



Health Care Information Technology Contracts and Contract Negotiations Frequently Asked Questions (FAQs)

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FAQS

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WHAT AM I GETTING?

SOFTWARE

The software license includes application features and functions. The software runs at the customer facility with a perpetual or term license or remotely from the vendor's facility (Application Service Provider or Software as a Service). Support includes warranty period, defect repairs, upgrades and enhancements to the software.

SYSTEM

The system is the complete collection of all software, integrated and functioning together with the data according to the applicable specifications and the equipment. This may include 3rd Party Software too.

INTERFACE SOFTWARE

The customer may require that the vendor develop software to transmit data between the vendor's system and one or more customer information systems. These interfaces should meet industry standard HL7 specifications.

DATABASE SOFTWARE AND TOOLS

Vendors also provide report writers, databases, monitoring tools and other utilities, which increase system's effectiveness.

SOURCE CODE

Vendors may go out of business after they license their software. Source code escrow provides for the deposit of the software source code with a third party for release to the customer in the case of vendor bankruptcy.

HARDWARE AND OPERATING SYSTEM SOFTWARE

Hardware such as servers, PCs or handheld devices is the equipment required to run the application software. The operating system software is responsible for the management and coordination of activities and the sharing of the resources of the computer.

Third (3rd) Party Software

This is software provided by another vendor that is incorporated into the product you are to acquire. Insure an appropriate license is obtained in addition to the on-going services.

PROFESSIONAL SERVICES

Implementation

The vendor or customer must install and configure the hardware and software before the system can be operational. A detailed implementation plan outlines the resources necessary for the customer and vendor to achieve system acceptance and first productive use. Ideally, the customer and vendor should develop the implementation plan, include it in the contract and maintain it during the project.

Development

Customization and configuration of software may be necessary to optimize the use of the application functionality at the facility. Specifications from the customer assist in designing such customization and configuration. Lack of a detailed specification for custom enhancement can result in many misunderstandings. The contract should identify whether the customer or vendor owns such customization or configuration.

Project Management

The vendor and customer each designate a point of contact to direct the project, e.g., respective project managers. The vendor and customer project managers must communicate clear expectations about the use of the software at the facility and the ability of the software to perform. Project managers plan, execute and control project scope, time, budget and quality necessary to implement the software according to pre-defined acceptance criteria.

Training

The vendor trains the customer in how to use the software. Typically, the vendor trains customer trainers and then those customer trainers train other customer representatives. Other types of training should be adequately described since the train-the-trainer is customary.

SUPPORT AND MAINTENANCE SERVICES

Scope of Services

Support and maintenance includes:

- Updates, defect repairs and enhancements to existing functionality sometimes called releases,
- Responses to inquiries and provision of diagnostics within specified time periods, and
- Provision of other types of support, e.g., on-site for an additional fee.
- First Line Call support is typically from the end user to a support center. This is sometimes provided by the customer and sometimes by the vendor. Most vendors like the customer to screen the calls and only call for software related problems. This call should have a response time of a few minutes.
- Second Line Call support is the call from the customers IT department to the vendors support center. This call should have a response time of a few hours.
- Third Line Call support is the escalation of the problem to a technical resource in the company. These are typically an issue that causes a "hard down time" or a dramatically effecting the business operation of a business. This escalation should be done in less than a day if these conditions exist.

Availability of Support

The vendor must provide software support for at least 5 years from contract signing to ensure the value of the customer's investment.

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WHAT AM I PAYING FOR AND WHEN?

SOFTWARE

Fees

In any IT contract, software license fees are ordinarily a large component of the initial system acquisition cost and may present a significant ongoing cost. Software license fees often include a number of restrictions and conditions. For example, they may include limitations on the number and types of users (e.g., named and concurrent users). They also may include the number and types of facilities at which, and equipment on which, the customer can install and operate the software. Accordingly, the customer should:

- Ensure that all software license restrictions are both fully understood (does concurrent use include being passively logged into an application, or is active use required?) and are consistent with the customer's current and anticipated needs, and
- Include contract terms for incremental license fees for expanded usage. The contract should address this as either a specific dollar amount or a guaranteed discount rate from the vendor's then-current list price.

