The "10 Commandments" of Negotiating HIS Contracts

By Vince Ciotti & Bill Bogutski

Purchasing a new Hospital Information System (HIS) is often the single largest purchase a hospital makes outside of a new building, while the challenges in negotiating the contract can be far more complex. State-of-the-art hardware, fourth-generation software, arcane terminology and the multitudinous parties involved (lawyers, vendor executives, consultants & hospital management) can easily make negotiating an HIS contract a daunting experience for even the most seasoned chief information officer. This article presents some of the techniques we have developed in negotiating literally hundreds of contracts, for both vendors and hospitals alike. These precepts are presented in the format of "10 commandments," with all due apologies to those who take the originals more seriously than this humorous approach intends.

1. "I Am Thy Winning Vendor; Thou Shall Have No Other Finalists"

The most common error hospitals make is at the start of the negotiating process, wherein many facilities announce the "winner" of their selection process, and then start to negotiate. This takes away the greatest power a hospital has in negotiations: competition. Instead, the vendor selection process should be planned to create two "winners" with whom you intend to negotiate, to gain the maximum clout in the ensuing bargaining sessions.Hospital executives, MIS Directors, users and even consultants are sorely tempted to give the "good news" to the winning vendor, and sadly that is often the death knell of any chances for real concessions. Wise buyers plan the entire selection process to narrow the field to either one of the two best vendors, both of which can meet the hospitals needs. Indeed, even if only one vendor seems to be the ideal solution (the sure sign of a flawed selection process), a wise buyer should still pick the runner up vendor to go through token contract negotiations, in order to keep the winner worried about their competitor and more willing to grant concessions.

2. "Remember to Keep Holy The Negotiating Day"

The second worst error is to save contract negotiations until a single "sit down" session at the end of the selection process. Ideally, negotiations should be an iterative process throughout the selection cycle:o Starting with the RFP, include a section on those key contract clauses that you will be insisting on to get early concessions from potential vendors wanting avoid the dreaded "cut." Figure 1 shows a typical contract questionnaire our firm has developed to draw out concessions early and allow a simple comparison of vendor responses (Figure 2).o Insist that the RFP checklist itself must become a part of the contract as the "product definition," or vendors should not even submit proposals. This will avoid the growing practice of vendors "auditing" their proposals in the finals, and withdrawing many of their "yes" responses in contract negotiations. Figure 3 shows a legend that should be placed in bold italics at the front of the RFP to make it a valid contract addendum.o Request discounts immediately in vendor proposals, again using the threat of being cut to draw out early price concessions. Few vendors give their best offer up front, but even less give all their discounts at any one time; it is far better to "nickle-dime them to death" throughout the selection process, just like so many vendors treat their client hospitals once they're signed!Another aspect of timing is a difficult one to control, but if planned properly, it may pay the most handsome monetary dividends: the time of year to negotiate. Vendor firms typically have a fiscal year end in conjunction with the calendar year end, but check the annual report you should have scrutinized as part of your RFP process to be sure. If your currently expiring contract does not allow you to wait until the vendor's year-end, then try to synchronize your negotiations with their next quarter-end, to catch those all-important quarterly earnings reports.Few hospital executives realize the tremendous pressures that public stock-holders can place on a vendor for quarterly earnings-per share figures. If you are having difficulties getting what you feel is an adequate discount from your finalist vendors, wait until the week before their next quarter or year-end and make them your best offer. For sure, most sales reps have a December 31 quota for their commission calculations, due to W-2 reporting, so you may find Santa Claus by timing your negotiations at the end of December!

3. "Thou Shalt Not Take Boilerplate Agreements In Vain"

Call a local printer near your hospital and ask them what it would cost to typeset an eight page document into an extremely small, 9-point, serif font like this sample in "Times." You will probably get a quote for under a hundred dollars to print several dozen copies. Yet, it is precisely the sacrosanct appearance of a small font with legal-looking print that often intimidates hospitals into signing a vendor's preprinted agreement without making changes for systems that cost tens of thousands of dollars!Hospitals should insist on having the vendor present a word-processed version of their contract in large, readable type, and feel free to change any and every word on it. If not, take your marked-up version of the vendors contract to your local printer, and have him print it in an extremely small, 9-point, serif font like this sample, and then give that to the vendor as your hospital's "standard" boilerplate response. Maybe they'll be intimidated into signing it!Typefaces and fonts aside, don't hesitate to request changes to any and all contract clauses. After all, the reason the vendors have created their boilerplate in the first place is that it highly favors their side of all issues. If the vendor refuses to change certain clauses because they are supposedly held "sacred" at corporate headquarters, that may be precisely the reaction you may hear to any changes requested to the system to meet your needs.

