NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
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Re: *CGI Federal, Inc. v. FCi Federal, Inc.*
Case No. CL-2015-4021

Dear Counsel:

The Plaintiff, CGI Federal, Inc. ("CGI"), filed a three-count complaint against the Defendant FCi Federal, Inc. ("FCi") claiming a breach of the Parties' Amended Teaming Agreement ("the ATA") (Count I), unjust enrichment (Count II) and fraud in the inducement (Count III). A trial by jury was held April 11 – 14, 2016 on Counts I and III.[1] The jury returned its verdicts in favor of CGI on both counts, awarding damages of $3,465,000 for breach of contract and $8,533,000 on fraud in the inducement. The Court took under advisement FCi's motion to strike the evidence made at the close of all of the evidence,

[1] On Count III, the fraud in the inducement claim, CGI sought damages and not equitable relief, and demanded a trial by jury. A bench trial on Count II has not been scheduled at this time.

OPINION LETTER

and requested briefing. FCi has now made a motion to set aside the jury verdict, which the parties have fully addressed in their post-trial briefs.

The Court heard oral argument on the post-trial briefs on June 16, 2016. Since that time, the Court has had sufficient time to consider the oral and written arguments and is prepared to rule. For the reasons that follow, the Court grants the Defendant's motion to set aside the jury verdict on Count I and Count III, and will enter judgment in favor of the Defendant on these counts.

FACTUAL BACKGROUND

CGI is a large government contractor providing services to the Federal government in support of military, civilian and intelligence operations. FCi at all times relevant to this case was a woman-owned small business government contractor also providing services to the Federal government. In September 2012, the United States Department of State issued a solicitation seeking qualified small businesses to bid on providing visa support services (hereafter, "the VSS Solicitation"). Both CGI and FCi were interested in bidding on this work. Because the VSS Solicitation was designated as a small business set-aside, CGI could not bid on the work as prime contractor. FCi, as a qualified small business, was eligible to bid as a prime contractor. CGI and FCi agreed to work together to submit a proposal in response to the VSS Solicitation.

The Teaming Agreement

The Parties' agreement was memorialized in a written Teaming Agreement signed by them and effective September 19, 2012. Plaintiff's Exhibit 1. Exhibit A to the Teaming Agreement set out the Statement of Work regarding proposal preparation (Section I) and program execution after the prime contract was awarded (Section II). An amended Exhibit A was executed in April 2013.[2] Plaintiff's Exhibit 2. The original Teaming Agreement plus the amended Exhibit A constitute the ATA. The relevant portions of the ATA are described below.

Section 1.0 provides that the ATA applies only to the VSS Solicitation. FCi would submit a proposal naming FCi as the prime contractor and CGI as a subcontractor. CGI agreed that it would team exclusively with FCi and not team with any other offerors for

[2] This amendment was signed by CGI on April 23, 2013 and by FCi on April 26, 2013. By its terms, the amendment became effective April 17, 2013.

the VSS Solicitation. FCi was permitted to team or contract with other entities in addition to CGI provided "however, if adding any supplemental teaming partner affects CGI's work share under Exhibit A, the parties will discuss and mutually agree upon the proposed addition in advance."

Section 2.1 provides that "[FCi], as the proposed prime contractor, shall retain express and exclusive control over all prime proposal activities in response to the [VSS] Solicitation including proposal preparation and revisions thereto, as well as the negotiation of any resultant prime contract. [FCi] will consult with [CGI] on proposal decisions affecting data and material submitted by [CGI], provided, however, that [FCi] alone shall determine the final form and content of the proposal and any revisions thereto." FCi retained control of all post-award activities under the VSS program, including management, technical direction and government liaison (pursuant to Section 2.4). **Section 2.6** provides that "[CGI] agrees to take all reasonable steps to meet competitive prices derived from pricing discussions between FCi Federal and [CGi]." **Section 2.7** provides that "each party shall bear its own respective costs, expenses, risks and liabilities arising out of performance of the Teaming Agreement, except as agreed otherwise in writing."

Section 3.1 provides that "[i]f [FCi] is selected by the Government as the prime contractor under the [VSS] Solicitation and the prime contract includes [CGI]'s scope of work as set forth in **Exhibit A** hereto, [FCi] and [CGI] will enter good faith negotiations for a subcontract for such services, subject to ... terms of the prime contract . . . . [CGI] agrees to accept applicable subcontract terms and conditions flowed down from the prime contract and such other reasonable provisions upon which mutual agreement is reached. The parties agree to enter into good faith negotiations relating to such a subcontract as soon as practicable upon award of a prime contract under the [VSS] Solicitation that includes [CGI]'s scope of work as set forth in **Exhibit A**. . . . ."

