



Negotiating “Must-have” provisions in HIT contracts

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Previously on...

- NPRM on Meaningful Use
 - Who's eligible?
 - Stages of Meaningful Use
 - Policy goals, objectives and measures
 - Medicare incentives for EPs and EHs
 - Medicaid incentives for EPs and EHs

Provider Gap Analysis

- Undertake compliance assessment re gap between existing practices & Meaningful Use
- Restructure existing contractual relationships
- Begin RFP/RFS/contract process to add needed software applications and/or hardware

Facts of Life

- “Meaningful Use” is an evolving concept – it will change over time
- Incentives insufficient to cover all real costs of achieving Meaningful Use
- Risk shifting will be attempted
- You do not want to be the last one in line

Manage the Initial Contract Process

- Define requirements / contract
- RFP/RFS
- Build a negotiation team
- Control negotiations
- Pay attention to the schedules
 - Timelines
 - Exhibits, schedules and/or attachments

Why is an RFP or RFS Necessary?

- Build internal consensus as to what capabilities are desired
- Develop a consistent basis for comparison of alternate vendor offerings
- Who you buy from is at least as important as what you buy

Build an HIT Contract Structure to Answer These Questions

- What are we acquiring (vs. what do we actually need)?
- What are we paying for and when?
- How to assure our requirements will be met?
- What happens if the product fails?

What Are We Acquiring Relating to Meaningful Use?

- Software
- Hardware
- Professional services
- Support and maintenance

What Are We Paying For and When?

- Pricing metrics
- Pay for performance
- Time and materials vs. fixed fee
- Roles / responsibilities in workplan
- Adjustment to charges
- Price protection

Payment Terms

- Vendor standard contracts typically specify payment terms by the calendar, regardless of whether milestones have been met
- Milestone payments keep the provider in control
- Milestone payments that are tied to achieving operational goals give maximum vendor alignment with your success
- Offering vendor incentives (financial or other) gives them a chance to win if you achieve your business objectives (rather than just installing the software)

How To Assure Our Requirements Will Be Met?

- Scope of License
- Implementation Workplan
- Acceptance Testing
- Warranties
- Service Levels

Deliverables / Scope

- Requirements definition
- Specific work done by whom based on specific payment
- Milestones, timelines & measurements
- Specific roles / responsibilities
- Obligations for maintenance, updates & repairs

Meaningful Use Requirements

- Work in progress
- Agree to today's definition / interpretation
- Agree to agree to future regulatory changes (“We don't know what we don't know.”)
- Build a pro-rata cost for compliance

Key Contractual Provisions

Key Contractual Provisions

- Definitions
- License terms
- Warranties / Support
- Confidentiality & privacy
- Limitation of Liability and Indemnification
- Testing / Acceptance
- Pricing
- Termination / ADR

Everything is negotiable

Acceptance / Refund

- Acceptance testing criteria
- Testing procedure
- Timeframe
- Remedies for non-acceptance

License terms

- Shrink-wrap licenses, typically used for off-the-shelf software
- Site licenses, covering a specific geographical location; enterprise-wide licenses, encompassing an entire business or institution; network licenses, for all users of a specified LAN (local area network) or WAN (wide area network)
- Named user or concurrent user licenses
- ASP or SaaS (software as a service) licenses, governing the right to use software on a subscription-type basis

Warranties

Standard:

- Compliance to documentation & specifications
- Interoperability / Interfaces
- Compliance with laws & regulations
- No viruses; security protections
- Sunset issues

Warranties

ARRA:

- All products are “certified” and shall remain so
- Vendor will fully cooperate to enable customer to achieve “Meaningful Use”
- Vendor shall comply with all applicable HITECH & HIPAA rules

Service Levels

- Uptime / downtime
- Response to severity level issues
- Minimum acceptable SLAs
- Remedies

Support & Maintenance

- Answer questions 24x7
- Remote diagnostics
- Updates, releases, versions, new products
- Customizations / interfaces
- Regulatory compliance
- Limits on price increases
- Limit vendor's termination rights

Financing Options

- Vendor financing may seem like a win-win situation
 - both parties are invested in successful implementation and operation of the product: healthcare provider must achieve meaningful use and the vendor will get paid when that happens
- Vendor-financed deals also pose serious risks
 - Leverage issues
 - Meetings of deadlines
 - Financing and payment terms
 - Many others

Key Provisions in Financed Licenses

- Healthcare providers must be especially vigilant about protecting their interests in vendor-financed transactions
- Resist pressure to accept vendor's standard terms and conditions
- Engage in robust negotiations to include the following safeguards
 - Note: the list below is by no means all-inclusive, it is merely a sampling of the required provisions

