

VBP CONTRACTING WEBINAR SERIES

Webinar 10 Contracting for EHR Systems

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National Council for Behavioral Health
Montefiore Medical Center
Northwell Health
New York State Office of Mental Health
Netsmart Technologies



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- This session is provided for general informational and educational purposes only and does not constitute the rendering of legal advice or opinions.
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- For legal advice, you should consult a qualified attorney.

Agenda

- How to Maximize Chances for Long-Term Success
 - Vendor Recruitment
 - Due Diligence
 - Vendor Selection
- The EHR Contract
 - Key Terms
- Your Questions and Comments!

Health Information Technology (HIT) /Electronic Medical Records (EHR) System

- **What is it?** A Health Information Technology (HIT)/Electronic Health Records (EHR) system procurement typically involves the procuring of EHR and/or practice management software, related services (*e.g.*, maintenance, implementation) and the necessary hardware/equipment.
- Purchase options abound in 2018 with notable variation in upfront costs but also different levels of direct control over key business information/functions.

Health Information Technology (HIT) /Electronic Medical Records (EHR) System

- Such arrangements are typically executed directly with an HIT/EHR product vendor, but in many cases, providers procure such products and services indirectly through participation in a network, through a hospital, or through some other third party.
- The options for such a system have expanded considerably with the proliferation of hosting services
 - Traditional arrangements = “ownership”
 - Hosting/Service arrangements eliminates a lot of hardware and other up-front costs = “leasing”
 - Biggest difference is potential control of/access to your information
 - Depending on the model, legal and technological concerns can vary significantly



Health Information Technology (HIT) /Electronic Medical Records (EHR) System

Unique Considerations for Behavioral Health

- Wide array of complex services doesn't easily translate into systems designed for medical content; more "free notes"
- Enhanced privacy/security requirements and expectations under federal and state law, but still need interoperability to exchange info
- Greater need for software that can be customized

Step 1: Vendor Recruitment

Rule #1 = Make it competitive!

- Your power to negotiate favorable terms realistically exists only during initial negotiations, i.e. before signing an agreement with a particular vendor, especially if purchasing a “package” of HIT equipment (i.e. hardware, software) and services (i.e. installation or customization, maintenance and support).
- Negotiate aggressively for not only favorable pricing but other issues that have arisen in past experiences, e.g., warranty, termination and remedy terms.
- If using federal funds from DHHS to procure the system (in whole or in part), need to ensure entire process is structured to comply with applicable procurement standards in 45 C.F.R. Part 75. *Bottom Line: formality of process will be important and as a high value contract, likely target for an auditor*

Step 1: Vendor Recruitment

Rule #1 = Make it competitive!

- Establish a qualified team who will oversee the entire process. If necessary, hire a qualified consultant(s) to fill in expertise gap; use them to determine key system capabilities and requirements based on your operations
- Put out a formal Request for Proposal (RFP) that describes the HIT-related specifications you are seeking, minimum vendor qualifications (e.g., experience in the business and with similar clientele) and key contract terms you expect to include (or may have to include under federal procurement standards if using federal grant funding to cover some or all of the cost of the procurement, e.g. creation of a federal security interest)

Step 2: Due Diligence

Rule #2 = Don't Rush!

- View as a long-term business deal
- Perform extensive “due diligence” in investigating vendors, their systems, and the proposed delivery model (e.g. hosting vs traditional)
 - Investigate vendor’s past performance record
 - Investigate vendor’s future business plans
 - Investigate all aspects of vendor’s products
 - Visit systems in other health provider sites (other than those identified by the vendor) and ask lots of questions

Step 2: Due Diligence

Rule #2 = Don't Rush!

- Get your clinicians involved in evaluating systems
- Recognize the monumental impact this decision will have on your business operations and its success
- It is not uncommon to invest anywhere from 6 months to two years in completing the purchase process (from solicitation to installation).

Step 3: Vendor Selection

Rule #3 = Don't Be Fooled by the Sales Staff

- Sales staff promises about the capabilities of a system to the contractual terms and protections for a buyer are unenforceable
- The greatest “protection” is performing a deliberate procurement process that gives the purchaser a deep level of confidence that they have investigated all options and found the “best” vendor and system for them
- It is not uncommon to invest anywhere from 6 months to two years in completing the purchase process (from solicitation to installation).

Step 3: Vendor Selection

Rule #3 = Don't Be Fooled by the Sales Staff

- Beware of accepting gifts, gratuities or other benefits that may run afoul of federal and/or state anti-kickback laws/guidelines
- Address any potential or actual conflicts of interest (or their appearance)
- Maintain procurement records, including basis for vendor selection and basis for the award cost and price.
- Document price analysis, including comparisons of systems being considered

The EHR Contract

- Your HIT/EHR contract(s) will set forth the key terms and conditions regarding
 - Software licensure
 - Implementation and support services
 - Ownership and confidentiality of the IT products and data entered into the system
 - The rights and responsibilities associated with the ongoing operation of the IT system

