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How to Successfully Negotiate a Healthcare Technology License Agreement

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Many hospitals, life science businesses and other providers of healthcare products and services routinely purchase sophisticated information technology systems and software, costing in the hundreds of thousands, if not millions. Many do so without a deep, much less a meaningful understanding of what the purchase contract or license means beyond the basic business terms.

By contrast, many, if not all, IT vendors use a refined template of purchase contract for virtually all of their customer transactions, and in the vast majority of these cases the template is invariably tilted toward the benefit of the vendor, not the customer. Here are nine key "traps" and "gotchas" in these templates, how to spot them, how to avoid them, and how to negotiate around them, or at least make the template more of a neutral document.

1. User Scope.

When buying any technology, particularly technology issued on a licensed basis, you need to understand exactly what you are buying or licensing, who will use it, how many people will use it, and what the stated cost is for additional users. For instance, many vendor agreements will limit the number of authorized users for a stated license fee. Any additional users, if allowed, could result in substantially higher license fees unless the per user cost is agreed to up front. At the same time, with hospital contracts, for instance, there may be different license terms for different classes of authorized users, e.g., physicians, PA's, nurses, etc. Never assume that the aggregate license fee covers all possible users or that a set number of authorized users automatically covers different categories of users.

2. Pricing.

Many vendor agreements include an initial license fee (usually tied to the total number of authorized users), as well as implementation fees and training fees. Beyond these initial costs, however, consider what future costs you might incur. For instance, if a given department is expanding and additional users are needed, what are the additional per person fees? At the same time, if additional software modules may be required at a later time, what will they cost and can that cost be agreed to up front? Lastly, are future maintenance costs ascertainable? Many vendor contracts will have not a cap on cost increases. Maintenance costs (which usually include support) often run between 15 and 20 percent of the overall license cost of the system. However, many vendors neglect to limit price increases for future years. A reasonable cap should be no more than an annual CPI increase or a fixed percentage increase (perhaps 3 percent) per year. You should also ask whether the maintenance includes new product upgrades and improved products. Ideally, "true" maintenance will broadly include all updates, improvement, upgrades and modifications to the licensed product, although some vendors will resist including "new" products within maintenance.

3. Installation/Testing/Acceptance.

Many vendors will refuse to agree to a fixed implementation schedule. You as the customer should absolutely insist on such a schedule and include it in the agreement. Moreover, while it seems simple and commonsensical, every agreement with a vendor should provide a mechanism to ensure that the installed system actually works in the production environment. In other words, the system needs to work within the hospital, within a lab or within a medical office, according to the published specifications. If the system does not work after testing, you as the customer need to have a practical remedy. A well drafted contract will provide that scheduled payments be made only according to milestones achieved, such as successful installation, data migration, testing, product acceptance, and either "Go-Live" for individual modules or "Go-Live" for the system as a

whole. The bottom line is that a vendor needs to be incentivized (whether economically or otherwise) to provide the system and services for which it contracted and to satisfy you as the customer.

4. Termination.

No one ever wants to contemplate termination of an agreement or a relationship. However, there are times when some systems simply do not work in a given environment (because of existing legacy systems, for instance) or where a given product's functionality was oversold to the customer. Therefore, as a customer, you need to have a mechanism to terminate the agreement in these situations. Termination can be for convenience (i.e., upon a certain period of notice for any reason) or can be based on the vendor's performance (e.g., if the product does not work, if implementation does not proceed satisfactorily, or if implementation is not timely). If termination is necessary, consider whether there should be a refund of the license fee and even a refund of implementation costs. Additionally, if your installed system includes certified electronic health record (EHR) software, for instance, try to negotiate a "meaningful use" (MU) guaranty. Many vendors will offer some type of MU guaranty, although they may insist on capping the dollar limits of that guaranty.

