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Contacts

Peter Brudenall

30 St Mary Axe
London EC3A 8EP
United Kingdom
+44 (0)20 7220 5725
pbrudenall@hunton.com

James A. Harvey

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4160
jim.harvey@hunton.com

Additional Contacts

Randall S. Parks

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-7375
rparks@hunton.com

James E. Meadows

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4161
jmeadows@hunton.com

Karen M. Sanzaro

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
(404) 888-4162
ksanzaro@hunton.com

Bridget C. Treacy

30 St Mary Axe
London EC3A 8EP
United Kingdom
+44 (0)20 7220 5731
btreacy@hunton.com

Outsourcing Update: Contrasting Fortunes for EDS and TCS

As major India-based outsourcing vendor TCS was winning the biggest-ever outsourcing deal won by an Indian supplier, US-based EDS was fighting a claim in London for over £700m in compensation.

The claims against EDS

Five years after terminating a failed Customer Relationship Management (CRM) contract, broadcaster BSKyB (Sky) is claiming £709m compensation, alleging that EDS was both “fraudulent and dishonest”. The US company was brought in to run the broadcaster’s customer service system in 2000, but was removed from the £48m per year contract in 2002 after attempts at renegotiation broke down. Sky alleges deceit, breach of contract and negligent misrepresentation by EDS and the size of the damages claim is far greater than the original £48m contract value.

Sky alleges that EDS knew its winning tender for management of the call centres was unrealistic, promising what the company wanted without a well-formed plan for its delivery. According to opening statements from counsel for Sky, it will tell the trial — being held at London’s Technology and Construction Court (TCC) — that it was a victim of “deliberate and dishonest” misrepresentation by EDS in its sales presentation and in the services agreement it signed. In his opening statements, counsel for Sky said EDS had not used

any recognised time or cost estimation system when tendering for the contract alleging that the company “put forward a sales pitch knowing it was being done in a misleading way.”

Had the misrepresentations not been made, Sky has claimed it would not have selected EDS to do the work. An attempt to renegotiate the contract in 2001 failed and Sky claims the contract was terminated in March 2002. EDS claims that, although it stepped down as systems integrator at the time, it still supplied contractors to Sky until January 2003, when the contract terminated.

Damages and defences

Although no detailed account of the damages claim has been outlined by Sky, it is understood that Sky is claiming the figure of £709 million on the basis of the profit it says was lost as a result of customer service failings under EDS. Sky says it later resolved the problems by spending £170m on a new CRM system. The terms of the contract are understood to have included a limited liability of £30 million. However it is believed that this provision did not cover claims of misrepresentation; therefore, BSKyB has been able to claim well above that figure.

In response, lawyers representing EDS have argued that the damages claim being

made by Sky was “artificial” and only made to allow Sky to “claim absurd and extravagant amounts of money.” In their opening remarks, EDS told the court that the firm took significant contractual risks when it signed the contract with Sky to deliver a system for which the specifications had not yet been formulated.

EDS can be expected to vigorously defend its position, and may, in its arguments, focus attention on its client’s contract management. It is also likely to suggest that the losses alleged by Sky occurred after it ended the contract, and was left without a CRM system. It is also understood that EDS will not only dispute the case itself but challenge the disparity between the value of the contract, £48m, and the £709m sum it is being sued for.

The case brought by Sky is expected to run until April or May next year.

Implications for the outsourcing industry

The case brought by Sky against EDS has focused attention on whether customers may be willing to use the courts to claim compensation for perceived poor performance. In the last few days, for example, telecoms group T-Mobile has also launched a £16M action against anglo-Dutch IT consultancy LogicaCMG in relation to the failure to deliver a mobile internet portal.

However, whilst the quantum of the losses claimed by Sky make it one of

the largest claims ever brought in the UK against an outsourcing vendor, there is little to suggest that either this or the T-Mobile claim indicates a rising level of dissatisfaction with the performance by vendors in an outsourcing relationship. Claims by customers that result in litigation are few and far between with most customer-vendor disputes being resolved through alternative dispute resolution procedures such as mediation or arbitration. The desire to avoid airing the “dirty linen” in public is generally paramount. Well-structured outsourcing contracts will also build in detailed governance processes that enable the parties to anticipate, and resolve, problems before they become major issues.

The case between Sky and EDS will, however, be watched closely. Given the size of the claim in the context of the value of the contract and the limitations of liability provisions, the case should provide an insight into the judicial analysis of a major outsourcing contract and the assessment of damages. Indeed it will place a premium on the limitations of liability, exclusion of damages and other “boiler plate” provisions that customers and vendors alike struggle with during negotiations.

It should be noted, however, that a claim arising out of “pre-contractual discussions”, as would appear to be the position with Sky, are typically excluded from the contract by “entire agreement” provisions. However, a claim of fraudulent activity would generally fall outside of this exclusion and allow a damages

claim far greater than that covered by the contract.

TCS’ major win

For another major outsourcing vendor, India-based Tata Consultancy Services, (TCS), the news this month has been far better as it announced that it has won a major 10-year, US\$1.2 billion contract with Nielsen covering a range of services from software to back-office functions to knowledge process outsourcing (KPO) and the revenue flow will start immediately.

It is believed to be the largest deal ever awarded to an India-based services provider, as most billion-dollar outsourcing deals go to what’s typically known as the global six: Accenture, ACS, CSC, EDS, Hewlett-Packard, and IBM. Yet the TCS deal, and a five-year, \$1 billion deal agreed last year between British Telecom and Tech Mahindra for tech support, are further evidence that major global customers are increasingly willing to source work from outside of the established players and, in particular, from India-based vendors.

The industry will watch with interest as to whether increasing levels of risk taken on by the India-based service providers leads them to some of the same types of customer disputes encountered by EDS and discussed above.

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