



Healthcare Institute - Part 3: Compliance and Contract Negotiations

SPEAKERS

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CONTRACT NEGOTIATIONS



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Contract Negotiations

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WHAT IS A CONTRACT?

A contract is a written **agreement** where the **identified parties** enter into a **bargained exchange** that is governed by **terms and conditions** and **signed by the parties**.

All in the contract...extrinsic evidence

WHAT IS A CONTRACT?

Get what you need by a
KIS, KIS approach...

“Keep It Simple”

MOW SERVICES

- Deliver meals
- Safety checks
- Friendly Visits

THERE ARE KEY DOCUMENTS THAT MAKE UP THE TRANSACTION AND IS THE CONTRACT

- SERVICES AGREEMENT
 - Who, what , where, when, how, and why.....
- BUSINESS ASSOCIATE AGREEMENT, IF NECESSARY
- IT SECURITY WORKBOOK
- PERFORMANCE STANDARDS
- WORK ORDERS
- PURCHASE ORDERS

WHAT IS A SERVICES CONTRACT?

In a services contract, a party hires another party to perform a task or service.

A SERVICES CONTRACT EXPLAINS THE RELATIONSHIP

- **Who** are the contracting parties?
- **What, how, why, where** are the services being performed?
- What are the payment terms?
- Is any party creating or sharing data? Is it confidential?
- What happens if something goes wrong?
- How do I get out of the contract?

WHAT ARE THE TERMS OF THE AGREEMENT?

- IDENTIFY THE PARTIES TO THE AGREEMENT
 - Who or what entity is responsible for performing the services?

IDENTIFY THE PARTIES...SAMPLE PROVISION

This Agreement (“Agreement”), dated and effective July ___, 2018 (the “Effective Date”), is by and between Meals on Wheels of Anytown, an Anystate nonprofit organization under IRS Code 501(c)(3) with a principal place of business at 1234 Anytown Street, Anystate 67890 (“Contractor”) and ABC Health Insurance Plan, Inc., a Delaware corporation, with a principal place of business at 4321 XYZ Road, Someplace, Otherstate 54321, for itself and on behalf of its subsidiaries, affiliates, joint ventures, partnerships, managed and contracted entities, located at (“ABC”). Contractor and ABC may be referred to individually as a “Party” or together as “Parties”.

WHAT ARE THE TERMS OF AN AGREEMENT?... CONTINUED

- SCOPE OF WORK
 - What are the services?

STATEMENT OF WORK- SAMPLE PROVISION

a. Contractor agrees to provide to ABC, meal delivery, safety checks, and friendly visit services to eligible ABC Members (collectively called “Services”) as requested by ABC and described in such SOW(s) that are incorporated into this Agreement. Such Services shall be provided in accordance with the provision of this Agreement and within guidelines established by ABC. In the event of any conflict between the terms and conditions of this Agreement and the terms and conditions of any Statement of Work, the terms and conditions of such SOW shall govern.

b. ABC’s owned, controlled and/or managed affiliates and subsidiaries may execute SOW’s and/or purchase orders under this Agreement, and for purposes of any such SOW and/or purchase orders under this Agreement, shall be considered “ABC” as that term is used herein.

WHAT ARE THE TERMS OF THE AGREEMENT?... **CONTINUED** REPRESENTATION AND WARRANTIES

- These are the guarantees a party makes to the other party
- Less is more for contractor, but more is needed by purchaser...details, details, details.....

REPRESENTATIONS AND WARRANTIES - *SAMPLE LANGUAGE*

- a. Contractor represents and warrants that it has full authority to enter into this Agreement and to consummate the transactions contemplated hereby and that this Agreement is not in conflict with any other Agreement to which Contractor is a party or by which it may be bound.
- b. Contractor represents and warrants that Personnel assigned to perform Services under any Schedule shall have the proper skill, training and background for his/her level of competence as specified in the Schedule so as to be able to perform in a competent and professional manner.
- c. Contractor represents and warrants that it shall comply, and all Services provided pursuant to this Agreement shall comply, at all times with all applicable state and/or federal laws, regulations or administrative orders, as well as the applicable laws and/or regulations.....

