of this Quotation or contained in attachments or exhibits hereto are deemed to be incorporated by reference so long as Masimo has provided such to Buyer.

PRICE AND DELIVERY: Masimo shall furnish the products or services in accordance with the price and delivery schedule stated herein.

PACKAGING AND SHIPPING: Masimo shall be responsible for packaging, marking and shipping the products in accordance with good commercial practices and all applicable laws. An itemized packing list shall accompany each shipment.

DELIVERY. F.O.B. point shall be Franklin, TN. Masimo reserves the right to make partial deliveries. The carrier shall not be construed to be an agent of Masimo. Masimo shall not be held responsible for delays by carrier to make deliveries for any cause.

PAYMENT: Payment terms are net 30 days from date of delivery or date of Buyer's receipt of invoice, whichever is later.

WARRANTY: Masimo warrants for the applicable warranty period as follows: (1) that all products delivered hereunder are free from defects in design, material and in workmanship; (2) that all services are

performed in a good and workmanlike manner; (3) that Masimo has good title to the products and has conveyed such title to buyer; and (4) that the products or services purchased hereunder conform to the applicable specifications, drawings or samples or other description referenced herein. Unless otherwise indicated in the instructions for use accompanying the product, the warranty period is one (1) year from the date of purchase for pulse **oximeters**; for reusable sensors and other accessories, the duration of the warranty is six (6) months; and for disposable sensors, the warranty period is six (6) months. The duration of warranty on Rainbow cables and sensors in the Fire/EMS market will be one (1) year. The product warranty and optional extended warranty for Pulse CO-Oximeters are subject to all restrictions and exclusions listed in the directions for use. RESTRICTIONS: The products contain Masimo's proprietary software ("Software"), trade secrets and other proprietary information (collectively, "Intellectual Property"). Masimo grants to Buyer a non-exclusive, non-transferable, perpetual license to use the Intellectual Property in connection with its authorized use of the products. This Agreement does not constitute a sale of the Software or any Intellectual Property.

OPTIONAL SOFTWARE PARAMETERS: Masimo offers optional software parameters ("Software Parameters") with additional functionality at the term license fees detailed herein. The optional Software Parameters contain Masimo Intellectual Property, and are licensed separately from the Software mentioned above. If Buyer elects to purchase term license(s) for optional Software Parameters, Masimo shall grant to Buyer, subject to the Payment paragraph above, a non-exclusive, non-transferable, non-sub-licensable, revocable limited term software license to use the optional Software Parameters for the term license period. Any license granted to Buyer is limited to use of the optional Software Parameter solely on a single Masimo **Oximeter**.

ADDITIONAL SOFTWARE PARAMETER LICENSES: Additional term licenses for optional Software Parameters may be purchased.

NO IMPLIED LICENSE: Possession or purchase of Masimo's pulse oximeters ("Oximeters") does not convey any express or implied license to use the Oximeters with unauthorized sensors or cables that would, alone, or in combination with the **Oximeters**, fall within the scope of one or more of the patents relating to the **Oximeters**. Sensors designated for single patient use only are licensed to Buyer under patents owned by Masimo to be used on a single patient only, and Buyer shall not use Masimo's patented single-patient use sensors which have been reprocessed or previously used with a different patient, unless specifically authorized by Masimo. There is no license, implied or otherwise, that would allow use of disposable Sensors beyond their intended single use. After use of sensors designated for single patient use only, there is no further license granted by Masimo to use the sensors and they must be discarded.

LIMITED USE: Buyer will not permit the Oximeters to be used by anyone other than Buyer's qualified and trained personnel. Except for use of the serial port to transmit data from Masimo's Oximeters to other oximeters, modification or connection of other equipment to Oximeters, including software, hardware and related instruments cannot be made without Masimo's prior written authorization, which authorization may be withheld at Masimo's sole discretion. The Oximeters and other products or services acquired hereunder may not be used for any processes, procedures, experiments or any other use for which the **products/services** are not intended for use or cleared for use by the Food and Drug Administration (FDA). Buyer may not disclose, publish, translate, release, distribute copies of, modify, adapt, translate, or create derivative works of the products, services deliverables, **software/firmware** or written materials. Buyer may not reverse engineer, decompile or disassemble the products, services deliverables or software.

