

Negotiating EHR Acquisition Contracts

Key Strategies, Terms and Conditions

Louisa Barash, Esq. & Jane Eckels, Esq.

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.

The Art and Skill of Negotiations

- 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

Questions?

Louisa Barash & Jane Eckels

Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101

(206) 757-8275
louisabarash@dwt.com

(206) 757-8037
janeeckels@dwt.com