

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

WIPRO LIMITED, LLC,)	CASE NO.: CI 19-676
)	
Plaintiff,)	
)	
v.)	<u>DEFENDANT'S ANSWER AND</u>
)	<u>COUNTERCLAIM</u>
STATE OF NEBRASKA,)	
)	
Defendant)	

COMES NOW the Defendant, State of Nebraska, by and through its undersigned attorneys, and for its Answer to Plaintiff's Complaint, states and alleges as follows:

I. PARTIES

1. The State of Nebraska admits Wipro Limited, LLC ("Plaintiff" or "Wipro") is a Delaware limited liability company with its principal place of business in New Jersey and that Wipro provides IT consulting services. The State of Nebraska is without sufficient information to admit or deny the remaining allegations in Paragraph 1 of Plaintiff's Complaint and therefore denies same.

2. The State of Nebraska admits the allegations in Paragraph 2 of Plaintiff's Complaint.

3. The State of Nebraska admits the allegations in Paragraph 3 of Plaintiff's Complaint.

II. JURISDICTION AND VENUE

4. The State of Nebraska admits Plaintiff filed a claim against the State of Nebraska with the Office of Risk Management on or about February 20, 2019, as alleged in Paragraph 4 of Plaintiff's Complaint.

5. The State of Nebraska admits the allegations in Paragraph 5 of Plaintiff's Complaint.

6. The State of Nebraska admits the allegations in Paragraph 6 of Plaintiff's Complaint.

III. FACTUAL ALLEGATIONS

7. The State of Nebraska admits it entered into a fixed-term, fixed-price contract with Wipro for Wipro to develop a Medicaid Eligibility and Enrollment Solution to replace the then-current Eligibility and Enrollment system. The State of Nebraska admits the contract required Wipro to meet the Seven Standards and Conditions which the Center for Medicaid Services had established for the State of Nebraska. The State of Nebraska admits that part of the contract is attached to Plaintiff's Complaint as Exhibit B, but the State of Nebraska denies that the version attached to Plaintiff's Complaint is a complete copy of the contract.

8. The State of Nebraska admits the contract provides for a six-year term from July 1, 2014 to June 30, 2020.

9. The State of Nebraska admits the quoted language in Paragraph 9 of Plaintiff's Complaint appears in Section GG of ADDENDUM ONE of the contract, and the State of Nebraska alleges the contract speaks for itself.

10. The State of Nebraska admits the quoted language in Paragraph 10 of Plaintiff's Complaint appears in Section Y of ADDENDUM ONE of the contract, and the State of Nebraska alleges the contract speaks for itself.

11. The allegations in Paragraph 11 of Plaintiff's Complaint constitute legal conclusions to which no response is required. To the extent a response is required, the State of Nebraska denies the allegations in Paragraph 11 of Plaintiff's Complaint.

12. The State of Nebraska admits the allegations in Paragraph 12 of Plaintiff's Complaint.

13. The State of Nebraska admits the allegations in Paragraph 13 of Plaintiff's Complaint.

14. The State of Nebraska admits the parties executed only four amendments to the contract, and that such amendments were for the purpose of creating an environment in which Plaintiff could succeed under the contract. The State of Nebraska also admits the amendments are attached to Plaintiff's Complaint as Exhibits C, D, E and F.

15. The State of Nebraska admits it discussed Plaintiff's proposed Amendment 5 to the contract and that such amendment would have added several years and tens of millions of dollars to the project. The State of Nebraska denies the remaining allegations in Paragraph 15 of Plaintiff's Complaint.

16. The State of Nebraska denies the allegations in Paragraph 16 of Plaintiff's Complaint.

17. The State of Nebraska denies the allegations in Paragraph 17 of Plaintiff's Complaint.

18. The State of Nebraska admits the allegations in Paragraph 18 of Plaintiff's Complaint.

19. The State of Nebraska admits that First Data issued a status report in August 2018, but denies that First Data concluded the project was on budget, on schedule, or otherwise progressing as needed as alleged in Paragraph 19 of Plaintiff's Complaint.

