3-6-2012

Syringa Networks v. Idaho Department of Administration Respondent's Ammended Response Dckt. 38735

IN THE SUPREME COURT OF THE STATE OF IDAHO

SYRINGA NETWORKS, LLC, AN Idaho limited liability company,

Appellant,

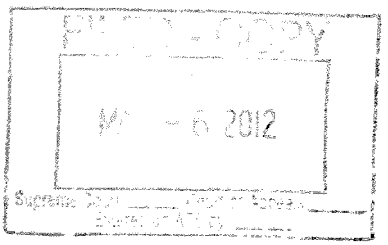
vs.

IDAHO DEPARTMENT OF ADMINISTRATION; J. MICHAEL "MIKE" GWARTNEY, in his personal and official capacity as Director and Chief Information Officer of the Idaho Department of Administration; JACK G. "GREG" ZICKAU, in his personal official capacity of Chief Technology Officer and Administrator of the Office of the CIO; ENA SERVICES, LLC, a Division of EDUCAT ION NETWORKS OF AMERICA, INC. a Delaware corporation; QWEST COMMUNICATIONS COMPANY, LLC, a Delaware limited liability company,

Appellees.

Supreme Court
Docket No. 38735

Ada County Case No. CV OC 0923757



APPELLEE ENA SERVICES, LLC, A DIVISION OF EDUCATION NETWORKS OF AMERICA, INC.'S AMENDED RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

*****

HONORABLE PATRICK H. OWEN, DISTRICT JUDGE, PRESIDING

Phillip S. Oberrecht, ISB #1904
Leslie M. G. Hayes, ISB # 7995
FARLEY OBERRECHT WEST HARWOOD & BURKE, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, Idaho 83701
Attorneys for Appellee ENA Services, LLC, a Division of Education Networks of America, Inc., a Delaware Corporation

Robert S. Patterson, *pro hac vice*
BRADLEY ARANT BOULT CUMMINGS, LLP
1600 Division Street, Suite 700
Nasville, TN 37203
Attorneys for Appellee ENA Services, LLC, a Division of Education Networks of America, Inc., a Delaware Corporation

IN THE SUPREME COURT OF THE STATE OF IDAHO

SYRINGA NETWORKS, LLC, AN Idaho limited liability company,

Appellant,

vs.

IDAHO DEPARTMENT OF ADMINISTRATION; J. MICHAEL "MIKE" GWARTNEY, in his personal and official capacity as Director and Chief Information Officer of the Idaho Department of Administration; JACK G. "GREG" ZICKAU, in his personal official capacity of Chief Technology Officer and Administrator of the Office of the CIO; ENA SERVICES, LLC, a Division of EDUCAT ION NETWORKS OF AMERICA, INC. a Delaware corporation; QWEST COMMUNICATIONS COMPANY, LLC, a Delaware limited liability company,

Appellees.

Supreme Court
Docket No. 38735

Ada County Case No. CV OC 0923757

APPELLEE ENA SERVICES, LLC, A DIVISION OF EDUCATION NETWORKS OF AMERICA, INC.'S AMENDED RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

*****

HONORABLE PATRICK H. OWEN, DISTRICT JUDGE, PRESIDING

Phillip S. Oberrecht, ISB #1904
Leslie M. G. Hayes, ISB # 7995
FARLEY OBERRECHT WEST HARWOOD & BURKE, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, Idaho 83701
Attorneys for Appellee ENA Services, LLC, a Division of Education Networks of America, Inc., a Delaware Corporation

Robert S. Patterson, *pro hac vice*
BRADLEY ARANT BOULT CUMMINGS, LLP
1600 Division Street, Suite 700
Nasville, TN 37203
Attorneys for Appellee ENA Services, LLC, a Division of Education Networks of America, Inc., a Delaware Corporation

B. Lawrence Theis
Steven Perfrement
BRYAN CAVE HRO
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Attorneys for Appellee Qwest Communications Company, LLC, a Delaware limited liability company

Stephen R. Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS CHARTERED
101 S Capitol Blvd, 10th Fl
PO Box 829
Boise, ID 83701-0829
Attorneys for Appellee Qwest Communications Company, LLC, a Delaware limited liability company

Merlyn W. Clark
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 W. Main St., Ste. 1000
P.O. Box 1617
Boise, Idaho 83701-1617
Attorneys for Appellees Idaho Department of Administration, J. Michael "Mike" Gwartney, and Jack G. "Greg" Zickau

David R. Lombardi
Amber N. Dina
GIVENS PURSLEY LLP
601 W. Bannock
P. O. Box 2720
Boise, ID 83701
Attorneys for Appellant Syringa Networks, LLC, An Idaho limited liability company

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Treatises

I. STATEMENT OF THE CASE

A. Nature of the Case

This case arises from the State of Idaho's award of a contract for the construction and management of the Idaho Education Network (IEN). The IEN is a project funded partially by the State of Idaho and partially by the federal government that generally seeks to bring internet and telecommunication capabilities to Idaho schools, libraries, and government facilities.

