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Table of Contents

Acquisition Of Healthcare Information Systems: Contracts Worth Your Attention
Fredric Entin, Esq. 1

Message from the Chair
John Washlick, Esq. 4

Annual Meeting Information 5

Proposed Changes to the Medicare IPPS Target Specialty Hospitals
Kevin Hilvert, Esq. 6

The Levinson Open Letter To Healthcare Providers
Michelle Williams, Esq. 7

Achieving Malpractice Magic: Casting Out Defensive Medicine
Kathryn Wire, JD, MBA 8

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—from a declaration of the American Bar Association

Acquisition Of Healthcare Information Systems: Contracts Worth Your Attention

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The following article refers to the "Guide To Critical Issues In Health Care Technology Contracting," which is provided as an accompanying document to the electronic version of this newsletter at www.healthlawyers.org/Newsletter/HHS.

In an Executive Order of April 24, 2004, President Bush announced the goal of an electronic medical record (EMR) for every American within ten years. Much has been written about the benefits of information technology and the prospect of a "modernized, interconnected system" saving lives and money.[1] Healthcare economists have predicted that an interconnected system will save more than $80 billion a year.[2] Although the government is now on the record as a proponent of the widespread use of information technology in healthcare, it has to date only provided a fraction of the funding necessary to make such systems widely available. As a result, the costs of acquiring information technology will continue to be an extraordinary investment borne by providers.

Investment in information technology by hospitals, doctor's offices, laboratories, and imaging centers is not new. Unfortunately, too many organizations that have purchased IT systems and other expensive technology have not ended up with the functionality or the value they expected. Instead of getting the benefits of technology, too many of these investments end up as failed projects wasting significant financial resources. And, not only is money lost, but jobs are inevitably lost as a result of a failed IT project.

The purpose of this article is not to join in the debate over whether the benefits of IT in the healthcare industry are there to be realized or are wishful thinking. IT systems will be acquired! In Modern Healthcare's 2005 Information System Survey[3] 64% of those responding reported that an inpatient clinical information system was a priority. A lesser but significant percentage of the respondents to the same survey listed diagnostic imaging technology, clinical communication links to physicians, and ambulatory clinical information systems as priorities.

The frequency of failure of these mission critical projects is alarming. According to David Brailer, who recently resigned as the National Coordinator for Health Information Technology, over 30% of electronic health record implementation projects fail. A study by the Standish Group of all industries reports that over 31% of software implementation projects are cancelled and of those that go live, 53% are substantially over budget, with an average overrun of 189%. Further, less than 20% of projects go live on time or on budget. The larger the projects, the more likely the project will fail and in healthcare, the projects are usually large.

The cost of failed projects is not limited to the costs of acquisition and implementation. Failed projects often lead to litigation. IT litigation is fact intensive, discovery intensive, and expert intensive. IT litigation is expensive and takes a long time to resolve. Like any litigation, there are additional costs that will be incurred not the least of which is the valuable time and attention of executives and the incalculable disruption to the business at hand. Because the healthcare provider needs to continue to move forward with the acquisition of technology, litigation is a real cost that will be incurred in addition to the new cost of replacement technology.

I. Healthcare IT Contracts

A. The Vendor's Form

Why has the history of IT implementation in healthcare not been uniformly successful and sometimes litigious? One reason many of these projects have been functional, financial, and personal disasters is because the organization did not negotiate the contract effectively. Too often, the contract is treated more like a technical document and the diligence to con-

Continued on page 2

Continued from page 1

tract negotiation and drafting devoted to the acquisition of almost any other product or service is conspicuously absent. Because healthcare information technology projects are often a mix of existing and developing technology, risks are present for both the vendor and the provider. Contracts however, too often do not reflect a fair assignment of risk.

The problem is that the provider usually is confronted with a Vendor drafted form with terms that reflect the hard work of the Vendor's lawyers. Depending on how important your client's business is to the Vendor, the negotiations will at best be difficult and at worst, take it or leave it.

The purpose of this article is to identify some commonly found contractual themes found in Vendor drafted contracts and the accompanying "Guide to Critical Issues in Health Care Technology Contracting" (the Guide) will identify many typical clauses found in Vendor supplied contracts and suggestions for how to address those clauses in the best interest of the healthcare provider. As a starting point, keep in mind that although the Vendor and the healthcare provider both want the project to succeed, their contractual goals are quite different.

B. Provider Goals

The goals are familiar to any attorney representing the healthcare provider: obtain the product or service that meets expectations within an acceptable time, for a predictable price, and ensure adequate recourse in the event of a vendor breach. Meeting these goals, the functionality of the IT system, and the relationship between the parties during the implementation should be well understood and should promote success. If however, the implementation fails, the contract should provide a roadmap to where responsibility for failure lies and to define recourse in terms that assign risk where it should reside.

