IN THE

Supreme Court of Virginia

RECORD NO. 170617

CGI FEDERAL, INC.,

Appellant,

v.

FCi FEDERAL, INC.,

Appellee.

BRIEF OF APPELLEE

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SCV: Submitted on 11-17-2017 15:49:54 EST for filing on 11-17-2017

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INTRODUCTION

In this government contract dispute, the plaintiff's theory of the case matched no remedy cognizable under Virginia law or the parties' contract. As a result, the plaintiff, CGI Federal, Inc. ("CGI"), utterly failed to prove any claim against FCi Federal, Inc. ("FCi").

The parties' relationship was governed by a teaming agreement that provided that, if the government awarded FCi a prime contract, the parties would negotiate the terms of a subcontract for the work to be performed by CGI. However, the parties never reached an agreement on a subcontract, and the teaming agreement expired under its own terms.

CGI's case was based on the fiction that it was entitled to money it would have received under a non-existent subcontract. CGI even abandoned any claim that the failure of the parties to enter the subcontract constituted a breach of the teaming agreement or fraud. Because CGI's claimed damages derived solely from a subcontract that never existed, it had no remedy under Virginia law.

CGI's case also blurred the boundaries of contract and tort. CGI's liability theory for breach of contract and fraud was identical. It rested on the same April 2013 modification to the teaming agreement, which reduced CGI's work share in a future subcontract from 45% to 41% (plus 10 management positions). According to CGI, FCi breached this promise, and fraudulently induced the contract

modification without the intent to perform. But, CGI's damages theory for contract and fraud was also identical. Damages were calculated as the overhead (contract) and lost profits (fraud) that CGI might have received if the parties had agreed to a subcontract with the 41% work share and 10 management positions as the April 2013 amendment to the teaming agreement described.

CGI's breach of contract claim should never have been submitted to the jury. The post-award, work share provisions of the teaming agreement were – as a matter of law – an unenforceable agreement to agree. Those provisions were expressly "subject to" to the execution of a subcontract that never materialized. Also, the teaming agreement was missing material terms. Under settled Virginia law, "agreements to agree," and those that are "subject to" the execution of a future writing, are unenforceable.

Even if the post-award provisions of the agreement had been enforceable, the verdict could not stand because the agreement did not provide CGI with a contract remedy. Instead, it expressly excluded damages, and required the parties to assume the risks and liabilities of performance. Further, CGI failed to prove that its lost "overhead" was tied to any breach because the subcontract from which the lost "overhead" would flow was never formed. Thus, with or without a breach, CGI's position never changed; without a subcontract, there could be no damages.

As to CGI's unjust enrichment claim, the trial court correctly held that no contract could be implied in law because the pre-award provisions of the teaming agreement and the Letter Subcontract were express, enforceable agreements covering the government project at issue. Because Virginia does not permit an implied contract in contravention of an express agreement, CGI could not recover on its alternative claim for breach of contract.

CGI's fraud claim failed on multiple grounds. Fundamentally, CGI's theory of the case did not match its damages. CGI sought benefit-of-the-bargain affirmance damages (contract damages) for the alleged fraud, not reliance damages, the traditional measure of fraud damages. Because it did not suffer any loss as a result of the alleged fraud, though, CGI did not even attempt to prove damages resulting from any reliance on the 41% work share provision. Nor could CGI be fraudulently induced to enter an unenforceable agreement, or recover for an alleged fraud that occurred *after* the parties formed that agreement.

Additionally, CGI could not recover in fraud because it ratified, performed, and received benefits from the teaming agreement after it discovered the alleged fraud. Having fully embraced and affirmed that agreement, it could not then sue for being fraudulently induced to enter it. And even if it could, its fraud theory was that it was entitled to the full benefit of its bargain, which was performance of the agreement. Performance of the agreement, though, merely meant the opportunity

to negotiate a subcontract that the parties never formed, and that was necessary for any damages. Because the teaming agreement expired when the parties failed to reach agreement on a subcontract, CGI had no recoverable fraud damages. Consequently, CGI's claimed damages would have put it in a *better* position than it would have been in without the alleged fraud.

STATEMENT OF THE CASE

FCi supplements CGI's summary of the proceedings.

FCi moved to strike the case at the close of CGI's evidence and again at the close of all the evidence. JA 1435-82, 2434-2563. It argued then, and throughout the trial, that: the post-award provisions of the ATA were unenforceable;[1] CGI failed to prove breach of contract damages;[2] CGI failed to prove fraud;[3] CGI failed to prove fraud/reliance damages;[4] and CGI could not recover damages for unexercised option years of the VSS contract.[5]

The trial court took the motions to strike under advisement, (JA 2563), and, over FCi's objection, submitted the case to the jury on the contract and fraud claims. *E.g.*, JA 2237, 2255.

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[1] JA 865-76, 975, 1220-23, 1440-64, 2095, 2445-51, 2454, 2556-57.
[2] JA 1216-23, 1310-11, 1440-47, 1451-64, 2451-54, 2463, 2552-55, 2558-61.
[3] *E.g.*, JA 2454-58.
[4] JA 1310-14, 1328-31, 1349-51, 2256-62, 2459-63.
[5] JA 2273, 2511-15.

The jury returned a verdict for CGI on both claims, JA 3056-60, but did not award punitive damages for fraud, having concluded that FCi did not engage in willful and wanton conduct. JA 3059.

FCi filed a motion to set aside the verdict, (JA 3061), and the parties filed hundreds of pages of briefs,[6] and again argued the issues.[7] In a lengthy letter opinion, the trial court agreed with FCi, and set aside the contract and fraud verdicts. JA 3354. First, it held that the post-award provisions of the ATA were unenforceable for two reasons: (1) the terms of the ATA were too indefinite to be enforced; and (2) it was simply an agreement to agree in the future. JA 3365-67. Second, on the fraud claim, it held that CGI did not present evidence of damages sustained through the expiration of the teaming agreement. JA 3370-71.

CGI and FCi then filed motions for summary judgment on the unjust enrichment, which had not been tried to the jury. JA 3372, 3376. Following additional briefing and argument, the trial court granted FCi judgment on the unjust enrichment claim, and entered final judgment for FCi. JA 3607.

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[6] FCi filed several post-trial briefs, two of which are not included in the Joint Appendix, but are contained in the record: (1) Defendant FCi Federal, Inc.'s Post-Trial Brief Concerning Recoverable Damages and (2) The Defendant's Reply in Support of it Post-Trial Brief Concerning Recoverable Damages.

[7] FCi reasserted the arguments it raised in the motion to strike, (*E.g.*, JA 3109-42, 3185-3244), and specifically argued that CGI could not be fraudulently induced to enter an unenforceable agreement, (*E.g.*, JA 3132-33, 3185-88), and that the alleged fraud post-dated the contract. (*E.g.*, JA 3226-30).

STATEMENT OF THE MATERIAL FACTS

FCi supplements CGI's statement of facts. In September 2012, the Department of State issued a solicitation seeking offers from qualified small businesses for a Visa Support Services program ("VSS"). JA 484. As a large government contractor, CGI could not bid for the prime contract for this program. JA 483-84, 489. So, it "had to find a partner to pursue this opportunity." JA 492. It found that partner in FCi, a small government contractor. JA 493, 1993-94, 2002.

1. The teaming agreement

FCi and CGI executed a teaming agreement on September 19, 2012, whereby CGI agreed to partner exclusively with FCi in pursuit of the VSS contract. JA 496-97, 506-9, 2631. The agreement contained "pre-award" provisions describing how the parties would work together to win the contract. JA 512. The parties agreed that FCi, as the prime contractor, would retain "exclusive" control over the solicitation process and, later, the "negotiation of any resultant prime contract." JA 2632. Further, the parties agreed that FCi alone would handle "[a]ll communications with the Government pertaining to the Solicitation or proposal." *Id.* The agreement also contained a merger and integration clause (JA 2638), a limitation on recoverable damages (JA 2636-37), and a severability clause. JA 2638. When the parties later amended the teaming agreement, they did not alter these core provisions.