Frustrated that the State did not award it any portion of the IEN project, Syringa Networks, LLC (Syringa), sued everyone involved including ENA Services, LLC, a division of Education Networks of America, Inc. (ENA). The suit brought against ENA related to the Teaming Agreement between ENA and Syringa, which joined the two together to bid for the entire IEN project statewide. Joining together as the Idaho Education Network Alliance (IEN Alliance), ENA and Syringa submitted their joint bid for the IEN project wherein ENA would provide the E-rate services (see below for definition) and Syringa would provide the connectivity. The State did not award the IEN Alliance the IEN contract; instead, it unilaterally decided to split the award between ENA (for E-rate) and Qwest (for connectivity). In addition to the claim against ENA for breach of contract, Syringa brought suit against the Department of Administration (DOA or State) and Qwest Communications Company, LLC (Qwest) on theories that they conspired to deprive the IEN Alliance of the award of the statewide contract for the IEN. Despite Syringa's assertions that the State and Qwest conspired against the IEN Alliance to direct portions of the IEN project to Qwest, Syringa sued ENA on the theory that "ENA had and

continues to have an absolute duty to perform its obligations" to direct work on the IEN project to Syringa despite the split awards made by the State. R. Vol. I, p. 21 (*Complaint*, ¶¶ 11-12).

B. Course of Proceedings Below

All the defendants, including ENA, moved for summary judgment in this matter, which was ultimately granted. ENA moved for dismissal on four separate grounds: (1) the Teaming Agreement was an unenforceable agreement to agree; (2) the Teaming Agreement terminated by its own terms; (3) even if the Teaming Agreement were an enforceable contract, performance never became due because of the failure of a condition precedent; and (4) performance was excused because the commercial purpose of the Teaming Agreement was frustrated by the State's award of the Idaho Education Network. The district court granted judgment in favor of ENA on the first two theories, dismissing Syringa's claims against ENA and awarding ENA attorney fees and costs. Syringa now appeals the court's dismissal of the breach of contract claim against ENA.

C. Statement of Facts

1. Background of the Idaho Education Network

"In 2008, the Idaho Legislature authorized the creation and implementation of a 'statewide coordinated and funded high-bandwidth education network' called the 'Idaho Education Network' (IEN)." R. Vol. I, p. 2557. In December of 2008, the Department of Administration issued a Request for Proposals 02160 for the IEN project (the "RFP"). R. Vol. I,

p. 1140. Only E-rate[1] service providers could bid on the IEN RFP. R. Vol. I, p. 2557. "The [Idaho Education Network] was meant to be 'the coordinated, statewide telecommunications distribution system for distance learning for each public school[.]'" R. Vol. I, p. 1140. The RFP sought a unified solution for internet access with two components, an E-rate component to administer the federally funded program and a connectivity component to physically connect schools and libraries through the IEN.[2] R. Vol. I, p. 1810, ll. 4-11. The RFP also contemplated a second phase in which all state offices would be connected through the IEN. The RFP specifically requested an "end-to-end" solution for both E-rate and the network architecture required for the connectivity services. R. Vol. I, pp. 1875-1879 (RFP ¶ 2.0). Through the RFP, the State was seeking "the best and most cost effective "total end-to-end service support solution" and supporting network architecture[.]" R. Vol. I, p. 1882 (RFP ¶ 3.2).

The RFP provided that "[t]he State reserves the right to reject any or all proposals, wholly or in part, or to award [the IEN project] to multiple bidders in whole or in part[]" and the State reserved the right to split the award. R. Vol. I, pp. 1875, 1892 (RFP ¶¶ 2.0, 5.3). "Any resulting contract from this solicitation will be awarded to up to four providers." *Id.* As the RFP

---

[1] E-rate status refers to telecommunication and internet access companies that are qualified to receive funding under the federal Telecommunications Act of 1996. For purposes of this matter, "E-rate services" shall include managed internet access services and responsibility for overall services to E-rate eligible sites integrating connectivity services, customer premises equipment, network management and customer support services.

[2] "Connectivity" includes both the "backbone" and the "last mile connectivity/circuits." For purposes of the motion for summary judgment, and for this briefing, ENA believes that the distinction is irrelevant because ENA lacks the power to direct work for either aspect of the connectivity services required by the IEN. The Teaming Agreement distinguished connectivity of the backbone from the last mile circuits that connect an individual school or other state facility to the backbone. Specifically, the Teaming Agreement provided a competitive bidding process for the last mile connectivity, which is why Syringa finds the distinction between the two relevant. ENA continues to believe that the distinction is irrelevant for the following reason: ENA was not awarded <u>any connectivity</u> portion of the IEN, which includes both backbone and last mile circuits.

anticipated that the State could accept any portion of a bidder's or multiple bidders' proposal(s) "in whole or in part," those responding to the RFP could not know what, if any, portion of the E-rate and connectivity services proposed in their response ultimately might be awarded to them by the State.

