

CONTRACTING FOR MEDICAL IT SYSTEMS – PART 2

By George S. Takach

Making the Contract Work for You

In my previous column, intended for the senior management of a large healthcare facility (though applicable to many others), I argued that medical IT systems, like the large-scale ERP-type clinical software systems that are being implemented now in healthcare facilities across the country, present customers with particular risks. This month, I offer some thoughts on how to mitigate those risks through the contract you will sign with the Supplier.

Dollars and Sense

First things first, let's follow the money, because these systems are very expensive. In terms of your procurement process, as I mentioned last time, I highly recommend a "dual track" negotiation process where, as the last phase in the procedure, you negotiate terms with two down selected proponents, and they both submit a BAFO (a Best and Final Offer). It is only this way that you can truly gauge just how eager the Suppliers are for your business. We have helped many public sector entities – including health care facilities – institute dual track negotiation systems, and with uniformly positive results (not only price, but also on securing reasonable contract terms).

One particularly price sensitive area relates to "license volumes", to the extent your supplier's pricing partially drives off of how many users you have, what they do with their software, and other volume-related variables. The key here (beyond getting the prices as low as you can – see above), is to have option prices in the contract for future volume increases; in other words, you need to address what happens when a bunch of condos go up around your facility, and in a few years your emergency admission numbers grow by 30 % ? Ideally your contract has reasonable provisions for this sort of volume growth, rather than leaving you to rely on a supplier that may not be so reasonable at the time you experience this growth.

A third financial item relates to tax, and specifically so-called withholding tax. This is particularly relevant because most suppliers of these large medical ERP-type systems are American, and so they will be sending staff up to Canada from the United States to assist with the implementation of the system for you – and when they do this, if you are contractual bound to the American company, you have to withhold a certain percent of the fees you pay to the American supplier, and remit that amount to the government in Ottawa. Well, what if you get this calculation wrong ? Guess what, your tax liability in Ottawa could grow, but you'll never really know, unless you ask Canadian Revenue Agency to do an audit of you, and really, who does that !

Therefore, ideally, you want to contract with a Canadian subsidiary of the US supplier; that way, you never get into a withholding tax quagmire, because you are always paying a Canadian company. But, at the same time, the Canadian subsidiary might be not a whole lot more than a few tables and chairs, in terms of its assets. So, while you want your license or services agreement to be with the Canadian subsidiary, at the same time you want a Guarantee from the US parent of the Canadian subsidiary, something that is given all the time from American tech companies.....provided you remember to ask, and you structure your procurement to maximize your opportunity to achieve such a contract result.

Integrations and IP

Invariably the supplier will end up continuing to own the software modules they implement for you, whether they host them for you, but even if they let you run their software on your own hardware; as the name of their main contract with you suggests (it is a “License” Agreement), you are only given a “license” in the software they provide to you. At the same time, however, very often there is more to the story than just the base software from the licensor – there are also the smaller bits of “software glue”, often called interfaces (or integrations) which are required to be programmed in order to tie together the new software to your legacy systems (so that data can run between them). The big question often is – who should own these ?

Your position ought to be that if your team works on creating these interfaces, particularly without any input from the supplier, then of course you should own them; with the exception that if they were to contain any bits of code from the supplier’s system, then the supplier keeps ownership of those components. But you should be able to use the interfaces as you wish, including trading them to other users, often in return for receiving similar elements of code back from the other user – this is done quite a bit in the tech community, such that it even has a name – “a contra trade”.

Getting from Here to There

Once the new system is up and running, and you are enjoying the benefits of wonderful new functions and features, you’ll begin to understand why you spent all the money you did on buying the new system. But first, you have to get “from here to there” – that is, you have the very difficult task of implementing the new ERP software modules. And bottom line, very often not enough quality time is spent planning the implementation, thereby causing a lot of angst and often downright failure in the adoption of the new system. There was one case a few years ago where not enough training was spent on one facility’s emergency department physicians, and they promptly mutineered and eventually simply refused to use the new software system, which was a devastating result. In another more recent case, not enough homework was done on migration of legacy system data, and so when the facility cut over to the new system, long lines began to form at admissions as manual data entry was called for, much to the disappointment of hospital staff and patients.

The best thing you can do to avoid such a result, is to find someone to lead your implementation project who has done this before, but with the very supplier you are going to be dealing with. And you need a really seasoned executive/manager – this is not an entry level job. You need someone who knows where “all the bodies are buried”. This person also has to be strong enough to be able to say “no” to your own users when they start clamouring for more features from the supplier. This is a hard and thankless job – but find someone who can play it well (someone who prefers to be respected in the organization than liked), and you are half way to success.

As for the supplier’s staff, it is absolutely critical that at least the most senior managers assigned to your project stay with you for the entire duration of the implementation, which can last about 18 months. Continuity of key personnel is a fundamental driver of success in these large projects – so you need to write this requirement into the contract, namely that the supplier will not take these people off your project and re-assign them to another client until the new system is in and running at your facility. Of course if they leave the supplier, there’s nothing you can do (except perhaps offer them a job yourself !); but what you are trying to solve for is where they worked on your project for six months, they finally understand what exactly needs to be done,

and then the supplier pulls them off your project, and puts them on a more lucrative account. Even if the supplier replaces them with an equally smart and qualified individual, the fact is the newbie will not have the same level of “institutional knowledge” about you as the predecessor, and your project will suffer – indeed, it’s probable success will be compromised. Nowadays, to really drive home this point, we suggest adding to the contract a provision that says that if the supplier breaches this staff continuity clause, they have to pay you a sizable sum of money as liquidated damages. The point of such an express remedy is not for you to make (or save) money; rather, it’s to force the supplier to really think twice about renegeing on an undertaking to you, because reducing their cash flow from a contract is quite embarrassing internally, and so they try to avoid it at all costs.

These are a just a few critical items that need to be carefully thought about, and reflected in the final agreement between your organization and the supplier. But don` t expect a supplier to just grant you all these provisions because you asked for them. As noted above, unless you structure your procurement in a dual track mode, the chances of getting these clauses decreases dramatically. Put more positively, if you approach the procurement looking to maximize the competitive dynamic between two short listed proponents, you stand a very good chance of achieving an agreement that is a win-win between the supplier and you, the customer.