

C.2.4. Contracting Service Providers

Healthcare professionals are not formally prepared to make deals or to negotiate contracts, nor are they expected to know the intricacies of applicable law and legal aspects of the process, whereas vendors are, by nature, professional negotiators. Vendors usually have standard sales contracts that secure the maximum protection, while providing the healthcare institution with minimal legal protection. Before signing a contract, its terms and conditions must be thoroughly understood. A standard contract should be modified if necessary, but a combination of legal and technical expertise is essential for dealing with amendments and modifications.

To avoid problems and to examine the vendor's performance, contracts for services should be staged to avoid lock-in to a vendor that performs poorly. One should favor short-term contracts with extension clauses instead of long-term contracts with commitment to one vendor. Some of the steps to be taken before signing a contract are the following:

- Hire or assign in-house staff to be part of a contract management team,
- Resist vendor pressure for longer term contracts,
- Employ the “best-of-breed” approach when evaluating vendors,
- Ensure that the higher level management is in agreement with the outsourcing contract and is prepared to evaluate the expected results, limitations, products, and impact of the project.

C.2.4.1. The Negotiation Process

The negotiation process should clarify the purpose and limits of each item in the contract. When negotiating a contract, the team should explicitly list priority items that should be addressed. A checklist of items to be discussed should include major contract objectives such as acceptance criteria parameters, maintenance warranties, cost limits for vendor charges, and delivery standards in terms of time, quantity, and quality.

The checklist for contract negotiations should be closely followed to ensure proper consideration of all items. Items on the list must include documentation manuals, payment terms, performance standards, corrective tasks to software or hardware, placement of equipment and software under the contract in case the vendor goes out of business, and causes for a right to cancel the contract.

A number of important points should be clearly specified in any contract for off-the-shelf, custom-adapted, or custom-designed systems:

- *Changes* - The contract must specify whether the healthcare institution or the contractor may change system specifications, what authorizations are required to do this, the rates at which

the contractor is reimbursed for additional authorized work, and the results of any impact on deadlines, dates, or schedules.

- *Disputes* - The contract should contain provisions resolving contract disputes, the mediation process, which person is legally authorized to resolve the issue, and the remedies available to each party.
- *Default* - The conditions that shall constitute default by either party should be carefully detailed, and the remedies available to the other party clearly stated. The statement should include specific liability for costs incurred as a result of the default.
- *Rights to technical data and development* - The contract should specify who retains rights to any technical data, products, documents, or developments arising from the contract performance. The healthcare institution can reasonably expect to retain some interest in such developments if it desires; the healthcare institution should not expect rights to technical data or developments used by contractors that were not developed during the contract. A statement should be included in the contract specifying whether the healthcare institution, the vendor, or both retain ownership of the system after completion.
- *Acceptance* - Perhaps the most important contractual statement for both parties is a clear delineation of what constitutes acceptance of intermediate and final results of the contract effort. This specification should include system capabilities, schedules, and formal conditions for acceptance.
- *Authorizations* - The contract should state who is authorized to commit each of the parties to the contract and who can authorize changes or additions.
- *Warranty, maintenance, and modification* - The contract should clearly specify whether the vendor provides any warranties on the system and its operation, the time limit on the warranty, and any limitations or exclusions. It should also include statements regarding provisions for maintenance and modification of the system during and after the warranty period.

C.2.4.2. Contract Negotiations

Contract negotiations should be carefully prepared, making sure that all relevant points will be taken into consideration. Some of the actions to be taken before contract negotiations are the following:

- Appoint contract negotiators (hospital administrators, managers, clinical and accounting technical staff, legal representative) and determine levels of authority and responsibility.
- If needed, contract outside expert to assist the organization to make the appropriate decision regarding this most crucial task.

- Determine type of contract to be negotiated (i.e., fixed price, cost reimbursement, time and materials, combination).
- Determine which areas to be negotiated are flexible and which must be rigidly defined.
- Clarify terminology used in the contract.
- Define healthcare institution and vendor responsibilities for assessment of requirements and systems design, development, and implementation.
- Determine and define components of contract:
 - [a] Basic system specifications
 - [b] Reliability and maintenance
 - [c] Other vendor services
 - [d] Terms of acceptance
 - [e] Costs and terms of payment
 - [f] Delivery
 - [g] Rights of the user
 - [h] User options
 - [i] Price protection
 - [j] Damages or penalties
 - [k] Other provisions.

C.2.4.3. Components of an Information System Contract

- *Glossary of terms* - Listing and explanation of major technical terms.
- *Basic system specifications* - Hardware configuration, software configuration, component performance standards, system performance standards, component compatibility (interoperability) guarantees, alterations and attachments, security and confidentiality provisions.
- *Reliability and maintenance* - Parameters to be used, guarantees, replacement, replacement costs, malfunction reports, maintenance location, maintenance credit, unreliable equipment, emergency equipment, response times, continued availability.
- *Other vendor services* - Support and assistance including: software development or modification, database design, supporting documents, design, conversion, site planning, installation, public relations. Education and training (curriculum, allotment, guarantee of continuation, availability of instructors, materials, rights to future courses). Documentation (availability, reproduction rights, copyright and patent protection, future materials). Machine time for testing, development, and emergency use (amount, schedule, location).

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- *Terms of acceptance* - Acceptance testing, deliverables, criteria for acceptance of each deliverable, sign-off.
- *Costs and terms of payment* - Terms of agreement by specific cost type, method of payment, conditions for nonpayment, taxes, charges and method of charging for overtime and holiday use, maintenance, transportation, relocation, insurance, supplies.
- *Delivery* - Dates of delivery, options for early delivery, delays, installation responsibility, site preparation responsibility, damages to hardware, software, and site during delivery, relocation, and return of equipment.
- *Rights of user* - Use and function of system, location of system, component cancellation, component substitution, changes and attachments, upgrading hardware or software, rights to technical data.
- *User options* - Purchase, rental, rental credit, trade-in, title passage, option to upgrade, availability of expansion units, alternative sources.
- *Price protection* - Prior to delivery, during term of contract, upgrading and expansion, maintenance, supplies, and services.
- *Damages or penalties* - Breach prior to delivery, after delivery, and during development, including damages, user costs, and breach with consent.
- *Other provisions.*

C.2.4.4. Checklist of Essential Contract Provisions

Contract provisions should necessarily include, but not be limited to, the following (Table 2):

Table 2. Checklist of Essential Contract Provisions

1. Length of term
2. Shared risk
3. Performance
4. Access to all of the vendor's capabilities
5. Capital commitments to acquire facilities, equipment, or technology, including assets currently owned by the healthcare organization, as required
6. Delivery
7. Acceptance of the system
8. Documentation
9. Rights to the programs
10. Training of personnel
11. User physical facilities
12. Back-up equipment
13. Warranties
14. Insurance
15. Confidentiality and disclosure issues
16. Access of vendor/provider to client's facilities and corporate documents
17. Maintenance
18. Arbitration
19. Infringement protection
20. Upgrades
21. Special contract provisions
22. Software warranties
23. Maintenance support
24. Reliability guarantee
25. New release clause
26. Renewal option
27. Termination clause