

**To:** [REDACTED]

**From:** Eric Esperne, President, James River Consulting LLC

**Date:** [REDACTED]

**Subject:** Best Practices for Management of the [REDACTED] SOW for Professional Services for eWC Phase 2

**Issue:** [REDACTED] has entered into a services agreement with [REDACTED] for Phase 2 of the eWC electronic health records (EHR) system previously developed and implemented by [REDACTED] in Phase 1. The scope of Phase 2 is to rollout the system to 197 additional medical provider sites.

Because of the large investment and the mission critical nature of the system, the [REDACTED] CIO's office has requested James River Consulting to conduct an audit of the negotiated contract, highlight risk points, and make recommendations for both management of the contract and strategies for improving return on investment (ROI) during the contract term.

**Contract:** The contract is made up of two parts, a Master Services Agreement and a Statement of Work for Professional Services.

Master Services Agreement. The Master Services Agreement is intended as an "evergreen" agreement that renews annually unless terminated. The master agreement is intended to be incorporated into subsequent separate Exhibits for specific projects, which are equivalent to statements of work (SOWs). The Master Services Agreement states that any conflict between the master agreement and the Exhibits will be construed in favor of the Exhibits.

Termination of the agreement (and by extension any Exhibits) is 10 days prior notice for breach and 30 days prior notice for termination without cause by either party.

There is some confusion in the Master Services Agreement document about [REDACTED] liability for 3<sup>rd</sup> party intellectual property infringement claims. Also it is unclear in the section covering ownership of intellectual property whether [REDACTED] in fact enjoys full title to deliverables. But the language in the agreement on these points can be reasonably interpreted and should not be considered a significant risk to [REDACTED]s.

The language in the Master Services Agreement that should be of greater concern to [REDACTED] in Section IV prohibiting “poaching” of [REDACTED] personnel after the contract ends, and in Section VI prohibiting [REDACTED]s from making derivative works of deliverables containing [REDACTED] Tools. [REDACTED] Tools are broadly defined to include know how, which is a very vague concept meant to describe general professional knowledge. The combination of these two sections creates the potential for [REDACTED] to hold [REDACTED] “captive” to continued engagement of [REDACTED] not only for future implementation of the eWC system, but for continuing extension, integration and regular maintenance. Additional interpretation of these sections depends on how and to what extent [REDACTED] services are defined as deliverables, as well as the opportunity for [REDACTED] to hire [REDACTED] staff through other providers, which is not prohibited by the master agreement. Non-solicitation provisions such as Section IV are anti-competitive and in general are strictly construed or not enforced by courts.

Finally, Section IX.F. addresses HIPAA. It is unclear what the meaning of the paragraph is. To the extent that the eWC system must be HIPAA compliant, this language can be read as absolving [REDACTED] from any responsibilities for delivering a compliant system. Further, it is unknown whether a separate Business Associate Agreement was ever executed

Statement of Work for Professional Services. The Statement of Work for Phase 2 is the accompanying description of [REDACTED]’s services. The document also sets out project related information.

*Pricing and Termination.* The pricing term of the SOW is a “fixed price (including 10% premium for fixed pricing) for completion of the work...” The price quote is a “Fixed Price/month” of [REDACTED]/month” totaling [REDACTED].

It is not clear from the face of the document what “type” of contract the SOW is. Contract type refers to how payment is made for the work. Examples of contract types are fixed price, time and materials with a not-to-exceed maximum, cost plus fixed fee, etc. How work is to be compensated—how mutual consideration is to be exchanged in legal terms—is one of the essential terms of any contract.

Two interpretations of the SOW contract type are possible. One possible interpretation is that the SOW constitutes a monthly retainer agreement with a specified flat rate guaranteed for a period of one year. Another possible interpretation of the SOW is that of an annual retainer agreement broken down into monthly installment payments. This second interpretation is reinforced by language requiring 60 days notice for changes in level of effort by [REDACTED].

It was the likely intent of the parties that the total figure of \$1.5 million was an estimate of the price for Phase 2 worked up by the one or both parties, that [REDACTED] accordingly budgeted that amount in its annual budget, and that the figure in the SOW was not consciously drafted as either a fixed price annual contract or a fixed price monthly contract. On the other hand, nothing in the SOW expressly amends the right of [REDACTED] to terminate the SOW for any reason with 30 days advance notice, which is consistent with a monthly retainer.

Where ambiguity exists in a contract, it is “parole” or surrounding evidence in the form of emails and working documents that determines the legal interpretation of the contract by showing the intent of the parties during contract discussions. The analysis herein does not address intent but what the SOW seems to say on its face for the tactical reason that, despite its actual intent, [REDACTED] may at some future time find it advantageous to argue for termination of the work under the SOW prior to the end of the project.

*Service Definition.* Whether the term of the SOW is monthly or annual, the nature of the services [REDACTED] will provide for Phase 2 is advisory and augmentative. While the SOW contains descriptions of outputs labeled deliverables, general time frames for completion of a specified number of systems, and FTE levels of effort,

██████████'s performance of services is not subject to any contractually obligatory standards or criteria, other than stock language in the Warranties section of the Master Services Agreement regarding industry and professional standards, which is subjective. Nor is ██████████ contractually bound to complete any milestones or meet deadlines, follow a detailed service methodology, or render deliverables according to specifications. ██████████ is required only to provide a specified level of effort during normal business hours, excepting listed holidays. It can reasonably be implied from the SOW language that the personnel supplied by ██████████ must be competent to undertake the roles and activities described in the SOW, however, ██████████ has no right to reject individual personnel staffing the project.

