SELLER BEWARE: THE DANGERS OF SALES LANGUAGE

Posted on January 19, 2018

Categories: Insights, Publications

Introduction

Winning a procurement bid often means gaining an important deal or a critical new relationship. Understandably, the sales and technical teams of suppliers of goods and services are motivated to draft persuasive bid proposals and marketing materials. However, danger lies when those materials use exaggerated or hyperbolic sales language and contain injudicious claims as to the performance, suitability, reliability, and functionality of the good or service being offered. While there might be an opportunity for legal review of the contract awarded following a successful proposal, the die may have been cast with the submission of the proposal prepared by the technical and sales teams without the benefit of rigorous legal input.

This can be a problem on two fronts. First, the statements and claims framed in informal sales language in a tender or bid proposal or in marketing materials can be incorporated in various ways into formal contracts and transformed from casual claims to onerous legal obligations. A proposal is often attached or incorporated by reference as a schedule to the contract. Even if that does not happen, it may form the basis of a resulting Statement of Work (SOW) which directly forms part of the contract as a detailed description of the services or products giving the particulars of the deliverables, specifications, and functionality. This SOW is generally attached as a schedule to the awarded contract, meaning anything in the SOW is legally enforceable.

Second, not only can pre-contract claims found in sales materials or bid proposals sometimes be imported directly into contractual obligations, they can also survive as separate representations and warranties upon which the purchaser can rely on outside of the contract. There have been several cases in which the courts have found that claims and representations made outside of a contract, such as during pre-contract discussions or proposal phase, have been the basis for huge damage awards.

Case Law

One of the most significant cases this decade regarding pre-contract sales language is the judgment in *BSkyB v EDS*[1]. The UK court found that a sales representative of EDS, an IT supplier, had made negligent and fraudulent claims regarding EDS's ability to perform the project within a certain time-frame in order to procure

the contract award for EDS. These representations were made during the negotiation phase, before the conclusion of the contract, and BSkyB, the purchaser, had relied on these representations in selecting EDS. Even though there was an "entire agreement" clause in the contract, which stated that the contract was to "represent the entire understanding and constitute the whole agreement between the parties... and supersede any previous discussions, correspondence, representations or agreement between the parties...", the court found that the clause was not effective to exclude liability in tort for negligent or deceitful misrepresentation outside of the contract.

In addition, because the misrepresentations were deceitful and made outside the contract, the court found they did not constitute breaches of the contract to which the contractual limitation of liability of £30 million applied and EDS paid £318 million on a contract worth £50 million. This case serves as a clear wake-up call for the ramifications of marketing and sales processes that are inappropriately used to win contract awards. Even if the SOW did not contain any traps or pitfalls for EDS, the pre-contract actions of the sales team doomed the relationship.

In Canada, it is well-established law that a negligent or fraudulent misrepresentation made during a pre-contract phase can give rise to an action in tort when an aggrieved party reasonably relies on those representations to its detriment. For example, in a recent Ontario case, *Business Development Bank of Canada v Experian Canada*[2], the court found that the defendant (a software company) made negligent or fraudulent misrepresentations about the characteristics of its software system during a procurement process to induce the plaintiff to award a contract to the defendant. The court allowed the plaintiff's claim for damages in the amount of $44 million based on the misrepresentations.

Language to Avoid

Clearly, one should avoid negotiating on a fraudulent and negligent basis, but what does that mean when it comes time to draft a proposal or other sales materials? The practice of making "aggressive" claims regarding skills, expertise, functionality, reliability and the ability to deliver is fraught. For example, sales documents frequently use absolute terms to describe products and services, such as the "best," the "fastest," the "most reliable," or the "safest." Sometimes, these claims can be disregarded as "puffery,"[3] but it is not always clear what claims can be disregarded and what claims will constitute actual representations upon which a party is entitled to rely.

Sales language often includes claims, for example, that a supplier will "ensure" that certain outcomes will be achieved. "Ensure" is an absolute obligation akin to a "guarantee," and implies an onerous legal obligation. A statement such as: "we will ensure your system is running 24x7" may be problematic as it likely assumes the existence of circumstances beyond the supplier's control. A prudent supplier needs to make it clear when a

claim is conditional on certain assumptions or express the claim in terms that the supplier can control. For example, the claim could be stated as: "we will work diligently to maximize system availability".

Suppliers should also be wary of subjective, immeasurable, or ambiguous sales language. For example, "fast" is a relative term that could mean different things to each party and lead to difficult contract negotiation or contentious interpretation. Objective, measurable language is recommended, as can be seen in the contrast between: "the system will be fast" and: "when operated in accordance with minimum specifications, the system will process 2,000 transactions per second."

Exclusions of Liability

It is important to carefully craft contractual limitations and exclusions of liability, especially to cover any representations made in proposals and sales pitches. While boilerplate limitations and exclusions of liability may cover representations made within the contract itself, they will often not be effective in applying to representations made outside the language of a contract. In addition, case law has shown that negligent or fraudulent behaviour will override a limitation of liability clause. Marketing "puffery" is usually not a sufficient basis to find fraudulent misrepresentation, but a representation that is made without a meaningful basis or analysis is sufficient to give rise to a tortious claim. Thus, great caution should be exercised, as a fraudulent misrepresentation can create exposure to enormous liability in even a small contract.

Recommendations

In conclusion, suppliers of products or services should beware of two things with respect to their marketing claims. First, sales documents should be purged of any language that includes hyperbolic, absolute, or ambiguous terms. Whenever possible, objective, measurable and considered language should be used even in proposals in order to appropriately set expectations and to form a reasonable basis to add into the contract. Because there is a risk that these claims will be incorporated into a contract, it may be prudent to involve lawyers in the early stage negotiations and in the preparation of proposals and marketing materials.

Second, the case law on negligent and fraudulent misrepresentations shines a spotlight on an area of vulnerability for all parties bidding on contracts. Sellers have paid hefty prices for fraudulent practices, and should review how they sell their services or products and bid on projects. To protect against this, seller should consider (i) having processes in place to take action if there is any suggestion of injudicious practices during the sales or marketing processes; (ii) ensuring that claims in proposals and marketing documentation are verified and are objectively supportable; (iii) training sales representatives and ensuring their remuneration does not incentivize bad behaviours; and (iv) limiting the number of individuals with authority to make statements during the bid/sales process so that all representations can be vetted. Taking some of these precautions will give some protection to the potential risks and dangers facing both suppliers and purchasers.

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[1] 2010 WL 20033
[2] 2017 ONSC 1851
[3] 'Puffery' is often thought of as an obviously hyperbolic boast or a vague and purely self-congratulatory statement of opinion that cannot reasonably be relied upon.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.