Assignment 4 Web Group
Hospital side of negotiation
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Introduction

In reviewing the proposed contract, LUHC's core team identified a number of issues that were problematic from our hospital's perspective. The RFP that the vendor responded to defined a comprehensive product. The contract should be inclusive of all the elements of the website as defined in that RFP. This contract does not reflect that intent. In determining which points will be our key criteria, we felt it useful to identify our full list of concerns first, and then target key criteria that we feel are critical to the success of this project and provide adequate protection to our hospital's interests. This paper will first review our list of concerns, and then summarize those that we feel are the three key points that must be included in the contract if this is to be a successful negotiation. Posted with the assignment is a modified contract that contains changes we would recommend. Further points to be negotiated and defined include performance metrics.

Contractual Concerns identified

Warranty

The warranty period is only for 30 days. This period of time is less than the standard 90 days. This warranty is essentially no warranty. There is no reference to performance, services, compliance with applicable law, viruses, or disabling mechanisms. Additionally, there are no references to third party software that will be incorporated into the website. Other provisions that we would look for include authority and litigation.

While all of these omissions are serious, we consider the warranty for applicable law a deal breaker. Section 7.1 and 7.2 of the RFP includes details regarding regulatory requirements and accessibility that are not outlined in the contract.

We have serious concerns about the AS-IS basis, the term and criteria for acceptance, the limitations to warranty, cost, limited mechanisms for redress of grievance and triggers for grievance, performance criteria for the vendor, and imbalance of penalties.

7.4 As-Is Basis: THE SOLUTION AND SERVICES ARE PROVIDED TO HOSPITAL UNDER THIS AGREEMENT ON AN "AS-IS" BASIS. VENDOR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT. This specific limitations might be added to the prior exclusivity paragraph, but AS-IS needs to be deleted.

Scope of License and fees

2.2 Indicates a maximum of 2600 users. This is not only incompatible with facility size (defined in RFP as at least 3200) and PHR use, but as a hosted website the number of users is highly variable and unpredictable. There can be no limit on this, but we can consider a moderation of the fee structure if it gets beyond a certain use level. This is also related to 4.4 – Audit fees/ access to records of licenses. Since this is a hosted website, there should be no need for this kind of audit.

2.2i Distribution to a third party – this makes no sense to us for a hosted web site.

2.3 Prohibited from modifying or customizing without permission – this is unreasonable unless the vendor is willing to make all changes to the system that we need (e.g. calendars, call schedules, postings) at what we consider to be our cost or gratis. Please note that the following provision was in the RFP regarding Technology Transfer:

Acceptance

Acceptance is defined as a period of 10 days in which to identify errors – much too short and inconsistent with the user acceptance testing plan. In section 10 of the RFP we included a description of a proposed timeline and a description of user testing was an important component of the response. We would expect the contract to reflect this. This is another potential deal-breaker.

Training

3.2 Lists 3 hours of training only – the purpose and content of this training is not defined either in the RFP or the contract. This is consistent with Section 2.3 preventing changes in the software, but inconsistent with Section 10 of the RFP, a timeline that included training. Adequate training for users, administrative staff, and IT support staff at the hospital must be defined. The degree of training needed is in part contingent on the level of technical support that will be provided by the vendor, which appears to be minimal.

Moreover, it should be noted that the RFP included the following section that was not addressed in the contract:

As part of the implementation process, it is the hope of LUHC that its existing information systems personnel can gain significant expertise in both the technology used by the application as well as the inner workings of the application itself. Within this section, please identify the steps involved in getting our IT personnel familiar with all aspects of your application.

Failure to address this section in the contract is incomprehensible given that the vendor included such provisions in their RFP response.

Technical Support

3.3.1 20 technical support contact hours Year 1 and 10 Year 2 – is that consistent with the hours needed by other parties with the Vendor's hosted website service? We would expect a facility as large as hours to need more than 20 hours. Discussion/negotiation appears to be in order.

3.3.2 Vendor determines if additional support is needed – language should reflect an opportunity for mutual agreement rather than a unilateral vendor decision.

Upgrades and Enhancements

3.4 Upgrades and enhancements are under vendor control. There needs to be notice to the Hospital and users due to the multiple interfaces between the vendor software solution and hospital systems. The Hospital must have the option to hold on the upgrade for some interval of time or indefinitely should the upgrade be incompatible with the hospital environment.