Section 3.2 provides that "[t]he award of the subcontract contemplated under this Teaming Agreement is subject to all of the following conditions: (1) Award of prime contract to FCi Federal; (2) Inclusion in the prime contract of [CGi]'s scope of work as set forth in **Exhibit A** and of subcontract requirements that are substantially similar to those proposed under this Teaming Agreement . . . (4) The Government's specific approval of [CGI] as a subcontractor and (5) Mutual agreement of the parties hereto to the statement of work, financial terms, and reasonable subcontract provisions."

The agreement further provides in **Section 5.1** that "this Teaming Agreement shall terminate with respect to the [VSS Solicitation] when any one or more of the following events occur, without further obligation or liability between the parties . . . (5) Disapproval by the Government, if required, of (a) [CGI] as a subcontractor or (b) any proposed subcontract between the parties . . . . (6) Execution of a subcontract as contemplated herein; . . . (8) Failure of the parties to enter into a subcontract for the work contemplated in the Exhibit A ..., or 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 award of a prime contract to [FCi]."

Section 9.0 provides that "In the event of any breach by either party ..., such party shall be liable for direct damages suffered by the other party which are caused by such breach in accordance with applicable law. In no event shall either party be liable for special or consequential damages of any kind or nature whether alleged to be attributed to such breach of this Teaming Agreement, to tort or negligence .... In no event shall either party be liable to the other for lost profits resulting from alleged breach of this Teaming Agreement ..."

Section 15.1 states that "[t]he foregoing states the entire agreement between the parties, and supersedes any prior understanding, commitments, or agreements oral or written, with respect to the [VSS] Solicitation." **Section 15.2** states that "Upon signing ... this Teaming Agreement shall become a mutually binding agreement by and between [FCi] and [CGI]. It shall not be varied except by an instrument in writing..." **Section 15.3** states that Virginia law shall govern the validity, construction, scope and performance of the Teaming Agreement.

Exhibit A as amended, consisted of two sections: Section I: Proposal Preparation and Section II: Program Execution. **Section I**: Proposal Preparation required CGI to provide its expertise and support necessary to complete the Parties' proposal. **Section II**: Program Execution stated, "Subject to final solicitation requirements, [CGI] will receive forty-one percent (41%) work share.[3] It is understood that that the work share commitment may not be exactly 41% each year, however, the end goal is that by the end of the contract term the work share commitment will be substantially met. At the end of each contract year, the parties will assess actual work share versus the 41% work share commitment." Section II further provided that "[CGI] will be provided 10

[3] Prior to the amendment, Exhibit A stated that "[CGI] will receive forty-five percent (45%) work share **of the total contract value.**"(Emphasis added.)

management/supervisory positions. These positions include ... Seven (7) team Lead Document Review positions including a Team Lead Scheduling Unit [and] Three (3) Team Lead Case Processing positions."[4] The Parties understood that the VSS prime contract would be a one-year contract with the Federal government having an annual option to renew for up to four additional years. At the time of the trial, the Base Year and Option Year 1 had been performed. The State Department had not formally exercised Option Year 2.

Pre-Award conduct and events

The Parties cooperated in drafting a proposal pursuant to the VSS Solicitation, consistent with the terms of the original Teaming Agreement. FCi submitted its proposal to the State Department in December 2012. FCi was not obligated to provide a copy of the proposal to CGI and did not do so. By the second week of March 2013, CGI pressed FCi to provide information regarding the total contract price that it bid and the proposed work share that would be performed by CGI. FCi did not respond with the information requested. Plaintiff's Exhibits 122 and 123. On March 8, 2013, the State Department notified FCi that its submission was in the competitive range. On March 21, 2013 the State Department provided an evaluation of FCi's proposal, identifying its weaknesses and deficiencies. Plaintiff's Exhibit 7. The State Department invited submission of a Final Revised Proposal by April 18, and scheduled an oral presentation for April 23, 2013. *Id.*

By April 16, 2013, CGI had been informed that the original submission provided a total contract value split of 54 percent for FCi, 38 percent for CGI and 8 percent for small business subcontractors. *See* Plaintiff's Exhibit 142. CGI stated that it understood that "FCI needs to have 51% as the Small Business (SB) prime and it must provide 8% to Small Businesses on the team to meet their RFP requirements, which leaves a balance of 41% work share for CGI." *Id.* CGI had decided, however, that if it could not get at least 40% of the contract that it was not worth the risk or effort to get involved. Kenyon Wells Trial Testimony.[5] It was in this context that the Parties negotiated the revision to Exhibit A to the Teaming Agreement. On April 17, 2013, FCi's President, Scott Miller, sent an

[4] The original Exhibit A was silent about the 10 management / supervisory positions.

