

Using Information Technology (IT) Contracts as Business Management Tools

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I recently received an “URGENT” Information Technology (IT) Contract from a Client. Having practiced IT law representing health care organizations for many years, I have come to expect that most, if not all, IT Contracts are URGENT. In fact, IT Contracts marked “Routine” cause me to raise an eyebrow.

After reviewing the Contract, I called my Client and asked, “When do you need a response?” My Client said, “Yesterday.” I then asked, “When do you want to have a Contract signed?” My Client said, “Yesterday.” Then I asked, “Is the Software already installed and in use?” My Client said, “No, but we want to begin implementation next week.”

Fortunately, the IT system was not already installed and in use. Leverage in negotiating contract protections would have been nonexistent at that point. In this case, despite the Client’s slightly funny wish for a contract “yesterday,” the reality was the Client was acquiring a multi-million dollar mission critical IT system. The Client needed a good contract, and, after I explained the terms in the Vendor’s proposed contract, the Client decided it needed substantial revisions. The delay was frustrating to all. The rest of this article is about how to avoid seeing yourself in this story.

The IT Contract Process

IT Contracts are not a necessary evil, although many people see them that way. In fact, the only purposes IT Contracts serve are to protect the healthcare organization’s investment, physicians and, most importantly, patients. IT contracting is a process, which consists of three interrelated and interdependent components:

- (i) business;
- (ii) technical; and
- (iii) legal.

All three components are equally important and equally dependent on the others. Healthcare organizations need to think about IT Contracts as business management tools, that combine these components, and protect the organization’s investment and expectations. The first step is to understand that negotiating IT Contracts begins when a business need is identified and vendors are sought to meet that need.

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Pre-Contract

Healthcare organizations tend to be proficient in identifying IT business needs. When an IT business need is identified, the healthcare organization typically selects devoted staff to drill down and find vendors capable of meeting the business need within a definable budget. Then numerous vendor client site visits occur and multiple reference calls are made, all in furtherance of the process to find the right solution and the right vendor. Demonstrations of the vendors' IT deliverables are also required and freely provided by each potential vendor.

Healthcare organizations are also usually proficient in drafting and including identified IT deliverable functionality within a request for information ("RFI"). Vendors typically respond to the RFI and such responses usually include sufficient information to ascertain the potential success, and potential hurdles, of any future engagement. A vendor is later selected by the healthcare organization. All seems well.

A few years ago I received an urgent call from a client's General Counsel. She said, "The Vendor is in the next room talking to my CIO and we would like to get this deal done by the end of this month. We are acquiring an integrated lab system which is critical to my organization." I said, "Send me the Vendor's contract and response to the RFI." While on the call I was e-mailed the RFI response, which had been delivered to my client more than eight months earlier. After a quick look, I commented, "The vendor will not stand behind third-party IT system components, they are AS IS." Her response, "You have to be kidding me, that's a deal breaker."

Drafting and submitting a RFI to potential vendors is only part of the process. Healthcare organizations need to review each vendor's RFI response to identify issues early in the process. This will not only reduce the likelihood of having a deal breaker identified after the preferred vendor is selected, but will also reduce the risk of an implementation delay.

Lesson: Read the response to the RFI early in the process.

In addition, beyond identifying basic functionality in the RFI document, healthcare organizations need to begin to internally ask other fundamental questions. The most basic being: Does the healthcare organization desire to conduct acceptance testing to make certain the IT system will do what it is suppose to do? The answer is typically, yes, of course. However, I am usually the person asking that question and pointing out that the vendor's contract not only fails to contain acceptance testing, but has acceptance (and usually a large payment) effective upon delivery.

Lesson: Discuss acceptance testing with the vendor early in the process and write it into the contract.

Healthcare organizations should also internally ask a number of other questions, a partial list of which includes:

- How and when do we expect to implement the IT deliverables?

- Do we want to test the IT deliverables in a test environment and in a subsequent production environment?
- When do we want acceptance testing to commence?
- Do we intend to test in a “big bang” or in stages (either by modality or by site)?
- What are the desired performance criteria?
- What happens if acceptance testing fails? Do we expect to receive all money back?
- How long do we desire the IT deliverable performance warranty?
- Do we expect other warranties? For example, a response time warranty and/or a compliance with laws warranty?
- Do we expect the vendor to provide a minimum support commitment period? How long is the expected support commitment? When do we expect support to start and when do we expect to start paying for support?
- Do we expect to receive the source code from the vendor in the event the vendor fails to perform or goes out of business?