The purpose of the RFP was to identify the vendor(s) who could build the "business model that they will initiate to service the State of Idaho IEN network." R. Vol. I, p. 1882 (RFP ¶ 3.2).[3] Importantly, neither the State nor the bidders knew exactly what "connectivity" would be required or contracted for, and accordingly the bidders could not offer definite pricing for the connectivity required by the IEN project. For the purpose of creating some basis for comparison of the pricing offered by the bidders, the State of Idaho provided certain assumptions to all bidders. R. Vol. I, p. 1843, l. 5 - p. 1844, l. 5. These standard assumptions allowed comparison of the bidders' proposals, while the RFP expressly reserved the right to tailor the actual services that ultimately were ordered based on the State's subsequent determination of an individual schools' needs. R. Vol. I, p. 1908 (RFP ¶ 10.0); R. Vol. I, p. 1843, l. 5 - p. 1844, l. 5.

> **The State shall not be required to purchase any specific service or minimum quantities of network services.** The quantities provided in this RFP as examples are for the sole purpose of assisting the Bidders in preparation of their proposals and the State to evaluate the feasibility of the proposed network solutions.

R. Vol. I, p. 1908 (RFP ¶ 10.0) (emphasis original); *see also* R. Vol. I, p. 1843, l. 5 - p. 1844, l. 5. Based on the above provisions, no party responding to the RFP could predict the requirements

[3] "The intent of the RFP process is to seek proposals from industry experts for achieving the purpose and goals of the IEN as established by the legislature. Rather than defining a specific technology, architecture or network design, the Department of Administration is providing broad guidelines only and relying on industry expertise to design and propose a network capable of meeting these requirements." R. Vol. I, p. 1882 (RFP ¶ 3.2).

of the ultimate contract because the State controlled the award, including whether it was split, and would only later specify the services and quantities that would be purchased from any award recipient.

2. Background of the IEN Alliance

In response to the RFP, Syringa and ENA joined together to prepare and submit a proposal as the IEN Alliance with the goal of obtaining the whole of the IEN contract. R. Vol. I, p. 1807, ll. 1-17. Just as Syringa asserts that ENA could not have responded to the RFP without Syringa, Syringa could not have responded without ENA. Neither Syringa nor ENA, standing alone, had the ability to present a single contractor "end-to-end" solution. *Id.* That is because ENA's core competency and strength is obtaining E-rate funding and providing logistical coordination of content for schools, while Syringa's core competency is providing connectivity services. R. Vol. I, p. 1808, ll. 9-21.

a. The Teaming Agreement had a Limited Purpose

The undisputed evidence is that the purpose of the Teaming Agreement was for the IEN Alliance to respond to the IEN RFP in an effort to win the right to provide to the State of Idaho a statewide, "end-to-end" solution. R. Vol. I, pp. 1858-1860; R. Vol. I, p. 1807, ll. 1-17. As Syringa has repeatedly emphasized in pleadings and in testimony, the limited purpose of the Teaming Agreement was for the IEN Alliance to obtain the entire, statewide contract to provide both components of the IEN project, E-rate services and connectivity services, statewide. R. Vol. I, pp. 567-568; R. Vol. I, pp. 23, 35 (*Complaint*, ¶¶24-29, 110); R. Vol. I, p. 1807, ll. 1-17; *See also* R. Vol. I, p. 1815, l. 16 - p. 1816, l. 3.

b. *Under the Teaming Agreement, Syringa's Role in the IEN Would Have Been to Provide Connectivity Services Only*

Within the Teaming Agreement, there was a clear division of responsibility between ENA and Syringa based upon their respective strengths and expertise. R. Vol. I, pp. 1858-1860; R. Vol. I, p. 1807, l. 1 - p. 1808, l. 21; *See generally* R. Vol. I, p. 1817, ll. 12-19. Syringa's only purpose was to provide the connectivity services or the technical or network architecture that physically connected the schools statewide. R. Vol. I, pp. 1858-1860. As described in ¶3(b) of the Teaming Agreement:

> **Syringa Responsibilities.** . . . Syringa shall be responsible for (i) providing the statewide backbone for the services, (ii) providing and operating a network operations center for the backbone, (iii) providing for co-location of core network equipment, (iv) procuring and owning all customer premises equipment not provided by ENA, (v) coordinating field service for non-school or library sites, (vi) managing the customer relationship for non-school or library sites, and (vii) procuring, managing and provisioning last mile circuits for non-school or library sites.

The Teaming Agreement clearly defines Syringa's purpose in participating in the IEN Alliance as becoming the sole contractor to provide the connectivity services required by the IEN statewide.

Syringa stated that the IEN Alliance's goal was to become the single "carrier of record" to provide connectivity services statewide to the IEN project. R. Vol. I, p. 1809, l. 17 - p. 1812, l. 5. The "carrier of record," as described by Syringa, is the single-point of contact for the State IEN contract. R. Vol. I, p. 1804, l. 19 - p. 1806, l. 5. Under the proposal of the IEN Alliance, ENA would have been the "carrier of record" as the State's single point of contact for the entire

IEN and Syringa would be the single point of contact for the connectivity service. R. Vol. I, p. 1811, ll. 3-8; R. Vol. I, p. 1812, ll. 2-5; R. Vol. I, p. 1794, l. 25 - p. 1795, l. 4.