[5] CGI was so concerned that FCi's proposal did not provide CGI with the work share percentage provided for in the Teaming Agreement that it was prepared to tell the State Department that it would no longer support FCi's proposal. This likely would have destroyed FCi's chance to be awarded the prime contract.

email to CGI stating, "I will ensure that our revised teaming agreement with CGI affirms our commitment to CGI providing 10 management / supervisory positions. These positions will included seven (7) Team Lead-Document Review positions, including the Team Lead-Scheduling Unit, and three (3) Team Lead-Case Processing positions. In addition, the agreement will reflect CGI's 41% total contract value work share." Defendant's Exhibit 114.

The day after affirming these commitments, April 18, 2013, FCi submitted its Final Revised Proposal to the State Department. FCi did not provide a copy of the proposal to CGI. The proposal did not include 10 management / supervisory positions for CGI, nor a 41 percent CGI work share. Miller Deposition 13, 16. At the April 23 oral presentation to the State Department, FCi stated that under its proposal all team leader and management positions would be staffed by FCi. Plaintiff's Exhibit 10, at 13; Miller Deposition, 10. CGI did not know that this statement had been made because FCi denied CGI's request to have a representative attend the oral presentation.[6] On April 23, 2013, the same day as the oral presentation, CGI executed the revision to Exhibit A to the Teaming Agreement which provided that CGI would have 10 management / supervisory positions and a 41% work share. FCi executed the revision to Exhibit A three days later, on April 26, 2013.

On August 2, 2013, the State Department awarded the VSS Prime Contract to FCi, with a contract amount of $164,322,767. However, the State Department rescinded the award on September 6, 2013, after a competitor, Ikun, challenged the award. In the letter revoking the award, the State Department invited FCi to submit a second Final Revised Proposal. Plaintiff's Exhibit 35. This letter included an evaluation of the strengths and weaknesses of FCi's last proposal.[7] In its second Final Revised Proposal, FCi reduced

[6] The State Department allows no more than five individuals at the presentation, which must include the Program Manager and the two on-site Operations Managers. Those three FCi employees attended along with Mr. Miller who, although president of FCi, intended to serve as the Transition Manager on the VSS project. Sharon Virts, the owner of FCi, attended as FCi's corporate officer.

[7] In that proposal FCi stated that all management positions would be FCi employees, which the State Department considered to be one of many significant strengths of the proposal. Plaintiff's Exhibit 35 at DOS-00476. FCi's price, which had been publicly disclosed when the contract was initially awarded, was the highest price of all submissions. *Id.* at DOS-00482. Another weakness identified by the State Department was that "FCi's proposed approach of allocating work to subcontractors on the basis of primary functional areas ... is not conducive to sustaining a single team environment." *Id.* at DOS-00480.

CGI's workforce in visa processing by half.[8] Miller Trial Testimony. The second Final Revised Proposal was submitted on September 11, 2013 and included a work share of 75% for FCi and 16% for CGI. This proposal did not include any management or supervisory positions for CGI. CGI was aware that the proposal had been submitted, but FCi again did not provide a copy or inform CGI of the proposal's terms. On November 22, 2013, the State Department notified FCi of its intent to award the prime contract to FCi. FCi did not relay this information to CGI.

Within five days, Ikun again filed a bid protest challenging FCi's status as a small business. Plaintiff's Exhibit 167. This protest was resolved by late February 2014, when FCi agreed to provide approximately 125 positions to Ikun-related entities as subcontractors. FCi did not consult with CGI before entering into this arrangement, nor inform the State Department about this arrangement. Plaintiff's Exhibit 20. Scott Miller decided to wait until the prime contract was fully executed before informing the State Department or CGI about the arrangement with Ikun. *Id.* After this arrangement, CGI would have approximately 18% of the employees working on the prime contract, other subcontractors would have 22%, and FCi would have 60%. *Id.*

FCi signed the prime contract on March 27, 2014. The State Department signed on March 31, 2014. That same day, after the prime contract was executed, Scott Miller spoke by telephone with Toni Townes-Whitley, a senior CGI executive. Mr. Miller informed Ms. Townes-Whitley that 100 CGI employees were reallocated to other subcontractors to resolve the bid protest, and that CGI would have approximately 132 employees, mainly data entry, and only one team lead. Defendant's Exhibit 175. Mr. Miller explained that FCi "made a business decision to end the prospect of continuing protests and further delays by negotiating a settlement . . . In addition . . . we made changes to address significant concerns raised by the government . . . related to management of our subcontractors. We eliminated that weakness by consolidating effectively all VSS management with FCI (sic)." *Id.*