Hospital Obligations

3.5.1 The hospital is being asked to maintain the environment described in section A. What environment? – this is a hosted solution. This appears to relate to the prior Section 3.4, stating the Hospital must install software and hardware to match the Vendors requirements.

This is a completely unacceptable business requirement. It would be expected rather that the vendor would adjust their software to match our needs. We are the customer. This amounts to enforced obsolescence.

3.5.2 Hospital cannot use vendor software to test – if this is a hosted solution, where would the hospital test changes to the site (response dependent on Section 2.3 – modification of the software) This requirement requires explanation and discussion.

Confidentiality and Security

6 Confidentiality/disclosure breaches – the Hospital is penalized by Vendor for breaches of software confidentiality, but there is no reciprocal protection for breaches of the Hospitals information by the Vendor.

6.1 Confidentiality does not include HIPAA compliance and protections – it only relates to the intellectual property of the vendor.

Automatic 'Preliminary and final injunction' for vendor in the event of software confidentiality breach – due process is required. There is no hospital negotiation or protection in the event that an event is perceived to have occurred.

Indemnities and Limitation of Liability

7.2 The disclaimer is too vague. Inability to patch the software and make it workable is unacceptable – needs to be changed to reflect a timeframe for correction

Force majeure

9 The description of force majeure exceptions includes industrial disputes and telecommunications failures. We would not expect to see carte blanche exceptions for these events. Instead, we would expect to see language allowing penalties or termination in the event of prolonged interruptions in service due to these events.

Term and Termination

10.1 With termination, the hospital loses all rights to data/website. For data protection and patient safety, the hospital must have a 'tail' policy for download data from site – or have them download it – in the event of termination.

The Breach section does include both hospital and vendor, but hospital STILL has to pay

Performance of the Vendor – there is no discussion of how quickly the vendor should respond to requested changes.

Penalties

11.2 5% of that month's license fee isn't much of a penalty [insufficient]. There is no statement that the system will be brought back quickly or how long outage might last.. What about system backups for such events? What is the redundancy plan?

Functionality

Section 7.1 and 7.2 of the RFP includes details regarding specifications, regulatory requirements and accessibility that are not outlined in the contract. A functionalities document was also developed that provided an outline of website requirements.

Appendix A of this paper outlines the functionalities that are not specifically addressed in the contract. We require that the contract must include all functionalities listed.

Cost

Schedule B, the fee schedule, is unclear and appears to be inconsistent compared with expectations generated by the RFP response. For example, it generically lists 'website development service but does not detail what is included in that service. There are no start dates identified for any of these fees, nor are they linked to the implementation phases outlined in the project timeline. There are two sections in schedule B, and it appears that the first section is the basic website development and the second section includes optional add-ons. However add-ons appear in both sections, seemingly indiscriminately so when compared with RFP expectations.

'Physician mini-sites' is listed in the first section, which was not a specific requirement of the RFP, but basic website functionality such as contact information and driving directions are listed under 'Other add-on options'. Additionally, maintenance costs are listed under the various sections and are not broken out. It is next to impossible to read this fee schedule and clearly relate it to project plan timelines, initial startup costs and ongoing maintenance fees.

4.2 Renewal fee – also reflected in Appendix B – automatic increase in rate unacceptable. There should be a standard fee for the duration of the contract with renegotiation of the rate at that time based on the experience of the Hospital and the Vendor.

12 Source Code Escrow

This section of the contract is somewhat unusual in that it relates 'permanent' vs 'temporary' access to source code. It appears restrictive on use of source code when the vendor can no longer support it (e.g. bankruptcy) without defining acceptable uses adequately. In such circumstances, we feel that the rights of the hospital to the source code for the purposes of support, maintenance, and modifying the software should be stated affirmatively.

For temporary access to source code, there is no clarity regarding what happens with the solution the Hospital comes up with when the Vendor has been unable to do so. At a minimum, this should be amended to indicate that the Vendor would recognize the value of the solution the

Hospital was able to accomplish and how this will be recognized (e.g. fees, sale, product use, third party application status). The need for 'temporary access' appears questionable, however.

