

# Maine HIE/Axolotl, Inc Contract Negotiations

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# Maine HIE (Buyer) Contract Viewpoint

Introduction  
Buyer: Maine HIE

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- Mission Critical Items
  - Licensing
  - Warranties
  - Service Level Agreement
  - Training

# Licensing

- After reviewing the contract presented the following is a list of items that we will require from the Axoloti Health Information Development.
  - License type
    - Perpetual- Allows the Maine HIE to use the software without paying additional licensing fees beyond the initial fees.
    - Enterprise- this type of license will allow for the HIE to grow without concern of additional fees.
      - The enterprise license will include all affiliates of the HIE, current and future. Important since we anticipate significant growth.

# Licensing

- We propose will a single agreement including licensing, support and maintenance .
- Propose: We are willing to take this off the table and have a separate support and maintenance agreement.
  - Conditions: WE HAVE A SEPARATE AGREEMENT MUST INCLUDE A PRECEDENCE PROVISION IN EACH AGREEMENT.

# License

- 2.1 License. Vendor grants MHIE a non-exclusive, non-transferable annual enterprise subscription license for access to the Vendor Solution solely for its internal operations.
- Propose:
  - Transferability- The license must be transferable to any successors or affiliates of the Maine HIE

# Source Code

- Must be kept by a third party escrow agent and updated with revisions, enhancements, bug fixes and upgrades
  - We will have the right to reverse engineer the source code if needs to interface additional applications
- **Users** – License will include all intended users of the software, current and future
  - This is critical due to the limited number of users initially and the anticipated growth in users

# Third Party Software Fees

- Any fees for 3<sup>rd</sup> party software to be paid by the vendor
- *Compromise* : Willing to compromise, must have copies of all 3<sup>rd</sup> party license agreement for approval prior to implementation
- If the license fee associated with the software is unacceptable may try for the ability to use reverse engineering to design and incorporate the features as stipulated in the source code agreement.
- Golden Bridge



# Miscellaneous License Issues

- Must be able to serve as a Service bureau
  - The nature of the business will require the organization to process data from other entities.
- Taxes
  - We will require the electronic distribution of the software in order to benefit from the lack of sales tax as a result of the document being governed by the laws of the state of Florida.

# Warranties

- There are several items that will be required in the Warranties/Liability and limitations of liability areas of the contract.
- The importance of this is that it will protect the organizations interest, and ensure that the vendor is delivering what we expect.

# Warranties

- The software will perform in accordance with all requirements in the RFP
- The software will be virus free
  - This applies to any 3<sup>rd</sup> party services used by the vendor
- The vendor will not embed a disabling method or any features that would lock us out of the software.
- The software is compatible with all hardware and software platforms used by the HIE. All standards included in the RFP are required.
- The vendor will comply with all laws current and future

# Service Level Agreement

## 11.1 Service Commitment

- Scheduled Downtime – request weekly maintenance downtime to be limited to every other week, midnight Friday through 6am Saturday to limit impact to sites with extended hours
- Any downtime resulting from Vendor personnel or Solution defects are entitled to the 25% credit
- Overall a 99.9% uptime is required by Maine HIE

# Service Level Agreement

- Definition of Delivery Date
  - Will be determined by the completion of the acceptance testing by the 10 pilot users

# Training

## Training 3.2

- One on one, “Just-In-Time” training will be conducted immediately following successful acceptance testing, including any requested fixes or agreed upon modifications
- Web based training solutions will be provided as well as end user manuals

# Axolotl, Inc. (Vendor) Contract Viewpoint

## Introduction Vendor: Axolotl, Inc

Jarrold Nagowski  
Andy Tice

- Mission Critical Items
  - 4.1 Initial Fee
  - 4.2 Renewal Fee
  - 4.3 Additional Services
  - 10.3 Remedy
  - 3.4 Upgrades
  - 3.3.4 Diversity