Post-Award conduct and events

On April 4, 2014, CGI asserted FCi had breached the ATA and invoked its dispute resolution provisions to resolve the issues regarding CGI's reduced work share under the prime contract. Plaintiff's Exhibit 47. However, the parties continued to negotiate terms of a subcontract throughout April and May 2014. The parties were not able to agree upon

[8] FCi did the same to another subcontractor's staff in telephone communications.

the terms of a subcontract before work needed to begin under the prime contract on June 23, 2014.[9] On June 20, 2014, the parties executed a Letter Subcontract that would provide for CGI's performance of the VSS prime contract and FCi's payment for that performance for 90 days while a final subcontract was negotiated. Plaintiff's Exhibit 61. The Letter Subcontract was revised and extended with an expiration of November 30, 2014.

The Parties continued to negotiate a final subcontract until early November 2014. On November 3, 2014, CGI arranged for off-site meetings with its employees during regular work hours without first notifying FCi. This caused certain of CGI's employees to leave their work stations, interrupting the work flow at the Visa Service Center. FCi considered this to be a major breach of the Letter Subcontract. Plaintiff's Exhibit 64. On November 5, 2014, FCi discontinued subcontract negotiations pending resolution of this issue. *Id.* On November 6, 2014, CGI responded that there were no contractual provisions affecting its ability to meet with its employees or requiring it to obtain permission from FCi before scheduling such meetings. Defendant's Exhibit 317. FCi responded on November 10, 2014 by terminating its relationship with CGI on the VSS program effective November 15, 2014. In accordance with Federal law, the CGI employees working on the VSS program were transferred over to FCi. The current litigation followed.

ANALYSIS

Standard of Review

In ruling on a motion to set-aside a jury verdict, the Court must "consider whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support [a] jury verdict in favor of the plaintiff." *Bitar v. Rahman*, 272 Va. 130, 141, 630 S.E.2d 319, 325-326 (2006).

FCi argues CGI is not entitled to any damages for breach of contract because 1) the ATA provisions regarding work to be performed after the award of the prime contract are not sufficiently definite to be enforceable and thus constitute merely an agreement to

[9] In addition to work share percentages, FCi and CGI negotiated other terms of the subcontract, including provision of a common level of benefits by each employer to employees working on the VSS program; coordination of employee morale events to avoid disparate treatment of employees working for different employers; coordinating through FCi each employer's communications with its employees; and access to the worksites by CGI managers.

agree; and 2) the Parties did not intend to be bound by the work share percentage stated in Exhibit A to the ATA. FCi claims that CGI is not entitled to damages for fraud because 1) there can be no fraud in the inducement if the Parties' agreement is not an enforceable contract; 2) the alleged fraud occurred after the Parties entered into their Teaming Agreement; and 3) even if a valid fraud claim existed, CGI is not entitled to the damages awarded by the jury.[10] FCi requests that the Court set aside the jury verdict and enter judgment in its favor on both Count I and Count III. CGI disputes each of FCI's arguments and requests that the Court enter judgment consistent with the jury verdict.

Count I – Breach of Contract

As succinctly stated by United States District Court Judge Cacheris in another case involving a teaming agreement between government contractors,

> In Virginia, the elements for a breach of contract claim are: (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of the obligation; and (3) an injury or harm to the plaintiff caused by the defendant's breach. *Ulloa v. QSP, Inc.*, 271 Va. 72, 624 S.E. 2d 43, 48 (Va. 2006). . . .
>
> For a contract to be enforceable, "there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances." *Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 281 S.E.2d 818, 820 (Va. 1981). Mere "agreements to agree in the future" are "too vague and too indefinite to be enforced." *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 493 S.E.2d 512, 515 (1997). Similarly, it is "well settled under Virginia law that agreements to negotiate at some point in the future are unenforceable." *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 490 (E.D. Va. 2002). Accordingly, "an agreement to 'negotiate open issues in good faith' to reach a 'contractual objective within [an] agreed framework" will be construed as an agreement to agree rather than a valid contract." *Virginia Power Energy Mktg., Inc. v. EQT Energy, LLC*, 3:11CV630, 2012 U.S. Dist. LEXIS 98553, 2012 WL 2905110, at *4 (E.D. Va. July 16, 2012) (quoting *Beazer*, 235 F. Supp. 2d at 491).