4. "Thou Shalt Not Steal Too Much Up Front"

The typical vendors contract calls for most of the payments to be made long before the system is operational and any problems are discovered, such as: 25% down with the contract, 50% upon delivery of the hardware and software, and the last 25% due upon "go live." Yet it is precisely after go live when users finally discover any serious deficiencies; indeed, many problems in month-end reports (such as ATB balancing and month-end GL interfaces) can't even be determined until two months or more after activation. Hospitals should ask for a widely staggered payment schedule that stagger payments with vendor performance, such as:

o 10% with the contract (no costs yet incurred to vendor)
o 30% upon delivery of the hardware and software (could be 50% of hardware fees, which is their usual mark-up, and 0% of software)
o 20% upon successful full system test or parallel (when you finally know if the system will actually perform as advertised)
o 20% upon go live (when you finally derive some benefit)
o 20% until 30 days after the first month-end and the correction of any discrepancies between the system and the RFP response (such a "hold-back" is your only guarantee they will ever get corrected!).

5. "Thou Shall Not Kill Through Acceptance Criteria"

Most vendor contracts provide for the formal "acceptance" of the system by the hospital as the time when final payments are made (the "killing"), which is also when maintenance charges begin (mutilation of the corpse), and any right to question system functionality ends (cemetery vandalism). However, defining exactly when acceptance occurs is sometimes a classic "whodunit" of detective work in vendor contracts. For example, one leading HIS vendor's contract defines the time of acceptance as "in accordance with Exhibit X." When you dig back to Exhibit X, it cross-references paragraph Y. When you flip the pages back to paragraph Y, low and behold, acceptance occurs upon "first productive use" which is, when you look it up in the "definitions" section, is the day you go live, leaving no time to report errors or hold back any payments! If only their system were as sophisticated as their contract...Another leading vendor defines acceptance as that time when the system "can" accept live data, whether the hospital is ready or not. Thus, before a single patient is admitted, order placed or bill is cut, you've "bought the farm!"As illustrated by these two examples, final "acceptance" should only occur some time after live activation (we recommend 1-2 months), so you have time to detect and report problems, before the vendor earns their final payment.

6. "Thou Shalt Not Steal Through Monthly Invoices"

Many vendors put CIOs and their staffs into a monthly panic mode by defining all discounts as "prompt payment," requiring total payment of all monies within thirty days of invoice date. However, they fail to mention that their complex pricing mechanisms takes up to a week to gather statistics internally and calculate their own inch-thick invoices ("x" pages of paper and "y" pages of fiche, times 'z" optional report units... ad nauseam). Give the vendor a few days for copying, stuffing and mailing (like hospital UB-92 generation), allow the post office a few days to find your hospital, several more days for interdepartmental mail, and you find the invoice on your desk around mid-month. With but two scant weeks to verify its accuracy and try to get a check through Accounts Payable, you have insufficient time to audit the pages of extra charges and special reports (the "theft")!The cure is to extend the payment term to either 45 or 60 days, to reflect the realities of Health Care in the nineties. Or, at worst case, make payments due 30 days from receipt of invoice, so have time to look for questionable charges. If the vendor claims they can't wait that long for their payment, they should target their software to an industry that doesn't have an average of 60+` days in AR for its receivables!

7. "Thou Shalt Not Commit Adultery Paying Interest"

An extension of the "Chinese fire drill syndrome" in the previous commandment is for the vendor to charge 18% interest or "whatever is the maximum allowable by law" for any payments by the hospital after the aforementioned 30 days. Your retort should be to tell the vendor you'll pay them exactly what Medicare, Medicaid and Blue Cross pay for their remittances older than one month after the date of invoice! As a worst case compromise, at least exclude any disputed charges from interest calculations, and be very eager to write dispute letters on any questionable charges. Again, if the vendor claims they can't afford such delay, they might be financially sound enough to be your "vendor of choice" anyway!