3. The State Awarded the IEN to Qwest and ENA

On January 20, 2009, the State issued a letter of intent to award the IEN project to ENA and Qwest. R. Vol. I, p. 1143. The State did not issue a letter of intent to Syringa or the IEN Alliance. *Id.* It provided in relevant part that "this [is] a Letter of Intent to award [the IEN] to Qwest Communications Company LLC and Education Networks of America, Inc./ENA Services, LLC for being awarded the most points." R. Vol. I, p. 1915. Notably, the letter of intent did not recognize the IEN Alliance.

On January 28, 2009, the State issued two, identical Statewide Blanket Purchase Orders (SBPO) with identical terms: one to ENA (SBPO 1309) and the other to Qwest (SBPO 1308). R. Vol. I, pp. 1917-1918, 1920-1921. In effect, the State rejected the IEN Alliance's single contractor, statewide solution in which Syringa would be the "carrier of record" for connectivity services, and instead split the award between ENA and Qwest. R. Vol. I, p. 1144. The State intended for ENA and Qwest to work together, communicate, and utilize their individual strengths and expertise to achieve the goals of the IEN project. R. Vol. I, p. 1820, l. 14 - p. 1822, l. 7.

On February 26, 2009, the State issued amendments to the statewide blanket purchase order (the "Amendments"), stating "[i]t is the intent of the State of Idaho to amend SBPO1308 [SBPO1309] to clarify the roles and responsibilities of the parties to the Agreement." R. Vol. I, p. 1144. The Amendments stated that "[t]he State considers Qwest and ENA equal partners in

the IEN project as demonstrated in the Intent to Award Letter dated January 20, 2009 and the subsequent SBPO1308 [SBPO 1309] dated January 28, 2009." *Id.* In the Amendments, the State segregated E-rate and connectivity services, awarding Qwest control of the connectivity services and awarding E-rate functions to ENA.

As explained by Greg Zickau, the Chief Technology Officer with the State of Idaho, the SBPO's gave the State the authority to purchase all, some or none of the services offered in the parties' RFP's. R. Vol. I, p. 1843, l. 5 - p. 1844, l. 5. Once the SBPO's were issued it was up to the State to determine what best met its needs, including the determination of whether Qwest or ENA would be the E-rate provider. R. Vol. I, p., ll. 2-4; R. Vol. I, p. 1839, l. 5 - p. 1840, l. 22. In other words, the SBPO's identified the contractors, but it was still within the State's discretion to determine what services would be contracted based on the State's subsequent determination of its needs. The Amendments served the purpose of clarifying ENA's role as distinct from Qwest's role, and specifying the type of services the State would be purchasing from each. R. Vol. I, p. 1838, ll. 10-18.

The Amendments to the SBPO's clearly state that the State desired Qwest to control the connectivity services required by the IEN project:

> Qwest will be the general contractor for all IEN technical network services. The Service Provider listed on the State's Federal E-Rate Form 471, Education Networks of America (ENA) is required to work with the dedicated Qwest Account Team for ordering, provisioning of, ongoing maintenance, operations and billings for all IEN sites.

R. Vol. I, pp. 1923-1926, 1928-1931. In contrast to the other provisions of the Amendment that were conditioned with "Qwest, in coordination with ENA," paragraph 1 of the Amendment

required ENA to work with Qwest and thereby vested in Qwest control of the *entire* technical network and connectivity services. R. Vol. I, pp. 1923-1926, 1928-1931. As the District Court noted, "[t]here is no evidence that ENA requested DOA to award to Qwest the work that the IEN Alliance proposed for Syringa." R. Vol. I, p. 2595.

The effect of the Amendment was to assign to Qwest the "entire scope of work assigned to Syringa in the Teaming Agreement and the IEN Alliance Proposal." R. Vol. I, p. 1144. As plainly admitted in Mr. Lowe's affidavit on behalf of Syringa, "the services for which Syringa was responsible under the Teaming Agreement and the services for which Qwest is responsible under the Amended SBPO's are the same services." R. Vol. I, pp. 570-71 (*Lowe Aff.*, ¶ 27). "The effect of the Amendments was to eliminate Syringa from participation in the IEN RFP project." R. Vol. I, pp. 1144, 1153.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Syringa has listed the following issues on appeal related to the claims asserted against ENA:

1. Whether the district court erred in dismissing the breach of contract claim against ENA.

    A. Whether the district court erred in finding that the Teaming Agreement was merely an agreement to agree.

    B. Whether the district court erred in finding that the Teaming Agreement terminated by its own terms.

2. Whether Syringa is entitled to attorney's fees and costs against ENA on appeal pursuant to Idaho Code § 12-120(3), Idaho Rule of Civil Procedure 54, and Idaho Appellate Rules 40 and 41.

In addition to the above, ENA asserts the following additional issues on appeal:

3. Whether alternate grounds exist to affirm the district court's judgment in favor ENA, specifically:

   A. Even if the Teaming Agreement is an enforceable contract, performance never became due because of the failure of a condition precedent.

   B. Whether the Teaming Agreement is unenforceable because its commercial purpose was frustrated when Qwest was awarded the entire connectivity portion of the IEN that was contemplated for Syringa under the Teaming Agreement.

4. Whether ENA is entitled to attorney's fees on appeal pursuant to Idaho Code § 12-120(3), Idaho Rule of Civil Procedure 54 and Idaho Appellate Rules 40 and 41.

III. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Marchand v. JEM Sportswear, Inc.*, 143 Idaho 458, 147 P.3d 90 (2006). "When a motion for summary judgment has been properly supported with evidence indicating the absence of material factual issues, the opposing party's case must not rest on mere speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact." *John W. Brown Props. v. Blaine County*, 138 Idaho 171, 59 P.3d 976, 979 (2002). If the evidence reveals no disputed issues of material fact, it is well settled that summary judgment should be granted. *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996). It is equally well settled that the moving party is entitled to judgment as a matter of law when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case upon which that

party bears the burden of proof at trial." *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126, 127 (1988).

This Court exercises free review when interpreting an unambiguous contract. *Knipe Land Co. v. Robertson*, 151 Idaho 449, ___, 259 P.3d 595, 601-02 (2011) (quoting *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Id.* "Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact." *Id.*

B. THE TRIAL COURT DID NOT ERR IN DISMISSING SYRINGA'S CONTRACT CLAIM AGAINST ENA

1. The Teaming Agreement Was Merely an Agreement to Agree

An agreement that merely states the parties' intent to contract in the future is unenforceable as an agreement to agree. *Maroun v. Wyerless Systems, Inc.*, 141 Idaho 604, 614 114 P.3d 974, 984 (2005) (finding a contractual provision that is "'tied to agreeable milestones' is merely an agreement to agree in the future on a condition precedent to any obligation to pay"); *Snyder v. Miniver*, 134 Idaho 585, 589 6 P.3d 835, 839 (2000) (holding that an earnest money agreement for the purchase of real property is merely an agreement to agree). Agreements to agree are also unenforceable because the "terms are so indefinite that [they] fail[] to show a mutual intent to create an enforceable obligation." *Maroun*, 141 Idaho at 614, 114 P.3d at 984. "It is essential to an enforceable contract that it be sufficiently definite and certain in its terms and requirements so that it can be determined what acts are to be performed and when

performance is complete." *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621, 226 P.3d 1263, 1268 (2010) (quoting *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662, 664, 534 P.2d 1102, 1104 (1975)).

The trial court found that the Teaming Agreement was not an enforceable contract because it is "merely an agreement to agree." R. Vol. I, p. 2595. Syringa disagrees with the district court's decision because "whether the Teaming Agreement was a binding contract presents disputed issues of material fact that can only be resolved by the jury." *Plaintiff/Appellant Opening Brief*, pp. 36-37. Specifically, Syringa argues that this material fact was created by the following evidence that was "ignored" by the district court: (1) knowledge by ENA and Syringa of the RFP provision that permitted multiple awards; (2) the pricing information provided in the response to the RFP; and (3) the CEO of Syringa's testimony concerning the "compulsory requirement that the parties enter into a Service Agreement that would include 'flow down' provisions that might be 'required' as a result of the Prime Contract with the state." *Plaintiff/Appellant Opening Brief*, p. 37. None of this information was "ignored" by the district court. Instead, these facts do not create a genuine issue of material fact because they fail to address the dispositive and undisputed facts, as presented through the testimony of Syringa CEO Greg Lowe, that the Teaming Agreement (1) lacked material terms; (2) was for the purpose of submitting a joint bid between Syringa and ENA for the IEN project; (3) expressly contemplates the need for a future agreement between the parties if the IEN Alliance was awarded the IEN project; and (4) lacks a mutual intent for the parties to be bound in the future.

Additionally, and confusingly, Syringa argues that the relevant inquiry by the court should not have been "whether a disputed contract [the Teaming Agreement] is 'an agreement to agree,' but instead, whether it is sufficiently complete." *Plaintiff/Appellant Opening Brief*, p. 38. This argument implies that the "sufficiently complete" standard is different from the "agreement to agree" standard, which, if properly applied by the trial court, would have resulted in a different ruling. In fact, an agreement to agree is one that lacks sufficient terms to bind the parties and merely contemplates some form of agreement in the future. *See Spokane Structures, Inc.*, 148 Idaho at 621, 226 P.3d at 1268. Further, the district court did not ignore the completeness of the Teaming Agreement and, in fact, relied on *Spokane Structures*, when it conducted the analysis that arrived at the ultimate conclusion that the Teaming Agreement was an agreement to agree, lacking the material terms of an enforceable agreement. *See* R. Vol. I, pp. 2590-2591.

2. The Teaming Agreement is Lacking in the Necessary Material Terms in Order to be a Binding Contract and Expressly Contemplates the Execution of a Subsequent Agreement

The district court found that the Teaming Agreement was an agreement to agree because it lacked definite and material terms, such as price, and because it expressly contemplated the need to execute a subsequent agreement contingent on the award of the "Project." R. Vol. I, pp. 2590-2591.

Specifically missing from the Teaming Agreement is language as to how the orders would be placed, how and when billing would occur, how each party would get paid, and how the money and labor would be divided. R. Vol. I, p. 1799, l. 22 - p. 1800, l. 15. As the CEO of

Syringa testified, all of these details were subject to "subsequent negotiations upon winning." R. Vol. I, p. 1800, ll. 19-20.