Exhibit A to the agreement contained a statement of work describing the services CGI would provide post-award, if the bid was successful. JA 2640. Under the agreement, if FCi was the prime contractor, then the parties "will enter good faith negotiations for a subcontract for such services," which was expressly "subject to" the "terms of the prime contract." JA 2633. The parties also agreed that "award of the subcontract" to CGI was "subject to" several conditions, including "[a]ward of prime contract to FCi"; the government's "specific approval" of CGI as a subcontractor; and "[m]utual agreement of the parties hereto to the statement of work, financial terms and reasonable subcontract provisions." *Id.* The agreement expired if "the parties fail to reach agreement on the terms and conditions of a subcontract within a reasonable time not to exceed ninety (90) days from the date of the award of the prime contract to FCi." JA 2635.

Exhibit A stated that CGI "will receive forty-five percent (45%) work share of the total contract value." The parties "understood that the work share commitment may not be exactly 45% each year, however, the end goal is that by the end of the contract term the work share commitment will be substantially met" and that "[a]t the end of each contract year, the parties will assess actual work share versus the 45% work share commitment." JA 2640. CGI understood that the teaming agreement required a formal, superseding subcontract. JA 752.

Kenyon Wells, CGI's vice-president, admitted that the teaming agreement "doesn't include all of the details" that would be in the "final subcontract." Instead, those terms "would be negotiated post-award." JA 512.

2. The solicitation process

The parties collaborated on the initial proposal, which FCi submitted in December 2012. JA 514-15. In April 2013, FCi "reached out to" CGI, advising that the government had asked for a Final Proposal Revision ("FPR"). JA 531-32. Based upon the government's assessment of the strengths and weaknesses of FCi's proposal, FCi thought it was in a "bad position." JA 1100-11, 1508-9, 1524, 1527-33, 1538, 1726. FCi advised CGI that its initial proposal had included a 38% work share for CGI, not 45%. JA 549. FCi "asked [CGI] to make some changes based on feedback received from the government" concerning weaknesses in its initial proposal; the need to allocate some work to small-business subcontractors; and the replacement of key CGI personnel that the government deemed unqualified. JA 532, 539-40, 545, 549, 1036-38, 1123, 1880-81, 2179.

CGI considered "blow[ing] up" the solicitation,[8] which could have killed the bid. JA 805-6. CGI's Townes-Whitley emailed Scott Miller, FCi's President, demanding a 41% work share and 10 management positions. JA 3027-28. Miller, concerned about the threats, responded by email: "I will ensure that our revised

[8] CGI threatened to contact the State Department, in contravention of the teaming agreement. JA 740-43, 825-27, 1547-48, 2160-62.

teaming agreement with CGI affirms our commitment to CGI providing 10 management/supervisory positions. . . . In addition, the agreement will reflect CGI's 41% total contract value work share." JA 1555-56, 1781, 3027.

On April 17, 2013, the parties amended Exhibit A of the agreement to provide that CGI "will receive forty-one percent (41%) work share." JA 556. The modified exhibit also stated that "to attain that work share," CGI "will be provided 10 management/supervisory positions." JA 2642. Otherwise, Exhibit A remained the same. JA 551-52, 738.[9] FCi expected to meet the 41% work share for CGI "over the course of the contract" based on the growth and volume of the VSS project. JA 1560-63, 1781-82, 1786, 2012-18, 2166-70. The resulting document after the amendment is the Amended Teaming Agreement ("ATA").

In the fall of 2013, FCi notified CGI that it had won the VSS contract, but that it was under protest by a small contractor and the government had reopened the solicitation.[10] JA 558, 1571-74. The government resolved that protest in FCi's favor, but a size-protest was then lodged that challenged CGI's involvement. JA 565-66, 1063-64, 1097-99, 1581-83. The second protest ended when CGI settled with the protestor for a share of the potential work. JA 1583-85, 1830.

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[9] After FCi submitted the initial proposal, CGI did nothing further under the ATA.
[10] FCi also learned that it was the highest bidder for the project. JA 2186.

3. Post-award performance and negotiations

In February 2014, the government awarded FCi the prime contract, effective March 31, 2014. JA 561. The government awarded a one-year base period, with the option to extend the contract annually for up to an additional four years. JA 714, 1082. A government witness testified that, at the time of trial, she "c[ouldn]'t predict" whether the option years would be exercised. JA 954, 1113-14, 1124.

FCi told CGI that, to resolve the protest and respond to government feedback, it gave the protester some of CGI's share of the potential work; thus, CGI's work share was now approximately 18%. JA 561-62. FCi explained that it needed to ensure the government that FCi, as the prime contractor, was "really driving the train" given CGI's involvement in what was a small business set-aside. JA 563-66. CGI's Townes-Whitley said that she understood FCi's position "and probably would have made the same decision."[11] JA 821, 3032.

Nevertheless, CGI was disappointed and invoked the "disputes" provision of the ATA. JA 568-69. But as CGI wanted to "salvage the deal," (JA 589), the parties negotiated the terms of a potential subcontract for the next several months, exchanging multiple fifty-page drafts. JA 569-70, 573, 616, 733, 1588-89, 1613-21, 3034-46. Under the ATA, the parties had 90 days to negotiate a subcontract before the ATA expired. JA 2635.

[11] At trial, CGI did not base its claims on the reduction of its work share in response to these protests. JA 1064-69.

As negotiations continued over subcontract terms (including how CGI would get paid[12] and employee healthcare benefits), (JA 732, 758, 766-67, 1588-92, 1893), the parties recognized that CGI could not get paid for work on the VSS contract without a subcontract. JA 589-92, 750-51, 1754. Thus, they executed a "stop-gap" Letter Subcontract on June 20, 2014, which allowed CGI to begin work and get paid during subcontract negotiations. JA 733, 1916, 2759. That contract set a 15% work share ceiling for what CGI might receive under a future subcontract. JA 756. CGI was paid $2 million for work under the Letter Subcontract. JA 619-20, 696, 1196.

The Letter Subcontract was extended several times, (JA 608), because, as Wells acknowledged, it could not serve as the subcontract as it "didn't resolve all of our final issues." JA 617, 619. CGI always understood that the parties would need to negotiate a subcontract, and that those efforts might fail. JA 745, 747.

CGI made several mistakes on the VSS project, (JA 609-12, 784, 843, 1611-12), but FCi continued working towards having a unified management of the work force to ensure equal treatment of all employees working for the VSS contract. JA 729-30. So, negotiations for the subcontract continued.

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[12] In November 2012, CGI informed FCi that it wanted to be paid on a time and materials basis ("T&M") to reduce risk, even though the government would be paying on a fixed-price basis. CGI's position complicated the payment mechanism for a later subcontract. JA 1491, 1510-18, 1773-74, 2011, 3022-23.

Although Wells testified that CGI would never have entered the teaming agreement if it had known that its work share would be reduced below 40%, (JA 555, 569), by October, the parties were close to agreement on a subcontract that would give CGI a 22% work share. JA 582, 616, 1604, 1900. Then, for reasons unrelated to a claimed breach or fraud, the Letter Subcontract terminated in November 2014, before agreement was reached on the terms of the subcontract. JA 691-92, 749. Thus, the 90-day period to negotiate the subcontract lapsed. JA 749.

4. CGI's damages evidence.

CGI's expert calculated its contract damages as its "anticipated indirect cost recovery" or "overhead" if it had worked on a five-year VSS contract, totaling $5,083,934. JA 1193, 1274, 1293-00, 1307-8. Although CGI agreed that it could only recover "reliance damages" for fraud, (JA 1313-15), it nevertheless sought the full benefit of its bargain under the ATA – profits it would have realized if it had fully performed under a subcontract with a 41% work share. JA 1194, 1354-74. CGI's expert used the "same exact calculation" as he did for the contract damages to arrive at fraud damages totaling $8,621,076. JA 1355, 1374.

STANDARD OF REVIEW

FCi amplifies CGI's standard of review for the fraud claim. The types of damages that are recoverable is reviewed *de novo*. *See Shevlin Smith v.*

McLaughlin, 289 Va. 241, 264 (2015) (citing *Sanford v. Ware*, 191 Va. 43, 47-51 (1950)).