20. The State of Nebraska denies the allegations in Paragraph 20 of Plaintiff's Complaint.

21. The State of Nebraska denies the allegations in Paragraph 21 of Plaintiff's Complaint.

22. The State of Nebraska admits it sent the letter attached to Plaintiff's Complaint as Exhibit G on or about September 7, 2018, but denies Plaintiff's characterization of the letter because the letter speaks for itself. The State of Nebraska further denies that Plaintiff was not on notice of the ongoing problems with the project and Plaintiff's performance under the contract.

23. The State of Nebraska admits it sent the September 7, 2018 letter based on an August report issued by the State's Independent Verification and Validation vendor, First Data, and that the report had not been shared with Plaintiff prior to September 14, 2018, as alleged in Paragraph 23 of Plaintiff's Complaint.

24. The State of Nebraska admits that the parties' representatives met in September 2018 and discussed Wipro's forthcoming formal response to First Data's report and further discussed Wipro's forthcoming submission of invoices for past work, but the State denies the remaining allegations in Paragraph 24 of Plaintiff's Complaint.

25. The State of Nebraska admits the allegations in Paragraph 25 of Plaintiff's Complaint.

26. The State of Nebraska admits Plaintiff sent three invoices on or about October 5, 2018 and that copies of those invoices are attached to Plaintiff's Complaint as Exhibits I, J and K. The State of Nebraska also admits Jennifer Brantley acknowledged receipt of the invoices, as alleged in Paragraph 26 of Plaintiff's Complaint.

27. The State of Nebraska admits a meeting took place between the parties and First Data but denies the remaining allegations in Paragraph 27 of Plaintiff's Complaint.

28. The State of Nebraska admits a telephonic meeting took place on October 17, 2018 and that Plaintiff learned the final version of the First Data report was dated August 27, 2018. The State of Nebraska denies the remaining allegations in Paragraph 28 of Plaintiff's Complaint.

29. The State of Nebraska admits the allegations in Paragraph 29 of Plaintiff's Complaint.

30. The State of Nebraska admits it received Plaintiff's response to First Data's report on or about October 23, 2018, but denies that Plaintiff's response refuted First Data's criticisms or changed anyone's mind regarding Plaintiff's poor performance under the contract. The State of Nebraska admits that Plaintiff's response is attached to Plaintiff's Complaint as Exhibit H.

31. The State of Nebraska denies the allegations in Paragraph 31 of Plaintiff's Complaint. The State of Nebraska affirmatively alleges it reviewed and considered Plaintiff's response and then terminated the contract.

32. The State of Nebraska admits the allegations in Paragraph 32 of Plaintiff's Complaint.

33. The State of Nebraska admits Plaintiff provided additional information on or about November 5, 2018, but denies that Plaintiff provided the necessary information requested by the State as alleged in Paragraph 33 of Plaintiff's Complaint.

34. The State of Nebraska admits it sent a termination notice on or about December 12, 2018 and alleges the notice speaks for itself.

35. The State of Nebraska denies it owes any further amounts to Plaintiff, as alleged in Paragraph 35 of Plaintiff's Complaint.

FIRST CAUSE OF ACTION

Breach of Contract -- Failure to Pay Outstanding Invoices

36. The State of Nebraska incorporates its responses to Paragraphs 1-35 above as if fully set forth herein.

37. Paragraph 37 of Plaintiff's Complaint constitutes legal conclusions to which no response is required. To the extent a response is required, the State of Nebraska admits the

contract and Amendments 1 through 4 constitute a valid and enforceable contract and deny that Amendment 5 is a valid and enforceable contract.

38. The State of Nebraska denies the allegations in Paragraph 38 of Plaintiff's Complaint.

39. The State of Nebraska denies the allegations in Paragraph 39 of Plaintiff's Complaint.

40. The State of Nebraska denies it owes any additional amounts to Plaintiff as alleged in Paragraph 40 of Plaintiff's Complaint.