The EHR Contract

- Vendors will present a standard “boilerplate” contract whose terms will be weighted heavily in the vendor’s favor at the expense of the buyer.
- Certain terms (e.g., warranties, disclaimers of liability, limit on remedies/damages) are restricted almost universally amongst all vendors
- Goal is to achieve a more balanced, customized agreement and to eliminate areas of unclarity; changing terms from unilateral to bilateral can make a significant difference
- Do not rely on the contract to be a source of remedy if the system “doesn’t work” – it may be virtually impossible to prove a “breach”; Make sure you have a viable exit strategy

The EHR Contract - Checklist of Key Terms to Review

Scope: Does the agreement clearly state:

- The scope of software licenses
- How licenses/fees are calculated (which often forms the basis of ongoing maintenance/support fees) and is it fair or reasonable
- The scope of implementation services (including related time plans/implementation steps)
- The scope of maintenance/support services (including related “stages” and performance expectations)?

The EHR Contract - Checklist of Key Terms to Review

Licenses

- Is there a provision certifying the right to license the software and clearly stating who is covered by the license(s) (e.g., the entity, its providers, administrative staff)?
 - For a network arrangement, is there a provision certifying the right to sublicense software to the provider?
- Carefully understand the allowable uses of the software and any limitations - are they clearly stated?
- Is there a hold harmless indemnification and remedy in case of third party intellectual property infringement claim? Subject to liability caps?

The EHR Contract - Checklist of Key Terms to Review

Implementation

- Is there sufficient detail/clarity as to implementation responsibilities (delivery, installation, customization), timeframes, and the related costs (including payment milestones, e.g., achieving go live)?
 - Do not develop implementation plan until after execution
 - Reserve sufficient financial incentives for motivation if implementation plan is not met.
 - What is the definition for “go live”? Should go beyond just “installation” and should represent the ongoing achievement of some key function(s) that exemplify that the “testing” period is complete (e.g., ability to generate bills without issue for a week)

The EHR Contract - Checklist of Key Terms to Review

Implementation

- There should be an identified project leader from the vendor (with sufficient experience in implementing with similar provider type/size) ; establish standard communication procedures for the project
- Ensure that all warranties start after customization is complete and all products have been installed and operational for the test period.
- Ensure that the warranties provide that the products conform to written documentation/specifications.
- Implementation needs to include a plan for training to provider staff members by the vendor on the use of software/system

The EHR Contract - Checklist of Key Terms to Review

Maintenance and Support

- Ideally, should not start until “go live” achieved and implementation is complete
- Are the scope and details regarding maintenance and support services sufficiently defined?
 - Differentiation for severe vs non-severe issues and related response times
 - Are there specific and objective measures for defining adequate performance of such service obligations?
 - If hosting arrangement, is there a regular business hours “uptime” guarantee (with teeth)?
 - What “penalties” are in place to incentivize performance /responsiveness?

The EHR Contract - Checklist of Key Terms to Review

Payment

- Are payment terms consistent with fair market value?
- Outline meaningful payment milestones
- Are all rate increases sufficiently identified in terms of amount (preferably capped) and triggers?

The EHR Contract - Checklist of Key Terms to Review

Confidentiality

- IT vendors are business associates – use your BAA, particularly with unique and additional confidentiality requirements for behavioral health providers
- Their confidential and proprietary information will be carefully defined; is yours?
- Is there a clear statement acknowledging your “ownership” of all information (patient health and business information) entered into the system?
- What provisions are there regarding the de-aggregation or other use/disclosure of information to third parties of for purposes not essential to your operations? Are you comfortable with this, regardless of “legality”?
- Confidentiality obligations should survive termination

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The EHR Contract - Checklist of Key Terms to Review

Term and Termination

- If incurring substantial upfront costs, term needs to extend for the projected life of the system, whether through auto-renewal or otherwise.
- Termination without cause by vendor should not be allowed during this period
- Carefully review specified causes for termination and the notice periods
- Negotiate a clause about post-termination transition of records (format, level of assistance, and agreed costs/rates)
- If sublicensing software through third party, in the event of the dissolution of the sublicensor, does the licenses automatically assign/transfer to the provider?
- With hosting arrangements, service “suspension” needs to be a last-ditch resort for only particularly grievous causes/breaches; not merely failure to pay on-time

The EHR Contract - Checklist of Key Terms to Review

Warranties/Remedies

- Software/system warranties generally of very short-duration and provide little practical remedy for a provider – will need to customize
- Negotiation points:
 - Duration and effective date - should commence only after all implementation services have been completed (e.g., true go live)
 - Customize a staggered remedy – e.g., Free and expedited service to fix issues, If unsuccessful, free assistance to transfer to new system and return of pro-rated license fees and majority of implementation fees
- Remedies for contract breach is similar issue and should be considered the same way – will have to be customized

The EHR Contract - Checklist of Key Terms to Review

Other

- Governing law – ideally your State
- Venue (including for arbitration or other dispute resolution mechanism) – ideally your State or not specified at all
- Dispute Resolution – try to avoid mandatory provisions
- Injunctive Relief – both sides should be able to invoke for particularly harmful breaches (e.g., confidentiality/HIPAA, de-engineering of software)

Questions and Comments

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Thank you!

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