[10] In its briefs, FCi raised the claim that CGI was barred from claiming fraud because it had failed to disaffirm the ATA. In oral argument, FCi withdrew this claim because CGI was not seeking rescission as a remedy.

> In determining whether there was mutual assent to be bound, a court first must examine the language of the agreement itself. *Virginia Power*, 2012 U.S. Dist. LEXIS 98553, 2012 WL 2905110, at *5; see also *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002); *Schafer*, 493 S.E.2d at 515; *Boisseau v. Fuller*, 96 Va. 45, 30 S.E. 457, 457 (Va. 1898). "The guiding light . . . is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *Golding v. Floyd*, 261 Va. 190, 539 S.E.2d 735, 737 (Va. 2001) (citing *Magann Corp. v. Electrical Works*, 203 Va. 259, 123 S.E.2d 377, 381 (Va. 1962)). . . . The Court must read the agreement as a whole, single document and must gather the meaning of its language "from all its associated parts assembled as the unitary expression of the agreement of the parties." *Berry*, 300 S.E. 2d at 796.

Cyberlock Consulting, Inc. v. Info. Experts, Inc., 939 F. Supp. 2d 572, 578 -79, (E.D. Va. 2013). The District Court also observed that

> In Virginia, any "writing in which the terms of a future transaction or later, more formal agreement are set out is presumed to be an agreement to agree rather than a binding contract." *Virginia Power*, 2012 U.S. Dist. LEXIS 98553, at *12, 2012 WL 2905110, at *4. Indeed, calling an agreement something other than a contract or subcontract, such as a teaming agreement or letter of intent, implies "that the parties intended it to be a nonbinding expression in contemplation of a future contract." *Id.* Moreover, even if the parties are "fully agreed on the terms of their contract," "the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" which is binding. *Boisseau*, 30 S.E. at 457.

Cyberlock, 939 F. Supp. 2d at 581.

The writing at issue in *Boisseau* stated that "We hereby agree to lease to Messrs. C. H. Conrad and __ our Union Street warehouse ... for a period of five (5) years from January 19, 1894, at an annual rental rate of three thousand dollars ($3,000), payable in monthly installments.... The above to be covered by a regular lease subject to approval of all parties." The Supreme Court of Virginia held that a writing with words which are sufficient to make a binding contract is, nevertheless, unenforceable when that writing

also includes language that another formal writing will be prepared, approved and executed which is intended to be the only authoritative evidence of the contract. *Boisseau,* 96 Va. at 48, 30 S.E. at 458.

The teaming agreement in *Cyberlock* included provisions for efforts to obtain a prime contract and the framework for a subcontract between Information Experts ("IE") and Cyberlock. The agreement provided that "upon Contract Award, IE will perform 51% of the scope of work with Cyberlock performing 49%." Each party was to "exert reasonable efforts to obtain an IE prime contract ... and to negotiate a subcontract" in accordance with the statement of work attached to the teaming agreement. That statement of work stated that it "sets out the anticipated Scope of Work and other pertinent information relative to Cyberlock's role in the Program, as presently understood by the parties. In that regard Subcontractor will perform 49% of the functions and scope of the work as relayed by the Government in the prime contract awarded to IE." The contemplated subcontract was subject to approval by the Federal government. The teaming agreement would terminate if there was a "'failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations.'" *Cyberlock,* 939 F. Supp. 2d. at 575-76 (internal edits omitted).

Applying the legal principles discussed above, the District Court awarded summary judgment in favor of the Defendant IE, finding "that the post-prime contract award obligations in the [parties' teaming agreement] are unambiguous *and* constitute an unenforceable agreement to agree." *Id.* at 580 (emphasis in original). The District Court held that the language providing Cyberlock with 49% of the prime contract "was not meant to provide a binding obligation but rather to set forth a contractual objective and agreed framework for the negotiation of a subcontract in the future along certain established terms." *Id.* at 581.

> [A]ny seemingly mandatory language to award Cyberlock with a portion of the prime contract was modified by the provisions indicating that: (1) the award of such work would require the negotiation and execution of a future subcontract; (2) the award of such work was dependent on the success of such future negotiations; (3) any future executed subcontract was subject to the approval or disapproval of [the federal Government]; and (4) suggesting that the framework set out for the work allocation in a future subcontract potentially could change as it merely was based on the work anticipated to be performed by Cyberlock as then-presently understood by the parties. . . . As such, the Court finds that the post-award obligations in

> the [parties' teaming agreement] unambiguously set out an agreement to negotiate in good faith to enter into a future subcontract. As discussed above, such an agreement is precisely the type of agreement to agree that has consistently and uniformly been held unenforceable in Virginia.