# 4. Fees and Payment

## 4.1 Initial Fee

- Initial Fee. MHIE shall pay the Initial Fees listed in accordance with the schedule set forth on Schedule B, which shall be due and payable to Vendor ninety (90) days after Acceptance of the Solution. Vendor shall invoice any additional costs reasonably incurred by Vendor in the delivery of the Solution as they are incurred.
- Vendor: It is in no way feasible to delay payment until 90 days after delivery. Our company does not have the resources available to pay out of pocket expenses to cover all work until then.
- Propose: Payment of 50% up-front, the remaining 50% on delivery and approval of acceptance testing

# 4. Fees and Payment

## 4.2 Renewal Fee

- Renewal Fee. The MHIE shall pay a license renewal fee annually on January 15th for that calendar year. If the renewal fees are not paid, the MHIE will lose the ability to access the Solution and read the data stored in the Solution.
- Vendor: These renewal fees are critical to our business and need to be paid annually. Additions to the solution from third parties may increase this renewal fee
- Propose: If MHIE does not choose to obtain new capabilities then renewal costs will be limited to the previously agreed upon renewal fee.

# 4. Fees and Payment

## 4.3 Additional Services

- Additional Services (Seat License Only). In the event that the MHIE shall expand the number of users beyond that identified in Section 2, it shall be liable for an additional licensing fee that shall be payable to the Vendor. Said fee shall be consistent with the then prevailing rates of the Vendor and shall be paid by MHIE within 15 days after such additions
- Vendor:
- Propose: MHIE will pay a flat rate for additional seats in blocs of 100. Fees will be increased beyond this amount in those aforementioned increments.

# 10. Term and Termination

## 10.3. Remedy

- In addition to any other remedy that Vendor may have at law, in equity or under this Agreement, upon the occurrence of any breach set forth in Section 10.2 above, MHIE shall have the right to immediately enter Vendor's premises, access Vendor's computer systems and to seize any copies of the Solution or Documentation or any modifications or materials derived thereof
- Vendor: Under no circumstance will Axolotl allow Maine HIE to enter our premises and access our computers. MHIE is not our only client and due to the nature and sensitivity of data included in our system which has nothing to do with MHIE, another solution must be implemented.
- Propose: After the breach has gone through proper channels and all due-diligence completed, Axolotl will provide all requested documentation to MHIE, and destroy that documentation within (3) days thereafter. Because the information is owned by Axolotl, only information specifically related to MHIE will be removed, whereas the solution can still be used and sold as Axolotl chooses.

# 3. Acceptance, Installation, Training, and Upgrades

## 3.4 Upgrades

- Upgrades. Upgrades and enhancements to the Solution may be made from time to time at Vendor's sole discretion and shall be implemented by Vendor. If an upgrade requires the use of ancillary hardware or Solution, it is MHIE's obligation to purchase and install the required ancillary hardware or Solution.
- Vendor: As the vendor, it is imperative all hardware and software implementations run through Axolotl.
- Propose: All requested upgrades must be approved by Axolotl. After approval, implementation will be completed exclusively by Axolotl to ensure proper compatibility with the current system. All costs incurred are still the responsibility of MHIE

# 3. Acceptance, Installation, Training, and Upgrades

## 3.3.4 Diversity

- Diversity. Vendor agrees and guarantees that a minimum of 50% of its implementation team shall be residents of Maine, and that 33% of the team must be of the Indian Tribe.
- Vendor: In order to accomplish SOW as defined in our current timeframe, it is necessary to assemble the best unbiased team possible.
- Propose: Axolotl will create the best team possible from applicants as we are an Equal Opportunity Employer and cannot stray from this. Due to the location of the project and our refusal to offer relocation fees, it is assumed a large percentage of applicants will reside in Maine.

