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Enterprise Resource Planning in the Healthcare Realm: Contract Tips

In the [first](#) of our three-part Enterprise Resource Planning (ERP) series, we shared an overview of ERP solutions and best practices for vetting an ERP provider in the healthcare industry. This article will shine some light on navigating the ERP contract process. Our final article in the series [outlines](#) the keys to a successful ERP implementation.

Dealing With Multiple Contracts from One Provider

Once a healthcare organization has successfully vetted and selected an ERP provider, the important process of contract negotiation begins. While some ERP providers rely on a single contract, it is commonplace for a provider to present three contracts to the customer:

- A subscription agreement for ongoing use of the ERP solution (often charged as a flat monthly or annual fee plus fees per user)
- A professional services agreement for implementation, configuration, and any customization of the ERP solution (often charged on a time and materials basis with or without a fee cap)
- A cloud services agreement for hosting the solution and/or the customer's data (often charged as a monthly or annual fee with additional charges for higher data storage)

Each of these agreements as presented by the ERP provider may be self-contained, with its own separate warranties, termination provisions, and limitations of liability tied to only the services provided under that agreement. However, in "real life" the performance of each of the agreements may materially impact the other agreements. To avoid surprises down the road, it is important to understand each party's rights and obligations under these agreements separately as well as the interplay between them, especially during the critical implementation period.

The Importance of Treading Carefully in ERP Contract Considerations

In an example scenario, a healthcare organization is unsatisfied with its ERP provider's progress in implementing the ERP solution one and a half years after signing the three agreements. Eventually, the customer sends a notice of breach under the professional services agreement and, when the provider fails to cure the breach, the professional services agreement terminates. During the 18 months of implementation, the organization has paid over a hundred thousand dollars to the ERP provider and suffered significant disruption to its staff and business operations, all to no benefit.

The organization will naturally want to recover all of the fees that it paid to the provider under all three agreements. However, the professional services agreement may limit recovery to only the implementation fees paid in the last twelve months, or even just the fees paid for the most recent deficient work. Fees paid under the subscription agreement and the hosting agreement may be unrecoverable. Moreover, the provider could insist that the organization continue paying subscription and hosting fees until it is able to give notice of non-renewal of those agreements.

With significant sunk costs in both money and time, the organization might have saved significant hardship by closely examining and negotiating interlocking rights between the agreements. For example, the contract could include clauses that allow the organization to terminate all of the agreements upon the termination of any one of the agreements and the organization could negotiate limitations of liability that allow for recovery of damages across the agreements.

Establishing Deadlines and Control Over Business Data

In addition to complications when dealing with multiple contracts, healthcare organizations should resist glossing over the project scope documentation or statement of work before signing. It is crucial to carefully review these documents and ensure that they accurately and completely describe features, functions, necessary integrations, and assumptions and contingencies with particularity.

Use of interim and final milestone deadlines, with payment tied to milestone deliverables, is also beneficial. ERP providers may resist committing to such fixed deadlines on the grounds that they don't have enough information about the organization's business processes to make those commitments. However, ERP providers can address these risks by including assumptions and contingencies in the SOW. It's also a good idea to document the testing and acceptance process for milestone deliverables, and for final user acceptance testing upon completion of the implementation.

The organization should also consider data security and privacy aspects, including if any changes are necessary to the organizations' privacy policy, and whether to enter into a data processing agreement. Finally, the organization will want to ensure that it has the right to extract its data in all events, including and especially in the event a dispute arises between the organization and the provider.

Takeaways for Healthcare Organizations

When negotiating ERP agreements, it is important to consider the interplay between the agreements, especially components relating to warranties, termination rights, and limitations of liability. It's also important to "sweat the small stuff" including detailed SOW descriptions, milestones, and testing, as well as data protection and recovery.

If you have questions or would like to learn more, please contact [Connie Lindman](#) of Frost Brown Todd's [Health Care Innovation](#) team.

To read more from this three-part series about ERP in the health care industry, click below for:

[Part 1: Enterprise Resource Planning in the Healthcare Realm: Overview and Vetting Insights](#)

[Part 3: Enterprise Resource Planning in the Healthcare Realm: Implementation Tips](#)

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