Invoicing Terms

Ideally, the vendor should have the right to issue invoices for the software license fees only as the vendor successfully performs its obligations, not based simply on the passage of time. These milestone payments will be negotiated with the vendor. The vendor will expect about 50% of all payment when the customer has full access to the asset (System build). Sample performance-based invoicing terms include successful completion of the following:

- 5% Project kick-off meeting,
- 20% System build,
- 25% Training,
- 25% Go-Live (preliminary acceptance) and
- 25% Final Acceptance.

The vendor should only issue an invoice when the customer confirms in writing (using a milestone/deliverable completion certificate) that the vendor successfully completed a project milestone/deliverable. Going live with an application generally institutes

acceptance and the vendor will expect to be paid all invoices except for Final Acceptance.

HARDWARE AND OPERATING SYSTEM SOFTWARE

Fees

Hardware and operating system software represent another core pricing-related IT contract consideration, when acquired through the vendor acting as a reseller. Vendor-imposed certification fees or other negative incentives may prompt the customer to buy equipment through the vendor when the customer actually might prefer to "buy direct." The customer should seek contract terms that limit the price the vendor may charge to, for example, cost plus 5%, to control such acquisition costs.

It may be less expensive for the customer to acquire the hardware and the operating system themselves. This should be considered. The existing contract held by the organization and the service company may be preferred.

Invoicing Terms if acquired through the vendor

Recommended invoicing terms for hardware are:

- 25% Vendor orders the hardware and
- 75% Vendor installs hardware at the facility and demonstrates it operates according to manufacturer's specifications.

PROFESSIONAL SERVICES

Fees

Vendors usually quote professional services as a fixed fee or time and materials estimate. A fixed fee nearly always requires a fixed scope and a number of assumptions, including:

- A maximum time frame for completing the project,
- Conditions based on the customer's existing environment (such as interface and data migration assumptions), and
- Service volume assumptions (*e.g.*, the vendor will only be responsible for establishing three interfaces).

While assumptions are not inherently bad, the customer must review them carefully to assure the assumptions address the project scope completely.

The customer should seek to include professional service rates in the contract. These rates should establish an upper limit on the amount the vendor can charge for services provided on a time and materials basis. Once established:

- The service rates should remain fixed for a set time period (1-3 years) and thereafter should only increase once a year,

- The customer should cap all increases at the lesser of the most recent Consumer Price Index (CPI) increase and a small percentage (3-5%), and
- The service rates should never exceed the vendor's then-current rates less a specified discount.

Invoicing Terms

Vendors prefer time-based payment terms, but customers should try to negotiate payment terms tied to successful completion of project milestones or deliverables. Other options include:

- If the vendor charges fixed implementation fees, allocate fixed fees to specific milestones or deliverables and only pay each allocated amount when the vendor successfully completes the milestone or deliverable, and
- If the implementation fees are variable (such as under a time and materials arrangement), pay a portion of each monthly invoice (for example, 50-60%) as the vendor successfully completes services, and hold back the remaining portion until the vendor achieves milestones and completes deliverables successfully.

SUPPORT AND MAINTENANCE SERVICES

Fees

Vendors usually calculate annual support fees as a percentage of the software license fees. While the percentage will vary from vendor to vendor, generally the range is 18-22%. The discounted (not list price) software license fees should provide the basis for calculating annual support fees.

Invoicing Terms

Customers should start paying for support only after accepting the system (or minimally after successfully achieving the system go-live date). Once started, support fees are typically subject to an annual fee increase. These annual increases should not exceed the lesser of the most recent increase in the CPI and 3-5%. Given the compounding effect of many years of increases, the customer should seek to include a statement in the contract that the support fees charged by the vendor never will exceed the then-current rates charged to other vendor customers.

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HOW DO I PROMOTE ON-TIME DELIVERY?

PROJECT SCOPE

Project Documents

To assure an alignment of expectations regarding project scope, a customer should work with the vendor before signing the contract to develop:

- A statement of work that comprehensively describes vendor-provided services, including: equipment installation, software implementation, interface development, data conversion, training and testing services;
- A detailed, customer-specific implementation work plan that identifies, among other things, vendor and customer tasks and start and end dates for performing each task, critical milestones and deliverables, interdependencies, etc.; and
- A resource plan for each party that describes the numbers and types of personnel resources assigned to each task by each party during the project.
- The vendor response to features and functions of the RFP/RFI should be included in the contract and discussion documents. This will keep people honest and is what the end users are expecting.

