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Procurement

1. A key failing of the procurement exercise was that Southwark did not set out in writing what its precise requirements were, notwithstanding that a paper was prepared by consultants acting for Southwark, which called for a "Customer Requirements Document" which would "outline in precise and explicit language the functions and capabilities for the MDM system."
2. As a result, as Southwark noted in an internal Review of the project, "there [were] a number of significant gaps in the functionality provided by the existing MDM solution procured ..., mainly due to a lack of definition of MDM's requirements."
3. Southwark should have set out what its specific requirements were before it entered into the contract. That should have assisted in ensuring that Southwark got what it wanted and, if not, would have been beneficial for the purposes of any claim, as it would have enabled it to identify what it had required and requested; but not received.

Implementation Lessons

4. A key failing regarding the installation of the system was that Southwark did not do what it was supposed to do.
5. IBM prepared a document in which it was stated that the "success and development and testing is dependent on the accuracy of the Southwark Council detailed mapping specification documents." Whilst the Websphere software could improve the quality of data, it was a tool set and would not automatically provide data in the format wanted. Therefore Southwark had to define what mapping and formatting rules it wanted.
6. Despite IBM reminding Southwark, after installation of Websphere, that Southwark had agreed to provide a mapping specification and IBM even providing a document which had to be filled in and completed by Southwark, this was never produced by Southwark

and was the primary reason that IBM could not complete its Websphere installation.

7. Secondly, during the implementation of the project, Southwark brought in a consultant data integrity specialist, who, it seems, did not read the relevant documents, including the contracts, or consult with the relevant people in Southwark who had originally been working on the project. As a result, that consultant judged the system not by what it was contractually obliged to deliver, but by what she wanted it to deliver based on her experience of other systems. As a result of that, the decision to abandon the project was taken on the basis that Arcindex did not deliver some key functionality which that consultant thought that it should have; not which it was obliged to have.
8. Even worse, it seems that Arcindex did have much of the functionality which that consultant required; but she did not take up the project manager's offer to explain that to her. The lessons here are too obvious to need spelling out.
9. Thirdly, not only was the project closed down without regard to the contractual provisions, but it was closed down prematurely and without proper consultation.
10. Extraordinarily, Mr Katz, an independent consultant who had been retained as the MDM project manager was not consulted about the decision to abandon the project. He was understandably upset, asking how he was expected to "handle queries where I had been left in the dark about a project I am meant to be managing!"
11. When the project was abandoned, there still remained a substantial amount of time which IBM and Orchard had not yet provided pursuant to the Contracts. As mentioned above, IBM could not complete its Websphere installation because Southwark did not provide a mapping specification.
12. Mr Katz produced for internal consumption an "End of Project Report", which stated that the Websphere and Arcindex software would have provided Southwark with operational benefits from data cleaning, standardisation and matching which Southwark did not currently have and that the Project was closed down before any of those benefits could have been realised. In any event, Arcindex, if operated sensibly and properly with cleansed and standardised information, would have been of substantial use to Southwark because, at the very least, it could be used to identify and take out a vast amount of duplicated or matching information which would effectively have de-clogged the source systems and avoided or reduced substantially the risk of errors being made in the

treatment of people and premises.

13. Thus, not only did Southwark abandon the project when it was not entitled to do so, it did so before it had given the project a chance to succeed. Further, it seems that the decision to abandon the project was not a sensible commercial decision, as it could have delivered many of the benefits Southwark wanted.

Dispute resolution lessons

14. Consideration should always be given to the most cost-effective way of resolving the problem. One should, therefore, always consider, before embarking on a dispute, whether the relationship with the other party has broken down irretrievably or whether a solution can still be found using the other party.
15. After deciding to abandon the system, there was a short test of Arcindex, which was considered by Southwark to be a success. Orchard said that they believed that they could have "achieved most if not all the expected results given some additional time" and sent a document which identified that the additional development costs for the main requirements which Southwark had indicated were lacking from Arcindex would be some £30,000.
16. IBM proposed that Southwark should acquire further IBM or other supplier's applications in addition to what it had already procured.
17. None of these suggestions were taken up by Southwark. Southwark, somewhat unrealistically, certainly given how things turned out, requested a proposal to acquire a solution that was fit for purpose that did not entail any additional expenditure of council funds. Clearly the litigation was far more expensive than the proposed additional costs and would have been.
18. Litigation should be a last resort, and, so prior to commencing litigation, parties should- indeed are required by the Court Rules- to engage in correspondence setting out their cases. Parties should, of course, formulate their cases with care. They should carefully consider the other parties' response, so that they have a good understanding of the issues and the strengths and weaknesses of their case before getting involved in litigation. It seems that Southwark did not do that to the extent required.

