

February 9, 2015

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Key Issues in Negotiating a Health Information Technology Agreement

Our partner, Dawn Crumel, recently spoke at American Health Lawyer Association's Physicians and Hospitals Law Institute in Las Vegas, Nevada on key negotiation strategies for health information technology ("HIT" or "health IT") agreements. We would like to share a summary checklist of our suggested approach with you:

1. **Create a Roadmap** - Have your IT professionals map out all of the health IT solutions your organization has and all long term goals for functionality. Ensure your organization purchases solutions that operate on the same standard as your existing solutions and is interoperable within your roadmap.
2. **Use Your IT Team** - IT professionals and legal counsel should work closely together when negotiating health IT agreements. Often the IT team will negotiate the business deal and then hand the HIT agreement over to the legal counsel. A better negotiating strategy is to include legal early in the process and for the IT team to stay engaged throughout negotiations.
3. **Costs** - Be on the alert for hidden costs that make health IT agreements "career-defining."
4. **Create a Table of Roles** - Put a table within your contract that clearly delineates roles and responsibilities between your organization and the vendor.
5. **Documentation** - The documentation includes the technical specifications, user manual, training materials and release notes ("Documentation"). Ensure that the Documentation is defined in detail in the agreement to minimize disputes over acceptance testing, service level agreements, liabilities and warranties.
6. **Licensing** - Have you considered whether the license should be set up as a capital expense or operating expense? What are licensing rights if there is a merger or acquisition in the future? Ensure that your license is broad enough to encompass your use now and in the future.
7. **Acceptance Testing** - The contract should not take effect until after acceptance testing to ensure compliance with Documentation specifications. Acceptance testing should test the solution across the spectrum. The IT team should run tests overnight so that it may see all of the triggers in the cycle and ensure that the solution works in accordance with the Documentation.

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8. **Upgrades and Enhancements** - Vendors are quick to provide free upgrades and enhancements for the solution your organization is purchasing. However, the cost to implement the upgrades and enhancements may make free upgrades and enhancements cost prohibitive. Consider how your negotiation strategy can account for implementation fees.
9. **Payment Milestones & Credits** - Rather than have payment set by the date of execution, your organization should consider tying payment to the achievement of milestones such as acceptance testing. A fully paid vendor has little incentive to be responsive to any outstanding implementation issues. Obtain credits for future work in the event of any gaps in the vendor's performance.
10. **Downtime** - Ensure that the definition of downtime captures short downtime that happens repetitively (for 2 hours each month for several months) as well as longer downtime (such as 3 consecutive days). As well, document the process for capturing downtime to avoid disagreement as to what counts for downtime.
11. **Interoperability** - Previously most solutions your organization purchased were interoperable as they were on HL7 regardless of the vendor. Most solutions are no longer operating on the HL7 standard. Know what standard on which the software operates and ensure it is interoperable with your existing solutions.
12. **Data** - Do you know where it will be stored if it is hosted in a cloud? Have you considered the implications of storing data outside the United States? What methods does your organization utilize to ensure the data is accurate? What is the process if there is a breach in privacy and security?
13. **Self-audit** - Consider requiring a vendor to perform a self-audit through a detailed questionnaire. This will cut down on your organization's costs - in expertise and resources - to ensure the vendor is complying with the terms of the transaction and your organization's policies and procedures.
14. **Termination** - In the event of termination, will your organization be able to access its data? Do you know in what format the data will be transferred upon termination? Will your organization need support in transferring the data? To ensure against lost data at termination, it is prudent to negotiate back up rights as well as the right to store a copy of the schema at an offsite location.
15. **Create Leverage** - Consider a request for proposal and/or negotiating with more than one vendor at a time to create leverage with the vendor. This can be very labor intensive and may slow down the process. Yet, given the high cost of implementing health IT agreements, it is a strategy that your organization may want to consider. Lastly, do not rely on the advice of a reseller with a financial conflict of interest in your organization's purchase of health IT solutions.

Questions?

If you have questions regarding health IT agreements, please contact a member of our **Health Law Practice Group** in Washington, DC or Hartford, CT.

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