Syringa's assertion that the pricing in the response to RFP was sufficiently precise is wrong because no one responding to the RFP could provide actual pricing terms. The pricing terms within the IEN Alliance's proposal were based solely on assumptions that were provided by the State in the RFP for the sole purpose of comparing various bidders' responses to the RFP. *See* R. Vol. I, p. 1908 (RFP ¶ 10.0); *see also* R. Vol. I, p. 1843, l. 5 - p. 1844, l. 5. The RFP directly states that those assumptions were never intended to specify the actual needs of the schools for the IEN. R. Vol. I, p. 1882 (RFP ¶ 3.2). In fact, the actual needs of the schools were not and could not be specified until a complete inventory of the schools was conducted by the successful bidder(s) months after the SPBO's issued. Therefore, the district court was correct in finding that there were no facts to support Syringa's assertion that the Teaming Agreement contained a pricing term. In addition to that finding, the Teaming Agreement also fails to address the material terms of a final contract regarding the scope, timing, and cost of the services required by the individual schools.

Further, the Teaming Agreement would constitute an agreement to agree even if the State had accepted the proposal by the IEN Alliance to be the single, statewide contractor for the IEN project. That is because prior to any subsequent contract between the parties, four steps were required by the State in order for the parties to address the actual pricing and logistics of the connectivity services of the IEN Alliance. First, the State had to conduct an inventory of each school's need, which was a function of the size of the school and existing connectivity. *See*

generally R. Vol. I, p. 1829, l. 9 - p. 1830, l. 3. Second the State had to decide when to connect each school, as the RFP anticipated phasing in the IEN over time and some schools already had current connectivity contracts in place. R. Vol. I, p. 1828, ll. 11-20 (discussing ENA's preparation of diagrams that reflect pre-IEN architecture, proposed architecture, and the architecture which exists once the school is approved and connected); R. Vol. I, pp. 1862-1913; R. Vol. I, p. 1845, l. 25 - p. 1846, l. 23. The third task, as expressly outlined and anticipated in the Teaming Agreement, the parties were to bid out the "last mile connectivity" to each school to assure the state the lowest price for physically connecting schools in remote locations to the internet. R. Vol. I, p. 1831, l. 13 - p. 1832, l. 13 (stating that around August 2009 "high cost locations" were identifiable and further cost breakdowns of the IEN were requested); R. Vol. I, pp. 1858-1860; R. Vol. I, p. 1797, l. 24 - p. 1798, l. 7. Finally, the State, having reserved the right not to buy any services, had to make the decision school-by-school to buy the connectivity, including the last mile connectivity, to connect a school or school system to the IEN. Therefore, even if the IEN Alliance had become the carrier of record for the IEN project, ENA and Syringa could not have priced the cost of connectivity before completing these four steps.

In addition to lacking material terms, the Teaming Agreement clearly contemplated a subsequent agreement in order for the parties to be bound. Syringa points to the use of the term "shall" to derive an intent to be bound beyond the parties submission of the response to the RFP. Such a narrow reading of the contract ignores the fact that the "shall" was directly related and contingent on a subsequent agreement. A contract that demonstrates an intent to be bound by a future contract is the definition of an agreement to agree.

> If ENA or Syringa are awarded the Prime Contract, ENA and Syringa shall enter into an agreement pursuant to which Syringa shall provide connectivity services statewide to ENA.
>
> . . .
>
> If ENA wins the Prime Contract as provided in Section 2(a) above, the parties shall execute a partnership agreement as specified in this agreement that will also include any required, flow-down provisions or other appropriate terms similar to those set forth in the Prime Contract."

R. Vol. I, p. 1858 (Teaming Agreement, ¶¶ 2(a), 3(a)) (emphasis added). In addition to the uncertainty regarding pricing, there were several practical reasons why the IEN Alliance could not contract beyond submission of the submitted proposal and why the parties agreed that a subsequent and binding contract would be necessary if the project was accepted by the State.

First, ENA and Syringa could not know if they would succeed in obtaining the entire IEN project because the RFP reserved for the State the right to split the award. R. Vol. I, pp. 1875-1879 (RFP ¶ 2.0). Second, the parties could not know what services would be required until completion of the inventory described above. Third, the RFP did not obligate the State to purchase any services, even if the IEN Alliance had won the entire contract for the IEN.[4] The Teaming Agreement does not establish the time, scope, or pricing for the services to be provided to individual schools or school districts because it could not under these conditions. As described by Greg Lowe, the CEO of Syringa, "[t]he subsequent agreement was for the logistics of what this teaming agreement defined as work." R. Vol. I, p. 1800, l. 22 - p. 1801, l. 7. The

[4] Specifically, the "required, flow-down provisions or other appropriate terms" are the terms that ENA and Syringa knew that they could not anticipate prior to an award of the IEN project.

RFP created an uncertainty in the scope of the award; therefore, the express terms of the Teaming Agreement could not contain the final agreement between ENA and Syringa.