WHAT ARE THE TERMS OF THE AGREEMENT?...CONTINUED

- **COMPENSATION**
 - Provision outlining the payment terms of the agreement.
 - To consider
 - Late payment interest
 - Undisputed
 - Audit
 - No payment from patients

WHAT ARE THE TERMS OF THE AGREEMENT?...CONTINUED

- TERMINATION/ NON-RENEWAL
 - How can a party end the agreement and under what terms?

TERMINATION- SAMPLE PROVISIONS

- Notwithstanding any other provisions of this Agreement to the contrary, ABC may unilaterally terminate this Agreement or any SOW hereunder, without cause, by giving Contractor thirty (30) days prior written notice of its election to terminate. Contractor may unilaterally terminate this Agreement or any SOW hereunder without cause by giving ABC one hundred twenty (120) days prior written notice of its election to terminate.
- ABC shall have the right to terminate this Agreement effective immediately and without prior notice if Contractor breaches any provision of Article 6 (Confidentiality). In the event of any other material breach of this Agreement by either party hereto, the other party may (reserving cumulatively all other remedies and rights under this Agreement and in law and in equity) terminate this Agreement, in whole or in part, by giving thirty (30) days' prior written notice thereof, provided, however, that this Agreement shall not terminate at the end of said thirty (30) days' notice period if the party in breach has cured the breach of which it has been notified prior to the expiration of said thirty (30) days.
- In the event that either party: (a) files any petition or answer that seeks or consents to any order for itself for relief under any bankruptcy or insolvency law; (b) becomes or is declared insolvent, or is the subject of any proceedings related to its liquidation, insolvency or the appointment of a receiver or similar officer for it; (c) makes an assignment for the benefit of all or substantially all of its creditors; or (d) enters into an agreement for the composition, extension, or readjustment of substantially all of its obligations, then the other party may, by giving written notice of termination to such party, terminate this Agreement as of a date specified in such notice of termination; provided, however, that Contractor shall not exercise such termination right so long as ABC continues to pay all fees in accordance with this Agreement.

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- INDEMNIFICATION
 - What if someone sues me and the other party should really cover my losses?
 - When?

INDEMNIFICATION - SAMPLE PROVISION

- a. Contractor shall require all of its Personnel to comply with the provisions of this Agreement and shall indemnify, defend, and hold ABC harmless from and against any and all losses, damages, administrative actions, causes of action, claims, demands, harm, injury, fines, penalties, assessments, costs and expenses, including reasonable legal fees and expenses, of whatsoever kind and nature (together "Liability") arising out of or on account of, or resulting from: (a) Contractor's performance of its obligations or failure to fulfill any undertaking under this Agreement, including (i) any actual or alleged breach by Contractor or any of Contractor's Personnel of any provision of this Agreement; or (ii) Contractor's employment of one or more of Contractor's Personnel; (b) the violation of any applicable law, order, or regulation by Contractor or Contractor's Personnel; (c) Contractor's misrepresentation, or breach of warranty under this Agreement; (d) the fault or negligence of Contractor or Contractor's Personnel; or (e) any injuries sustained by Contractor Personnel in provision of Services under this Agreement.
- b. ABC shall indemnify, defend and hold Contractor harmless from and against any and all Liability to Contractor, including Contractor Personnel, arising out of, or on account of: (a) the fault or negligence of ABC; (b) the violation of any applicable law, order, or regulation by ABC; or (c) any actual or alleged breach by ABC of any provision of this Agreement.

WHEN INDEMNIFICATION MAY MATTER

Example: What happens when a meal delivery driver gets injured when he slips and falls when delivering meals?

Example: What happens if a person has an allergic reaction to a meal?

