



Part III

Contracts



Why? Is it Necessary?

- A properly written contract will minimize the hidden risks of the parties to it, by focusing upon the responsibilities of each to the extent that they can be foreseen.
- A good contract will deal comprehensively with the two substantive aspects of any transaction.
 - describing the job to be done and the price to be paid;
 - to explore the contingencies.

Example: Two Contracts for the Purchase of the Same Item

- A. “One Horse - \$100 C.O.D. – One year rental”
- B. “One solid black, two-year-old stallion, with all his teeth, vaccinated within the last 30 days, complete with horseshoes, weigh at least 1600 pounds, trained for the saddle, capable of running one mile in 2 minutes or under, in good health, otherwise as is. Delivery to X stable on or before January 1, 1976. \$100 C.O.D. (cash only). Freight charges of \$45 to be borne by Buyer, and risk of injury or death to Seller until received by Buyer at X stable. Price covers one year’s rental. Buyer to return horse to Seller at the end of year, freight prepaid.

Source: Data Processing Contracts: Structure, Contents, and Negotiation
Dick H. Brandon and Sidney Segelstein, Esq.



Contingencies – what if?

- Too many ‘one horse’ contracts
- Inadequate descriptions of physical, performance and delivery criteria give vendors an advantage over clients when problems arise because of descriptive inadequacies – you must know what you are buying

Source: Data Processing Contracts: Structure, Contents, and Negotiation
Dick H. Brandon and Sidney Segelstein, Esq.

Questions About the Horse

- *What if the horse goes lame within 30 days? Get some warranty extending into the future.*
- *What if the horse goes lame within 30 days, but as a result of being improperly shod? Get the warranty to exclude misuse.*
- *What if the horse is delivered but a day late? Get a “liquidated damages” provision.*
- *What if the late delivery is the result of a strike or accident of the carrier? Determine who will bear the loss.*

Source: Data Processing Contracts: Structure, Contents, and Negotiation Dick H. Brandon and Sidney Segelstein, Esq.



Questions About the Horse

- *What if the horse turns out to be sterile? Get a warranty of virility extending for some future time period.*
- *What if the horse dies within the year? Of natural causes? Of accident? Of abuse?*
- *What if there is a dispute between Buyer and Seller on the contract? If they are located in different states, which law controls?*



So, Lawyer-up Negotiating your Contract

- When negotiating, consider your areas of strength as well as the vendor's weaknesses
- Vendor provided contracts - Too often an organization will trustingly sign a standard contract, usually written to favor the vendor, without carefully reading its content and consulting counsel - this is a serious mistake – Never sign a vendor standard contract

Negotiating your Contract

- A prerequisite for signing:
 - The vendor must provide a full project plan stating tasks, timelines, and resources.
- Remember that if it is not in the contract, it is not binding. Read all contracts carefully and do not be afraid to negotiate the best deal possible
- Above all – do not accept any terms that are not favorable to you!




Negotiating your Contract

- From our “experience” files: If the vendor is just starting and has no existing installation or if the software product is new and has limited or no implementation history, or the vendor has no experience with your State Medicaid laws – Never pay full price. (You are going to be a beta test site whether or not it is labeled as such)




Negotiating your Contract

- If you are buying a large number of licenses always ask for a volume discount because installation and training costs can be shared
- A good attorney will fight very hard for the client. Instruct yours as to your desires and what is or is not negotiable. He/she will do the rest



Negotiating your Contract Performance


- Include as part of the contract the information provided by the vendor through sales literature, response to the request for proposal and system specification
- Keep in mind that failure to meet the user needs may be a breach of contract



Negotiating your Contract


Escrow

- The contract should provide for the availability of the source when warranties are terminated unless the software vendor goes bankrupt or ceases to do business prior to the expiration of the warranty.
- The vendor, at its own expense, must provide an escrow account, where source programs are retained by an independent escrow agent who will release them at a designated point in time, upon bankruptcy of the vendor, or after some other designated event. This is a required clause.



Negotiating your Contract Escrow


- The Escrow Agreement must outline the procedures for the deposit and handling of the code by the vendor and agent including what will be deposited (updates, customizations, enhancements, etc.), and how often the deposits should occur



Negotiating your Contract

Random Thoughts


- Think of the future – what happens if the organization grows/shrinks? What happens if the vendor grows/shrinks?
- Observe the vendor's attitude during negotiation – if it is anything less than friendly, you can expect the same when you need service



Negotiating your Contract

Random Thoughts

- Items for Negotiation
 - Guaranteed bug fix time
 - Guaranteed support response time – consider asking for and attaching the vendor's internal support policy as an exhibit and then refer to it in the contract.



Negotiating your Contract


Random Thoughts

- The contract must also:
 - Identify the maximum number of users and the incremental cost of adding users
 - If the vendor manufactures other modules that are not being purchased at the time, the cost of acquiring them later should be set at the time the contract is signed

Negotiating your Contract

Random Thoughts

- Training
 - Training costs should detail the number of trainers to be provided as well as their experience and training experience
 - Number of trainees allowed
 - Number of hours of training included at the agreed upon price



Negotiating your Contract

Random Thoughts

- Also specified should be cost of additional training at the daily or hourly rate (Make sure this price is valid for the next year or two because employees often require additional training as it will improve their efficiency)
- If vendor trainers are to be traveling from a distant site – the contract should specify the **MAXIMUM** amount that will be paid for lodging, meals, and travel expenses.



On Price Negotiations

***The first quote may not be the
best possible quote***