Finally, the contract does not define Source Code materials, nor state that they must be maintained and current. The description should include regular deposits of scripts, software, and documentation at a minimum.

Miscellaneous

10.3 In the event of irresolvable problems, the Hospital will want both paper and electronic copies of records in format to be determined at the time that will allow transfer to a new system

10.4 Certify deletion of all copies of software – with a hosted solution this is not necessary.

13 Conflict of interest. The Hospital Board needs to be aware of this and to determine that there is no effect on the contract. Because there is no current relationship and no children from the prior marriage the risks of a true conflict of interest may be small, but both entities must be comfortable with the situation. One potential solution is to ask the vendor to appoint someone else as a sales representative. It is of concern that this was not revealed during the RFP process.

Key Points

We have lesser concern about many of the items listed above, including the maximum number of users, prohibitions to modification, training time, technical support, decision process regarding the character of support, lack of control regarding upgrades and associated costs, termination of service criteria and response, definitions of intellectual property, reciprocity in confidentiality and disclosure, and compliance with regulations.

Our top three concerns are:

- Consistency
    - Contract defined in accordance with the RFP
    - Contract written for a hosted solution
    - Budget tied to the project plan and key deliverables
- Performance
    - Performance measures consistent with the timeline of RFP
    - Project Management included
    - Identify resources, deliverables, acceptance process, phases and key dates
    - Detail penalties associated with failure to deliver
- Warranty
    - Functionality included in the warranties
    - Warranty duration increased to 90 days

These 3 items were identified as key points because they comprise the core constituents of the contract. The contract must clearly define deliverables in terms of the functions that will be performed by the software solution. A service level agreement is needed in order to make expectations clear and allow the hospital protection from nonperformance. Lastly, the hospital

engaged the vendor due to poor market performance. The hospital cannot agree to a budget that is not tied to specific performance metrics.

Items that we are willing to take off the table

In general, items from the key concern list must be dealt with if the contract is to be enforceable and represent a value to the hospital. The other items are more negotiable. We may be willing to remove minor items from the table regarding particular functionalities if the core constituents can be agreed upon. The automatic renewal provision is another provision that we may be willing to take of the table if the key flaws in the budget can be addressed. For other items noted below, correction of basic flaws in the contract may make some of our concerns moot.

Scope of License and fees – as noted above, these items will primarily become irrelevant with the correction of the contract to reflect the hosted solution. (2.2 Maximum number of users; 4.4 – Audit fees/ access to records of licenses; 2.2i Distribution to a third party) Clarification of the ability to change content of the web pages as needed, and mechanisms to do so will clarify 2.3 (Prohibited from modifying or customizing without permission). 4.2 (Renewal fee) will be clarified with the overall pricing structure of the contract when it is established as a package website.

10.1 (Termination - 'tail' policy for download data) should be a minimal issue since this is a hosted website that accesses data already in the Hospital. It is not likely there will be any significant data on the site. 11.2 (5% penalty) is important but with more effectively written performance criteria (which is a Key Concern) these issues should be included.

Confidentiality and Security
6 and 6.1 (Confidentiality and disclosure penalties) should be resolved by correcting the Vendor requirement to meet HIPPA regulations. The remainder will follow, and due process or safeguards to prevent the automatic 'Preliminary and final injunction' in the event of vendor software confidentiality breach will be addressed when the Mechanisms for Redress are negotiated.

Maintenance and Support
3.2 (training & 3.3.1 technical support) will be addressed in the AS-IS negotiation. There will need to be clarity of what the product is designed to entail and appropriate hours negotiated to assure that the product is able to provide the benefits the hospital is looking for.
3.3.2 (Vendor determines support needs; 3.4 Upgrades and enhancements; 3.4 Software and hardware; 3.5.1 Environment; 3.5.2 Internal Testing) will be addressed when the contract is corrected to reflect the hosted status.

Miscellaneous
10.3 (Paper AND electronic copies; 10.4 deletion of copies) will be addressed with the clarification of the hosted site and the termination discussion)
13 (Conflict of interest) will be addressed outside of the contracting negotiation. The Board needs to be aware of this and to determine that there is no effect on the contract.

14.6 Georgia law? One company is in Delaware and the other in California. This makes no sense and will be corrected. It should be consistent with the laws of the state the purchaser is located in – California.