41. The State of Nebraska denies the allegations in Paragraph 41 of Plaintiff's Complaint.

42. The State of Nebraska denies the allegations in Paragraph 42 of Plaintiff's Complaint.

43. The State of Nebraska denies the allegations in Paragraph 43 of Plaintiff's Complaint.

SECOND CAUSE OF ACTION

Breach of Contract -- Suspension of Contract

44. The State of Nebraska incorporates its responses to Paragraphs 1-43 above as if fully set forth herein.

45. The State of Nebraska denies the allegations in Paragraph 45 of Plaintiff's Complaint.

46. The State of Nebraska denies the allegations in Paragraph 46 of Plaintiff's Complaint.

THIRD CAUSE OF ACTION

Breach of Covenant of Good Faith and Fair Dealing

47. The State of Nebraska incorporates its responses to Paragraphs 1-46 above as if fully set forth herein.

48. Paragraph 48 of Plaintiff's Complaint constitutes legal conclusions to which no response is required.

49. The State of Nebraska denies the allegations in Paragraph 49 of Plaintiff's Complaint.

50. The State of Nebraska denies the allegations in Paragraph 50 of Plaintiff's Complaint.

51. The State of Nebraska denies all allegations in Plaintiff's Complaint not expressly admitted herein, except those allegations which constitute admissions against the interest of Plaintiff.

52. The State of Nebraska denies Plaintiff is entitled to the damages requested in Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

53. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

54. Plaintiff's Complaint is barred due to Plaintiff's prior material breach of contract.

55. Plaintiff's Complaint for breach of Amendment 5 of the Contract is barred by the plain terms of the Contract requiring any changes to be approved in writing by the State's designee.

56. Plaintiff's Complaint is barred due to failure of consideration.

57. Plaintiff's Complaint is barred in whole or in part by the statute of frauds.

58. Plaintiff's Complaint is barred by the doctrine of fraudulent inducement in that Plaintiff represented in its Proposal that it possessed the requisite expertise to perform the Contract, but in fact Plaintiff's representation was not true.

59. Plaintiff's Complaint is barred in whole or in part by the doctrines of waiver and/or estoppel.

60. Plaintiff's Complaint is barred in whole or in part because Defendant's conduct was taken, in part, for the purpose of mitigating damages that were ongoing.

61. Plaintiff's claim for damages is barred in part due to Plaintiff's failure to plead the damages with specificity, as required by the Nebraska Court Rules of Pleading in Civil Cases.

62. Plaintiff's claim for damage to its reputation is barred because any damage to Plaintiffs' reputation was caused by the poor performance of Plaintiff and/or its strategic partner on this project and/or by other extra-contractual events which were publicized and well-known in the industry and in the public domain.

63. Plaintiff's claims which sound in quasi-contract or which are based on implied terms are barred by the express language of the Contract.

64. Plaintiff's Complaint is barred in part because Plaintiff's claims are cumulative and duplicative.

65. Plaintiff's Complaint is barred by the doctrine of election of remedies.

66. Defendant reserves the right to assert additional affirmative defenses as those defenses become known during the course of discovery in this action.

WHEREFORE, the State of Nebraska respectfully requests an Order dismissing Plaintiff's Complaint with prejudice, at Plaintiff's cost, and awarding such other and further relief as the Court deems fair and just.

COUNTERCLAIM

COMES NOW, the State of Nebraska, by and through its undersigned attorneys, and for its Counterclaim against Wipro Limited, LLC (hereinafter "Wipro"), states and alleges as follows:

1. Wipro is an information technology vendor with its global headquarters located in Bangalore, India, and its U.S. headquarters located in East Brunswick, New Jersey.

2. Jurisdiction and venue are proper in this Court because the events giving rise to this Counterclaim occurred in Lancaster County, Nebraska.

FACTUAL BACKGROUND

3. On or about October 31, 2013, the State of Nebraska released an RFP for the development of a modern COTS-based Medicaid Eligibility and Enrollment Solution to replace the functionality of the then-existing Medicaid Eligibility and Enrollment system.

4. Wipro submitted a cost proposal that was significantly less than its competitors, and the State of Nebraska selected Wipro based on Wipro's cost proposal.

