

Professional practices

IT Software Implementation –
Key issues for suppliers



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The decision in *BSkyB Ltd. v HP Enterprise Services UK Ltd. (formerly t/a Electronic Data Systems Ltd.)* (*BSkyB v EDS*) in January 2010 provided a sharp reminder to IT suppliers of the pitfalls and issues that can arise during the tender and contractual stages of what are often complex and high value IT software implementations for customers. Whilst the decision was handed down some time ago, the ‘lessons learnt’ from the case still ring true and are particularly pertinent given businesses’ ever-increasing reliance on reliable, quick and user-friendly IT software which is seen as a key investment and integral to increasing businesses’ efficiency and profitability.

The purpose of this document is, after providing an overview of the BSkyB case, to highlight key issues of which suppliers should be aware when tendering for new business, negotiating the relevant terms of an IT services contract and carrying out implementation of the software.

BSkyB v EDS **Background facts**

The case concerned the procurement by Sky of a new customer relationship management (‘CRM’) system with a view to saving costs, giving customers a better service and ultimately avoiding customers leaving Sky. Sky issued an Invitation to Tender to a number of companies, including EDS, which made its sales pitch to Sky in June 2000. EDS’ written pitch was fairly bullish and contained a number of representations about EDS’ ability to deliver the system, including key representations as to (i) time; (ii) cost; and (iii) resource that would be deployed to implement the project within Sky’s requisite time limit of nine months. On the basis of these representations, Sky selected EDS and the parties signed a letter of intent on 9 August 2000. The intention was for EDS to start work immediately under the terms of the Letter of Intent and then for a full Prime Contract to be signed later in the year.

Soon after the Letter of Intent was signed, it became apparent within EDS that they would not be able to deliver the new system by April 2001. In particular, concerns were flagged early on in the project that EDS would not be able to implement the CRM solution within the nine month timeframe stipulated by Sky and also that there were issues over the staffing and ability to deliver the project in the required timescale. Further, in October 2000, before signing the final contract with Sky, a junior member of the EDS team drew up a revised plan for delivery in late 2001. However, this was overruled by EDS’ senior salesperson at the time and the Prime Contract was signed in November 2000 containing an earlier (and what later transpired to be a plainly unachievable) delivery date.

Inevitably, EDS did not deliver on time and the project went badly wrong. Eventually, Sky took over the project itself and implemented its own CRM system which did not complete until 2006. Sky subsequently issued proceedings against EDS claiming GBP 700 million in losses. The trial was heard in the High Court in late 2008 and BSkyB was awarded GBP 200 million in interim damages. The parties subsequently settled the litigation in June 2010 by way of settlement in which EDS paid BSkyB GBP 318 million (including the interim damages payment).



The decision

In *BSkyB v EDS*, Sky alleged that, within EDS' promises in its initial tender that it could deliver the project 'on time', were implied representations that EDS had adequately considered the amount of time it needed to complete the initial delivery and go live of the contact centre and that EDS also had reasonable grounds for believing that it could deliver within that timescale. The importance of this element of the claim is that it related to **alleged pre-contractual** misrepresentations with the result that, if successful (which it was on its claim regarding EDS' misrepresentation as to the time needed to complete delivery and go-live of the project), EDS' liability would be extended beyond the contractual liability cap in the Prime Contract (which was set at GBP 30 million).

The Judge accepted that EDS had made these implied representations and also went on to find that the representations were false because, on the evidence, no proper analysis of timing had been conducted when the response was delivered and therefore the Judge held that EDS could not have had reasonable grounds for believing that it could deliver on time.

The Judge further found that, not only were EDS' promises before the Prime Contract false, but they were fraudulent. This was on the basis that the Judge found EDS to have made a representation which it knew was untrue (or was reckless as to whether or not it was true) and BSkyB had relied on this misrepresentation to its detriment.

The finding of fraudulent misrepresentation was heavily dependent on the facts of this particular case and was founded in large part on the proven dishonesty of EDS' senior salesperson, in particular during cross-examination. However, the following important points arose from the judgment of which suppliers should still remain mindful.

Practical points for suppliers

The integrity of a supplier's customer facing representatives

- It is important that a supplier's customer-facing representatives have integrity, are well trained and are conscious of the potential exposure that could be caused to the supplier in the event that promises are made at the pre-contractual phase which the salesperson has no reasonable grounds to believe or, worse still, he or she knows to be false
- A supplier's customer-facing representatives should also be aware of the financial consequences of making such statements in the event that they are known to be untrue. Namely, that if a supplier is found to be guilty of fraud or fraudulent misrepresentation, the supplier will be liable for both direct losses (e.g. the cost of a replacement system or supplier) and

also indirect losses, such as lost business benefit and anticipated savings of a customer's time.

Conduct a thorough and proper analysis of the customer's requirements

- EDS was also found to be liable for negligent misrepresentation. Essentially this was because EDS repeatedly made promises in its pre-contractual tender which it could not meet. As such, it is essential that suppliers carry out appropriate analysis at the outset of the engagements with the customer of (i) the customer's requirements; and (ii) how the supplier intends to meet those requirements (and indeed if they can at all)
- Suppliers should consider implementing controls at every stage of the project from the beginning of the tender process right through the implementation of the project and into final 'go-live'. These should include, amongst other things, early assessment and the production and retention of adequate project analysis before committing to project timescales, costs and resourcing as these may be necessary to defend a future claim in misrepresentation.

Entire agreement clauses

- In *BSkyB v EDS*, the entire agreement clause was drafted insufficiently widely which meant that BSkyB was able to claim for negligent misrepresentation or negligent misstatement, resulting in a greater liability for EDS
- Entire agreement clauses should, therefore, be reviewed very carefully by suppliers to ensure that they meet the customer's intended objectives. From the supplier's point of view, the clause should be drafted very widely and renounce all liability for statements outside the strict written terms of the contract. Ideally, the clause should have the effect of specifically excluding the supplier's liability for all pre-contractual statements (other than statements made fraudulently, for which liability cannot be excluded).

Warranties

- Suppliers should be wary of signing up to customer's standard terms and conditions that may be supplied as part of the invitation to tender. EDS' warranty that it had the knowledge, ability and expertise to perform the contract, and that BSkyB could rely on this, meant that it could not later deny that it had a duty of care to BSkyB. As such it could not avoid a claim for negligent misrepresentation
- Suppliers should, therefore, review warranties closely and investigate them internally to assess whether it can in fact comply with each one, before signing up to them during the tender phase of the project

Further advice should be taken before relying on the contents of this summary.

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