Syringa relies on *ATACS Corp. v. Trans World Comm., Inc.*, to support its position that the anticipation of a future agreement does not render the Teaming Agreement incomplete. *Plaintiff/Appellant Opening Brief*, pp. 38-39. However, *ATACS*, is distinguishable from the present case because the court was analyzing a situation where one party was awarded the entire bid for which the parties had submitted the proposal. *ATACS Corp. v. Trans World Comm., Inc.*, 155 F.3d 659, 663 (3d Cir. 1998). In *ATACS*, the parties entered into a teaming agreement and agreed that Trans World would be the contractor and ATACS would be the subcontractor to a bid submitted to the Greek government. *ATACS Corp.*, 155 F.3d at 663. The Greek government then informed Trans World that it was the lowest bid among all the competitors; Trans World responded to this information by requesting that ATACS resubmit its bid because it "was not competitive with other proposals which [Trans World] [had] received." *Id.*, at 663-64. Trans World subsequently entered into a contract with the Greek government for the entire project contemplated in the submitted bid. *Id.*, at 663. *ATACS* is distinguishable from the present case for precisely that reason; ENA did not receive the entire project as contemplated and bid for by the parties and ENA was not awarded the portion of the project contemplated for Syringa's completion (the connectivity). Therefore, Syringa's reliance on this case as to the "completeness" of the Teaming Agreement is misguided.

Syringa also argues that the Teaming Agreement is "unquestionably complete concerning the parties' efforts to obtain the Prime Contract." *Plaintiff/Appellant's Opening Brief*, p. 39

(emphasis added). ENA agrees. The Teaming Agreement was complete regarding the parties' efforts to prepare and submit a bid to obtain the Prime Contract as the sole, single source provider for the entire, statewide IEN project. However, the Teaming Agreement is not "unquestionably complete" regarding the parties' relationship after the bid for the project was submitted, let alone after those efforts were thwarted.

a. The Teaming Agreement Does Not Show a Mutual Intent to be Bound by an Enforceable Obligation.

Similar to the above arguments, the Teaming Agreement did not manifest an intent to create an enforceable obligation beyond the submission of the proposal. The Teaming Agreement is premised on "if" and "when" and merely contemplated a future contractual relationship. R. Vol. I, p. 1858 (Teaming Agreement ¶ 2(a)) ("If ENA or Syringa are awarded the Prime Contract"). Had Syringa and ENA intended to create an enforceable obligation, they would have stated that intent within the four corners of the document. As discussed above, any final agreement between ENA and Syringa was contingent on many factors. There is no language in the Teaming Agreement that unequivocally states a present intent to create a mutually enforceable obligation regarding the services that might ultimately be determined to be required for the IEN project.

The language of the Teaming Agreement alone rebuts Syringa's efforts to create an issue of fact. Syringa concludes its argument that there is a mutual intent to be bound by stating that the parties defined the "individual and joint obligations should ENA be awarded a Prime Contract[.]" *Plaintiff/Appellant's Opening Brief*, p. 41-42 (emphasis added). This is Syringa's

attempt to parse the language of the Teaming Agreement to argue that any award to ENA was covered by the Teaming Agreement. Syringa's assertion that ENA only needed to be awarded "a prime contract" is contrary to the stated purpose of the Teaming Agreement, which expressly states that the parties desired for ENA to be awarded "the prime contract" to provide both E-rate and connectivity services required by the IEN statewide. *See* R. Vol. I, p. 1858 (Teaming Agreement, ¶ 2(a)) ("Purpose. ENA is seeking to become either (i) the prime contractor for the Project or (ii) the prime contractor for the portion of the Project which provides all services to schools and libraries.") (emphasis added).

Additionally, Syringa's argument rests on the assumption that the Teaming Agreement was meant to govern the parties' relationship beyond the submission of the bid to the State and ignores that any future contract between Syringa and ENA was premised on the award of "the prime contract." Syringa wants the Court to read the Teaming Agreement as the only agreement necessary between ENA and Syringa for all future contractual relationships involving the IEN project. The Teaming Agreement states exactly the opposite: "[i]f ENA wins the Prime Contract as provided in Section 2(a) above, the parties shall execute a partnership agreement[.]" R. Vol. I, p. 1859 (Teaming Agreement, ¶ 3(a)). That is, although the parties contemplated a subsequent agreement defining their relationship as well as a separate contract with the state, any mandatory nature of these subsequent agreements was completely contingent on the IEN Alliance (or ENA) being awarded "the prime contract" or "the prime contract . . . [for] all services to schools and libraries." R. Vol. I, p. 1858 (Teaming Agreement, ¶ 2(a)). It is undisputed that ENA and the

IEN Alliance were awarded neither. Therefore, the Teaming Agreement could not have been intended to govern the parties' relationship beyond the submission of their proposal to the RFP.

b. *Even if the Teaming Agreement is an Enforceable Contract, it Terminated by its Own Terms When the State Twice Rejected the IEN Alliance's Proposal*

By its own terms, the Teaming Agreement terminated when the State rejected the IEN Alliance's proposal. "This agreement will terminate without liability upon any of the following events: (i) the customer formally and finally rejects the Proposal or cancels the Project." R. Vol. I, p. 1859 (Teaming Agreement ¶ 2(h)(i)). It is black letter law that a purported acceptance of an offer, which varies from the terms of the offer is a rejection of the offer. *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 43, 105 P.3d 700, 703 (Ct. App. 2005) (quoting *Phelps v. Good*, 15 Idaho 76, 84, 96 P. 216, 218 (1908) (stating that "[a]n acceptance which varies from the terms of the offer is a rejection of the offer")). When the State split the award between ENA and Qwest, rather than awarding the entire IEN project to the IEN Alliance as proposed by ENA and Syringa, the State rejected the proposal of the IEN Alliance and the Teaming Agreement terminated pursuant to the above term.