Id. at 581-82 (internal quotes and citations omitted).

Both FCi and CGI agreed during the trial in this matter that the ATA is not ambiguous.[11] The ATA includes provisions similar to those that rendered the teaming agreement unenforceable in *Cyberlock*. Like the teaming agreement in that case, the ATA when read as a whole clearly shows that the parties did not intend to be bound by the post-award provisions of the agreement until negotiation and execution of a formal subcontract. Thus, even if the ATA is sufficiently certain in all material terms, it is not enforceable. *See Boisseau*, 96 Va. at 48, 30 S.E. at 457.

First, the ATA states explicitly that the stated work share percentages are "end goals" not intended to be exactly met each year of the subcontract. The agreement states "[i]t is understood that the work share commitment may not be exactly 41% each year, however, the end goal is that by the end of the contract term the work share commitment will be substantially met. At the end of each contract year, the parties will assess actual work share versus the 41% work share commitment." This language makes it clear that the work share percentages are aspirational and not binding.[12] This language makes explicit the conclusion reached by the District Court in *Cyberlock* regarding the specific work share percentages in that teaming agreement: "[t]his particular language was not meant to provide a binding obligation but rather to set forth a contractual objective and agreed framework for the negotiation of a subcontract in the future." *See Cyberlock*, 935 F. Supp. at 581.

Second, the ATA provides in several sections for the negotiation of a subcontract if FCi is selected as the prime contractor. Section 3.1 provides that "If FCi is selected by the Government as the prime and the prime contract includes [CGI]'s scope of work per

[11] Thus, the Court will consider only the four corners of the ATA in determining the intent of the Parties and will not consider extrinsic evidence, such as the Parties' negotiations of the Teaming Agreement, or of a subcontract or their performance after the award of the prime contract to FCi.

[12] This language shows that CGI's position that "Per the [ATA], CGI's entitlement *to the specific Exhibit A work* and FCi's obligation to allocate it to CGI were not matters subject to further negotiation," (Plaintiff's Post-Trial Brief at p.7) is incorrect.

Exhibit A, FCi and [CGI] will enter good faith negotiations for a subcontract for such services, subject to ... terms of the prime contract ...." Section 3.2 states that the award of the subcontract contemplated under the ATA is subject to certain conditions, including the "[m]utual agreement of the parties hereto to the statement of work, financial terms, and reasonable subcontract provisions." Section 5.1 terminates the ATA upon "[e]xecution of a subcontract as contemplated herein" or "failure to enter into a subcontract . . . within 90 days from date of award of the prime [contract]." Thus the award of work to the subcontractor required the negotiation and execution of a future subcontract. In the absence of a subcontract, work would not be provided to CGI under the ATA because it would have terminated 90 days after the prime contract award without further obligation.[13]

Third, the ATA includes other provisions similar to those in the unenforceable agreement in *Cyberlock*. For example, the award of a subcontract to CGI was expressly conditioned upon: (1) award of the prime contract to FCi; (2) inclusion in the prime contract of CGI's portion of the statement of work; (3) the federal Government's specific approval of CGI as a subcontractor. *See Cyberlock*, 939 F. Supp. 2d at 575-76 (the contemplated future subcontract would be executed "in the event IE is awarded a prime contract" and "may be subject to approval of the [Federal government] and approval for Cyberlock as subcontractor). Like the agreement in *Cyberlock*, the Parties agreement provided for termination of the ATA if negotiation of a subcontract was not successful after a period of time. *See Id.* at 576.

In support of its argument that the ATA is enforceable absent the successful negotiation and execution of a subcontract, CGI points to Section 15.2, which states "[t]his Teaming Agreement shall become a mutually binding agreement by and between [FCi] and [CGI]." The Court finds that this provision does not vitiate or supersede the provisions which make the obligation to provide work to CGI expressly conditioned upon execution

[13] CGI does not dispute that the respective work share percentages would need to be included in a formal subcontract executed after the award of the prime contract to FCi. *See* Plaintiff's Post-Trial Brief at 8 ("The Exhibit A work share promised to CGI was to be set forth in a later subcontract document..."). CGI claims, however, that any negotiation of the terms of that subcontract would be limited to "additional **reasonable**, but **non-essential** terms" *Id.* (emphasis in original). Nothing in the ATA imposes such a limitation on negotiation of the contemplated subcontract. In fact, the ATA expressly contradicts this view. Section 3.2 makes award of a subcontract conditional upon "[m]utual agreement of the parties hereto to the *statement of work*, *financial terms*, and reasonable subcontract provisions." (emphasis added). Thus, subcontract negotiation expressly includes matters addressed in the ATA and the amended Exhibit A statement of work.

of a mutually agreed subcontract. Rather, Section 15.2 states that the Parties intend to be bound by those very provisions, which clearly establish that any post-award work contemplated by the ATA would be provided for under a later, formal subcontract.