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- LIMITATION OF LIABILITY
 - How can a party limit their exposure/risk under the agreement?
 - EXCEPT FOR CONTRACTOR'S OBLIGATIONS AS SET FORTH IN ARTICLES 5 (INDEMNIFICATION), 6 (CONFIDENTIALITY), 7 (REPRESENTATIONS AND WARRANTIES), 22 (INSURANCE), AND ARTICLE 26 (SOFTWARE INSTALLED ON C-OWNED COMPUTING DEVICES) IN NO EVENT SHALL ABC OR CONTRACTOR BE LIABLE TO EACH OTHER FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE FURNISHING, PERFORMANCE, OR USE OF ANY PRODUCTS OR SERVICES PROVIDED PURSUANT TO THIS AGREEMENT.

LIMITATION OF LIABILITY - SAMPLE PROVISION

EXCEPT FOR CONTRACTOR'S OBLIGATIONS AS SET FORTH IN ARTICLES 5 (INDEMNIFICATION), 6 (CONFIDENTIALITY), 7 (REPRESENTATIONS AND WARRANTIES), 22 (INSURANCE), AND ARTICLE 26 (SOFTWARE INSTALLED ON C-OWNED COMPUTING DEVICES) IN NO EVENT SHALL ABC OR CONTRACTOR BE LIABLE TO EACH OTHER FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE FURNISHING, PERFORMANCE, OR USE OF ANY PRODUCTS OR SERVICES PROVIDED PURSUANT TO THIS AGREEMENT.

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- INSURANCE
 - Each party usually requires the other to carry insurance.
 - Types of insurance depends on the type of transaction.
 - Auto insurance, worker's compensation, cyber liability insurance, general liability coverage
 - Additional insured

Insurance- Sample Provision - continued

a. During the Agreement Term and for three (3) years thereafter, Contractor must carry the following insurance coverage with an insurance Contractor licensed in the jurisdiction in which Contractor is doing business and has a general policy rating of at least A- from Best's Insurance Report, and such requirements will be in any contract executed by the parties:

- (1) Worker's Compensation insurance as required by the laws of the jurisdiction where work is being performed.
- (2) Comprehensive general liability insurance including Products with limits for bodily injury and property damage of not less than \$3,000,000 in the aggregate and per occurrence (such coverage may be provided by primary coverage and an umbrella policy);
- (3) Employee theft and dishonesty (fidelity) coverage for claims arising from fraudulent or dishonest acts on the part of any employee and agent providing services with limits of not less than \$1,000,000 in the aggregate and per occurrence;
- (4) Automobile Liability insurance with limits for bodily injury and property damage of not less than \$1,000,000;
- (5) Professional Liability coverage with limits of not less than \$1,000,000 for each occurrence;
- (6) Cyber Liability coverage with limits not less than \$3,000,000 per occurrence and in the aggregate.

b. Upon contract execution, and annually during the contract term, Contractor must provide certificates of insurance and applicable endorsements showing ABC as the additional insured on General Liability, and a Certificate Holder on all other lines of coverage. Any changes in insurance carriers shall include a retroactive date covering any losses from the contract effective date. Contractor's insurance must be primary and non-contributory to any insurance maintained by ABC. All policies must contain an endorsement waiving any right of subrogation against ABC and its affiliates.

c. If any personnel performing services is a subcontractor, Contractor's insurance must cover such subcontractor or Contractor must provide evidence that subcontractor maintains the same types and level of insurance. Contractor must bear the risk of loss for or damage to Contractor property. Insurance amounts will not limit Contractor's liability under the contract.

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- CONFIDENTIALITY

Terms of the agreement that define what is generally not to be disclosed without permission from the other party.