Non-Performance Consequences

The contract should also define the consequences associated with the vendor's failure to execute the project as promised. Among other things, if the project fails to meet the planned schedule, after a reasonable remedy period the contract might:

- Require the vendor to provide any additional personnel resources necessary to get the project on schedule, without additional cost or expense to the customer,
- Provide the customer with the right to receive a specified dollar amount (liquidated damages) for each day the vendor fails to achieve milestones timely and complete deliverables successfully, and
- Provide the customer with the right to withhold payment.
- Require the vendor to pay for a suitable replacement product.

The customer should aim to specifically identify failure to achieve project milestones timely or complete deliverables successfully as a material breach of the contract. This allows the customer to terminate the contract and pursue all rights and remedies that may be available to it.

Change Control Procedures

The contract should have disciplined change control procedures, including a methodology for agreeing on whether requested changes are within, or outside, the then-current scope of the project (and therefore whether the vendor can charge additional fees).

The contract should also include a detailed governance model that allows the parties to quickly escalate unresolved project issues to successively higher levels within the parties' respective organizations, as necessary.

PROJECT MANAGEMENT

Personnel

The success of IT projects often hinges on the experience and qualifications of the vendor personnel resources assigned to the project. For this reason, the contract should:

- Identify by position and name the vendor's "key personnel", which ordinarily will include the project manager and may include application and technical experts,
- Allow the customer to interview and select the key personnel from among candidates proposed by the vendor, and
- Restrict the vendor's ability to permanently or temporarily remove the key personnel from the project.

The customer may also want to include an experience requirement in the contract. This would require the vendor to obtain the customer's prior consent before assigning inexperienced resources to the project (for example, someone with less than 12 months of experience as a vendor employee).

Status Meetings and Reports

The customer should not overlook the critical activity of carefully tracking and documenting the progress of the project. The contract should specify:

- The frequency of, and required attendees at, status meetings,
- The party responsible for taking and circulating minutes of status meetings, and
- The vendor's project reporting obligations, including the frequency and level of detail for each report. The vendor should deliver a month executive report and other regular status reports during the month.

Joint issues log

The parties should maintain a joint issues log that identifies all outstanding issues, including the date opened, the party responsible for resolving the issue, the proposed resolution and the current issue status. The vendor should be affirmatively required to report all known project issues the vendor believes have or may impact its ability to perform within scope, on schedule, within budget and according to specified quality standards.

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HOW DO I KNOW IT WILL MEET MY REQUIREMENTS/WORK?

DELIVERABLE ACCEPTANCE CRITERIA

The contract should include each identified vendor deliverable (e.g., design specifications, interfaces, test plan, test scripts), including identifying:

- The name of the deliverable,
- The deliverable type (e.g., a document, software code),
- The requirements or specifications for the deliverable, including required content, functional and performance capabilities and the format of the deliverable (e.g., Microsoft word, excel),
- The deliverable due date and
- The deliverable review and comment period.

All deliverables should be subject to the customer's review and approval. If the customer discovers that the deliverable does not conform to its requirements or specifications, the vendor should correct any customer-identified deficiencies in a timely manner. The customer should accept the deliverable only when it confirms in writing (in the form of a deliverable acceptance certificate) that the deliverable conforms to its requirements and specifications.

If you elect to go-live without all the contractual agreements met, then document all the open issues remaining and have both parties sign that affidavit these remain open issues.

SYSTEM ACCEPTANCE TESTING

The contract should describe in detail the system acceptance testing process, including time frames for testing the system (e.g., 30-90 days); the vendor's obligation to correct any defects discovered during the testing process and the system acceptance criteria. The acceptance criteria should include confirming:

- The system's functional capabilities,
- Whether data conversions completed successfully,
- Whether interfaces work properly and
- The system complies with scalability and performance requirements.

If the system does not complete acceptance testing successfully within a contractually specified time, the customer should have the right to pursue various remedies, including:

- Reject the system and receive a full refund of monies paid, or
- Declare a material breach of contract, terminate the agreement and seek recovery of damages from the vendor.

FUNCTIONALITY AND PERFORMANCE

The customer should ask the vendor to make a number of functionality and performance warranties relating to the system, including:

- The system does and will continue to process, and perform according to the functional capabilities described in the documentation/specifications (including the RFP/RFI),
- The system does and will continue to comply with applicable laws and regulatory requirements, including those required by CMS, HIPAA, CCHIT and others,
- All interfaces will meet the HL7 standards,
- The system as delivered does not contain, and the system will not receive from any vendor source in the future, any viruses or other malicious code, and
- The equipment configuration recommended by the vendor is sufficient to operate the software (within specified operating parameters, such as software release levels, number of concurrent users, etc.).