5. Support.

IT vendors are essentially in the service business. They should therefore place a premium on using trained and experienced personnel to get the implementation completed efficiently and timely. At the same time, the vendor needs to have enough bandwidth, or resource availability, to complete the project. IT vendors are routinely stretched very thin and will often over commit their resources, especially when it comes to installing certified EHR software. A qualified vendor should be willing to make representations in the agreement about the qualifications of its personnel and its commitment to complete the job by either a date certain or within a fixed period after a fixed kick-off date. Still a vendor can rightfully expect that you as the customer have enough internal personnel dedicated to work with the vendor on the implementation. Such personnel need to have the dedicated time to coordinate with the vendor, whether for data migration, implementation or testing and acceptance. It not unusual for a vendor to insist on customer representations to this effect.

6. Type of Deal.

When negotiating a system purchase, understand whether the system software is provided to you on an installed basis or on subscription basis. Installed software is literally loaded onto a customer's own servers (perhaps requiring additional hardware costs), while subscribed software resides on the vendor's own systems and is made accessible to the customer via the Internet. Remember that the documentation for each type of deal will differ as will the pricing structures, support obligations and warranty and "uptime" obligations.

7. Confidentiality.

An often overlooked concern when engaging IT vendors is confidentiality. To the extent that a vendor may have access to your confidential business information, your proprietary information or that of your customers or patients, the vendor needs to be bound contractually not to either use or disclose that information. A well drafted confidentiality provision will obligate the vendor (and indirectly its employees, agents and representatives) not to use or disclose any such information at any time. To that extent that a vendor may have access to protected health information (PHI), the vendor may need to sign a business associate agreement which will have many additional protective restrictions imposed by the Health Insurance Portability and Accountability Act (HIPAAO).

8. Warranty/Limitation of Liability.

Most license agreements contain some form of warranty protection. While a vendor would like to keep the warranty period as short as possible and as limited in scope as possible, your concern as the customer is quite the opposite. You want a warranty last as long as possible and having it be at least as broad in scope as the vendor's ongoing support obligations. It is customary to have a product warranty last for at least ninety (90) days after some fixed date, preferably after a "Go-Live" date, although some vendors may try to start that period earlier, perhaps after the implementation date of a given system. Even with an adequate warranty provision or other agreement provisions, however, it is important to have a sufficiently protective limitation of liability clause in the agreement. In other words, if the installed system does not work or if for some other reason there is a deemed breach of the warranty provisions or other agreement provisions, a vendor will attempt to minimize its liability by capping it within the limitation of liability clause. Vendors will attempt to cap the limitation of liability at the last three, six or twelve months of payments. As a customer, your interest is obviously having that limit be as high as possible, preferably only limited by the amount of money actually paid to the vendor. To the extent that the installed system includes certified EHR software and you will be seeking meaningful use payments from the federal government, you should also consider a separate MU guarantee just for that purpose.

9. Indemnification.

Although often thought of as legal boilerplate, indemnification provisions are important in that they provide a mechanism for a vendor to protect and defend its customer against claims related to the vendor's actions or those of its employees, contractors or representatives. For instance, if there are violations of patient confidentiality or if there are intellectual property infringement claims where the customers are caught in the middle, a vendor needs to defend and indemnify the customer against any such claims. A well-drafted indemnification clause will cover all such claims.

In sum, when negotiating a technology license agreement, the best approach is to project worst-case scenarios, i.e., the "what ifs:"

- What if I need to add more users? Is there an added cost for that?
- What if I need to add more modules, more functionality or more interfaces?
- What if the vendor improves the licensed product? Is that covered under "maintenance?"
- What if the system just doesn't work, or the software does not perform as represented? What remedies do I have?
- What if I need to terminate the agreement? How do I do that and can I get some money back?
- What if there are ongoing bugs or glitches with the system? How and when will the vendor fix them?

Understand that the playing field is not level when negotiating with a vendor, and by keeping the "what-ifs" in mind you will likely be able to remedy some of those imbalances and end up with a more effective and complete agreement.

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