Key Provisions (cont'd)

- Financing and payments
 - No “hell or high water” clauses
 - Payments should be linked to vendor’s performance and achieving meaningful use
 - Restrict assignment of the note by vendor-creditor
 - Link loan and services/product agreements
 - Build some flexibility into the loans
 - Early repayment options
 - Refinancing options

ASP / SaaS models

- Must avoid vendors holding data “hostage”
- Ensure access to customer data, including PHI, on vendor’s systems
- Regular back ups of data
- Mandate return of customer data upon termination of the contract
- Ensure security of data and access to such data if vendor goes out of business

Remedies

- Acceptance / Refund
- Indemnification
- Escalation / Alternative Dispute Resolution
- Termination

Termination

- For cause
- For convenience
- For force majeure
- Effect of termination; remedies

Fine Print

- Limitation of Liability
 - Disclaimer of Consequential Damages
 - Needs to be mutual
- Disclaimer of Implied Warranties

Fine Print (Cont'd)

- Limitation of Liability Carve-outs for:
 - Breach of confidentiality/privacy
 - Personal injury/death, property damage
 - Intellectual property infringement
 - Vendor's breach resulting in healthcare provider's failure to achieve Meaningful Use in a timely manner

Privacy, Security & Confidentiality

- Need to stress confidentiality of PHI
- Who owns data; use of data by vendor
- Intellectual property issues
- Obligations of nondisclosure
- Remedies for breach
- Indemnification obligations

Governance

- Operating and strategic teams
- Shared strategic plan
- Communication plan
- Frequent meetings
- Reporting requirements

Manage Conflicts Post Signing

- Develop common lexicon
- Certification standards / best practices
- Institute change control
- Communicate early and often
- Adhere to governance principles
- Use dispute resolution / escalation

Dispute Resolution

- Designate project sponsors for both parties
- Meet and communicate frequently
- Escalate through higher levels of each organization
- Continue contract while in dispute resolution
- Consider third party mediation / arbitration

How to Avoid Disputes Regarding Meaningful Use

- Understand perspectives
- Provide ongoing value
- Set proper expectations
- Accountable leadership
- Project management process



Questions?

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Also, check out our blog on Healthcare IT Law at <http://www.HealthITLawBlog.com>, which provides commentary and updates on IT and e-commerce news in the health care industry. See link to “Negotiating Contracts for Vendor-Financed Purchases of EHR Systems,” JHIM - Winter 2010 - Volume 24 / Number 1.

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Steve is co-author of "Guide to Medical Privacy and HIPAA," published by Thompson Publishing Group. He is also a co-author of "Guide to Establishing a Regional Health Information Organization," which was published in February 2007 by the Healthcare Information and Management Systems Society (HIMSS). Mr. Fox is a frequent national speaker and author on issues involving technology and healthcare information. For five years beginning in 2000 he authored a regular "Q&A" column about compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) at www.HIPAAAdvisory.com.

- Jim Oakes is a Principal with Health Care Information Consultants LLC. His career spans over 30 years in healthcare information systems and management engineering, with extensive experience as an operating manager, as a vendor executive, and as a consultant. He specializes in helping healthcare providers plan and optimize their use of information resources, systems, and technology to improve clinical, operational, and financial outcomes. In his consulting career, he has worked with hundreds of healthcare institutions ranging from small specialty facilities to large multi-facility organizations and emerging Health Information Exchanges. He has led or participated in numerous strategic plans, has negotiated or re-negotiated contracts with virtually all major vendors in the industry, and has participated in oversight of implementations to assure mutual success. He has negotiated a number of innovative “risk sharing” agreements to align vendor and provider incentives, and to maximize the chances for mutual success. Prior to entering the consulting arena, he spent number of years as a vendor executive, including APACHE Medical Systems (Chief Operating Officer), HBO & Company (Regional/Divisional Vice President), and Amherst Associates (Regional Vice President). He holds a Bachelor of Industrial Engineering and a Master of Industrial Management, both from the Georgia Institute of Technology. He co-authored the book, ***Return on Investment for Healthcare: Maximizing the Value of Healthcare Information Technology***, which was selected as the HIMSS 2003 book of the year, and which advocates the development of a disciplined business case for technology investments. He has also authored or co-authored numerous journal articles on topics such as interoperability, IT planning, ROI analysis, and other topics. He was a founding member of the Healthcare Technology Network of Greater Washington (HealthTechNet.org), providing a forum for healthcare providers, vendors, payers, and government representatives to exchange views, network, and explore new technology.

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