Ideally, the vendor will provide warranty coverage for both the vendor-proprietary software and third-party software supplied or recommended by the vendor. If the vendor is unwilling to offer warranties that extend to the third-party software, then the vendor minimally should pass through all available warranties from the third party software vendors and act as a liaison between the customer and the applicable third-party vendor to resolve any functional or performance issues that may arise.

SERVICE LEVEL AGREEMENTS

Service Level Agreements (SLAs) measure vendor performance quality related to both product performance and service performance. Quality measures often focus on accuracy, timeliness or responsiveness, availability and completion.

SLAs may include:

- **System Availability** – A measure of the amount of time during scheduled hours of availability (i.e., excluding mutually agreed scheduled downtime) that a system is available for full use by the customer’s end users,
- **Transaction Response Times** – A measure of how quickly the system is able to perform transactions during peak processing periods, and
- **Incident Resolution** – A measure of Incident response and resolution time frames based on the criticality of the underlying incident (e.g., urgent, high, medium or low).

Each SLA should include or specify:

- A standard for performance (e.g., monthly system availability during scheduled hours of availability will be 99.99% or better),
- A support response time matrix that defines support response time for first, second, and third line support. Further, the document should include the minimum and matrix response times for each level.

- A mathematical formula for calculating whether the vendor achieved the SLA,
- A measurement methodology (e.g., the parties' mutually agreed monitoring tools and methodologies that periodically measure availability), and
- The consequences associated with the vendor's failure to achieve the SLA. These typically will include the customer's right to receive service level credits (reductions in the fees that the customer would otherwise pay). They may also include the customer's right to terminate the contract and seek recovery of damages if the vendor's failure to achieve the SLAs rises to a certain threshold.

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WHAT DO I DO IF IT DOESN'T WORK?

TERMINATION

Sometimes it is necessary to end the contractual relationship whether due to breach or perhaps a change in strategic direction.

Termination for Cause

Either party should have the right to terminate for default if a breach continues after a reasonable notice and opportunity to cure, generally 30 days.

Termination for Convenience

Either party may want the opportunity to terminate the contract for any or no reason upon a reasonable notice, e.g., generally 60 days. If the customer wishes to terminate early, the vendor may ask for additional fees to recoup some of the revenue it booked based on the length of the agreement term.

ACCEPTANCE

The customer should conduct acceptance tests of the software functionality and hardware performance to ensure that the vendor's system operates properly at the customer's facility. The vendor will correct any defects, which prevent the software from functioning according to agreed upon acceptance criteria, at no additional charge. The customer may recover all fees paid if the vendor cannot comply with the agreed upon acceptance criteria.

NOTE: First productive use (going live) is a form of acceptance. If you are very concerned with the remaining features and functions being available, then DO NOT go live. If you do go live have the vendor's executive team clearly state the open issues and expected issue resolution.

LIMITATION ON DAMAGES/LIABILITY

Vendors generally seek to minimize their exposure by monetary caps on damages. The contract will provide a cap on actual damages to some fraction of the revenues paid and disclaim all consequential damages. There should be no cap for certain damages i.e., indemnification for intellectual property infringement.

TRANSITION ASSISTANCE

The customer may require certain application software transition assistance to prevent business disruption, in the event of termination. The vendor must convert the customer's data upon termination or expiration of the agreement. The contract should also include an exit strategy with the time necessary for that transition.

ESCROW AGREEMENT

The escrow agreement ensures the source code for the applications will be available. A third party escrow agent holds the source code and releases it to customer if the vendor goes out of business. This ensures that the customer will be able to continue operation of the software and realize its investment value.

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WHAT ELSE SHOULD I THINK ABOUT?

CONFIDENTIALITY

All contracts should include mutual confidentiality obligations for the parties and their employees, agents and third parties. The vendor must protect the privacy and security of patient data. The customer must keep all knowledge of the vendor's software confidential as trade secrets.

COMPLIANCE WITH LAWS

Each party must comply with all applicable federal and state laws, rules and regulations. A Business Associate Agreement is an essential requirement for the facility to comply with HIPAA.