The Court finds, therefore, that the most reasonable reading of the ATA, construed as a whole, is that any language regarding the percentage of work to be awarded to CGI was aspirational only, and that the actual award of such work required the execution of a future subcontract, which was expressly conditioned upon "[m]utual agreement of the parties hereto to the statement of work, financial terms, and reasonable subcontract provisions[,]" and other conditions. 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. Even if the ATA is sufficiently certain in all material 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. Therefore, FCi's motion to set aside the jury verdict on Count I is granted, and the Court will enter judgment in favor of the Defendant.

Count III – Fraud in the Inducement

CGI claims that FCi committed fraud in April 2013 by promising CGI a 41% work share and 10 management positions when, in fact, FCi had no intention to provide CGI that percentage of work or the management positions. CGI seeks an award of money damages to recover its lost profits and overhead costs that would have been collected but for the alleged fraud.[14] FCi claims that CGI is not entitled to damages for fraud because 1) there can be no fraud in the inducement if the Parties' agreement is not an enforceable contract; 2) the alleged fraud occurred after the Parties entered into their Teaming Agreement, and thus could not act as an inducement; and 3) even if a valid fraud claim existed, CGI is not entitled to the damages awarded by the jury.

1. The law of fraud in Virginia

An understanding of the tort of fraud is necessary to resolve FCi's claims. Actual fraud is defined as: (1) a false representation; (2) of a material fact; (3) intentionally and knowingly made; (4) with the intent to mislead; (5) reliance by the parties misled; and (6) resulting to damage the party misled. *State Farm Mut. Auto Ins. v. Remley*, 270 Va. 209, 218, 618 S.E.2d 316, 321 (2005). An action for fraud must aver the misrepresentation of

[14] CGI does not seek rescission or other equitable relief for fraud.

present pre-existing facts. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 362, 699 S.E.2d 483, 490 (2010).

"Fraud in the inducement is a species of actual fraud[,]" *Foster v. Wintergreen Real Estate Co.*, 81 Va. Cir. 353, 358 (2010), and is a well-recognized tort in Virginia.

> "[A]n action in tort for deceit and fraud may sometimes be predicated on promises which are made with a present intention not to perform them . . . . [T]he gist of fraud in such case is not the breach of the agreement to perform, but the fraudulent intent . . . . [T]he fraudulent purposes of the promisor and his false representation of an existing intention to perform . . . is the misrepresentation of a fact . . . . [T]he state of the promisor's mind at the time he makes the promise is a fact, and . . . if he represents his state of mind . . . as being one thing when in fact his purpose is just the contrary, he misrepresents a then existing fact."

Boykin v. Hermitage Realty, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (quoting, *Lloyd v. Smith*, 150 Va. 132, 145-46, 142 S.E. 363, 365-66 (1928); *Abi-Najm*, 280 Va. at 362-363, 699 S.E.2d at 490.

> Fraudulent inducement claims involve one of two types: fraudulent inducement to enter into a contract, and fraudulent inducement to perform a contract. *See generally Devine v. Buki*, 289 Va. 162, 175, 767 S.E.2d 459, 466 (2015). In the former situation, a misrepresentation entices a party to enter into a contract that, but for the fraud, he would not have entered into. *See, e.g., Abi-Najm v. Concord Condo.*, LLC, 280 Va. 350, 362-63, 699 S.E.2d 483, 490 (2010). In the latter situation, a misrepresentation entices a contracting party to perform an executory contract that, but for the fraud, he would not have continued to perform. *See, e.g., Devine*, 289 Va. at 175, 767 S.E.2d at 466.

Modern Oil Corp. v. Cannady, 2015 Va. Unpub. LEXIS 16, *12 (Dec. 30, 2015).