CONFIDENTIALITY- SAMPLE PROVISION

- a. During the term of this Agreement and surviving its expiration or termination, the receiving party will regard and preserve as trade secrets, proprietary and confidential all past, present and future business activities and all information related to the business of the disclosing party, its parent and its subsidiaries and affiliated companies and its or their clients, members and/or enrollees, that may be obtained from any source, whether written or oral, as well as all information on the disclosing party's mainframe, networks, LANs and workstations and all software, middleware, firmware, groupware and licensed internal code whether owned or licensed currently or in the future accessed by the receiving party's by any direct or remote access method and also including, but not limited to, any information relating to the pricing, software or technical information, hardware, methods, processes, financial data, lists, apparatus, statistics, program, research, development or related information of the disclosing party, its subsidiaries or affiliated companies or its clients, patients, members and/or enrollees concerning past, present or future business activities of said entities, and/or the results of the provision of Services performed by the receiving party under this Agreement (collectively "Confidential Information"). The receiving party shall limit its Personnel's use and access to any Confidential Information to that use and access necessary for the receiving party to meet its obligations under the Agreement. The receiving party shall not communicate or otherwise utilize any Confidential Information, including the social security number, of any ABC client, member, beneficiary, subscriber or enrollee for purposes other than meeting internal administrative business needs as restricted by state rules, laws, and regulations or as required by the disclosing party. The receiving party shall not utilize the Social Security Number of any client, member, beneficiary, subscriber or enrollee on any external communication to that client, member, beneficiary, subscriber or enrollee.....

WHAT ARE THE TERMS OF AN AGREEMENT- CONTINUED

- COMPLIANCE WITH LAW
 - DEBARMENT, EXCLUSIONS FEDERAL PROGRAMS
 - CMS
 - DHHS
 - Food Safety

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- **FOOD SAFETY**
 - Policies
 - Preparation, storage, transportation, and delivery
 - Licensure
 - Food Inspections
 - Disasters
 - How do meals get to those in need in a disaster?

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

- **INDEPENDENT CONTRACTORS**
 - Payment
 - Benefits
- **NOTICE**
- **FORCE MAJEURE**
 - Beyond control
- **GOVERNING LAW**
- **AMENDMENTS**
- **DISPUTE RESOLUTION - ARBITRATION?**

BUSINESS ASSOCIATE

HIPAA – BUSINESS ASSOCIATE AGREEMENT

- COVERED ENTITY
 - The party who owns the Protected Health Information (PHI)
- BUSINESS ASSOCIATE
 - The party providing the service and needs the PHI or collects PHI when providing the services
- DATA USE; DATA TRANSMISSION; DATA STORAGE
 - Data has value
- BATTLE OF FORMS

BUSINESS ASSOCIATE AGREEMENT - SAMPLE

IT SECURITY WORKBOOK

DATA SECURITY REVIEW

- Most providers will require MOW to complete a workbook related to their information technology platform and features. This may include questions about:
 - Hosted solution?
 - Data transfer?

DATA SECURITY - SAMPLE PROVISION

- a. Contractor shall execute and comply with the ABC Data Security Agreement (attached hereto and incorporated herein as Exhibit C).
- b. Contractor Personnel assigned to perform Services at any ABC location will be instructed by Contractor to comply with ABC's physical and data security regulations applicable to the assigned location. Contractor's Personnel, when deemed appropriate by ABC, will be issued visitor identification cards and Contractor's Personnel, upon demand will surrender each such card by ABC, upon termination of the Schedule pursuant to which Contractor's Personnel are performing Services hereunder or upon termination of the Agreement.
- c. Contractor shall coordinate all security activities relating to providing its Personnel with access to ABC's information systems through the designated security contact at ABC. Within twenty-four (24) hours, Contractor shall notify ABC when any of Contractor Personnel who have been granted access to ABC facilities, Confidential Information or other systems are terminated, transferred, begin a leave of absence, or no longer need access to the ABC Confidential Information.
- d. Contractor understands and agrees that any access to ABC's information technology systems and networks, if applicable, via modem, internet or any other method shall be restricted solely to access as approved and outlined by ABC. Contractor shall not access, without prior written authorization by ABC, any other ABC data or software, middleware or firmware from ABC's other third party suppliers. Any such unauthorized use shall be considered a breach of the provisions of Article 6 of this Agreement.
- e. Contractor shall not replicate any ABC data or systems within Contractor systems or buildings.