Only after due consideration of these questions, among others depending on the organization’s objectives, will a healthcare organization understand how to protect its business interests and expectations. The IT Contract is the vehicle for doing so.

Lesson: Ask these questions, at the very least, during the contracting process, and write the results of your answers into the contract.

Healthcare organizations should convey its IT Contract expectations to each potential vendor early in the process. I recommend including basic contract terms as well as important business provisions within the RFI submitted to each potential vendor. Healthcare organizations should advise each vendor that its RFI responses will be used not only to evaluate the vendor’s product and the vendor, but that its responses will also, at the healthcare organization’s discretion, be part of any final IT Contract. Remember, read each RFI response.

If these pre-contract steps are followed, healthcare organizations will begin to think about IT contracts as business management tools. Such pre-contract steps will:

- (i) Enable the healthcare organization to identify critical issues and risks well before selecting a preferred vendor;
- (ii) Enable the healthcare organization to obtain and protect its technical and business objectives (e.g., appropriate acceptance/warranty/support provisions);
- (iii) Enable the healthcare organization to manage its implementation (e.g., increase the likelihood that the IT Contract will be executed before the time scheduled for implementation); and
- (iv) Enable the healthcare organization to reduce its risks and to protect its investment.

Failure to include these basic pre-contract steps as part of the IT Contract process will almost inevitably lead to an accelerated negotiation which may unnecessarily compromise the healthcare organization's financial and business interests. Absent these pre-contract steps, the healthcare organization will often find itself discussing important objectives and terms with the preferred vendor much too late in the process, in a way that disappoints the expectations of the organization's administration, staff, and physicians.

Such pre-contract steps directly play a role in the negotiation and ultimate terms obtained in the IT Contract.

Lesson: During the pre-contract period, view the contract as a business management tool.

The Contract

The Vendor said the IT System Could do That

Many months ago I received an urgent call from a very unhappy healthcare organization. The caller said, "We are having all kinds of issues with a very important IT System we just installed. What can we do?" I asked, "Is the functionality which the System is failing to perform part of the contract?" The caller responded, "No, but they said it could do it."

The missing functionality was vital to the healthcare organization. It had been discussed with the vendor prior to execution of the IT Contract and the vendor had demonstrated the system with that functionality. However, this important functionality was not specifically addressed in the IT Contract and therefore, unfortunately, not part of the IT deliverable.

Lesson: Include all of the desired functionality in the contract.

The first principle of any contract is that if it is not in the contract it never existed.² Therefore, healthcare organizations should make sure that all expected terms and functionality are either expressly included within the IT Contract or, at a minimum, expressly incorporated into the IT Contract.

This is a simple principle. However, it is often compromised if the healthcare organization fails to view IT Contracts as business management tools.

Healthcare organizations will dramatically reduce their risks by identifying performance criteria, conveying those criteria to potential vendors early in the procurement process, and including such criteria within the IT Contract. Understand that a healthcare organization's expectations are only protected to the extent they are included in the IT Contract, regardless of the number of site visits, referral calls and demonstrations witnessed.

Vendors will honestly state that their company will be there when you need them, that the IT deliverable will meet your needs, and that their company views the healthcare organization's

² Certain jurisdictions allow a written contract to be modified orally. However, the party asserting the modification bears the burden of proofing such modification.

acquisition of the IT deliverable as a partnership. However, the IT Contract needs to reflect those statements and expectations. If it does not, all of those well-meaning, honest statements are unenforceable; it is as if they never existed.

IT Deliverable Response Time (or Lack Thereof)

A number of years ago a colleague who was an Associate General Counsel of a client of mine called and said, “My organization acquired an IT system with which we are having major response time issues.” I responded, “What is the issue?” He said, “It is taking 6 days to return a response on a critical request that the vendor said would be done in less than 1 second.” I asked, “Did you include a response time warranty in the agreement?” He said, “No, the vendor refused and we had to get the deal done.”