5. On or about July 22, 2014, the State of Nebraska entered into a fixed-price, deliverables-based contract with Wipro, pursuant to which Wipro was to develop a modern COTS-based Medicaid Eligibility and Enrollment Solution that meets the CMS Seven Standards and Conditions for the State of Nebraska, as defined in the contract specifications ("Contract").

6. Pursuant to the Contract, the Contract period was defined as the six-year period starting July 1, 2014 and extending through June 30, 2020.

7. Addendum One to the Contract consists of Terms and Conditions governing the contract.

8. Section A of Addendum One provides that the Contract incorporates the following documents: (1) Amendment to Contract with the most recent dated amendment having the highest priority; (2) Contract Award and any attached Addenda; (3) the signed Request for Proposal form and the Contractor's Proposal; (4) Amendments to RFP and any Questions and Answers; and (5) the original RFP document and any Addenda.

9. In Section J of Addendum One, Wipro warranted that all personnel assigned to this project shall be employees of Wipro or specified subcontractors, and shall be fully qualified to perform the work required by the Contract. Wipro also committed that it would not change personnel commitments made in its Proposal without the prior written approval of the State of Nebraska, and that the replacement of key personnel, if approved by the State of Nebraska, would be with personnel of equal or greater ability and qualifications.

10. Section Y of Addendum One provides that the State, in its sole discretion, may terminate the contract for any reason upon 30 days written notice to Wipro, and that cancellation shall not relieve Wipro of warranty or other service obligations incurred under the terms of the Contract. Section Y also provides that upon termination of the Contract, the State is required to pay only for those services which were satisfactorily performed or provided.

11. Section GG of Addendum One provides that the State will render payment to Wipro when the terms and conditions of the Contract and specifications have been satisfactorily completed by Wipro, as solely determined by the State of Nebraska.

12. Section HH of Addendum One requires Wipro to request payment by submitting invoices which contain sufficient detail to support payment.

13. Section XX of Addendum One provides that "time is of the essence in this Contract."

14. The parties executed four written amendments to the contract. The State of Nebraska agreed to those amendments, generally, for the purpose of creating an environment where Wipro could succeed in its performance of the Contract requirements.

15. Wipro requested that the State execute a fifth written amendment to the contract, pursuant to which Wipro requested to delay the project completion date by two years and also requested additional funding of \$28 million.

16. Wipro had successfully been awarded the Contract based on its low, fixed-price, competitive bid. Wipro's proposed Amendment 5 sought substantially more funds, and two additional years, to complete the project.

17. The State of Nebraska declined to execute the fifth proposed amendment.

18. First Data Corporation provides Independent Verification and Validation Services ("IV&V Services"). The State of Nebraska retained First Data Corporation to perform IV&V Services and to evaluate Wipro's performance throughout the Contract term.

19. In the course of evaluating Wipro's performance, First Data issued multiple Critical Incident Reports.

20. In the course of evaluating Wipro's performance, First Data made various observations about Wipro, including but not limited to Wipro's lack of expertise. In some instances, Wipro spent considerable time and effort to build custom code when an off-the-shelf product would have sufficed. In other instances, Wipro's work product demonstrated Wipro's unfamiliarity with the Curam platform that it selected for this project.

21. Wipro's work product was of poor quality.

22. The implementation and perfection of any eligibility system requires expert knowledge in multiple practice areas with the experience, core product knowledge, subject matter, and implementation expertise to deliver. Wipro lacked the requisite expertise to successfully perform the Contract and implement the eligibility system for the State of Nebraska, and the constant turnover in staff further compounded the problem.

23. Wipro acknowledged that a key component of the successful implementation of this project was the need to have the right staff, in the right place, at the right time, and it understood the urgency to engage qualified and experienced staff. Wipro further expressed its understanding that deploying well-qualified and experienced staff for this project was a crucial element of success.

24. Notwithstanding Wipro's understanding of the importance of personnel stability, Wipro's performance on this project was impacted by turnover in personnel throughout the project and the replacement of those personnel with inexperienced employees. This turnover of key personnel included Wipro's project manager position, which constantly changed throughout the term of the project.

