Negotiating EHR Acquisition Contracts

Key Strategies, Terms and Conditions

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Painful Contract Negotiations
- Take too long
- Are too expensive
- Create friction and distrust between the parties

Effective Negotiations
- Work through issues efficiently
- Increases understanding
- Involves give and take from both parties
- Result in an understandable and mutually beneficial contract
Contracts Impact Both Sides

- Identify the goal of negotiations:
  - A working EHR adopted and used by the caregivers that improves the quality, safety and efficiency of care provided to patients

- A one-sided document that favors and protects only one of the parties is likely to lead to breach, disappointment or dispute

- A good contract is reasonable and balanced in each party’s rights and remedies

- The easier the contract is to understand, the easier it is for your project manager to administer the contract
Major Negotiation Issues

- License Grant / Scope of Use
- Acceptance Testing
- Fees and Payment Structure
- Representations and Warranties
- Indemnification
- Limitation of Liability
Major Negotiation Issues

- Privacy and Security
- Data Ownership and Rights
- Termination
- Hosted Solutions
  - Disaster recovery / continuity of operations
  - Service availability and other performance standards
  - Transition planning
- Support Services
  - SLAs/Response Times
  - Hours of operation
License Grant / Scope of Use

- A License Grant:
  - Gives the licensee permission to exercise rights in the software
  - Defines the scope of what the licensee can and cannot do
- Special concerns for an EHR:
  - "Authorized Users"
  - "Internal Business Purposes"
  - HIE / Data sharing
  - Quality assessment
  - Potential donation project under Stark safe harbor?
  - Ability to add further users, sites at pre-negotiated fees
Functional Requirements

- Standards for testing, warranties and support
- What collection of information / documents count:
  - Documentation may be limited: online help, user manuals
  - RFP requirements
  - Contract requirements (warranties, etc.)
  - Published specifications
  - Other materials provided by the vendor
- Did you include:
  - Hardware and software compatibility, performance standards, scalability
Acceptance Testing

- Purpose of testing is:
  - To verify that software functions as represented
  - To identify problems – and get them fixed – prior to go-live
  - If serious problems cannot be remedied, to terminate the contract

- Areas of negotiation
  - Is acceptance testing included?
  - Time period
  - Deemed acceptance
    - After time
    - “First Productive Use”
  - Correction efforts
  - If unable to correct, further correction, right to terminate and refund, keep with price reduction
Payment and Fees

- License Fees versus Hosting Fees
  - Capital versus Operating
- Implementation
  - Training
  - Business process reengineering
  - Data migration
  - Other consulting services
  - Interface or other custom developments
- Support/Maintenance Fees
- Transaction Services
Payment Structure

- **Software License Fees**
  - One-time or period fees
  - Per user fees
    - Concurrent users, named users, per provider

- **Implementation services**
  - Fixed fees, time and materials, “not to exceed”

- **Support fees**
  - Annual prepaid v. periodic payments
  - Multi-year discounts
  - Price increases
Timing of Payment

- Upfront payments
- “Non-refundable, non-cancelable” payments
- Milestone payments
- Common issues:
  - “Revenue recognition” and refund rights
Standard Representations and Warranties

- **Software warranties**
  - Compliance with specifications
  - Ownership and non-infringement
  - No bugs or viruses
  - No time bombs or disabling code

- **Hardware warranties**
  - Compliance with specifications
  - New and unused
  - Clean title with no liens or encumbrances
  - Sufficient to support full use of software
  - Assignment of manufacturer’s warranties

- **Services**
  - Compliance with specifications
  - Professional manner
  - Performed by experienced and knowledge staff
  - Best practices in the industry
EHR Representations and Warranties

- E-discovery
- Audit trails
- Automated reports, including entire patient records
- Electronic transactions that comply with HIPAA
- Data integrity
- Interoperability
- Meaningful use certification as Complete EHR or EHR Module
- Updating requirements
Indemnification

- What is indemnification?
  - Provides financial protection to indemnified party that would otherwise be its responsibility
  - Within specific limits
- Defense is a separate obligation
  - Responsible for handling defense or settlement of claims
- Scope is highly negotiated and defines coverage
  - Triggering events
  - Judgments, settlements, other losses, liabilities and expenses
  - Claims by third parties vs. between the parties
Indemnification

- Intellectual property infringement
- Breach of confidentiality
  - PHI
  - Other confidentiality requirements
- Violation of laws
- Personal injury/property damage
- Negligence or willful misconduct
Limitations of Liability

- **Categories**
  - Direct damages
  - Consequential damages
- **Common to:**
  - Exclude liability for consequential damages
  - Cap direct damages
- **Common to have unlimited liability (exclusions from the limitations)**
  - Indemnification for third party claims
  - Breach of confidentiality
  - IP violations
  - Gross negligence or willful misconduct
  - Personal injury/property damage
Privacy and Security

- HIPAA compliance
  - Business Associate Agreements
- Meaningful use requirements
  - Only provides tools for compliance
- Due diligence
- Security audits
Data Ownership and Rights

- Ownership: access, use and disclosure
- Some use is necessary for vendor to perform services
- What secondary uses (if any) are permissible?
  - Aggregation and de-identification
  - Who owns the data derivatives?
Termination

- **Triggering Events**
  - Material breach of contract
  - Breach scope of license or confidentiality of software
  - More than a payment issue (e.g., exceeded licensed number of users)?

- **Cure Period**

- **Effects of Termination**
  - Means you will need to cease using the software *immediately*
  - Access to medical records and other data
    - Without interruption? How soon?
    - In what format?
    - At what cost?
  - Ability to retain copy of software
    - Malpractice defense
    - Substantiation of claims for payment
Special Issues for Hosted and Cloud Solutions

- Disaster recovery / continuity of operations
  - Disaster recovery planning
  - How quickly will data be recovered and available for use?
  - How much data will be lost?
- Uptime availability and other performance standards
  - 99% uptime v. 99.99% uptime
  - When does downtime begin and end
  - Are there grace periods?
  - Credit remedies
- Transition planning
  - How will you get access to data?
    - In what format?
    - Any additional cost?
  - Other transition services
Support Services

- Basic obligation to maintain software/system performance in accordance with specifications
- Hours of availability
  - Healthcare is 24x7
- Error correction services
- SLAs
  - Severity levels
  - Response v. resolutions standards
  - Credit remedies
- Updates and upgrades
  - New versions/new products
  - Compatibility