OWNERSHIP OF DEVELOPMENTS

Before a vendor develops new software or customizes existing software, the parties should discuss ownership of the deliverable. Each party owns its pre-existing work and generally, if the customization is an extension of the vendor's software, the vendor will want ownership rights. If the customer is paying the vendor to create a "work for hire" to develop new software, the customer should own the deliverable.

INDEMNIFICATION AND INSURANCE

One important function of the contract is to allocate risk to the appropriate party. In an indemnification scenario, a party is seeking a remedy and reimbursement from the other party if sued by a third party for acts of the other party.

For example, the customer did not develop the software but may be sued by someone alleging intellectual property infringement. The defense, settlement or resulting judgment is the vendor's risk and thus the vendor agrees to indemnify the customer for such infringement issues. The contract may provide for similar indemnification for slips and falls, breach of data security, and other breaches of the contract.

Insurance provides a layer of additional protection for the customer should the vendor have insufficient funds to correct a breach.

STRUCTURE OF THE AGREEMENT

If the parties anticipate a series of orders for software, hardware or services, a master agreement facilitates such future purchases under a single set of terms and conditions. This agreement may govern as the parties agree to each transaction under a separate schedule or statement of work. To the extent, several documents combine to form an agreement, it is important for the agreement to state an order of precedence in the case of a conflict among the various terms and conditions.

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HOW DO I CONTROL THE CONTRACTING PROCESS?

DEFINE REQUIREMENTS

Requirements define what a customer needs. Successful requirements definition involves consensus building to ensure agreement by the stakeholders that their needs are properly defined. Definition of requirements is a significant undertaking that must be in sufficient detail to:

- Communicate what the stakeholders need,
- Serve as the basis for a solicitation document,
- Supply the basis for evaluating vendor proposed products and services,
- Provide the basis for an acquisition contract,
- Support configuration/customization of a vendor's product and
- Verify that the vendor delivered the product they contractually committed to provide.

DEVELOP THE CUSTOMER'S FORM OF AGREEMENT

The customer can structure a contract in different ways, for example:

- **Master Agreement** – A comprehensive document that includes all goods, services and responsibilities associated with providing hardware and software, for example:
 - Hardware purchase,
 - Software license,
 - Hardware maintenance,
 - Software support and
 - Software escrow.

This contract form is most preferable for the customer, since it integrates all responsibilities for both parties. If a party fails in one contract clause there should be an impact elsewhere in the agreement that adversely affects that failing party.

- **Separate Agreements** – Individual contracts, or the opposite of the master agreement, tend to limit the scope of responsibility for each party. This form is less desirable for the customer.

INCLUDE THE CUSTOMER'S CONTRACT IN THE RFP

Include the customer's contract in the RFP to:

- Present the contents of the contract with the most favorable terms and conditions available to the customer, and
- Require that proposing vendors indicate their agreement or disagreement with comments regarding the proposed contract.

The RFP should include space by each clause where proposing vendors can provide written comments about the contract.

SCORE THE VENDOR'S RESPONSE TO THE CONTRACT AS PART OF EVALUATION

The selection process attempts to identify the best vendor, i.e., the vendor that meets most of the user requirements for the lowest cost. These requirements should contain selection criteria, including vendor willingness to negotiate and enter into the contract provided in the RFP.

INDICATE IN THE RFP THAT THE VENDOR MUST DEVELOP KEY CONTRACT-RELATED DOCUMENTS, AT NO COST TO THE CUSTOMER

Specify in the RFP that vendor contract negotiations include preparation of all contract documents, at no cost to the customer, for example:

- Project organization,
- Roles and responsibilities,
- Work plan,
- Schedule and
- Deliverable payment schedule.

CONSIDER NEGOTIATING WITH TWO VENDORS TO ENHANCE CUSTOMER LEVERAGE

The customer maintains leverage through competition. For example, the best time for contract negotiations is just after the customer selects a vendor in a competitive procurement and another vendor is available as an alternate. The customer loses leverage when making a public commitment to a single vendor or notifying vendors the customer did not select them.

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HOW DO I PREPARE FOR CONTRACT NEGOTIATIONS?

ASSEMBLE AN EMPOWERED, MULTI-DISCIPLINARY CUSTOMER NEGOTIATION TEAM

Assemble a team, with decision-makers, including, representation from, for example:

- Business,
- Executive management,
- Finance,
- Information technology,
- Legal,
- Procurement,
- Project management and
- Risk management.