COMPLIANCE WITH LAWS: Masimo warrants that in performance of a Purchase Order it has complied with or will comply with all applicable federal, state and local laws and ordinances including,

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but not limited to, OSHA, the Fair Labor Standards Act, as amended, and Executive Order 11246, as amended. In addition, Masimo shall secure and maintain adequate Worker's Compensation coverage.

GOVERNMENT CONTRACTS: Masimo warrants that in the performance of a Purchase Order it has complied with or will comply with all Federal Acquisition Regulations or their counterpart for other governmental agencies, which are applicable to the products or services purchased hereunder. Upon request, Masimo shall certify compliance with any of the aforementioned rules or regulations.

RELATIONSHIP BETWEEN PARTIES: Nothing in this Quotation shall be construed as creating any partnership, joint venture, or agency between the parties.

NOTICES: All notices shall be in writing and delivered either by hand, facsimile or certified mail at the addresses set forth herein. Notice shall be deemed to have been given upon receipt if delivered by hand or facsimile, or if given by certified mail, upon expiration of seven days after mailing.

APPLICABLE LAW: These terms and conditions are governed by the laws of the State of Tennessee without regard to its conflict of laws provisions.

ACKNOWLEDGEMENT AND ACCEPTANCE: The issuance of this Quotation to Buyer constitutes an offer expressly limited to the terms contained herein. Buyer acknowledges that the terms of its purchase order are part of the agreement. Masimo reserves the right to revoke this offer at any time prior to its acceptance, which shall only be by either the placement of an executed Purchase Order or the delivery and acceptance of conforming products to Buyer. These terms and conditions contain the entire understanding between Masimo and Buyer; supersede all prior understandings, written or oral, regarding the subject of this Agreement; and may only be amended, modified or superseded by a written agreement signed by Masimo and by Buyer. Only an executive vice-president or the president of Masimo has the authority to sign such amending document.

APPROVED AS TO FORM
by City Attorney's Office

By: Shauna R. Billingsley
City Attorney

Date: 3.17.11

Exhibit No. 2 to Masimo Agreement
COF Contract No. 2011-0041

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This addendum shall modify and supersede the attached agreement from Masimo (the "Agreement") and entered into on the 2nd day of March, 2011, by the City of Franklin, Tennessee and Masimo ("Vendor"). The Agreement together with this Addendum and the attached document(s) constitute the entire agreement ("Contract"). Acceptance of payment as stated in the Agreement constitutes Vendor's acceptance of all terms and conditions stated herein.

Standard Terms and Conditions

1. Time of the Essence. The parties agree that TIME IS OF THE ESSENCE with respect to the parties' performance of all provisions of the Agreement.
2. Confidentiality. Vendor waives any right to confidentiality of any document, e-mail or file it fails to clearly mark on each page (or section as the case may be) as confidential or proprietary. City may be required to disclose documents under state or federal law. City shall notify Vendor if a request for documents has been made and shall give Vendor a reasonable opportunity under the circumstances to respond to the request by redacting proprietary or other confidential information. In exchange, to the extent of Vendor's negligence, Vendor agrees to indemnify, defend, and hold harmless City for any claims by third parties relating thereto or arising out of (i) the City's failure to disclose such documents or information required to be disclosed by law, or (ii) the City's release of documents as a result of City's reliance upon Vendor's representation that materials supplied by Vendor (in full or redacted form) do not contain trade secrets or proprietary information, provided that the City impleads Vendor and Vendor assumes control over that claim.
3. Derivative Works. To the extent that the Agreement contains Vendor's reservation of rights, such definitions and limitations are superseded by the following: "Derivative Work" means a program that is based on or derived from one or more existing programs or components. If the original software is modified to create a new program, a derived work is created. If the original software was designed to accept plug-ins or drivers using a defined mechanism, such a driver or plug-in does not form a derived work. Linking to a library in the way it was designed to be interfaced with, does *not* constitute deriving a work. "Derivative work" is not the data that the Licensee inputs, manipulates, modifies or otherwise improves, nor the images resulting therefrom.
4. Warranties/Limitation of Liability/Waiver. The City reserves all rights afforded to local governments under law for all general and implied warranties. The City does not waive any rights it may have to all remedies provided by law and therefore any attempt by Vendor to limit its liability shall be void and unenforceable.
5. Arbitration/Mediation. No arbitration shall be required as a condition precedent to filing any legal claim arising out of or relating to the Contract. No arbitration or mediation shall be binding.
6. No Taxes, No Interest Payments. As a tax-exempt entity, the City shall not be responsible for sales or use taxes incurred for products or services. The

