

Hammersmith, Suann (MICRC)

From: Metzger, Kim (MDOS)
Sent: Friday, July 30, 2021 11:37 AM
To: Hammersmith, Suann (MICRC)
Cc: Bassett, Chad (MDOS)
Subject: RE: QuickBooks SXR

Hi Sue,

Below are the Caveats that came back for QuickBooks. Will the Commission accept the noted risks? As noted by the reviewer "Based on the proposed purchase value for this software request, it is unlikely there will be any opportunity to negotiate with the vendor to revise the terms."

Thanks!

Kim

MCS:

MCS has no objection, contingent upon documented agreement to following caveats (** SXR OnHold response will suffice):

- 1) Local install and/or use of software only.
 - a. For audit purposes, must be ONE-TIME exception to document acceptance (on case-by-case basis) for individually named users of following caveats.
- 2) Design & Delivery must create/push or install package(s).
- 3) Software must be procured through an appropriate licensing process that includes EULA review for business use and costs that may be implied through the use of the software.
- 4) NO online (Internet) collaboration, NO application remote control functionality, NO offsite database interface or connections, and NO offsite hosting, processing, or storage of "any" SOM data without prior EASA and/or MCS MiSAP(Michigan Security Accreditation Process) security assessment.
- 5) If you cannot agree to ALL caveats under #4 above, the following must be met PRIOR to MCS approval:
 - a. a) A completed & signed DTMB-3544 (data classification form) must be submitted to both the EUSC and the agencies MCS Security Liaison.
 - b. b) Security Liaison must review/approve both the DTMB-3544, and the request itself (the Liaison may determine an EASA and/or MiSAP(Michigan Security Accreditation Process) is required).
 - c. c) Per AG, if data is classified as anything other than PUBLIC per DTMB Standard 1340.00.150.002, both AG and MCS upper management must review/approve.

EULA caveats from LEO request:

Your agency has asked DTMB to process a request to purchase rights to software. DTMB has reviewed the vendor's terms and conditions ("terms") associated with your requested purchase, and your request has been placed on hold due to the Identified Risks below. Upon review of these Identified Risks, if you want to move forward with this purchase, please email written acceptance from your agency, and this approval may be from your department director, agency head, or their designee.

IMPORTANT NOTES:

The list of Identified Risks below is for informational purposes only and is not to be considered legal advice, as it is not specific to any situation or set of terms. This list is not comprehensive and there may be additional risks involved with this purchase, including data security and accessibility compliance risks. The terms have not been reviewed by an Assistant Attorney General, and the use of this list does not constitute approval of the terms by the Department of Attorney General. The Identified Risks below may only be accepted on behalf of your agency, and not on behalf of the entirety of the State of Michigan ("SOM"). Low-cost or free software does not correlate to the potential risk to the SOM. For example, a vendor providing free software may have access to sensitive SOM data, which increases risk. The use of this list is not appropriate if the vendor will have access to sensitive SOM data.

Based on the proposed purchase value for this software request, it is unlikely there will be any opportunity to negotiate with the vendor to revise the terms. You may attempt to negotiate directly with the vendor to address the Identified Risks, accept the terms as-is along with the associated risk(s), or decide not to use this software solution.

IDENTIFIED RISKS:

- **Indemnification.** The terms require the SOM or the end-user to indemnify and hold harmless the licensor against legal action, either by use of the term "indemnify" or by referencing the concept of indemnification. As to the latter, the terms may have language that the SOM is responsible for costs and other amounts the licensor may incur from a claim against the licensor arising from the SOM's use of the software or breach of the license agreement.

The Attorney General has opined that indemnification by the SOM is unconstitutional. The end-user agency must contact the vendor to obtain removal of an indemnification provision or concept. Acceptance of any such provision is against the advice of the Attorney General. That said, the law does not require the Attorney General to approve procurement contracts or software purchases. Please note that if indemnification concepts are present, the end-user agency is hereby notified that DTMB and its employees will NOT be responsible, personally or otherwise, for any claims by the vendor seeking indemnification by the SOM.

- **Governing Law.** The governing law is a state or jurisdiction other than Michigan or is not provided. The governing law should be Michigan, and if it is not, this is contrary to the Department of Attorney General's recommendation. Further, you may be waiving protections the SOM has under Michigan law that it may not have under another state's law, e.g., immunity, and your costs to defend a legal action may be higher since it may be litigated outside of Michigan.
- **Binding Arbitration.** In the event of a dispute, the terms require the parties submit the matter to binding arbitration and waive our right to go to court. This waives certain rights that would otherwise be available to the SOM in the Michigan Court of Claims.
- **Automatic Termination.** The terms indicate that the software license will terminate automatically for any breach on the SOM's part. This violates contracting best practices and may leave the end-user agency vulnerable to future costs and penalties that are outside of our control and are not assessable at this time.
- **Unilateral Modification.** The terms permit the vendor to change the terms at any time without the SOM's approval. This violates contracting best practices and may leave the end-user agency vulnerable to future costs and penalties that are outside of our control and are not assessable at this time. Further, the vendor may later unilaterally add an unconstitutional provision, such as indemnification.