ARGUMENTS AND AUTHORITIES

I. CGI FAILED TO PROVE ITS BREACH OF CONTRACT CLAIM.

For its breach of contract claim, CGI had to prove that (1) the ATA is a legally enforceable obligation; (2) FCi breached that obligation; and (3) FCi's breach caused CGI to sustain any damages. *See Filak v. George*, 267 Va. 612, 619 (2004). Even if CGI could prove a breach of the ATA, it failed as a matter of law to prove that the post-award provisions of the ATA were legally enforceable or that a breach proximately caused any damages. Further, CGI's alleged contract damages were contingent. Because CGI failed to prove these essential elements of its contract claim, the trial court properly set aside the jury's verdict.

A. CGI's second assignment of error is insufficient and does not appeal an independent basis for the trial court's breach of contract ruling.

CGI's second assignment of error states: "The Circuit Court erred in holding that the parties' teaming agreement was unenforceable, even if it set forth specific terms for the parties' intended performance, just because the agreement required execution of a later subcontract." JA 3612.

This assignment of error addresses only one part of the trial court's holding. Although the trial court found the ATA unenforceable because it required execution of a later subcontract, it also held that the 41% work share was too

indefinite to be enforceable: "This language makes it clear that the work share percentages are aspirational and not binding" and are merely "'end goals.'" JA 3365. Thus, the trial court did not hold that the ATA was unenforceable "just because" it required the later execution of a subcontract. In fact, it found *both* that the work share term of the ATA was too indefinite to be enforced and that the ATA was an agreement to agree because it required execution of a future subcontract.[13]

Consequently, the assignment of error fails for two reasons. First, it is insufficiently narrow because it addresses only one part of the trial court's holding. Rule 5:17(c)(1)(iii). Second, the assignment of error does not address an independent basis for the trial court's ruling. *E.g.*, *Davis v. Johnson*, 274 Va. 649, 655-56 (2007); *Magco of Maryland, Inc. v. Barr*, 262 Va. 1, 1 (2001); *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 286-87 (1996). Therefore, this Court may not consider the assigned error.

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[13] That there is an independent, unappealed basis for the trial court's ruling is evident from the ruling CGI did appeal: "*Even if the ATA is sufficiently certain in all materials terms* and thus capable of enforcement, the Parties have expressed their intent not to be bound until a subsequent formal subcontract was negotiated and signed." JA 3367 (emphasis added). The trial court had already found that the work share term was insufficiently certain to be enforced, (JA 3365), and introduced its independent, alternative holding with the italicized "even if" language above.

B. The ATA is an Unenforceable Agreement to Agree.

"[W]hen the terms of a contract are clear and unambiguous, a court is required to construe the terms according to their plain meaning." *Golding v. Floyd*, 261 Va. 190, 192 (2001). A contract is unenforceable when a material term in the agreement "is too vague and indefinite to be enforced." *Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 364 (1981).

The post-award provisions of the ATA are unenforceable for at least two reasons. First, the post-award provisions of the ATA are merely an "agreement to agree" to a future subcontract; such agreements are not enforceable under Virginia law. Second, the post-award provisions of the ATA were expressly "subject to" the successful negotiation of a subcontract; an agreement that is expressly "subject to" the execution of future agreement is not enforceable in Virginia.

1. <u>The ATA was expressly "subject to" the successful negotiation of a future subcontract</u>.

Under Virginia contract law, agreements that "merely set out agreements to negotiate future subcontracts" are unenforceable contracts. *Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 347 (2016); *see also W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 517-18 (1997). Applying this settled principle, this Court found the teaming agreements in *Navar* and *Cordant* to be unenforceable. *Id.* Further, for more than 100 years, this Court has held that a purported contract that is expressly "subject to" the negotiation of a future contract is unenforceable, even if

the parties are "fully agreed on the terms of their contract." *Boisseau v. Fuller*, 96 Va. 45, 46-47(1898); *Golding*, 261 Va. at 193. Thus, in finding that "even if the ATA is sufficiently certain in all material terms, it is not enforceable" because it is expressly "subject to" the execution of a subcontract, the trial court faithfully applied settled Virginia law. JA 3365.

The post-award promises in the ATA were expressly "subject to" several future contingencies. The ATA provides that the "award of the subcontract contemplated under this Teaming Agreement" is "subject to" at least four future contingencies: 1) award of the prime contract to FCi; 2) inclusion in the prime contract of the scope of work in Exhibit A to the ATA; 3) the government's approval of CGI as a subcontractor; and 4) "[m]utual agreement of the parties hereto to the statement of work, financial terms, and reasonable subcontract provisions." JA 2633. Because the parties expressly made their post-award promises "subject to" and dependent upon the agreement of a subcontract, the post-award provisions of the ATA are unenforceable.

CGI cites no case where this Court has enforced an agreement that, like the ATA, was expressly "subject to" execution of a future contract that would govern the parties' relationship. Indeed, CGI conspicuously dodges the "subject to" provision altogether. Notwithstanding the controlling precedent against it, CGI suggests that the ATA is enforceable even if the parties contemplated a future

contract. CGI misapplies Virginia contract law and effectively seeks to have this Court re-write the ATA as though the "subject to" language was never there. However, courts do not re-write contracts. *Management Enters., Inc. v. Thorncroft Co.*, 243 Va. 469, 472 (1992).

An enforceable contract can be found in some cases where the parties contemplate a future formal agreement. *E.g.*, *Snyder-Falkinham v. Stockburger*, 249 Va. 376, 385 (1995) (where "the parties are fully agreed upon the terms of the settlement and intend to be bound thereby, 'the mere fact that a later formal writing is contemplated will not vitiate the agreement'") (quoting *North Am. Managers, Inc. v. Reinach*, 177 Va. 116, 121 (1941)). By contrast, this Court has uniformly held that when the agreement is made expressly "subject to" the execution of another agreement, it is not a binding contract. *E.g.*, *Golding*, 261 Va. at 193.

In *Boisseau*, this Court explained the critical difference between an unenforceable agreement to agree and an agreement that merely contemplates a more formal writing in the future:

> [W]here you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. Where it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail.

96 Va. at 47. Virginia has steadfastly applied these principles. *E.g.*, *id.* (agreement that was expressly "subject to" a later lease was unenforceable); *Golding*, 261 Va. at 193-95 (settlement memorandum that was "subject to execution of a formal agreement" was unenforceable). Given the unambiguous language of the ATA, the trial court properly held that the portion of the ATA concerning the parties' post-award conduct is unenforceable.

2. <u>The ATA as a whole evinces the parties' intent not to be bound to any post-award obligations until the execution of a subcontract</u>.

In *Navar*, this Court held that a teaming agreement was unenforceable because it was "merely an agreement to agree to negotiate at a future date." 291 Va. at 347. CGI relies on *Navar* for the proposition that the ATA is sufficiently certain to be enforceable, and contends that it satisfied the two-part test articulated in *Navar* for determining whether a contract has sufficient definiteness to be enforced. (Br., 20). This is incorrect.

Irrespective of whether CGI can satisfy the standards articulated in *Navar*, the ATA remains expressly "subject to" the execution of a future subcontract and, for this reason alone, may not be enforced. *Boisseau*, 96 Va. at 47. The teaming agreement in *Navar* was not expressly "subject to" execution of a later contract; rather, it failed because it did not contain reasonably certain terms that permitted the Court to find an enforceable contract. 291 Va. at 347. Thus, this Court in *Navar* did not address whether the teaming agreement would fail on the additional

ground presented here – that the ATA was expressly "subject to" the negotiation of a subcontract to govern the parties' post-award relationship. *Navar*, then, does not support the theory CGI presses.

Nevertheless, like the unenforceable teaming agreement in *Navar*, there are numerous material terms that are missing from the ATA, which reinforces the parties' intent that the ATA not govern their post-award conduct. JA 3365-66. For example, the ATA did not identify how many employees CGI would provide to earn its work share or how payments would be calculated, which was important because CGI insisted on being paid on a T&M basis. JA 2022-23. Even CGI admitted that a suitable subcontract would need to reflect agreement on these and a number of other material terms, none of which were in the ATA. JA 512.

Further, if the parties had truly intended to be bound by the ATA, then it would not have been necessary to enter the Letter Subcontract or the subcontract, which they were actively negotiating. Nor would the parties have agreed that the ATA would expire 90 days after award of the prime contract if no subcontract had been executed. JA 2635. Read as a whole, as it must be, the ATA evinces the parties' intent that a subcontract, not the ATA, would govern post-award conduct.