C. Vendor Goals

Vendors on the other hand, approach the contract from a different perspective. Considering the significant expense of IT, the critical need to avoid disruption, the expectation that IT will lead to enhanced care, lowering of costs, and greater efficiency, IT contracts are drafted with attention to representations, warranties, limitation of damages, indemnification, delegation of responsibilities, and the timeliness of performance. These are, of course, basic contracting principles and typical Vendor drafted agreements contain language that address each of these principles in ways that are advantageous to the Vendor.

II. Dos and Don'ts of Healthcare IT Contracts

The Guide contains a more thorough review of Vendor drafted clauses that can be problematic. The following are recurring issues in the negotiation process to always keep in mind:

1. *Do make sure the implementation plan has been completed.*

   The implementation plan is where the project, long a matter of discussion between the parties, becomes real. It is the key to understanding just how the project will be implemented and what resource commitments will be required, yet it is often not complete when the contract is signed. In some cases, difficulty in negotiating the implementation plan should determine whether the contract should be signed in the first place.

2. *Don't forget what you were contracting for when you began the process.*

   There were good reasons why your client chose a particular Vendor. The history and the basis for the selection of the Vendor is usually obvious from the exchange of documents that occurs during the sales and negotiation cycle. Although your client may be working from the Vendor's form agreement, pre-execution representations in the form of general and provider specific marketing material were key to the decision to purchase the system. These representations can also be found in a well documented form starting with the Request for Proposal and the Responses from the Vendor and the series of communications that followed, clarifying the understanding of the parties. These representations, which often are expressed in functional terms, should be included by definition as specifications. Defaulting to the Vendor's technical specifications could result in technology that is quite different than the technology that formed the basis of the bargain.

3. *Don't undermine your expectations by limitations of warranties and disclaimers.*

   Commitments found elsewhere in the agreement are only as good as the limitation of liability. If not clearly understood, Vendor drafted agreements often have clauses that limit if not completely disclaim what the provider believes has been promised. Vendors do this in a variety of ways. For example, Vendors can weaken warrantees by severely limiting the applicable time such warrantees apply, sometimes expiring even before the technology has been tested and accepted. Other ways in which warrantees are commonly undermined is by use of disclaimers. The Guide has several examples of some particularly egregious Vendor disclaimers and suggestions for addressing them. There are also important suggestions in the Guide that address the effect of broad disclaimers on healthcare specific warrantees.

4. *Do make sure your remedies for breaches of warrantees are meaningful.*

   The various clauses in the agreement are not discreet. Warrantees are of little value if the Vendor limits the nature or amount of recovery in the event of a breach. Given the ever escalating costs of technology, caps on monetary damages could severely affect the ability of the provider to have the resources to move to another Vendor's product in the event of failure. Since healthcare providers are dependant on the IT system twenty-four hours a day and 365 days a year, monetary damages may be inadequate no matter how generous a recovery the contract permits. Movement to a new system

takes time and the contract should anticipate transition and support issues in the event of project failure. Certainly, third party intellectual property infringement claims should be the problem for the Vendor to resolve so that there is no interruption of use of the technology.

5. *Don't pay for something before you know whether it works.*

Testing, acceptance, and payment terms are generally found in different sections of the agreement. The concern however, is attention to the interrelated nature of these contractual provisions. Vendor drafted agreements should be scrutinized to make sure that there is adequate time for the provider to test the system in a live environment. Logic should dictate that acceptance only occurs if the testing is successful and that payments should always be linked to these significant milestones. As can be seen in the Guide, Vendor drafted form agreements often treat these three critical contractual provisions as if they are completely unrelated.

6. *Don't accept liability for anything out of your control and avoid attempts to shift liability by the Vendor.*

Your clients are in the business of caring for sick or injured patients and the use of technology could cause harm to third parties. Providers are often presented with a number of contract terms that unfairly shift liability from the Vendor by way of indemnification. Any indemnification language must be carefully read in conjunction with the limitations of warrantees and disclaimer provisions found in the agreement to ensure that each party is accepting responsibility for only those matters each can control. The Guide contains several examples of indemnification language including clauses relating to "the practice of medicine" and infringement of third party intellectual property rights that are critical for the healthcare provider to understand and negotiate.

III. Conclusion

There is no reason to treat the basic goals of an IT system contract any differently than the goals of any other contract. Healthcare IT contracts are legally binding agreements and the client should be advised not to consider the document as a mere memorialization of technical specifications. IT projects are expensive and risky. Counsel should get involved as early in the process as possible.

Endnotes

[1] Center for Health Transformation, Summary of Findings from the CHT Connectivity Conference, October 18, 2005.

[2] Hillestad et al., Health Affairs 24, No. 5 (2005).

[3] February 14, 2006.

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