*Project Management.* Decision rights in the SOW are undefined. While it is clearly stated that ██████████ takes a lead role in managing the project, in contrast a change management section states any changes in "scope, cost or duration" of the project require mutual consent by the parties.

This kind of approach to contract governance is similar to some infrastructure outsourcing contracts in which a flat monthly fee is charged and the parties mutually make adjustments in the price and scope on an ongoing basis, as assumptions and requirements change. But in outsourcing contracts the supplier is taking over existing operations (meaning there is a clear baseline and the supplier has complete direction and control), there are many assumptions that can impact scope and cost that are internally and externally driven (i.e., unpredictability), governance provisions in these contracts give more detailed procedures for addressing changes (e.g., trigger mechanisms), and decision making responsibilities are more clearly delineated (e.g., executive steering committee). Such a flexible, mutual governance structure is inappropriate for the work in Phase 2 of the eWC implementation because 1) the project is under ██████████' direction and control, 2) the work is ill defined in the SOW, and 3) underlying assumptions are few and manageable.

**Analysis:** The Phase 2 eWC contract in general should be viewed by [REDACTED] as unfavorable to [REDACTED]'s interests in completion of the project for all site implementations within the projected time and budget, and in capturing full benefit from [REDACTED]'s expertise.

The biggest risk for [REDACTED] in the eWC Phase 2 project is that not all system implementations will be completed by the end of the one year funding period. None of the written terms in the Statement of Work or the Master Services Agreement require [REDACTED] to ensure completion of implementations at all provider sites. Under the terms of the SOW, [REDACTED] bears all risk for disruptions and unforeseen difficulties that would delay the project, even those caused by [REDACTED] through poor or inefficient performance. While the Phase 2 SOW commits a great deal of language to describing assumptions on which the project is based, the effect of this language is informational only, it does not work to minimize [REDACTED]'s risk of slower than expected progress while [REDACTED]'s obligation to continue making monthly fee payments continues unabated.

As previously discussed, the other palpable risk for [REDACTED] stems from the non-poaching and derivative works language in the Master Services Agreement, which act to make [REDACTED] captive. This risk may be practically mitigated, however, by a lack of suppliers other than [REDACTED] to provide eWC systems integration services.

There are several alternatives that [REDACTED] might have chosen to contracting with [REDACTED]. One alternative approach to designing the Phase 2 SOW would have been to first benchmark implementations from Phase 1, then negotiate a per site fixed price for [REDACTED]'s services in Phase 2, together with incentive payments for attainment of faster completion, reduction of costs through project delivery improvements, and increased user satisfaction. If, on the other hand, the project fell behind, [REDACTED] would equally be monetarily penalized. If some [REDACTED] services were considered non site specific or strategic, those services would be segmented and priced separately. This approach would require [REDACTED] to take the lead in managing the project to achieve optimum results, although it could also be utilized with [REDACTED] in the lead. The approach would require a detailed standard project implementation plan.

Another possible approach would have been for [REDACTED] to negotiate non-blended time and material labor rates based on project value and expertise, guaranteeing key [REDACTED] personnel a minimum contract for retention purposes but paying other [REDACTED] staff strictly on a time and materials basis. Also [REDACTED] would negotiate terms for hiring away [REDACTED] personnel to mitigate the risk of exceeding cost projections, assuming that the eWC system is non-proprietary to [REDACTED].

Whatever the approach taken, [REDACTED] should always retain the right to immediately terminate any individual consultant and give final approval on a replacement. A right to reject may be implied where [REDACTED] can make a case that individual [REDACTED] personnel have broken laws or pose a threat to [REDACTED] employees or property.

**Recommendations:** It is recommended that [REDACTED] dedicate significant project management resources to the eWC Phase 2 contract to mitigate risks. [REDACTED] management emphasis should be more on project management than on true contract management, given [REDACTED]'s advisory role and the lack of specific performance specifications or measures. Project schedules with milestones, critical paths, work breakdown structures, resource management plans, and a lessons learned database for reducing implementation cycle times and costs, e.g., SharePoint, are well known project management tools that [REDACTED] should employ.

For example, [REDACTED] might start the project by assessing target provider sites and categorizing them as easy, moderate or difficult implementations. Different project strategies would then be developed, such as scheduling easier and moderate sites first to avoid bottlenecks, or allocating more [REDACTED] resources to the difficult sites.

[REDACTED] should consider itself the final decision maker regarding project planning. [REDACTED] should not view its project management decision making as requiring [REDACTED]'s consent and should largely ignore the change management language in the contract. Because [REDACTED]'s services are so loosely defined in the SOW, it is highly speculative whether any given project management decision will change scope, duration and price.

██████ should exercise complete direction and control over the daily activities of ██████ staff as necessary to capture value. ██████ should expect that ██████'s staff will provide added value by helping to continuously improve site implementations over the project duration. ██████ should also expect that ██████ will willingly engage in "knowledge transfer" of its expertise in eWC implementations. ██████ project management needs to bear in mind that, given the monthly retainer pricing, ██████, like all suppliers, has a strong incentive to continue the project duration for the entire funding year by influencing project planning, to delay completion of implementations past the funding year, and to milk change management language in the contract to increase its profits.