Nor was the 41% scope of work described in Exhibit A a binding term, as CGI claims. The ATA provided that the scope of work to be included in a subcontract was conditioned on mutual agreement of the parties. JA 2633. The

parties would not have needed to agree to the scope of work to be included in the subcontract if it was already a binding commitment. In addition, the ATA provided that the scope of work shown on Exhibit A would be "substantially met" at the end of the contract. JA 2640.

Consequently, the trial court held that the work share percentages were an "end goal," (JA 3365), a finding that CGI now criticizes. However, CGI's counsel conceded that the ATA provided the parties "wiggle room" on the 41% (JA 3269, 3272, 3280-81); that the 41% work share was just "a goal" (JA 3269); and that the ATA merely provided that "CGI will receive 41 percent *give or take*." JA 3272 (emphasis added). These concessions, and the ATA as a whole, support the trial court's holding that the 41% work share was not a binding commitment.

The trial court correctly recognized that the ATA was much like the unenforceable teaming agreement in *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013), *aff'd* 549 F. App'x 211 (4th Cir. 2014). JA 3364-66. Like the *Cyberlock* teaming agreement, the ATA "was expressly conditioned upon: (1) award of the prime contract to FCi; (2) inclusion in the prime contract of CGI's statement of work; [and] (3) the federal Government's specific approval of CGI as a subcontractor." JA 3366. It also was subject to the parties' agreement on "the statement of work, financial terms, and subcontract provisions." JA 2633.

As this Court recognized more than 100 years ago, the intent to execute a formal agreement in the future "is strong evidence" that the parties do not intend to be bound by their current agreement. *Boisseau*, 96 Va. at 46. Applying this principle, the district court in *Cyberlock* held that the teaming agreement was too vague to be enforceable. 939 F. Supp. 2d at 581. The trial court here properly relied upon *Cyberlock;* indeed, this Court recently cited it with approval in declaring the teaming agreement in *Navar* unenforceable. 291 Va. at 346-47.

3. <u>This Court's precedent supports the trial court's conclusion that the post-award provisions of the ATA are unenforceable</u>.

CGI does not cite any binding or persuasive Virginia authority for reversal of the trial court's decision. Its reliance on *Long View Int'l Tech. Solutions, Inc. v. Lin*, an unpublished decision where this Court held that a Term Sheet was an enforceable contract, does not help its case. 2017 Va. Unpub. LEXIS 9 (Va. Sup. Ct. 2017). The Term Sheet in *Long View* did not contain a "subject to" clause, a fact that this Court found to be a critical difference between the enforceable agreement in *Long View* and the unenforceable settlement agreement in *Golding*: the "Term Sheet does not contain [a subject to] clause and, therefore, it was not dependent for its efficacy upon the execution of a formal contract." *Id.* at *8. *Long View*, then, is inapposite.

CGI also cites *EG&G, Inc. v. Cube Corporation*, a Virginia circuit court opinion that found a teaming agreement enforceable. 63 Va. Cir. 634 (Fairfax

2002). Not surprisingly, this Court has never cited *EG&G*, even though it was decided 15 years ago. By contrast, this Court recently cited *Cyberlock* with favor, *Navar*, 291 Va. at 346-47, and *Cyberlock* strongly criticized *EG&G.* 939 F. Supp. 2d at 580. Finally, *EG&G* is distinguishable; once again, the teaming agreement there was not made expressly "subject to" a future subcontract.

C. Virginia law does not recognize different rules for teaming agreements.

CGI contends that the trial court's decision creates an "absurd" result. (Br., 20, 39). To the contrary, its decision is compelled by a faithful application of more than 100 years of Virginia contract law. Simply put, under Virginia law, "an agreement to agree" is not enforceable. Nor is an agreement which is expressly made "subject to" the execution of a future agreement. These two fundamental principles of Virginia law are dispositive – and fatal – to CGI.

CGI also fearfully forecasts that affirmance of the circuit court's ruling will doom the use of teaming agreements in Virginia, and Virginia's government contracting industry as a whole. (Br., 21). CGI's dire predictions, however, are unavailing. Virginia's contract law, and its treatment of teaming agreements, is clear and settled. Contracting parties to teaming agreements in Virginia have ample guidance on the requirements for an enforceable contract, and teaming agreements are subject to the same requirements. Thus, if CGI – a sophisticated contractor – had desired to enter an enforceable contract, it could have done so.

CGI's arguments also run afoul of this Court's recent admonition on the creative construction of contracts to save a party from its bad bargain. *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 189 (2016) ("We are aware of the temptation of courts to indulge in artificial interpretations or abnormal implications in order to save a party from a bad bargain. We resist this temptation . . .") (citations and internal quotations omitted). This Court cannot reverse a century of contract law to relieve CGI of the bargain it struck, and should decline CGI's invitation to create a separate rule for teaming agreements.

D. Even if the ATA is enforceable, CGI failed to prove any contract damages.

1. <u>This Court may affirm the trial court's ruling on different grounds</u>.

The trial court considered, but did not decide, other arguments that FCi raised as a basis to strike CGI's contract claim. Those arguments provide an alternative basis to affirm the trial court's decision. Therefore, if this Court believes that the trial court erred in finding that part of the ATA is unenforceable, then the "right result, wrong reason" doctrine applies to affirm that decision on different grounds that are supported by the record. *Lynnhaven Dunes Condo. Ass'n. v. City of Virginia Beach*, 284 Va. 661, 670 (2012); *Byler v. Virginia Elec. & Power Co.*, 284 Va. 501, 509 (2013) (applying the "right result, wrong reason" rule to affirm the trial court's decision).

2. <u>CGI failed to prove any damages caused by a breach</u>.

The proper measure of damages for breach of contract is the sum that would put CGI "in the same position, as far as money can do it, as if the contract had been performed." *Estate of Taylor v. Flair Property Assocs.*, 248 Va. 410, 414 (1994). That sum of money is the damages which arise from the breach of contract itself. *Manss-Owens Co. v. H.S. Owens & Son*, 129 Va. 183, 201 (1921). Contract damages must be proved as of the time of the breach. *United Va. Bank v. Dick Herriman Ford, Inc.*, 215 Va. 373, 375 (1974).

Further, as the jury was instructed, (JA 2294-95), CGI had the burden of proving the amount and cause of its damages with reasonable certainty. *Navar*, 291 Va. at 344. To satisfy this burden, CGI had to prove "'a causal connection between the defendant's wrongful conduct and the damages asserted," and any damages must be calculated "'by using a proper method and factual foundation.'" *Id.* at 344-45 (quoting *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 189 (2006)). A plaintiff may not recover speculative or contingent damages. *Suntrust Bank v. Farrar*, 277 Va. 546, 554 (2009); *Saks Fifth Ave., Inc.*, 272 Va. at 189.

a. CGI did not suffer any contract damages before award of the prime contract.

CGI claimed that FCi breached the ATA by not giving CGI management positions and 41% of the scope of work described in the ATA. JA 1473, 1480, 3283. CGI calculated its contract damages as the amount of overhead that it would have realized if the parties had agreed to a subcontract providing CGI with this

work share over the possible, but uncertain, five-year life of the VSS contract. JA 1193, 1294. CGI claimed that the breach of contract occurred on various dates, but *all before the prime contract was awarded*. JA 1474-75, 2490. CGI's counsel also acknowledged that it could incur only "nominal" damages *until after the prime contract was awarded.* JA 1478-79.

Contract damages are designed to put the non-breaching party in the same position he would have been in if the contract had been performed without a breach. *Estate of Taylor*, 248 Va. at 414. Under CGI's theory, then, it could not have suffered any damages. As CGI claimed that the breach of contract occurred one year *before* the prime contract was awarded, it was merely entitled to continued performance of the ATA, which included negotiation of a subcontract (if FCi won the prime contract). That is exactly what CGI got. At best, then, CGI had "an unenforceable right to negotiate towards a [sub]contract." *See Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 494 (E.D. Va. 2002) (letter of intent requiring parties to negotiate in the future is unenforceable).

