

## Contracts – Overview of Key Principles

### OVERVIEW OF ISSUE

Contracts are the foundation of all business relationships and are important to healthcare organizations. They should communicate information in a clear and precise manner. Poorly drafted and managed contracts can lead to ambiguities and inconsistencies which, in turn, may lead to financial loss, business interruption, unnecessary conflict, lengthy litigation and loss of stakeholder trust.

HIROC recommends that subscribers have their corporate counsel (and privacy officer if personal health information is involved) review all contracts.

### KEY POINTS

- Elements of a valid contract: offer, acceptance, legal purpose, consideration, mutuality of purpose and capacity.
- An organization-wide contract management system is essential to monitor contracts across their lifecycle.

### THINGS TO CONSIDER

#### Definition of a Contract

- A legally enforceable promise between two or more parties to do something (e.g. provide goods or services), or reframe doing something, in exchange for something of value.

#### Six Key Elements of a Valid and Legally Binding Contract

1. **Offer** – an offer is a promise in exchange for the performance by the other party. A valid *offer* must demonstrate an immediate willingness to form a contract, versus an intention to make a future commitment. The offer must have specific enough terms and the offer must be known to the offer-ee(s) to whom it is directed.
2. **Acceptance** – there needs to be a *demonstration of agreement* (or acceptance) to the terms made by the offeree. Once an offer is made, it may be accepted until it is terminated. Termination may occur if a time for termination is included in the offer and that time occurs before an acceptance. An acceptance must not change the terms of an offer because if it does the offer is rejected. For example, a material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party.
3. **Legal purpose** - the objective of the contract must be for a *legal purpose*, meaning the object of the contract must not attempt to circumvent the law. So, a contract that attempts to avoid paying income tax or contracts enabling a regulated health professional to perform tasks not permitted by their regulatory body are not binding contracts because the purpose for which they exist is not legal.
4. **Consideration** – refers to the *price* one party must pay for the *promise* (i.e. something of value) they acquire from the other party. The promise can be a right, interest, profit or benefit that accrues to one party, or alternatively, of a forbearance, loss, or responsibility that is undertaken or incurred by the other party. Consideration does not necessarily denote an exchange of money, but rather means there must take place an exchange of joint benefit between the parties.
5. **Mutuality of purpose/meeting of the minds** - refers to the parties' mutual understanding and assent to the expression of their agreement. The parties must agree to the same thing, in the same sense, at the same time. Offer and acceptance are based on the objective standard of what the parties said and did, and not on their subjective state of mind. Should there be a dispute, courts look to communications between the par-

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ties and to the circumstances surrounding those communications to interpret mutuality of purpose.

6. **Capacity** – capacity refers to a person’s legal ability to enter into a contract. Parties to a contract must be *competent* and authorized to enter into a contract. For example, a contract with a minor is unenforceable against the minor; however it is enforceable by the minor against the other party.

### Managing Contracts Enterprise-Wide Contract Management Systems

- Implement a standardized contract management system to oversee contracts across their lifecycle, including:
  - Standardized workflows, defined hierarchies and checklists/procedures for contract development, review and approval;
  - Defined scenarios where legal involvement is required (e.g. development of precedent/template contracts; review of contracts with higher values or risks);
  - Embedded triggers to identify key notice periods (e.g. expiry and termination).
- Provide ongoing training for individuals with contract review/approval/oversight responsibilities.

### Filing and Storage Practices

- Maintain a “master” list of all vendors and contractual obligations enterprise-wide.
- Adopt a standardized and systematic process for logging and filing:
  - Current and obsolete contracts (e.g. file by contract type, by date, by services provided);
  - Documents created/obtained during the course of the contract (e.g. specifications, drawings or manuals, solicitation/RFP documents, the response, evaluation determination and the notice of award and related correspondence related to the contract).

### Reporting and Governance

- Embed formal strategies to monitor and measure:
  - Contractual activity organization/enterprise-wide (e.g. volumes, priorities, risks, values);
  - Compliance with contract management policies/procedures/checklists.
- Ensure reporting of contract management issues and performance to the organization’s Board/governance structure (National Audit Office, 2008).



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