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Fiscal Note

The proposed resolution authorizes designated Information Technology staff to click on and accept the terms of End User License Agreements (EULA) in order to purchase or subscribe to software on behalf of the City, 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. 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

Authorizing staff designated by the Information Technology Director 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 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 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 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.