Before the prime contract was awarded, CGI had no damages, or at least no evidence of damages that it presented at trial. As CGI essentially acknowledged, its claim to the 41% and 10 management positions had not ripened into actual damages before award of the prime contract, which did not occur until one year *after* the date of the alleged brief. JA 1478-79. But, even without a breach, CGI

would have been in the same position: it had the right to continued performance of the ATA and the opportunity to negotiate the terms of a subcontract, all of which occurred. Therefore, CGI failed to prove any damages it had suffered at the time of the breach. *See United Va. Bank*, 215 Va. at 375.

Moreover, CGI did not contend that the failure to reach agreement on the subcontract was a breach of the ATA. Rather, CGI maintained that the breach occurred much earlier. JA 1474-75. In fact, CGI confirmed that it was not suing for breach of the contractual duty to negotiate for a subcontract. *E.g.*, JA 1473: "We're not trying to enforce the 'you didn't negotiate in good faith' provision;" *see also* 1480, 2467.[14] Nor could it. The ATA did not require FCi to enter a subcontract with CGI, but only to negotiate for one. JA 2633. Therefore, the failure to negotiate for, or agree to, a subcontract cannot support contract damages.

b. CGI failed to prove a causal connection between its damages and any wrongful conduct.

CGI failed to prove a causal connection between FCi's conduct and its claimed damages. The alleged breach of the ATA was not a cause of CGI's failure

[14] CGI's trial theory differed from the claim it plead. CGI plead that "FCi breached its obligation to award CGI Federal a definitive subcontract upon award of a Prime Contract when it" failed to provide CGI a 41% work share and management positions "in the superseding subcontract." JA 46-47. CGI may not recover on the theory it plead, but did not prove at trial. *See Allison v. Brown*, 293 Va. 617, 626 ("Pleadings are as essential as proof, the one being unavailing without the other.") (internal quotations and citation omitted).

to obtain the benefits of the purported 41% work share. Rather, the cause of any loss was the parties' inability to agree to a subcontract, an undisputed fact that is completely unrelated to any claimed breach. JA 1473, 1480. Plainly, CGI had no right to a subcontract at the time of the breach (or at any time thereafter).

Thus, CGI's claim for overhead that it would have realized under a subcontract is based on a fiction unrelated to a breach of the ATA. *See Vasquez v. Mabini*, 269 Va. 155 (2005) (personal injury damages were based upon "the fiction" that decedent's son, who died 6 months after decedent's death, would have lived through decedent's life expectancy); *Farrar*, 277 Va. at 557 (in breach of fiduciary duty case, "[b]eneficiaries failed to present sufficient evidence that a sale of the property before 1997 was possible, and therefore failed to prove damages").

Finally, CGI did not introduce evidence of damages that it could tie to a breach of the ATA occurring before award of the prime contract. For example, CGI did not introduce any damages resulting from the lost opportunity to team with another prime contractor for the same government contract. *See Saks Fifth Avenue, Inc.*, 272 Va. at 189 (plaintiff did not meet its burden of proving that defendant's conduct caused any damages where it failed to connect the company's lost profits to anything other than the fact that the employee who left was no longer at the company). Instead, CGI introduced damages that had no connection with any allegedly wrongful conduct by FCi.

II. CGI COULD NOT PROVE UNJUST ENRICHMENT.

CGI brought an unjust enrichment claim as an alternative to its breach of contract claim. JA 48. CGI divided its unjust enrichment claim into two parts: (1) quantum meruit, seeking recovery of $300,000 in "bid and proposal costs" during the pre-award solicitation process;[15] and (2) the disgorgement of *FCi's* anticipated profits from the VSS contract. JA 48-49, 3516, 3518-19, 3521.

Although CGI complains that the trial court granted summary judgment without stating why, (Br., 45), the rationale was obvious after mountains of briefing and argument. More importantly, the trial court's conclusion was correct.

A. Because there were two enforceable, express contracts governing the parties' relationship, unjust enrichment was not an available remedy.

Unjust enrichment is an equitable theory where an implied contract is imposed by law because the parties have failed to arrive at an enforceable bargain themselves, but compensation is nevertheless due for services rendered. *Po River Water & Sewer v. Indian Acres Club*, 255 Va. 108, 114-15 (1998). In keeping with the salutary principle that courts do not rewrite contracts to relieve parties from the bargains they strike, unjust enrichment is not available if there is an enforceable, express contract governing the parties' relationship. *Spectra-4, LLC v. Uniwest*

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[15] CGI alleged that it conferred a benefit on FCi during the pre-award solicitation phase by providing its experience and expertise in preparing the proposal; by not participating on any other team responding to this procurement; and by permitting FCi to identify three CGI contract references in the proposal. JA 48.

Commercial Realty, Inc., 290 Va. 36, 45 (2015) (implied contract may exist "[i]n the absence of an express contract between the parties governing a particular subject matter"); *Nedrich v. Jones*, 245 Va. 465, 476 (1993); *Ellis & Myers Lumber Co. v. Hubbard*, 123 Va. 481, 501-02 (1918) (where there is "an express and an enforceable contract in existence which governed the rights of the parties, the law will not imply a contract in contravention thereof").

CGI could not maintain an unjust enrichment claim because there were two enforceable, express contracts that governed the parties' relationship – the pre-award provisions of the ATA and the Letter Subcontract. And, most importantly, CGI received precisely what it bargained for under each of these contracts – no compensation under the ATA and $2 million under the Letter Subcontract. Unjust enrichment has never been intended to provide a party *more* than it bargained for, yet this is the unprecedented result CGI seeks.

1. <u>The enforceable provisions of the ATA govern the parties' relationship with regard to the solicitation process and the assignment of risk</u>.

By its own terms, the ATA "states the entire agreement between the parties . . . with respect to the Program or Solicitation." JA 2638. The trial court's ruling on enforceability left intact the pre-award provisions of the ATA, (JA 3367), which governed the parties' agreement regarding the solicitation process. Consequently, the existence of an enforceable, express contract relating to the pre-award solicitation process bars the unjust enrichment claim.

CGI's quantum meruit claim for $300,000 covers its "bid and proposal costs," all of which were incurred before the award of the VSS contract. JA 48-49. CGI, however, expressly disavowed any right to compensation for pre-award services it provided during the solicitation process by agreeing that each party "shall bear its own respective costs, expenses, risks, and liabilities arising out of performance under" the ATA. JA 2633. The law cannot imply a contract for the payment of these expenses when it is expressly precluded by an enforceable, express contract that governs the same subject. *E.g.*, *Nedrich*, 245 Va. at 476.

This provision, and other pre-award provisions, also bar CGI's claim for any profits FCi might realize through the VSS contract. Because the parties expressly agreed to bear their own risks and liabilities in this endeavor, (JA 2633), they intended that each side assume the risks arising out of performance of the ATA, which included the risk that no prime contract or subcontract would ever be awarded. They also agreed that they would not "shar[e] in the profits or losses arising out of the efforts of either or both of the parties," (JA 2636), and would not be entitled to lost profits, special damages, or consequential damages. JA 2636-37. There could be no clearer statement of the intent of the parties to preclude the very claim that CGI has pursued – a share of FCi's profits.

Nevertheless, the measure of recovery for quantum meruit is the reasonable value of the services rendered, not the benefit that accrues to the person for whom

the services were performed. *Campbell County v. Howard*, 133 Va. 19, 49 (1922). Therefore, CGI cannot bootstrap its $300,000 pre-award effort into a $6 million share of FCi's future profits.

2. The Letter Subcontract governed the parties' post-award relationship and, therefore, precludes CGI's unjust enrichment claim.

The Letter Subcontract governed the parties' post-award conduct. It describes the terms of CGI's work and how it would get paid, thus demonstrating the parties' appreciation for the terms needed for an enforceable agreement. JA 2759. Pursuant to this express contract, CGI was paid more than $2 million for work performed on the VSS contract while the parties negotiated the terms of a subcontract. JA 619-20, 1196. To the extent that CGI seeks to recover profits it might have earned under the subcontract, the Letter Subcontract bars that claim because it covers the same subject matter as the subcontract under negotiation.