The team should also include a scribe that takes minutes to record open negotiation issues, agreed upon terms and conditions, specific wording, etc.

IDENTIFY KEY BUSINESS OBJECTIVES AND PRIORITIES

Business objectives might address regulatory compliance, cost, schedule, etc. Once the customer identifies these objectives, they must prioritize them and determine their impact on the contract and negotiations. For example, if schedule is a key business objective, the contract provided in the RFP should include key terms and conditions associated with schedule performance that are not negotiable.

EVALUATE EACH VENDOR'S RFP RESPONSE CAREFULLY

An analysis of each vendor's response to the contract specifications indicates the extent of exposure the customer might face if they sign the contract with a particular vendor. This analysis assists the customer in understanding the risks associated with selecting each vendor at this point in the acquisition process. It also highlights areas where negotiating a different position is either mandatory or desirable. Finally, it helps the customer understand how the vendors compare to each other, e.g., the customer could use concessions offered by one vendor as leverage to negotiate a more favorable position from another vendor who offered less favorable terms.

PREPARE AND DISTRIBUTE A LIST OF "NEGOTIATION RULES"

Before meeting with the vendor, the customer should prepare and distribute an administrative guide with negotiation rules. Examples include the following:

- Designate a lead negotiator who is responsible for facilitating all customer discussions with the vendor,

- Require that the vendor supply an empowered negotiator, who will attend all meetings,
- Maintain continuity of the customer's and vendor's negotiation teams to ensure full understanding and evolution of negotiation issues,
- Mandate that the customer and vendor use the same word processing and change tracking software,
- Ensure the customer controls edits of the contract during negotiations and
- Manage costs by developing and requiring adherence to a published negotiation schedule, which should include multiple work streams for development of the contract terms and conditions and all supporting project-related documents.

PREPARE THE CUSTOMER NEGOTIATION TEAM BEFORE MEETING WITH THE VENDOR

The customer should conduct an internal preparatory meeting to review the selected vendor's position documented in their response to the RFP. This meeting is also an opportunity for understanding the position of the individuals participating in negotiations. All of these individuals are key stakeholders who have different levels of flexibility, authority, influence and motivation that everyone must understand before conducting vendor negotiations.

During this meeting, the customer negotiating team should also do the following:

- Prepare a list of all negotiation issues,
- Organize the issues into groups, e.g., project management, financial, information technology,
- Prioritize the list by order of importance,
- Identify deal breakers and explore identifying an overall fallback position of negotiating with the second-ranked vendor,
- Prepare a fallback position for each non-deal breaker issue,
- Share this negotiation issues list (excluding fallback positions and deal breakers) with the vendor and
- Request that the vendor prepare a written response to each issue and send it to the customer one week before starting face-to-face negotiations.

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HOW DO I CONDUCT NEGOTIATIONS?

CONTROL NEGOTIATIONS

The lead negotiator must stay in charge of negotiations by doing the following:

- Adhere to the established schedule,
- Initiate discussion of each negotiation issue,
- Rely on an alternate as “the good guy” to mediate discussion when negotiations become contentious,
- Control the customer negotiating team by assigning tasks to team members and monitoring these tasks through completion,
- Facilitate discussion among customer negotiating team members,
- Balance difficult negotiating issues with easy ones to help maintain a positive working relationship,
- Plan to give up issues, but use this as leverage to gain on other issues,
- Defer contentious issues and return to them at a later time, and
- Terminate negotiations with the top-ranked vendor if required and start negotiations with the second-ranked vendor.

WALK AWAY FROM THE DEAL ON KEY POINTS

There comes a point when further discussion just breeds more disagreement. If the top-ranked vendor is intractable on a deal breaker, the customer must have an overall fallback option to initiate negotiations with the second-ranked vendor. The customer's lead negotiator should:

- Suspend negotiations to give both parties time to reconsider their options,
- Resume negotiations and attempt to resolve the contentious issue,
- Notify the vendor that the customer will terminate negotiations and initiate negotiations with the second-ranked vendor if the top-ranked vendor remains contentious on a deal breaker issue, and
- Terminate negotiations, if the vendor is still intractable.

Willingness to negotiate was one of the reasons for selecting the top-ranked vendor. The customer now knows that they scored this vendor incorrectly. It is now desirable to start negotiations with the second-ranked vendor. This decision on an individual deal breaker issue may not appear desirable, but the decision on the overall deal must be favorable or the customer should not do it.

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