

Beyond the Hype – B SkyB Changes Nothing



By Gary S. Greenstein, Esq.

For hundreds of years contract law has been clear – fraud is outside the bounds of a contract. If you commit fraud, you will not be protected by a contractual provision that limits liability for direct damages or excludes indirect damages.

The recent ruling against EDS on a claim of fraudulent representation has shocked many in the outsourcing community. The shock comes from the bursting of the erroneous presumption that companies would only be liable for breaching explicit provisions in the contract, and upon such a breach that damages would be capped at the amount in the contract. This presumption is contrary to well established contract law.

In an effort to win bids, sales and marketing teams too often make promises that their companies cannot possibly keep. The result is financial waste and inefficiencies, and a devaluation of the company's brand. If the sales marketing hype rises to the level of fraud, then we are outside the bounds of the contract. And B SkyB clarifies that recovery for damages flowing from fraud will be applied regardless of the size of the parties or the amount of money at stake.

What is fraud? A fraudulent representation occurs when a person makes a statement, verbally or in writing, knowing it is false. Another type of fraud, negligent misrepresentation, occurs when a person makes a statement without a reasonable expectation that it is true. Therefore, if you make a statement, you must at least have a reasonable expectation, or a reasonable belief, that it is accurate.

In the EDS case, the court found that EDS knowingly made false statements to B SkyB regarding EDS' capabilities, the project's time frames and the milestone completion dates. The court found EDS had fraudulently represented and negligently misrepresented information to B SkyB. As

noted above, fraud is outside the bounds of the contract; and from my point of view, its outside the bounds of proper business behavior.

Services Provider Practice Notes: During a bid process, make sure that you have a reasonable expectation that you can fulfill the claims and promises that you make. Write every bid, respond to every RFP, as if what you were writing is going to be incorporated into the contract. Make sure you have a thorough understanding of your company’s capabilities. If you knowingly make false representations or if you negligently misrepresent something in order to win a piece of business, don’t think you are doing anyone a favor, not your customer, not your employer, and ultimately not yourself. That said, if you have a reasonable expectation that you can fulfill the claims and promises you make, then the agreed upon limits of liability in the contract will hold in the event there is a breach.

Customer Notes: Trust but verify! In entering into a large project with a vendor, you must do your due diligence. I always suggest that customers discuss the project in detail with the vendor’s operations team, not just the salesforce. And you must control the bid process to maintain your leverage. In that regard, BSKyB made many mistakes. While that doesn’t excuse EDS’ fraud, BSKyB could have protected itself better – hopefully to be the subject of another post.

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