19. The project was abandoned on 19 July 2007. On 18 October 2007, Southwark asserted that IBM had been negligent in selling a “system that did not deliver the most basic objective of any local authority MDM requirement - a customer index” and claimed that IBM, by selling this "solution, is complicit in this situation.” The use of the word "complicit" is tantamount to saying that IBM should have advised Southwark that it was going wrong. That was no part of its pleaded case, as finally maintained.
20. IBM responded on 12 November 2007 claiming that the Websphere software it sold to Southwark was fit for purpose and explained why that was so; broadly that it gave Southwark what it requested. That was exactly what the judge decided.
21. Quite astonishingly, there was no response from Southwark to that letter.
22. There was some further communications between IBM and Southwark about further software, but those discussions had faltered by January 2008.
23. On 28 January 2008 Southwark wrote to IBM complaining that the “IBM solution" was "not fit for purpose". Seven complaints were identified of which only two were still pursued, when judgment came to be given. It was suggested that IBM misrepresented "its solutions capabilities" to Southwark.
24. IBM replied on 13 February 2008 saying that the Websphere software satisfied Southwark’s requirements, that it was made clear that Southwark had to conduct its own evaluation of Arcindex and that it could not warrant its suitability. Accordingly, IBM had no liability or responsibility in relation to Arcindex.
25. Southwark replied on 13 March 2008 asserting that IBM gave "expert advice" and made recommendations to Southwark in relation to the decision to obtain Arcindex. It concluded by saying that Southwark "relied solely on the judgement and professional skills of IBM to recommend a product that was suitable to the specified requirements of" Southwark.” During the trial, those claims were abandoned.
26. IBM responded on 4 April 2008 challenging that letter in some detail and concluding that there was no legal basis for a claim for damages against IBM in respect of the purchase of Arcindex.
27. Again there was no response from Southwark; but in August 2009 Southwark commenced the proceedings. Given the dismissal of its claim and particularly the abandonment of many parts of its claim, it is difficult to avoid the conclusion that

Southwark did not properly consider the correspondence from IBM.

28. Prior to commencing litigation, the relevant documents should be carefully reviewed. In particular the contractual documents should be carefully reviewed and you should assess precisely whether you have got what you asked for. A number of documents have already been referred to above and in Part 1 which should have given Southwark cause to question the strength of its case. In that regard, it was also noteworthy that, when Southwark informed IBM of its decision to abandon the project, it did not criticise IBM at all.
29. Prior to commencing litigation, brief statements should be taken from relevant witnesses regarding the events in question. Mr Katz left Southwark without having been asked to play any part in the investigation into what had gone wrong. There was no evidence that Mr Orrom, an independent consultant, or Mr Currey, Southwark's Head of Information Services, was ever consulted. It was a remarkable feature of the case (particularly given Southwark's claims for misrepresentation) that Southwark called no factual witness who was involved in the procurement of the IBM software and services.
30. Prior to commencing litigation, an expert should be consulted to ensure that he/she will support your case. In this case, Southwark's expert agreed that "Arcindex functioned as described in the Arcindex User Manual." If Southwark had known that, before it embarked on litigation, it may not have brought the claim, thereby saving very significant costs.
31. Evidence should, of course, be preserved. It may have made no difference in this case, but it was remarkable that most of the installed software from Orchard and IBM was deleted from Southwark's servers with no or no accessible backups.

Litigation Lessons

32. Even more so than with pre-litigation correspondence, once litigation has commenced you need to consider carefully the legal basis of your claim and the specific facts that support that claim. As the facts below demonstrate, Southwark never did that. Its case was constantly changing.
33. The original Particulars of Claim served by Southwark in August 2009 relied upon

misrepresentations, the three Contracts and an "Agreement" (not then properly identified). Implied terms of fitness for purpose, satisfactory quality and the exercise of reasonable skill and care were relied upon as was an implied term of supplying the MDM system "within a reasonable time".

34. After a number of differing drafts were produced by Southwark, amended Particulars of Claim were served in September 2010, which, in addition to the three Contracts, relied upon an overarching "Main Agreement" made on the 22 June 2006, a collateral warranty to the effect that the Websphere and Arcindex software together would provide a system of merchantable quality and fit for intended purpose, misrepresentations and negligence. A number of additional complaints were added.
35. Re-Amended Particulars were served on 14 February 2011, which was the fifth day of the trial, as a result of which Southwark substantially changed its position. It abandoned the overarching Main Agreement and its allegations of breach of the Websphere and the Consultancy Service Contracts. It pleaded reliance on Section 14 of the Sale of Goods Act 1979 as well as on the express term of the ICT conditions forming part of the Arcindex Contract of the need for "satisfactory quality". It also abandoned about half of the complaints about the Arcindex software.
36. During final oral submissions, Southwark expressly abandoned any reliance on misrepresentation, collateral warranty or negligence and indeed any reliance on any breach of contract other than of the Arcindex Contract. By the time of those final submissions, only two of the complaints were left, the rest having been abandoned.
37. It seems that there was never any basis for claiming misrepresentation or negligence, as, at no time, prior to the Arcindex Contract, did IBM make any recommendation to Southwark about the suitability or desirability of using Orchard or Arcindex. Southwark evaluated Arcindex for itself and selected Arcindex as reflecting its project team's requirements, without any technical or indeed other input from IBM.
38. Southwark personnel took it upon themselves to investigate with Orchard and understand what Arcindex was and could provide. Given the presentations, demonstrations, pilot, and the documents provided by Orchard, they knew exactly what Arcindex could and would provide and that they believed that Arcindex met Southwark's requirements as they perceived them.

39. Considerable costs are, of course, wasted by pursuing points which have no prospect of success; and even more so by pursuing a claim that fails. It is always easy to be wise with hindsight; but it seems that Southwark should have known, if it had analysed its claim properly, that this claim would not succeed.

If you would like to talk to us about the issues raised by this note, please contact:

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