Exhibit No. 2 to Masimo Agreement
COF Contract No. 2011-0041

Thomas J. Cox

City shall supply Vendor with its Sales and Use Tax Exemption Certificate upon Vendor's request. Vendor shall bear the burden of providing its suppliers with a copy of the City's tax exemption certificate and shall assume all liability for such taxes, if any, that should be incurred. The City does not agree to pay any interest for late payments, having agreed to pay in a timely manner.

7. Notices. Any notice provided pursuant to the Contract, if specified to be in writing, will be in writing and will be deemed given: (a) if by hand delivery, then upon receipt thereof; (b) if mailed, then three (3) days after deposit in the mail where sender is located, postage prepaid, certified mail return receipt requested; (c) if by next day delivery service, then upon such delivery; or (d) if by facsimile transmission or electronic mail, then upon confirmation of receipt. All notices will be addressed to the parties at the addresses set forth below (or set forth in such other document which the Agreement or this Addendum may accompany, or such other address as either party may in the future specify in writing to the other):

In the case of the City:

City of Franklin
Attn: Purchasing Manager
109 3rd Ave. South
P.O. Box 305
Franklin, TN 37065-0305
FAX: 615/550-0079
E-mail: purchasing@franklintn.gov

In the case of Vendor:

Masimo Corporation
Attn: Travis Pond
40 Parker
402-661-4598 (cell)
Irvine, CA 92618
FAX: 877-236-0280
E-mail: tpond@masimo.com

8. Waiver. Neither party's failure or delay to exercise any of its rights or powers under the Contract will constitute or be deemed a waiver or forfeiture of those rights or powers. For a waiver of a right or power to be effective, it must be in writing signed by the waiving party. An effective waiver of a right or power shall not be construed as either (a) a future or continuing waiver of that same right or power, or (b) the waiver of any other right or power.
9. Severability. If any term or provision of the Contract is held to be illegal or unenforceable, the validity or enforceability of the remainder of the Contract will not be affected.
10. Precedence. In the event of conflict between this Addendum and the provisions of the Agreement, or any other contract, agreement or other document to which the Agreement or this Addendum may accompany or incorporate by reference, the provisions of this Addendum will, to the extent of such conflict (or to the extent the Agreement is silent), take precedence unless such document expressly states that it is amending this Addendum.
11. Entire Agreement. The Contract between the parties and supersedes any prior or contemporaneous communications, representations or agreements between the parties, whether oral or written, regarding the subject matter of the entire Contract. The terms and conditions of this Addendum may not be

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Exhibit No. 2 to Masimo Agreement
COF Contract No. 2011-0041

changed except by an amendment expressly referencing this Addendum by section number and signed by an authorized representative of each party.