8. "Honor Thy Product Definition (Father) & Remedies (Motha)"

Most vendor contracts define their user documentation or technical manuals as the definition of what features their product is supposed to contain. If you issued an RFP with a feature checklist, it should take precedence as the product definition fist, followed by the vendor's User Manuals. The trick in this regard seems to be for how long your RFP will define the product.Several major vendors have obtuse wording which, when deciphered by a legal Champollion, reveals that the RFP only defines the product until go live, after which the product is defined by the vendor's user manuals. Hospitals should insist on at least several months after live to determine that the system actually performs as well as all of the "yes" responses in the vendor's proposal. If the vendor refuses to grant such a time period, you may be very glad that you kept a second vendor in the running!Probably few clauses give vendors as much "agida" as requesting effective remedies or "penalties" in case of their non-performance. Unfortunately, however, without pre-defined remedies in the contract, your hospital may be forced into prohibitively expensive litigation to recover damages suffered by vendor non-performance. To be fair, your hospital should not demand the right to recover excessive amounts, for example, in excess of the license fee, or the vendor firm may place itself in jeopardy in case of bugs or other human errors by its employees. But some remedies should be established for critical areas, such as:· System being "down" for lengthy periods of time (several days)

· Regulatory changes (eg: UB-92) not being reflected in releases

· Rookie or "green" installers giving inadequate trainingA reasonable remedy in such events may be for the vendor to grant a credit of one-month's software maintenance for each such occurrences. This isn't too great an amount to threaten the vendor's viability, but enough to insure that someone at corporate headquarters is concerned when things go wrong at your hospital.

9. "Thou Shalt Not Covet Thy Neighbor's Computer"

During the eighties, response times were a major concern, with relatively new minicomputer systems barely having the "horsepower" to automate a total HIS. War stories (usually spread by shared system vendors)made the rounds about this syetm taking several days to process month-end, and that system's nightly processing runnning well into the next morning, etc.With the realtive commonality of such mini-based systems today and the burgeoning power of new computer chips, such platforms are decidedly less RISC-y than they used to be. However, it is precisely for these reasons that vendors should be willing to extend generous response-time clauses, with some due caveats about peak-and-valley averaging, no report writer jobs, nor background processing, etc..Sadly, most vendors have by now written elaborate 2 and 3-page response time gaurantee clauses that contain more mitigating and extenuating circumstances than the liability waivers one signs to go skiing. Our advice: insist on some response time gaurantees, and if the vendor balks at putting sufficient teeth into the wording, insist on more RAM and DASD, even if it makes them more expensive than their competitior.

10. "Though Shalt Not Covet Thy Neighbor's Installer"

The fees for installing a system today are starting to rival the cost of the system itself (see figure 4 for recent examples culled from actual proposals). Would you pay a six-figure sum for an unspecified hardware configuration or a to-be-determined future release of software? In the same spirit, insist on seeing a detailed install plan before signing, one that lists who will be doing what and when. Indeed, use the pretext of contract negotiations to do what you should have done during the selection process: check out the actual installers (not their impressive managers and vice-presidents) by having them visit your hospital for a day or two to meet your user managers and walk through the facility.Once there, they can also fine-tune the hardware configuration ("who said you need color CRTs on every desk?") and verfiy software modules needed ("make sure you get the "x" option in your contract"). Most vendors sales teams tend to drop the baton when they pass your account to their installers, and such a walk-through can insure sufficient days on site, proper hospital staffing, and sufficiently experienced installers.If you haven't the time to negotiate a detailed install plan because of expiring contracts or other time presures, then allow a 30 - to 60 day "cooling off period" to work out the details after the contract is signed. If it turns out you and the vendor cannot reach agreement on the installation details during that time, then the contract becomes null and void and all deposit monies are returned. Yet another good reason to have a "number 2" vendor in the running!

Epilogue

Negotiating an HIS contract should need not be a "religious experience" conducted by hordes of legal high priests who take over in the eleventh hour, utter magical chants in a strange (Latin) language while threatening doom to all who disobey their precepts. The techniques described above are common sense rules that most hospital MIS Directors have probably thought of at one time or another. By codifying them into a single set of "tablets," we hope they provide a set of guidelines which, if followed, should gain for readers both the "heaven" of maximum price concessions, while avoiding the "hell" of litigation that can ensue from a poorly negotiated agreement.

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