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Healthcare IT procurement: Key factors for success

A unique set of issues surrounds the acquisition of information technology by healthcare organizations.

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Purchasing technology systems and applications typically requires a formalized and structured approach. In the public sector, technology procurement typically occurs through an RFP (Request for Proposal) or similar process in which the acquiring organization articulates the challenges that need to be met and invites IT vendors (often pre-selected through circulation of a prior RFI – Request for Information) to submit proposals. Proposals typically articulate the fashion in which a supplier organization and associated product offerings (and sometimes partners) will provide the necessary solutions. The proposals are reviewed and ranked by the customer's evaluation team, and final contract negotiations then follow with the successful vendor.

Applying best practices: In structuring documents for IT procurement, it is important to bear key principles in mind. What follows is a list of our top 10 observations and concerns relating to healthcare IT procurement that, when properly considered and applied, contribute to a "best practices" model. They are based on our own experience in working with healthcare clients in technology procure-

ments and in structuring IT partnering, alliance and contracting documentation.

1. Information technology procurements are different: A case in point is software, which is generally an intangible set of computer operating instructions stored in a computer's memory, on its



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hard drive, on a CD or DVD. It is provided under limiting conditions that are usually described in a written document called a "License". In other words, the organization does not acquire ownership of the software, but rather a right to use it in accordance with the terms of the license. The reason for this exclusivity, aside from contractual prohibitions in the

License, is that only the software provider has the sole repair kit and owns all of the intellectual property in the software (thus precluding the customer from seeking support through other organizations.) While maintenance and support are typically available from the software provider, it may be of little comfort to an organization where the software company has abandoned the particular product offering, has gone out of business, or is unable to support customer-specific modifications to the product.

2. Be aware of the intellectual property issues: Information technology is all about patents, copyrights, trademarks, and confidential information – including trade secrets, as well as personal information. IT contracts are by their very nature replete with supplier-favored disclaimers, and termination and indemnification provisions that need to be addressed, risk assessed and often strenuously negotiated. Does your organization intend to have custom-developed software or enhancements, and if so, is there a compelling reason to outwardly own all associated intellectual property (IP) rights – such as for commercialization to generate a new source of revenue or for use by associated or affiliated entities? Remember, that in the absence of specific contractual language about who is to own it, the law presumes that the

contractor (consultant), and not the customer, is the owner of the IP.

3. Need to appreciate the vendor preparation effort: Suppliers expend significant amounts of time and effort in structuring their proposals in response to the RFPs. This can be extremely labor-intensive, requiring coordination of various talent pools while searching out information that may not be readily available. The governing instructions should be up-front, at the beginning of the document, and articulated in clear and precise language.

4. Courtesy in responses: Ensure suppliers that do not make the cut are promptly and courteously notified, both verbally and in writing. Remember that they may be stakeholders or partners in future acquisitions. Also, offer to be available to those of them that wish to be de-briefed. A well coordinated process should be established to receive, consider and respond to vendor questions. These responses should be redistributed to all other competing vendors to allow them to incorporate a clarified item in their response.

5. Test the numbers and outcomes: If there is a leasing or other financing component, ensure the numbers are independently verified by the external auditors or other appropriately qualified independent organization. This applies also to offerings from competitive leasing or financing organizations. Lower monthly payments do not necessarily represent a bargain, and watch out for hidden or buried charges and costs. As part of the process for evaluation of vendor submissions, detailed evaluation models should be developed to provide for an objective and complete scoring, and fair evaluation of the vendor summations.

6. Are terms commercially reasonable? It has become critical in today's business climate to assess the commercial reasonableness of the transaction. Are terms consistent with those in the business community, and are they fair and reasonable without imposing undue hardship (and resulting in failure to comply) on either of the

parties? Use your legal professionals to set a "win-win" agenda with provider partners. Explore group buying opportunities among other buying options.

7. Security for performance: Should there be a requirement for some type of performance security in the nature of an irrevocable letter of credit, performance bond, or corporate guarantee given the complexity or size of the transaction, or when the financial stability of the provider is questionable? The answer lies in asking whether provisions have been made for an associated release of the source code in the event of the inability of the provider to fulfill the software deliverables.

8. Contracting terms: The procurement terms in an RFP and those in any attached contract need to be consistent. Specific-

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ly, the attached form of contract needs to address IT equipment, software, and services procurement. IT procurement carries with it, an additional set of considerations that include, but are not limited to, the following:

- acceptance testing;
- performance levels;
- milestone achievements and payments;
- restrictive licensing;
- IP ownership in products, designs, or applications;
- source code escrow;
- warranties, limitations and disclaimers;
- availability or provision of source code, specifications, and documentation;
- continuing product availability;
- product maintenance and upgrades; and
- cost of modifications.

9. Privacy: The health system of the

future is all about sharing information; while hospitals have for some time now operated under health privacy legislation, more recently, the impact of PHIPA (or counterpart provincial legislation) requires that healthcare organizations take steps to satisfy themselves that suppliers observe and fully comply with all applicable federal and provincial privacy laws, particularly where access to personal information is granted or where the supplier acts in a custodial capacity for the collection, storage, and maintenance of that information. Examples include services that have been outsourced (e.g., website hosting or management, operating personal registration or payment portals, or HR records management).

10. Limitations and Disclaimers: Be alert to limitation and disclaimer language in the contract as common features in IT procurements. Ensure that you understand the difference between disclaimers, limitations, warranties and exclusions. Also, investigate to what extent the risk is definable, measurable, and manageable. Some risks may be insurable while others may not be.

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