12. Additions/Modifications. If seeking any addition or modification to the Contract, the parties agree to reference the specific paragraph number sought to be changed on any future document or purchase order issued in furtherance of the Contract, however, an omission of the reference to same shall not affect its applicability. In no event shall either party be bound by any terms contained in any purchase order, acknowledgement, or other writings unless: (a) such purchase order, acknowledgement, or other writings specifically refer to the Contract or to the specific clause they are intended to modify; (b) clearly indicate the intention of both parties to override and modify the Contract; and (c) such purchase order, acknowledgement, or other writings are signed, with specific material clauses separately initialed, by authorized representatives of both parties.
13. Applicable Law; Choice of Forum/Venue. The Contract constitutes the entire agreement and is made under and will be construed in accordance with the laws of the State of Tennessee without giving effect to any state's choice-of-law rules. The choice of forum and venue shall be exclusively in the Courts of Williamson County, Tennessee.
14. Breach. Upon deliberate breach of the Contract by either party, the non-breaching party shall be entitled to terminate the Contract without notice, with all of the remedies it would have in the event of termination, and may also have such other remedies as it may be entitled to in law or in equity.
15. Survival. This Addendum shall survive the completion of or any termination of the Contract, agreement or other document to which it may accompany or incorporate by reference.

Exhibit No. 1



GOVERNMENT CERTIFICATE OF EXEMPTION

To: _____

Vendor

The undersigned hereby certifies that the purchases of tangible personal property or services being made on this certificate of exemption are being made by the State of Tennessee, or a county or municipality within the State of Tennessee, or the Federal Government, or an agency thereof and are for the use of such government or agency.

The undersigned further certifies that the said government or agency is making the purchase direct from the above named vendor, will obtain title or has title to the property immediately when it is delivered, and will use public funds to pay directly to the above named vendor for the tangible personal property or services obtained upon this certificate of exemption.

Name of government or agency CITY OF FRANKLIN, 109 3rd Ave., South, Franklin, TN 37064
State Sales & Use Exemption #: 265002302 Federal ID # 626000290

Date: _____

Signed: *Forrest B. Powell*

Title: Chief Financial Officer



Please Make Purchase Order to:
Masimo Corporation
 40 Parker
 Irvine, CA 92618
 Phone: 1-800-326-4890
 FAX: 1-877-236-0280

Masimo Representative:	Ted Piper	Date:	02/18/2011 11:24 AM	Quote #:	39454
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Fire/EMS Government Quotation and Order Form

Please Sign and, if necessary, Include Purchase Order - Please fax to: Customer Service 1-877-236-0280

Account Name:	Franklin Fire Dept	Contact Name:	Todd Horton
Physical Address:	109 3rd Avenue South	Title:	Assistant Fire Chief
City:	Franklin	Main Phone:	615-550-6751
State:	TN	Fax:	615-591-5615
Zip Code:	37064	E-mail:	toddh@franklintn.gov

Purchase Order #	To Be Paid By Purchasing Card	Authorized Signature:	
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Part #	Description	Base Price	Volume Price	Qty	Extended Price
9216	Rad-57 Handheld	\$ 695.00	\$ 695.00	6	\$ 4,170.00
2296	Carboxyhemoglobin (SpCO) parameter [valid for the life of the device on which it is installed]	\$ 2,195.00	\$ 2,195.00	6	\$ 13,170.00
2297	Methemoglobin (SpMet) parameter [valid for the life of the device on which it is installed]	\$ 2,195.00	\$ 2,195.00	6	\$ 13,170.00
2201	Rainbow® DCI-dc3 Adult Reusable Direct Connect Sensor, 3 ft. (SpO2, SpCO and SpMet) 1/box,	\$ 695.00	\$ 695.00	6	\$ 4,170.00
2208	Water Resistant Protective Carrying Case for Battery operated portable handhelds, Red	\$ 0.00	\$ 0.00	6	\$ 0.00
	Shipping	\$ 27.00	\$ 27.00	6	\$ 162.00

Total:	\$ 34,842.00
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** Carry case offer: One per Rad-57 unit purchased.
 *** Trade-in offer limited to the exact number of Rad-57 units purchased.
 Additional Accessories are available. Please call for more information.