25. In the summer of 2018, the State of Nebraska requested that First Data evaluate the current level of completeness of the then four-year-old project. This request was prompted by Wipro's request to enter into Amendment 5 which would have added tens of millions of dollars and multiple additional years to the project.

26. First Data completed its review in August 2018 and memorialized its findings in a written report. In that report, First Data concluded there was no evidence to support completion or to determine a percentage of completion of function to accurately determine Medicaid eligibility.

27. First Data concluded that Wipro's performance under the Contract represented a "long-standing pattern of failures reflected in the previous contract amendments which were proposed and adopted in an ongoing effort to create an opportunity for [Wipro] to succeed," and that "the pattern of persistent failures had continued with no discernible sign of abatement."

28. In an effort to mitigate its damages, avoid incurring further costs, and to evaluate whether the State of Nebraska could proceed with Wipro, the State of Nebraska spent several months evaluating the project status and considering Wipro's response to First Data's conclusions.

29. On or about December 12, 2018, the State of Nebraska exercised its discretion under the Contract to terminate the Contract.

30. At the time the Contract was terminated, Wipro had already been paid \$58,600,000 for its work on the project, despite the fact that there was no evidence that any of Wipro's work was functional.

COUNTERCLAIM COUNT I

Breach of Contract

31. The State of Nebraska incorporates by reference the allegations in Paragraphs 1-30 above as if fully set forth herein.

32. After more than four years of work on the project, Wipro failed to deliver any functional Medicaid Eligibility and Enrollment Solution.

33. Wipro failed to staff the project with personnel who had the requisite expertise to complete the Contract requirements. Persistent staff turnover compounded these problems and contributed to the delays and the unsatisfactory work.

34. Wipro's work product was of poor quality, and Wipro failed to manage the project effectively or efficiently.

35. Wipro was unable to meet the deadlines under the Contract, and it also committed an anticipatory breach of contract by representing to the State of Nebraska that it would not complete the project on time and needed two additional years to complete its work on the project.

36. Wipro breached the covenant of good faith and fair dealing by failing to perform its obligations under the Contract with care, skill, reasonable expediency, and faithfulness.

37. Wipro breached the covenant of good faith and fair dealing by securing the Contract award by underbidding the original Contract price in its initial Proposal, and then seeking to make up additional funds for this fixed-price project by extending the timeline and increasing the cost structure for the project, thereby thwarting the letter and spirit of the competitive bidding process.

38. As a result of Wipro's breaches of contract, the State of Nebraska sustained damages in the amount paid to Wipro of \$58,600,000.

39. The State of Nebraska also sustained additional damages as a result of Wipro's breach of contract, including but not limited to the following:

- (a) \$525,000 spent on a third party to perform an independent analysis of the current situation following Wipro's breach, and the State of Nebraska's options going forward to successfully implement an Eligibility and Enrollment Solution; and
- (b) \$117,433 spent to physically relocate servers owned by the State of Nebraska but hosted by Wipro.

40. In addition to the losses already sustained by the State of Nebraska, the State also expects to sustain additional losses in the future as a result of Wipro's breach and its inability to deliver a functional system, including but not limited to the following:

- (a) \$1.5 million to design, develop, and implement modifications to the current system to accommodate the Medicaid expansion population;
- (b) Approximately \$5 million in annual losses due to a loss of federal funding that the State of Nebraska would have received; and

- (c) Costs to develop a functional Medicaid Eligibility and Enrollment Solution in response to Wipro's breach, in an amount not yet known and to be proven at trial.

COUNTERCLAIM COUNT II

Fraud In the Inducement and Fraudulent Representation/Concealment

41. The State of Nebraska incorporates by reference the allegations in Paragraphs 1-40 above as if fully set forth herein.

42. Wipro purposefully submitted a low cost proposal for the project to induce the State of Nebraska to select Wipro for the project, but Wipro intended to amend the contract to add additional costs, in contravention of the competitive bidding process.