Do you have a BATNA (Best Alternative to a Negotiated Agreement)? What is it and why would it work?

We have several BATNA's available. The Key Concerns about the contract not reflecting the RFP make this somewhat more likely. We can accept portions of the current Vendor's product and use other vendors for the remaining portions, choose to have a smaller scope of work for the website, or choose a different vendor for the entire project. This would likely work because one of the Vendors could act as a 'General Contractor' who would build a shell for other Vendors to be linked in. This could give us a 'Best of Breed' product, but risk increased problems with interfacing. We have the option of continuing with our current approach, i.e. 'do nothing', but the associated risks of inaction are likely higher than the risks of a multivendor system.

Risks and benefits of using a "go to the balcony" approach in negotiating the terms of a service level agreement;

Risks – going to the balcony too often can slow down the contract process to the extent that time will become an issue to completion. Additionally, this is a product that involves an ongoing relationship with the Vendor. Souring that relationship in the beginning with a distant or secretive approach to negotiation will make future problems more difficult to manage.

Benefits – assuring that criteria to define the level of service are well established and thought out. Giving the Vendor time to consider the impact of the proposal they are making may be very effective. This can act as an emphasis for the most important items, and an opportunity for the Vendor to recognize their own emotional state.

Other approaches to negotiating the Service Level Agreement
Due to the number of concerns regarding failure to include key functionalities and the disorganization of the budget, stonewalling appears to be a viable approach. The hospital has a significant 'do nothing' BATNA in that they can simply refuse to contract with the vendor. Another alternative is to approach the vendor who came in second during the RFP process. The failure of the vendor to agree to vital changes in the contract can be safely stonewalled.

However, reframing the issues from the hospital's perspective can help lead to needed changes, and building a golden bridge can be accomplished in several ways, either by suggesting contractual changes in a 'cooperative' environment or by collaborating with the vendor to identify alternative solutions to a stalemate.

Cloud computing, ASP and SaaS models as operational alternatives
The proposed solution is supposed to be an SaaS model (e.g. a hosted solution). The alternative to this is the in-house solution. The CIO has already stated his opposition to having this in house, and a part of the decision process for the Selection Committee was to look at the options for hosting. It was decided that the best option for the Hospital based on time, resources

and available technology was the hosted solution offered by this Vendor. Fortunately this is a very flexible solution that can be literally hosted 'anywhere and everywhere' – which is what SaaS is.

However, a significant concern under HIPAA regulations include breaches of security. LUHC handles a large volume of PHI, and a breach in security is associated with severe financial penalties both for LUHC and the vendor. While Cloud computing and SaaS models offer improvements in scalability and flexibility, it is at a cost in security. LUHC is reluctant to take such a step until security options for these software approaches have improved. Further, the potential difficulty in assigning liability for a breach under Cloud computing adds to hospital risk and means that a hospital must have reliable control over all aspects of security.

Attachment 1.

Functionalities listed in the functionalities document not adequately addressed in the contract:

	Category	Functionality	Found in contract?
1.2	Link to content or content develop-ment and search engine	Disease Specific Information	health management tools?
1.3	Patient data	Medical Home	p. 13 add-ons/options - medical home not specified
1.4	Patient needs	Concierge	p. 13 add-ons/options - /concierge not specified
1.5	Patient data	Billing/Insurance information Referral status Co-pays Coinsurance	p. 13 no not specified not specified
1.7	Patient Data	PHR Medications Problem Lists Preventive service reminders	 not specified not specified not specified
1.8	Patient Data Requests for data from offices/depts	Questionnaires Pre-operative New patient Post op checks	not specified
2.3		Provider Order Entry interface	No
2.4		Scheduling	No
2.5	Patient data, diagnosis, financials	Authorization request data entry and status	No
3.2	Provider offices	Physician Referrals	?says physician information p.
3.3	Patient records	Clinics and Scheduling info	? Provider sites, pt appt sched, but not specified
4.2		Bulletin Board	Not in EE intranet - public only
4.3	Provider/ clinic call and coverage schedules	Coverage Schedules*	Not in EE intranet
5.7	Public questions	Disease/Procedure specific search functions	health care videos
5.8	Public questions	Ask the Expert (email/chat)	No