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Health Insurance Exchanges: Litigation to Follow and How to Avoid It Next Time

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First you have the problem and then you have the litigation. This more-or-less iron rule of American life will be honored once again in the aftermath of the "roll out" of Obamacare.

The design and operational failures of the federal insurance exchange and comparable failures of a number of state exchanges will generate contract disputes and litigations. The issues in these disputes will span the spectrum of government contract issues: from design defect claims to claims for delay damages and for additional compensation based upon changes in contract scope and requirements. All of this is sufficiently predictable, if not certain, that both the government contracting parties (purchasers) and their respective IT vendors and consultants should start preparing now for this next chapter in the troubled "roll out" of healthcare reform.

Preparation here includes collecting and preserving the relevant documents and identifying and interviewing key witnesses before their memories dim. The process also necessarily involves a careful analysis of contract documents, starting with the request for proposals, to understand exactly what was sought, what contractors agreed to provide, which contractors had responsibility for which parts of the project, and parties' obligations to each other for cost sharing and indemnification. Beyond the contract documents, there needs to be an analysis of how the project changed and evolved to what was ultimately expected.

Timing – when to initiate a dispute – is always a critical consideration, but is particularly so in this context. Parties involved in building the information technology infrastructure to support healthcare reform will need to weigh protecting their rights and avoiding the risk of waiving claims while, at the same time, not acting in a fashion or at a time which creates further legal and practical problems and puts the project in jeopardy or appears to do so. Being in litigation may be necessary, but is unlikely to enhance efficient project management.

Forum – where to initiate a dispute – is similarly critical. The proper forum for resolving contract disputes with government bodies is often dictated by a statute which grants at least initial jurisdiction to an administrative agency. However, given the priority which governments assigned to implementation of the healthcare law, contract matters may well have been exempted from the normal procurement laws, including their dispute resolution procedures. Private subcontracts may well provide for mandatory arbitration with, perhaps, a "carve out" for claims for injunctive relief.

Even as parties begin to address the legal disputes arising from Affordable Care Act Round I, they should be gathering the "lessons learned" in the hopes of doing better in Rounds II, III, and beyond. As healthcare reform moves forward, there is no reason to repeat the contract failures of Round I.

The implementation of the ACA is a technology-dependent enterprise. Because the equipment and expertise to run that enterprise reside outside of government, government will need to continue to contract with vendors to make changes to the original system, to update system architecture and functionality, to operate and maintain the system, and to provide the equipment to do all of these things and more.

A common theme which appears to run through the failures in ACA Round I at the federal level and in a number of states involves inadequate contract management on both the governmental (purchaser) and on the private (vendor) sides. This is a fixable problem. Contract management responsibilities should be spelled out in the contract documents and a clear structure of contract management should be put in place. Another common theme appears to be inadequate testing prior to "going live." The risk of repetition here could be reduced by greater clarity in contract documents mandating appropriate rounds of successful testing prior to deployment.

For now at least, the focus of much of the debate about the ACA has shifted from the merits of the ACA

to the complexities of its implementation. This focus on implementation will continue as the prospects for outright repeal diminish. This changed focus will, in turn, draw attention to the disputes which will arise from ACA Round I even as interested parties prepare for subsequent implementation efforts.

If you have any questions about this article, please contact **Ralph Tyler** at 410.244.7436 or .