CGI does not, and indeed cannot, claim that the Letter Subcontract is unenforceable. Rather, CGI claims that the Letter Subcontract does not cover the same subject as the unjust enrichment claim because "it does not seek compensation for this short-term work," but rather, for "the benefits that CGI conferred on FCi to help win the prime contract." (Br., 48). CGI misses the point. The very existence of the Letter Subcontract and the ATA defeats the unjust enrichment claim. The Letter Subcontract is an express, enforceable agreement covering CGI's post-award relationship with FCi, and the ATA is an express,

enforceable agreement covering CGI's pre-award relationship. Thus, the entire subject matter of the parties' relationship is already covered by express agreements, and the law will not imply a different contract in contravention thereof. *Nedrich,* 245 Va. at 476 (the law will not impose an implied contractual relationship in contravention of an express agreement).

B. CGI failed to show that FCi should reasonably have expected to pay CGI for its efforts on the proposal or for a share of its profits.

To prove unjust enrichment, CGI had to show that: (1) it conferred a benefit on FCi; (2) FCi knew of the benefit and should reasonably have expected to repay CGI; and (3) FCi accepted or retained the benefit without paying for its value. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008). CGI could not prove the second element of its unjust enrichment claim – that FCi should reasonably have expected to repay CGI – because the parties intended that they would be responsible for their own losses, and would not share profits.

As discussed, the parties agreed to "bear their own respective costs, expenses, risks, and liabilities arising out of performance under" the ATA. JA 2633. Further, they agreed not to "shar[e] in the profits or losses arising out of the efforts of either or both of the parties," (JA 2636), and to have no right to lost profits, special damages, or consequential damages. JA 2636-37.

"One may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that

the defendant promised to pay the plaintiff for such benefit." *Nedrich*, 245 Va. at 476. In support of summary judgment, CGI produced no evidence to show that FCi reasonably should have expected to pay CGI for the costs it incurred for efforts on the solicitation, or to share its profits if the government awarded FCi the prime contract. To the contrary, the ATA demonstrates the parties' intent that such a payment *was not* contemplated, and *would not* be made. JA 2633, 2636-37. Consequently, CGI failed to prove the second element of unjust enrichment.

C. In severing the unenforceable post-award provisions from the enforceable pre-award provisions of the ATA, the trial court gave effect to the parties' intent.

CGI maintains that the trial court erred in using the ATA to bar its recovery for unjust enrichment because (1) the trial court declared the ATA unenforceable and (2) the ATA's severability clause should not be enforced. CGI is incorrect.

1. <u>The pre-award provisions of the ATA survived the trial court's breach of contract ruling</u>.

First, CGI overlooks the fact that the trial court did not find that the entire ATA was unenforceable. As the court stated in its letter opinion, it found unenforceable only the post-award provisions of the ATA. (JA 3367: "CGI's claim that FCi breached the ATA must fail as a matter of law because that agreement is unenforceable with respect to work to be performed post-award."; *see also* JA 3457, 3607). CGI even admitted below that the court found only the post-award provisions of the ATA unenforceable. JA 3484-85. CGI cannot now take an

inconsistent position. *E.g.*, *Matthews v. Matthews*, 277 Va. 522, 528 (2009) ("a party may not 'in the course of the same litigation occupy inconsistent positions'") (quoting *Hurley v. Bennett*, 163 Va. 241, 252 (1934)).

CGI also contends that the trial court must have declared the entire ATA unenforceable because it set aside the entire contract verdict. CGI reasons that because it had also alleged other breaches of the ATA that did not trigger the post-award work share provisions of the ATA, the decision to set aside the verdict necessarily meant that the entire ATA was unenforceable. This argument ignores CGI's evidence at trial. CGI's only contract damages were what it might have received post-award (*i.e.*, if the parties had entered a subcontract giving CGI 41% of the work share and management positions). CGI did not present any damages based upon any of the other purported breaches alleged in its Amended Complaint. JA 3459-60. And for good reason – the pre-award provisions of the ATA precluded any recovery by CGI. JA 2633, 2636. Consequently, when the trial court ruled that the post-award provisions of the ATA were unenforceable, it had no choice but to set aside the breach of contract verdict in its entirety.

2. <u>The parties intended that any part of the ATA that was unenforceable be severed from the valid parts of the agreement</u>.

The ATA itself provides that any unenforceable provision be severed. It states: "If any part, term, or provision of this Teaming Agreement shall be held void, illegal, unenforceable, or in conflict with any law of a Federal, State, or local

Customer having jurisdiction over this Teaming Agreement, the validity of the remaining portions of provisions shall not be affected thereby." JA 2638. Given this plain language, the parties obviously intended that, in the event part of the ATA was declared unenforceable, the rest of the agreement would survive.

CGI contends, however, that "this is not how severability clauses work." (Br., 47). To the contrary, the trial court properly enforced this provision.

Whether contractual provisions are severable is determined from the intention of the parties. *Eschner v. Eschner*, 146 Va. 417, 422 (1926). The intent of the parties is to be determined from the agreement itself. *O'Quinn v. Looney*, 194 Va. 548, 551-52 (1953) (in determining if a contract is severable, "[i]f the intent is expressed in the writing, it of course controls"). Further, a contract is to be "construed as a whole," and "[t]he various provisions are harmonized, giving effect to each when reasonably possible, and are construed considering the circumstances under which they were executed and the condition of the parties." *Schuiling v. Harris*, 286 Va. 187, 193 (2013).

This Court addressed a similar issue in *Schuiling*, a case on which CGI unwisely relies. The issue in *Schuiling* was whether the designation in an arbitration agreement of a certain arbitrator was integral to the agreement, making the entire agreement unenforceable upon the designated arbitrator's unavailability.

The agreement included a broad severability clause. In deciding whether the arbitrator designation could be severed, this Court explained:

> A contract is either entire, meaning all its provisions are integral to the agreement of the parties, or severable. Thus, whether a provision is severable or integral is the same inquiry: *a provision integral to the parties' agreement cannot be severed and one the parties intended to make severable is not integral*. Accordingly, the analysis is identical: "No precise or invariable rule can be laid down . . . for it is a question of construction as to the intention of the parties to be discovered in each case from the language employed and the subject matter of the contract." In addition, the court considers "the situation of the parties and the object they had in view at the time and intended to accomplish."

Id. at 193 (citations omitted and italics added).

As the central purpose of the agreement in *Schuiling* was to ensure arbitration, this Court enforced the severability clause, holding that the unavailability of the designated arbitrator did not render the entire agreement unenforceable. *Id.* By contrast, not severing this provision would have defeated the entire agreement, a result that contradicted the parties' expressed intent. *Id.*

As in *Schuiling*, the severability clause in the ATA is "broad." *Id.* at 495. It reflects the parties' intent that "if any part, term, or provision" of the ATA be held "unenforceable," then "the remaining portions" of the agreement "shall not be affected thereby." JA 2638. This result gives effect to the central purpose of the ATA – for the parties to partner to win the VSS contract. The recitals in the ATA focus exclusively on the parties' efforts to win that contract. Indeed, the parties

entered the ATA for the purpose of "defin[ing] their mutual rights and obligations in connection with the efforts to be undertaken in response to the Solicitation." JA 2631. That purpose is not undermined by severing the post-award provisions, which were plainly intended to be determined *after* award of the VSS contract. A contrary finding would lead to an absurd result.[16]

D. CGI fails to show any legal error that the trial court committed.

CGI contends that its unjust enrichment claim cannot be barred by the ATA because that agreement was fraudulently induced. (Br., 45-46). This argument is incorrect as a matter of fact and law.

As a factual matter, CGI based its entire fraud claim on the modification to the ATA which reduced its work share to 41% and 10 management positions. CGI explained that it was not seeking rescission of the ATA – even though its fraud allegations read that way (JA 50-51) – but rather was seeking to enforce it. JA 3298. Thus, CGI is obliged to "take the good with the bad," which includes the

[16] Because the unenforceable provisions of the ATA are severable – as the parties intended – the ATA does not fail for lack of mutual consideration. CGI's principal reliance for this proposition is *Schuiling*. (Br., 46). There, however, this Court enforced the severability clause, and the agreement was enforceable without the severed term. 286 Va. at 193. Here, the pre-award provisions were supported by the mutual promises to collaborate on pre-award efforts, and the post-award provisions were not the sole consideration for the pre-award promises. As both parties were bound by the ATA, there was no failure of consideration by severing its post-award provisions. *Compare Vinton v. Roanoke*, 195 Va. 881, 896 (1954) (covenant requiring company to furnish all water the town needed, but not binding the town to take any water, lacked mutuality of promises).

severability clause it seeks to escape. *See Wilson v. Hundley*, 96 Va. 96, 101 (1898) (plaintiff affirming a fraudulently induced contract is bound by the terms of the contract). Additionally, the pre-award provisions and the severability clause are part of the original teaming agreement, and pre-date the amendment in any event. JA 2638. Because the trial court enforced the provisions of the ATA that were untouched by CGI's fraud claim, it did not err in finding that those provisions barred the unjust enrichment claim. Lastly, as CGI never claimed that the Letter Subcontract was fraudulently induced, it cannot explain how the Letter Subcontract would fall victim to its argument.

