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Scope creep on IT projects - when and how to call it a day.

It's an all too common problem with IT projects.

A customer engages an IT supplier to develop software, systems or both, and the project is delayed and/or costs overrun. Frequently, this is due to changes in the customer's requirements, otherwise known as 'scope creep'.

De Beers

The recent case of De Beers UK Ltd v ATOS Origin IT Services UK Ltd is a prime example.

ATOS was the successful bidder for a tender to supply and develop a software system for De Beers, and a fixed price contract was agreed.

Delays occurred and ATOS was unable to deliver the software by the contractually agreed date. Resultant discussions led to an agreed revised delivery date but De Beers withheld payment of an invoice because of the delays and concerns over the quality of ATOS's work.

ATOS was worried by escalating costs and cited De Beers' lack of cooperation and increases in the scope of work as causes of the delays, and threatened to down tools unless there was a renegotiation of the contract. De Beers refused to be held to ransom, and ATOS suspended work. Each party argued that termination was due to the other's breach (known as a 'repudiatory' breach) of contract, which it had accepted.

The Court had to decide which party was entitled to treat the contract as repudiated and what damages could be recovered. It found that De Beers had not repudiated the contract, as its conduct fell well short of a repudiatory breach. ATOS on the other hand had, by its conduct, shown a clear intention not to be bound by the contract any further, and De Beers had accepted ATOS's repudiation. De Beers was therefore entitled to recover some (but not all) damages claimed.

Lessons to be learned

The case shows the importance for parties contracting on IT and similar projects to have a clear contract which:

- sets out the cost, scope and timeframe for the project;
- addresses any changes in scope and timeframe, including any cost variation; and
- deals with any delays and breaches.

A good contract will contain a detailed scope of work and specifications, a detailed implementation plan, a change control process for dealing with any scope and implementation changes, and service levels and a service credit regime/liquidated damages for delays and other specified breaches.

The case also demonstrates the need, when in dispute, to exercise caution as some conduct can unintentionally give rise to a repudiatory breach entitling the other party to terminate the contract when this may not have been intended. It therefore pays to seek early legal advice on such disputes.

If you need assistance with IT contracts, tenders or other commercial contracts, contact Mark on +44 (0)1293 527744 or email him on moshea@rawlisonbutler.com

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Rawlison Butler LLP's commercial law practice is experienced in advising franchisors and franchisees, and is an Affiliate member of the BFA. Mark O'Shea is Commerce & Technology Partner and Head of Franchising.

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