



# City of Madison

City of Madison  
Madison, WI 53703  
www.cityofmadison.com

## Master

**File Number: 47764**

**File ID:** 47764

**File Type:** Resolution

**Status:** Passed

**Version:** 2

**Reference:**

**Controlling Body:** FINANCE  
COMMITTEE

**File Created Date :** 06/21/2017

**File Name:** Authorize indemnification for EULAs

**Final Action:** 09/19/2017

**Title:** SUBSTITUTE - Authorizing staff designated by the Information Technology Director or designee to click on End User License Agreements for licensing and use of certain software, and authorization for indemnification of the software vendor by the City.

**Notes:** This resolution is a companion to Ordinance Legislative File No. 47865 and should be considered and acted upon together.

**Sponsors:** Samba Baldeh

**Effective Date:** 09/21/2017

**Attachments:**

**Enactment Number:** RES-17-00762

**Author:** Paul Kronberger

**Hearing Date:**

**Entered by:** Istarczewski@cityofmadison.com

**Published Date:**

**Related Files:**

### History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Department of Information Technology	06/21/2017	Referred for Introduction				
	<b>Action Text:</b> This Resolution was Referred for Introduction						
	<b>Notes:</b> Finance Committee, Affirmative Action Commission						
1	COMMON COUNCIL	07/11/2017	Refer	FINANCE COMMITTEE		07/24/2017	Pass
	<b>Action Text:</b> A motion was made by Rummel, seconded by Baldeh, to Refer to the FINANCE COMMITTEE. The motion passed by voice vote/other.						
	<b>Notes:</b> Additional referral to Affirmative Action Commission.						
1	FINANCE COMMITTEE	07/11/2017	Referred	AFFIRMATIVE ACTION COMMISSION		08/08/2017	
	<b>Action Text:</b> This Resolution was Referred to the AFFIRMATIVE ACTION COMMISSION						
	<b>Notes:</b>						
1	FINANCE COMMITTEE	07/24/2017	RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER				Pass

**Action Text:** A motion was made by Rummel, seconded by Wood, to RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER. The motion passed by voice vote/other.

**Notes:**

1	COMMON COUNCIL	08/01/2017	Re-refer	AFFIRMATIVE ACTION COMMISSION	08/08/2017	Pass
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**Action Text:** A motion was made by Rummel, seconded by Baldeh, to Re-refer to the AFFIRMATIVE ACTION COMMISSION. The motion passed by voice vote/other.

**Notes:**

1	AFFIRMATIVE ACTION COMMISSION	08/08/2017	Return to Lead with the Recommendation for Approval	FINANCE COMMITTEE		Pass
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**Action Text:** Lara Mainella provided an overview of what the End User License Agreement is and what the resolution serves to solve. A motion was made by Moze, seconded by Kigeya, to Return to Lead with the Recommendation for Approval to the FINANCE COMMITTEE. The motion passed by voice vote/other.

2	COMMON COUNCIL	09/19/2017	Adopt			Pass
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**Action Text:** A motion was made by Baldeh, seconded by Verveer, to Adopt. The motion passed by voice vote/other.

**Notes:**

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## Text of Legislative File 47764

### Fiscal Note

The fiscal impact depends on particular claims or suits in which a vendor may seek indemnification; in which case the City may have coverage for such indemnification under its current insurance policies. Minor savings may be achieved from efficiencies gained in the purchasing process.

### Title

SUBSTITUTE - Authorizing staff designated by the Information Technology Director or designee to click on End User License Agreements for licensing and use of certain software, and authorization for indemnification of the software vendor by the City.

### Body

The City of Madison regularly purchases proprietary, off-the-shelf software to perform routine or administrative tasks. Examples of this software are Adobe and Microsoft products. Frequently, the only way to purchase the software is through an online download or subscription enrollment which can only be completed by clicking on a set of legal terms and conditions commonly referred to as an End User License Agreement ("EULA"). For purposes of this resolution, "EULA" will mean any set of click-through legal terms required to download software or subscribe to software as a service which the City has no opportunity to negotiate.

A EULA is a contract and, depending on the vendor or the nature of the software, the EULA may contain a clause that requires the City to indemnify the vendor, its parent, partners, subsidiaries, officers, agents and employees and hold them harmless from third party claims and losses, including reasonable attorney's fees, resulting from the City's breach of the EULA, negligent or wrongful acts, or violations of any laws. Frequently, there is no opportunity to negotiate the legal terms nor to require the vendor to agree to City of Madison policies.

Pursuant to APM 1-1, City employees do not have authority to sign or otherwise enter into contracts without specific authorization through an ordinance or from the Common Council.

APM 1-1 further prohibits the City from entering into a contract that requires indemnification of another party by the City, unless permission is specifically granted by the Common Council with the advice of the City Attorney's Office and the City's Risk Manager.

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WHEREAS, City Information Technology staff are required to click and accept EULAs as part of installing or subscribing to proprietary off-the-shelf software for City staff, and

WHEREAS, EULAs often include indemnification clauses requiring the City, as customer, to indemnify, defend and hold harmless the software vendor against various claims, losses and expenses, and such clauses are non-negotiable; and

WHEREAS, while indemnification clauses in EULAs increase the City's exposure to risk, the City may have coverage for such indemnification under its current insurance policies, subject to the policies' terms and conditions, the actual wording of the indemnification clause in question, and the particular claim or suit for which the vendor seeks indemnification; and

WHEREAS, APM 1-1 requires permission from the Common Council before the City may agree to indemnify another party;

WHEREAS, by City ordinance and policy, certain contract requirements apply to all purchases, or to purchases exceeding ~~\$5,000~~ \$10,000 or \$25,000 and the City has no mechanism to bind a contractor to these requirements when clicking on a EULA;

NOW, THEREFORE, BE IT RESOLVED that staff persons designated by the Information Technology Director or designee using procedures established by the IT Director, are authorized to click on and accept the terms of EULAs in order to purchase or subscribe to software on behalf of the City when there is no opportunity to negotiate legal terms, if the purchase is not funded by federal grant dollars, and if the purchase does not exceed ~~\$5,000~~ \$10,000 for a single purchase and will not exceed \$25,000 with the same vendor in the calendar year; and

BE IT FURTHER RESOLVED the Common Council authorizes indemnification of such software vendors if necessary under the terms of a non-negotiable EULA, only after having unsuccessfully attempted to negotiate the terms of the EULA with the vendor and only upon receiving the City Attorney and Risk Manager's approval to click through the terms and conditions in question.