DATA SECURITY – SAMPLE WORKBOOK

PERFORMANCE STANDARDS

Performance Metrics

Providers likely to require that MOW adhere to some metrics regarding their delivery of services. Need to consider:

- What to measure?
- Measurement tools?
- Verification? Audits?
- Disasters and restore services?
- Remedies for non-performance
 - Re-do; terminate
 - Pay Money

PERFORMANCE STANDARDS - SAMPLE LANGUAGE

- a. Following Contractor's self-report of any failure to provide the Services in accordance with any applicable Performance Standard or after receipt of notice from ABC in respect of Contractor's failure to provide the Services in accordance with any applicable Performance Standards, Contractor shall within ten (10) days: (a) perform an analysis to identify the cause of such failure; (b) correct such failure; (c) provide ABC with a report detailing the cause of, and procedure for correcting, such failure; and (d) provide ABC with reasonable evidence that such failure will not reoccur. This shall be in addition to any and all rights, remedies, credits and damages to which, in a particular instance, ABC shall be entitled under this Agreement as a result of Contractor's failure to provide the Services in accordance with the Performance Standards, which may constitute a default under this Agreement.

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

SHARED SAVINGS

- Value based programs, with or without risk.
- Where the parties work together to bring about savings that they both want from their relationship.
- More meals on wheelsmore compensation
- More meals on wheels.....more subscribers healthy

WHAT ARE THE TERMS OF AN AGREEMENT - CONTINUED

AUDITS

Right to review the books and records of the other party to confirm that the money and services are consistent with the agreement.

AUDITS - SAMPLE PROVISION

- a. To the extent that Contractor assists ABC in initiating, processing, recording, hosting or accounting for transactions that may impact the financial statements of ABC (as defined by ABC), ABC or ABC's agent may from time to time upon reasonable notice of not less than fourteen (14) days inspect the facilities, systems (anything that processes, stores, passes, outputs or otherwise handles ABC data assets), processes, books and records of Contractor to assess the design and effectiveness of internal controls over those transactions. Contractor shall cooperate fully with such audit staff and shall promptly remedy any significant deficiencies in the design or effectiveness of internal controls that could potentially impact the financial statements of ABC.
- b. At ABC's option, Contractor's failure to promptly remedy an identified deficiency may result in ABC's Termination of this Agreement for cause. Nothing in this paragraph shall be interpreted to limit ABC's rights to pursue its remedies for breach if the aforementioned control weakness constitutes a breach of this Agreement.

MASTER SERVICE AGREEMENT

MASTER SERVICES AGREEMENT

- COMMON TERMS
- TERM AND TERMINATION
 - Difference between master and work orders

AREAS IN NEGOTIATING

Key Negotiation Terms

- Food Quality
 - Preparation, delivery, storage, transportation, disaster
- Scope of Work
 - Defined/ described
 - Acceptance criteria
 - Records retention
- **Exclusivity**
- “From time to time”
 - Compliance with policies and procedures

AREAS IN NEGOTIATING

Key Negotiation Terms

- Key Personnel
 - Assignment
 - Availability
 - Right to change
 - Background checks
 - Compliance with policies and procedures
- Indemnification
 - One place
 - Apples and oranges

AREAS IN NEGOTIATING

Key Negotiation Terms

- Use of name
 - Neither party shall use the name of the other in any advertising or publicity releases without securing the prior written approval of the other party, and shall make no use or reference to the name of any associate, trademarked names, or logo in any advertising, marketing or other material in any way unless prior written permission is received by from the owning party for each such use or reference.

AREAS IN NEGOTIATING

Key Negotiation Terms

- Assignment
 - We know you...

No Party shall have the right to assign this Agreement or any of such Party's rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that either Party may assign this Agreement to a successor in interest in the event of a reorganization, merger, consolidation or sale of all or substantially all of such Party's assets or stock. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against the respective successors and assigns of the Parties. Any purported assignment in violation of this provision shall be void.

AREAS IN NEGOTIATING

Key Negotiation Terms

- What survives termination of agreement
 - Survival. The respective rights and obligations of Sections 2,4,7, and 9 of this Agreement shall survive the termination of this Agreement.

CONCLUSION

The contract documents the relationship, commitments, and understanding of the parties. No party can have it all. It is about a well-reasoned compromise.

Thank you for your time.

Any Questions?