CGI's argument also fails on the law. Because the cases CGI cites for the argument it advances do not involve unjust enrichment, (Br., 46), they do not stand for the proposition CGI asserts. Indeed, they cannot, as Virginia has long held that unjust enrichment does not lie where there is an enforceable, express agreement on the same subject. *E.g.*, *Nedrich*, 245 Va. at 476. In short, CGI cannot use the theory of unjust enrichment to drive a better bargain for itself.[17]

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[17] If this Court reinstates the jury's verdict on the contract or fraud claims, CGI is not entitled to remand of its unjust enrichment claim. (Br., 48-49). As discussed, the unjust enrichment claim is plainly barred by the existence of the ATA and Letter Subcontract.

III. CGI'S FRAUDULENT INDUCEMENT CLAIM WAS SIMPLY A BREACH OF CONTRACT CLAIM SEEKING BENEFIT-OF-THE-BARGAIN DAMAGES.

CGI sought fraud damages measured as the profits it might have received under a subcontract giving it a 41% work share and 10 management positions. Because the parties failed to enter a subcontract before expiration of the ATA, the trial court properly found that CGI failed to prove any damages. JA 3370-71.

Further, this Court may affirm the trial court's decision on the alternative grounds FCi raised below. *See Byler,* 284 Va. at 509 (applying right result, wrong reason doctrine). Specifically, CGI failed to prove fraudulent inducement because: (1) its fraud claim sounded in contract; (2) it failed to prove reliance damages; (3) with full knowledge of the alleged fraud, it ratified and performed the agreement, and received its benefits; (4) the post-award provisions of the ATA were unenforceable; and (5) CGI could not recover damages for unexercised option years of the VSS contract.

A. CGI turned a simple breach of contract claim into a fraud claim.

CGI contends that it proved a tort that was independent from contract, and that the trial court impermissibly conflated tort and contract principles. (Br. 23, 29). CGI's complaints do not square with established Virginia law. Although CGI's theory of fraud (i.e., inducement to enter the ATA) might have been independent from the ATA, its evidence of breach and the damages purportedly

flowing therefrom were inextricably tied to that document. Moreover, CGI never claimed that the parties' original teaming agreement was infected by any fraud, which further underscores the *ex contractu* nature of the claim.

This Court has cautioned that every breach of contract should not be converted into an action for fraud. *Lloyd v. Smith*, 150 Va. 132, 145 (1928). Where the essence of the fraud claim is the breach of a contract, a fraud action will not lie. *Richmond Metro. Auth. v. McDevitt Street Bovis*, *Inc*., 256 Va. 553, 558-60 (1998).

To maintain the important distinctions between contract and fraud, this Court has "consistently adhered to the rule that, in order to recover in tort, 'the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.'" *Dunn Constr. v. Cloney*, 278 Va. 260, 267 (2009) (citation omitted). Whether a cause of action sounds in contract or tort requires a determination of "the source of the duty violated." *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 361 (2010). "The controlling policy consideration underlying tort law is the safety of persons and property – the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for." *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 425 (1988). Therefore, a tort claim is not available

for "losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law." *Filak v. George*, 267 Va. 612, 618 (2004).

CGI did not prove that FCi breached a duty that is independent from the duty it assumed under the ATA.

First, the source of the duty was one assumed only by contract. CGI does not point to any common law or statutory duty underpinning its fraud claim. Instead, it sought to recover for its disappointed contractual expectations, *i.e.*, the net revenue it hoped to receive from a future subcontract. *E.g.*, JA 1293-00. Thus, the alleged fraud was tied solely to lost economic expectations stemming from a contractual bargain, not to violation of an independent legal duty.

The only unfulfilled promise is the one in the ATA – that CGI would get a 41% work share and management spots if the parties executed a subcontract.[18] However, any failure to fulfill this contractual promise is not a duty that exists independent of the ATA*; indeed, it arises by virtue of the ATA itself*. In the absence of an independent wrong to support its fraud claim, CGI's only available action was one for breach of contract.

[18] CGI asserts that the basis for its fraud claim is Miller's email to CGI on April 17, 2013. (Br., 24-5; JA 2523-26). That email promised only to amend the teaming agreement to give CGI a 41% work share and 10 management positions. JA 3027. FCi kept the promise it made in the email when it executed the amendment to the teaming agreement. Even so, that promise was purely contractual.

Second, CGI did not seek redress in fraud for personal injury or property damage – the very harms that tort law is designed to remedy. *Compare Devine v. Buki*, 289 Va. 162 (2015) (plaintiffs proved fraudulent inducement in purchase of damaged property); *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 493 (2011) (negligence claim stated against pest control company for personal injury and property damage where plaintiffs alleged breach of common law and statutory duties independent of company's contractual duty to control pests); *Abi-Najm*, 280 Va. at 362-64 (plaintiffs stated a claim for fraudulent inducement where they alleged statutory consumer protection violations relating to property). Instead, CGI seeks money for FCi's failure to fulfill a contractual promise. Because CGI does not seek to remedy a violation of common law or statutory duties that "are imposed to protect the broad interests of society," its claim must "remain the sole province of the law of contracts." *Filak*, 267 Va. at 618.

Third, as CGI admits, fraudulent inducement occurs before a contract is formed. (Br., 23). Here, though, the false representation post-dated the agreement. CGI alleged that the fraud occurred in April 2013, well after the teaming agreement was signed. JA 2639. Timing is important because, in a fraudulent inducement case, the independence of the fraud from the contract may be proven where the fraud precedes the contractual relationship. *Abi-Najm*, 280 Va. at 363 ("The fraud alleged by the purchasers was perpetrated . . . before a contract

between the two parties came into existence, therefore it cannot logically follow that the duty [the seller] allegedly breached was one that finds its source in the Contracts."). Here, the contractual relationship was already in place when the fraud allegedly occurred, thereby negating the breach of an independent duty outside of the contractual relationship.

B. CGI utterly failed to prove fraud damages.

1. The trial court correctly held that CGI was entitled to damages for the 90-day period until the ATA expired.

CGI criticizes the trial court's decision limiting its fraud damages to the period when the ATA was in effect, arguing that contractual limitations cannot bar a fraud claim. CGI ignores its own damages theory, and Virginia's fraud law.

The trial court's holding was that CGI's damages evidence is "inadequate to support the [jury's] award." JA 3370. The court based this holding on CGI's contention that "[t]he measure of damages for the tort of fraudulent inducement is the full economic value of the contract to which CGI was induced into signing and performing." JA 3092; *see also* 3088, 3091. CGI also insisted that "the value of [fraud] damages is properly measured as the value of the contract had it not been breached." JA 3093.

As CGI asserted that it was entitled to the benefit of its bargain, the trial court properly held that CGI failed to prove any damages based upon what would have been due under the ATA. Under the ATA, the parties' relationship would

cease, and the agreement would expire, no later than 90 days after award of the prime contract if the parties failed to enter a subcontract. JA 2635. CGI never claimed that this provision was the product of any fraud; indeed, it was part of the original teaming agreement. JA 2635.

Having elected to perform the ATA, rather than rescind it, CGI affirmed the agreement, and "consent[ed] to be bound by its provisions." *Wilson*, 96 Va. at 101 (describing available remedies for fraudulent inducement). The trial court, then, correctly held that "the benefit of the bargain that CGI may be entitled to is that which it was due under the ATA, not under a subcontract that was never entered into. Thus, CGI's damages cannot extend more than 90 days from the date the prime contract was awarded." JA 3370.

Even so, the trial court simply gave CGI what it asked for: the benefit of its bargain with FCi without the breach. Having invited the court to measure its fraud damages in accordance with the ATA, CGI cannot now complain that the trial court did just that. *See, e.g., Phillip Levy & Co. v. Davis*, 115 Va. 814, 820 (1914) (a party cannot complain of error which he invited).