# Negotiations

# Source Code Issues (Buyer)

## Source code

- Contract states the the vendor will place in escrow
- Vendor will release in the event of :
  - bankruptcy
    - Permanently
  - Failure to provide a work around
    - Temporarily



# Source Code Interests

- Vendor wants
  - No access to source code besides what is stated
  - Updates only with major upgrades
  - Will not pay for validity check
- Buyer wants
  - Updates on all bugs, fixes, revisions and enhancements
  - To have temporary access to develop interfaces in-house

# Source Code Compromise

- Updates will include
  - Weekly during acceptance testing and then monthly and with major upgrades
  - Buyer will pay all fees related to checking the validity of the upgraded source code
  - Vendor will be given the opportunity to compete with our in house team to develop interfaces , if we chose the in house proposal, the source code will be released temporarily to allow for reverse engineering.

# Licensing Issues (Buyer)

- Current state in contract
  - Annual renewal fee
  - Seat license per number of users

# License Interests

- Vendor wants
  - Annual renewal fee
  - Fees per number of users
- Buyer wants
  - Perpetual license
  - Unlimited users

# License Compromise

- Buyer will purchase initial perpetual license
- The fee for this will be consistent with fees for this type of license in a similar sized organization
- The buyer will purchase additional license in increments (250, 500,1000) users, this will be a one time fee to the buyer

# Service Level Agreement Issues (Buyer)

- Current state:
  - Weekly scheduled downtime from midnight Friday to noon Saturday (7.1% downtime built in as written)
  - Significant exceptions permitted to proposed 100 % uptime and vendor responsibilities limited and in part exempted from the 25% credit

# Service Level Agreement Interests

- Vendor Wants
  - Scheduled Uptime: Vendor shall use reasonable efforts to make access to Vendor available 100%, twenty-four (24) hours per day, seven (7) days a week,
- Excluding:
  - (i) Scheduled downtime for systems maintenance, including without limitation diagnostics, upgrades, and operations reconfiguration which shall occur weekly from midnight Friday night through Noon on Saturday; and
  - (ii) Unscheduled downtime caused by forces beyond the immediate control of Vendor, including Solution defects, hardware failures, insufficient Vendor personnel or downtime caused by MHIE's network, the Internet, Vendor personnel error or force majeure.
- Buyer Wants
  - Limitation to scheduled down time
  - Increased vendor responsibility for unscheduled downtime with corresponding 25% credit
  - buyer request for the regular downtime to once a month. then the compromise could be every other week

# Service Level Agreement Compromise

- The compromise is to schedule down time every other week
- We (the vendor) will negotiate the percent credit which is currently 25% in para 11.2 for compensation to MHIE down to
- If acceptance testing is not completed on the pilot group within 180 days it will be considered at this time.



# Training Issues (Buyer)

- Current Contract:
  - One-on-One training within first 90 days of agreement prior to completion of allowed 180 days of end user testing
  - No web based or training manual type offering

# Training Interests

- Vendor Wants
  - Not to have to take away from the completion of the project to provide training
  - Additional compensation per hour/call
- Buyer Wants
  - Training at the end of acceptance testing and associated changes
  - Additional training materials to include web base solutions and end user manuals

# Training Compromise

- Training will run through the deployment and up to 180 days after first deployment
- Training sessions will have no less than 5 people or they will be rescheduled
- Training hours will be decreased to reflect a group training methodology
- Online tutorial training created by the vendor will be available continuously and updated with upgrades

# Additional Considerations

- Due to the potential conflict of interest Sharon and Jarrod will have alternates negotiate their positions

# Negotiation Techniques Used

- Reframe
- Building a golden bridge
  - Source code
  - Licensing
- Considerations during negotiations – Best Alternative to A Negotiated Agreement (BATNA)

# References

- Overly, M., & Kalyvas, J. R. (2004). Software agreements line by line: A detailed look at software contracts and licenses and how to change them to fit your needs. Boston, MA: Aspatore Books.
- Ury, W. (1993). Getting past no: Negotiating in difficult situations. New York, NY: Bantam Books.