The vendor did not dispute the critical impact of the slow response time to my client’s business. However, the vendor pointed directly to the IT Contract and the IT Contract arbitrated the issue. Result, the healthcare organization purchased a great deal of additional hardware and related services from the vendor to remove the adverse impact. The healthcare organization would have benefited from an appropriate response time warranty.

Lesson: Include a response time warranty in the contract. (See side bar.)

[Insert as sidebar] Suggested Response Time Warranty: “Vendor warrants that the Response Time, as defined below, for screen navigation and retrieval using the IT deliverable, will be less than one (1) second. Response Time is defined as the elapsed time between (a) the moment the terminal operator pushes a function key (or the equivalent action with a pointing device) on the workstation and (b) the moment at which all meaningful data has been displayed on the workstation and the workstation is capable of initiating another transaction.”

That’s a Law?

Some clients assume that IT products are designed in a way that complies with the law.

About a year ago, a client called concerned that it was unable to use an IT deliverable because it would not perform in accordance with the law. The client had tried to implement alternative procedures to resolve the issue; however, the issue could only be fixed within the IT deliverable. I asked, “Do you have a compliance with laws warranty in the contract?” The answer was, “No.”

The vendor did not dispute the inability of the IT deliverable to perform a function required by law. However, the IT Contract arbitrated the issue. Result, the healthcare organization purchased additional services from the vendor to remove the adverse impact. The healthcare organization would have benefited from an appropriate compliance with laws warranty.

Lesson: Include a compliance with laws warranty in the contract. (See side bar.)

[Insert as sidebar] Suggested Compliance With Laws Warranty: “To the extent that the IT

deliverable supplies functionality the productive and lawful use of which by the Healthcare Organization requires that the IT deliverable conform to federal, state or local law or regulation, the IT deliverable shall so conform no later than the date such law or regulation requires such conformance. Vendor's obligations set forth in this Section shall be observed and performed solely at Vendor's expense. No additional fees shall be due and payable to Vendor on account of such observance and performance"

In addition, healthcare organizations should also look ahead to foresee what laws and/or compliance standards may be on the horizon. Healthcare organizations moving to electronic health records should be aware of the development of interoperability standards. Kathy Kenyon's article, *The (Non-clinical) Future of EHR in Medical Groups: Managing Foreseeable Changes and Risks*, in this issue of the *Group Practice Journal* addresses this issue. Should interoperability standards not be mandated into law, the "compliance with laws warranty" recommended above will be of little assistance.

Lesson: For EHR contracts, in particular, include terms that protect against foreseeable risks, including an interoperability warranty. (See side bar.)

[Insert as sidebar] Suggested Interoperability Warranty: "Vendor warrants that the IT deliverable will meet nationally recognized interoperability standards including, but not limited to, all interoperability standards endorsed by the Department of Health and Human Services. Vendor's obligations set forth in this Section shall be observed and performed solely at Vendor's expense. No additional fees shall be due and payable to Vendor on account of such observance and performance."

Is it an IT System?

When healthcare organizations acquire an IT system from a vendor, they often assume that the vendor will stand behind the entire IT system, which often includes licensed software and hardware from other vendors. Many a healthcare organization has been surprised to find that the preferred vendor is only willing to stand behind its own IT system components. Although this is a major issue, it becomes most problematic when it is identified a week or two prior to the desired implementation date.

By not addressing this issue early, many a healthcare organization has been faced with the unpleasant alternatives of either delaying the implementation while negotiating better acceptance and warranty language or accepting the vendor's unwillingness to stand behind the entire system, which may mean that to make the system work, you are forced to deal with a multitude of third party vendors. In either event, the risks to the healthcare organization have increased.

Lesson: In the contract, require the entire IT System to be subject to acceptance testing and require the vendor to warrant performance of the entire IT System or be prepared to deal with third party vendors if the System does not work.

Conclusion

IT Contracts are not a necessary evil. They are a healthcare organization's most effective tool for managing the enormous business risks associated with the organization's increasing reliance on IT Systems to perform critical functions. Healthcare organizations should start to think about IT Contracts as business management tools. The first step is to understand that negotiating IT Contracts begins when a business need is identified and vendors are sought to meet that need. By viewing IT Contracts as the vehicle to protect expectations, healthcare organizations will reduce their risks.