Nor did the trial court use the ATA to shield FCi from a fraud claim. (Br., 31). The court did not apply any damages' limitation or contractual disclaimer in the ATA to restrict the fraud claim. Rather, it applied the theory that CGI itself supplied, which required fraud damages to be measured "as the value of the

contract had it not been breached." JA 3093. These facts distinguish the cases CGI cites for the proposition that contractual limitations cannot limit fraud damages. (Br., 31-32). Here, the court simply recognized that CGI could not prove the requisite nexus between the alleged fraud and its damages because there was no subcontract. CGI cannot embrace the ATA, and also ask the court to delete the 90-day term and replace it with a five-year term from a subcontract that never existed.

2. CGI's fraud damages were not the result of any fraud.

Even if CGI's damages were not limited by the expiration of the ATA, CGI nevertheless failed to prove any damages caused by the alleged fraud. As with all fraud claims, CGI had to prove that it relied on a false representation and that its reliance led to damages. *Sales v. Kecoughtan Hous. Co.*, 279 Va. 475, 481 (2010). The jury was instructed on this important point of Virginia law. JA 2292.

"The usual remedy in an action for fraud is to restore the defrauded party to the position he held prior to the fraud." *Murray v. Hadid*, 238 Va. 722, 731 (1989). Over FCi's objection, the jury was instructed that the measure of damages for fraud is "all the losses [CGI] sustained, including gains prevented that are a natural and ordinary result of the fraud." JA 2295. Here, though, CGI's fraud damages were not the natural and ordinary result of any fraud; indeed, they did not flow from the alleged fraud at all.

The crux of CGI's fraudulent inducement claim was the modification to Exhibit A that allegedly induced CGI to reduce its work share from the 45% promised in the original teaming agreement to 41% and management positions. (Br., 24-25). Thus, the proper measure of CGI's damages resulting from reliance on the false promise was the delta between these two figures. *See Murray*, 238 Va. at 731 (reliance damages). Because it had no reliance damages, CGI measured its damages as the profits it *might* have received over the one-to-five-year VSS contract (which had not yet been awarded),[19] and assumed that the parties had agreed to a subcontract with a 41% work share. As CGI's damages fix the benefit it lost from its uncertain bargain, not the losses resulting from any detrimental reliance on the 41% promise, they are contract damages, not fraud damages. Even worse, these damages are not the natural and ordinary result of the alleged fraud. Because no subcontract was ever entered, CGI did not suffer any damages resulting from its reliance on a promise to receive a smaller work share in a subcontract.

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[19] CGI claimed that the fraud occurred in April 2013 when it signed the modification to the teaming agreement. (Br., 24-25). At that time, though, CGI had no fraud damages. *See Klaiber v. Freemason Assocs.*, 266 Va. 478, 485-86 (2003) (damages for fraudulent inducement of a contract are measured from the time of the fraud or contracting); *Tyson v. Williamson*, 96 Va. 636, 639 (1899) (same). In April 2013, the VSS contract had not been awarded and, in any event, all damages would have flowed from a subcontract that never materialized.

Nor did CGI offer proof of damages it sustained by signing the ATA with the 41% reduction instead of walking away from the agreement altogether. For instance, although Wells testified that he was only interested in the relationship with FCi if CGI received more than a 40% work share,[20] (JA 554-55), CGI presented no evidence that – at the time of the alleged fraud – it could have joined with another small business to compete for the VSS contract with a minimum 40% work share. Further, by the time it signed the ATA in April 2013, CGI had already completed its work on the submitted initial proposal. Consequently, CGI did not incur any additional expense in the solicitation process as a result of signing the amendment. Signing the agreement, rather than walking away, then, put CGI in the same position it would have been in if it had refused to sign.

In sum, CGI did not prove that its reliance on the 41% promise put it in a worse position than if there had been no promise. *Community Bank*, 221 Va. at 175 ("'there is no damage where the position of the complaining party is no worse than it would be had the alleged fraud not been committed'") (citation omitted).

[20] Wells' testimony about the 40% work share did not square with the parties' subcontract negotiations. By the end of October 2014, CGI had agreed to a 22% work share. JA 582, 616, 1604, 1900.

3. CGI cannot recover damages for the fraudulent inducement of an agreement that, after discovery of the fraud, it ratified and performed, and from which it reaped substantial benefits.

CGI admitted that it discovered FCi's fraud on March 31, 2014, (JA 50), but nevertheless, it continued to perform under the ATA until it was terminated for reasons unrelated to any fraud. CGI also executed the Letter Subcontract, for which it received over $2 million, while simultaneously engaging in ongoing negotiations for a subcontract, as the ATA required. Then, when the parties' contractual relationship ended, again for reasons unrelated to any fraud, CGI sued for the additional benefits it would have obtained if the parties had continued to perform the ATA and, later, if they had executed of the subcontract.

Having concluded that it had been fraudulently induced to modify the ATA, CGI could not ratify and perform under the ATA, receive the benefits of that agreement, and then sue for fraudulent inducement of the very same agreement:

> "The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence, to disaffirm the contract, or abandon, the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations."

Lloyd, 150 Va. at 148 (citation omitted); *see Virginia-Carolina Rubber Co. v. Flanagan*, 150 Va. 276, 281-82 (1928) (having received the benefits of a

fraudulently induced stock subscription agreement, subscriber could not obtain fraud damages). Although CGI could have disaffirmed the ATA and sought rescission, *Lloyd*, 150 Va. at 148, it instead fully embraced the ATA and received at least $2 million in benefits from that agreement. Under these circumstances, CGI waived any performance damages for fraudulent inducement.

4. CGI cannot recover damages for unexercised option years of the VSS contract.

At a minimum, though, CGI failed to prove any lost profits beyond the second year of the VSS contract because the government had not exercised option years 3, 4 and 5. "[A]s a matter of law, damages for unexercised option years [of a government contract] are unrecoverable" because "the government is under no obligation to exercise the option." *Mktg. & Mgmt. Info., Inc. v. United States*, 62 Fed. Cl. 126, 130-31 (2004); *see Murray*, 238 Va. at 731 ("'It is well settled that . . . prospective profits are not recoverable in any case if it is uncertain that there would have been any profits.'") (citation omitted). As a matter of fact, no one could predict at the time of trial whether the government would exercise the remaining option years of the contract. JA 1113-14.

C. CGI cannot recover for the fraudulent inducement of an unenforceable agreement.

CGI's fraud claim fails because the modification of the teaming agreement on which it depends is unenforceable. To recover for fraud, a plaintiff's reliance

on the defendant's representation must be reasonable. *Metrocall of Delaware, Inc. v. Cont'l Cellular Corp.*, 246 Va. 365, 374 (1993). "'Where a promise is legally unenforceable . . . a plaintiff is unable, as a matter of law, to establish that his reliance was reasonable.'" *Sneed v. American Bank Stat. Co.*, 764 F. Supp. 65, 68 (W.D. Va. 1991) (quoting *Longnecker v. Ore Sorters (N.A.), Inc.*, 634 F. Supp. 1077, 1082 (N.D. Ga 1986)); *see also McNierney v. McGraw-Hill, Inc.*, 919 F. Supp. 853, 861 (Md. 1995) (Maryland law). Thus, CGI could not suffer damages resulting from the fraudulent inducement of an unenforceable contract.[21]

CONCLUSION

The trial court's judgment should be affirmed, and final judgment entered for FCi. This is the only outcome which will give effect to the enforceable portions of the ATA, the Letter Subcontract, and the well-established precedent applicable to this case.

FCi FEDERAL, INC.

By: /s/ Monica Taylor Monday

[21] Comment C of §530 of the Second Restatement of Torts does not help CGI. This Court has not adopted that portion of Comment C relating to unenforceable contracts. *Compare Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 351 (1982) (citing Comment C for a different proposition). Nevertheless, Comment C does not expressly apply to an agreement that is unenforceable due to missing material terms. Fraud, even if proven, cannot conjure material terms on which the parties never agreed.

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by emailing one copy to them; on the same day, I caused the correct number of copies of this Brief to be filed with this Court.

The brief complies with the page limits prescribed by the Court.

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