43. Wipro made numerous fraudulent representations in the course of submitting its cost proposal, including but not limited to the following:

- (a) That Wipro's programming would "meet[] and exceed[]" Nebraska's Medicaid eligibility and enrollment requirements;
- (b) That Wipro's strategic partner in the development of Nebraska's COTS-based Medicaid Eligibility and Enrollment Solution had successfully implemented the same or similar programs in other states, including Maryland, Minnesota, and Missouri;
- (c) That Wipro's strategic partnerships with other program developers would "reduc[e] the time and cost associated with support and upgrades by providing single-level fixes/patches/upgrades;"
- (d) That Nebraska's COTS-based Medicaid Eligibility and Enrollment Solution would be fully implemented within twelve months of contract formation;
- (e) That Wipro and/or its strategic partners would "quickly address" and resolve project issues;
- (f) That Wipro and/or its strategic partners would deliver software that was "off-the-shelf," meaning it did not need to be built from scratch and could be easily reconfigured to fit Nebraska's specific needs;

- (g) That Wipro and/or its strategic partners would meet or exceed the State of Nebraska's staffing requirements by providing "the right staff, in the right place, at the right time;"
- (h) That Wipro and/or its strategic partners would leverage its existing staff, and hire additional staff members, to "deliver on time results for this project;"
- (i) That the Curam platform was an ideal component of the Medicaid Eligibility and Enrollment Solution;
- (j) Concealing the fact that Wipro and/or its strategic partners had been sued, or threatened to be sued, or had faced allegations relating to problems arising from the same or similar projects employed by states throughout the country following the passage of the Affordable Care Act; and
- (k) Concealing the fact that Wipro lacked the expertise to satisfy the requirements set forth in the State of Nebraska's RFP, and that the software marketed to the State of Nebraska had not actually been meaningfully tested and was not an ideal solution.

44. Other states have experienced significant trouble with utilizing the Curam platform, including but not limited to the following:

- (a) Maryland, which secured a \$14.8 million settlement from IBM and Curam Software for misrepresentations made to the State relating to the development of the State's health exchange website;
- (b) Missouri, which experienced multiple problems with Curam's software due to gaps in its functionality; and
- (c) Minnesota, which identified more than 100 defects in Curam's software — more than double any other vendor.

45. Each of the representations and/or omissions set forth above was material and false.

46. The State of Nebraska relied on these misrepresentations and/or omissions in contracting with Wipro, resulting in significant damages as alleged above.

COUNTERCLAIM COUNT III

Rescission

47. The State of Nebraska incorporates by reference the allegations in Paragraphs 1-46 above as if fully set forth herein.

48. Wipro's breach of contract was so substantial and fundamental as to defeat the object of the parties in making the Contract.

49. Wipro's fraud in the inducement and fraudulent representations and concealment require rescission of the parties' contract.

50. The State of Nebraska is entitled to Rescission of the Contract, including a return of all payments made to Wipro for performance under the Contract in an amount of at least \$58,600,000.

PRAYER FOR RELIEF

WHEREFORE, the State of Nebraska respectfully requests an Order finding in the State of Nebraska's favor on all of its claims; ordering rescission of the Contract; awarding damages to the State of Nebraska in an amount not less than \$65,742,433, plus such other and additional damages as proven at trial; awarding all costs and interest available under the law; and providing for such other and further relief as the Court deems fair and just.

DATED this 5th day of September, 2019.

Respectfully submitted,

STATE OF NEBRASKA, Defendant.

BY: /s/ Mark C. Laughlin

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of September, 2019, a copy of the above and foregoing was filed with the Clerk of the Court using the JUSTICE E-filing System and also served upon the following by United States mail, postage prepaid:

Andre R. Barry
Nathan Clark
Lily Amare
Cline Williams Wright Johnson & Oldfather, LLP
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508

/s/ Mark C. Laughlin

2191693.04

Certificate of Service

I hereby certify that on Thursday, September 05, 2019 I provided a true and correct copy of the Answer & Counterclaim to the following:

Wipro Limited, LLC represented by Barry,Andre Robert (Bar Number: 22505) service method: Electronic Service to abarry@clinewilliams.com

Signature: /s/ Laughlin,Mark,C (Bar Number: 19712)