2. FCi Argument 1 – Fraud in the inducement requires an enforceable contract

The Supreme Court of Virginia has not answered the question whether in Virginia a fraud in the inducement claim can exist when the contract at issue is unenforceable. The Court will assume, without deciding, that it can.[15]

3. FCi Argument 2 – There is no inducement because the alleged fraud occurred after the parties entered into their agreement

FCi next argues CGI's fraud in the inducement claim must fail because the original Teaming Agreement was entered into in September 2012, well before the allegedly fraudulent promise was made in April 2013 when the parties executed the ATA. The Court does not agree for two reasons. First, the amendment to Exhibit A effectively created a new agreement – the ATA – with new terms that superseded the original agreement. Viewed this way, the fraudulent misrepresentation was made at the time the ATA was formed, not after. If the amendment to Exhibit A is viewed not as creating a new agreement, but as amending an existing one, the evidence amply supports a finding of fraud in the inducement to perform in accordance with the pre-existing agreement. On April 17, 2013 Scott Miller promised to amend Schedule A to provide CGI with a 41% work share and 10 management positions. Defendant's Exhibit 114. However, the very next day CGI submitted its Revised Final Proposal which provided CGI with less than a

[15] There are good reasons to believe this assumption is correct. A misrepresentation of one's present intent to perform an unenforceable promise is a false statement that is just as false as a misrepresentation concerning a promise that is enforceable. All of the other elements of fraud – the intent to make the statement, the intent to mislead, reliance and resulting damages – can exist regardless of the enforceability of the fraudulently made promise. A second reason that a promise likely need not be enforceable to sustain a claim of fraud in the inducement is found in the distinctly different policy considerations distinguishing the law of torts from the law of contracts. See *Filak v. George*, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004). The primary purpose of the law of torts is the protection of persons and property from injury. It affords a remedy for violations of common law and statutory duties involving the safety of persons and property that are imposed to protect the broad interests of society. In contrast, the law of contracts exists to protect the bargained for expectations of parties. *Id.* It would frustrate the broad protective intent behind tort law if a promise had to be enforceable in contract in order to obtain recovery in tort when proved that the promise was fraudulently made. Lastly, allowing the claim for fraud in the inducement based upon an unenforceable promise is consistent with the Restatement of Torts 2d § 530 (1979) at Comment C ("[s]ince a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable . . . . This is true whether or not the promise is enforceable as a contract.").

41% work share and zero management positions. On April 23, 2013 -- the same day CGI signed the amended Schedule A providing for those management positions and the 41% work share -- FCi told the State Department in its oral presentation that FCi would have all management positions and that CGI would have less than 41% of the work share. Three days later, on April 26, 2013, FCi executed the amendment to Schedule A knowing that its terms were not included in its Revised Final Proposal submitted to the Government just days before. The evidence at trial also showed that CGI was ready to terminate its involvement with FCi on the VSS Solicitation if it did not get at least 40% of the work share. Wells Trial Testimony; Defendant's Exhibit 105. In reliance upon the promises contained in the amended Schedule A, CGI continued to support FCi's efforts to obtain the VSS prime contract and did not terminate its involvement. The evidence thus supports the finding that CGI was fraudulently induced to perform pursuant to the ATA. The Court therefore rejects FCi's second argument.

4. *FCi Argument 3 – Evidence of CGI's damages is inadequate to support the award*

CGI is seeking "the full economic value of the contract to which CGI was induced into signing and performing" as damages under its fraud claim. *See* Plaintiff's Post-trial Brief, 31. CGI claims that it is entitled to the "benefit of the bargain" approach in which the measure of damages is the value that CGI would have received if FCi's representations had been true. *Id.* at 32. Under this theory, CGI claims that is entitled to the amount it would have realized had it received the 41% work share for the duration of the prime contract including the option years. FCi responds that CGI is entitled to at most the benefit it would have received under the ATA, which by its express terms expired upon execution of a subcontract or 90 days after award of the prime contract. The Court agrees with FCi.

Had FCi acted as promised and included in its final proposal for CGI to receive the work share and management positions as stated in the ATA – and assuming FCi was awarded the prime contract – CGI would have been entitled to begin negotiations with FCi over the terms of a subcontract that would have allocated the work. Section 5.1 of the ATA expressly anticipated that a subcontract might not be successfully negotiated within 90 days, at which time the ATA would expire and neither party would have any further obligation to the other. 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.

CGI's evidence at trial addressed damages over the course of the first year of the prime contract and the subsequent option years. CGI did not attempt to identify damages that would have been due based upon the first 90 days after the contract award.[16] There being no evidence of the amount of damages sustained through the time that the ATA expired, the Court grants the motion to set aside the jury's verdict on Count III.

CONCLUSION

The Court grants FCi's motion to set aside the jury verdict on Count I and Count III and will enter judgment in favor of the Defendant FCi on those counts. The parties are directed to contact my law clerk to schedule further proceedings on Count II.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

[16] The State Department executed the prime contract on March 31, 2014, and work under the prime contract began on June 23, 2014, approximately one week before expiration of the ATA.