On January 20, 2009, the State expressly rejected the IEN Alliance's offer to have Syringa provide the connectivity portion of the IEN on a statewide basis. The State did not award a single, statewide, "end-to-end solution" as offered by the IEN Alliance proposal. Syringa's role in the IEN Alliance was to provide connectivity for the IEN project on an exclusive, statewide basis. The State rejected the IEN Alliance's proposal a second time when it issued "clarifying" amendments on February 26, 2009, that clearly delegated to Qwest those

tasks proposed by the IEN Alliance to be performed by Syringa. Therefore, the Teaming Agreement terminated when the state "formally and finally rejected" the proposal by the IEN Alliance that Syringa provide connectivity on a statewide basis. *See* R. Vol. I, p. 1859 (Teaming Agreement ¶ 2(h)(i)).

The district court correctly found that the unilateral decision to divide the work between ENA and Qwest constituted a "formal and final rejection of the IEN Alliance proposal." R. Vol. I, p. 2595. Syringa argues that such a finding is erroneous for the following reasons: (1) "[t]he district court erred by concluding that the amended SBPO's did not require the agreement of ENA[;]" (2) Syringa and ENA, based on the language of the contract, did not intend for a counteroffer by the State to constitute a "formal and final rejection" of the parties' proposal; and (3) a "formal and final rejection" cannot occur by operation of law.

Syringa's first argument that the Teaming Agreement could not have terminated by its own express terms because "the amended SBPO's did not require the agreement of ENA" rests on the incorrect position that the termination occurred at the formation of a new contract, rather than at the rejection of the original offer on January 20, 2009. The effect of the State SBPO's, which were issued to ENA and Qwest (not the IEN Alliance), was a "formal and final rejection" of the IEN Alliance's offer to the State. "An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract." *Heritage Excavation, Inc.*, at 43, 105 P.3d at 703 (quoting *Phelps*, at 84, 96 P. at 218). Therefore, regardless if ENA's acceptance was required for the Amended SBPO's, the rejection of the IEN Alliance's offer occurred at the

moment that the State "formally and finally reject[ed] the Proposal" or "the written response to the Project." R. Vol. I, pp. 1858-1859 (Teaming Agreement, ¶¶ 1(d), 2(h)).

Syringa next argues that rejections by "operation of law" cannot be "formal and final" and that Syringa and ENA did not intend for a rejection by "operation of law" to terminate the Teaming Agreement. There is absolutely no evidence, factually or legally, to support such a contention. Syringa relies on the language of the Teaming Agreement and the knowledge of the parties that the State could make multiple awards. However, although the RFP contemplated multiple awards, there is no evidence that either ENA or Syringa contemplated that another provider (Qwest) would be given the entire portion of the project intended by the IEN Alliance for Syringa. A joint award, although possible, was not contemplated to occur in the fashion it did.

Despite the unequivocal testimony of its CEO, Syringa attempts to create an issue of fact by arguing that it can contradict its CEO's testimony and take the position that the parties did not intend the Project to be "all or nothing." Syringa relies on the "Purpose" of the Teaming Agreement to support such an inference. As confirmed by Greg Lowe, the purpose of the Teaming Agreement is unequivocal that the award to the IEN Alliance be either (1) a full award of the project or (2) a full award for the portion of the project that provides services to all schools and libraries. R. Vol. I, p. 1858 (Teaming Agreement, ¶ 2(a)). So although the parties were charged with the knowledge that the RFP allowed the State to slice up the proposal submitted by the IEN Alliance and only partially accept it, ENA and Syringa's clear intent was to obtain the entire contract statewide. The state did not make an award to the IEN Alliance, and instead split

the award between ENA, which could not provide connectivity services, and Qwest, which could. The State twice rejected the allocation of work contemplated by the Teaming Agreement; first by splitting the award between ENA and Qwest, and then by expressly delegating to Qwest those services that Syringa was anticipated to perform under the terms of the Teaming Agreement.

Finally, Syringa's argument completely ignores the fact that there is nothing ambiguous about the Teaming Agreement's language that "[t]his agreement will terminate . . . [upon] the customer formally and finally reject[ing]" the IEN Alliance's submission to the RFP. The State did not accept the IEN Alliance proposal. Therefore, the district court correctly found that the Teaming Agreement terminated by its own terms when the State rejected the IEN Alliance's offer.

i. The State Rejected the IEN Alliance's Proposal on January 20, 2009

As is evident by the filing of this case, the State did not accept the IEN Alliance's bid proposal. Greg Lowe, the CEO of Syringa, explained the purpose of the IEN Alliance's proposal was to provide an end-to-end solution, which consists of a statewide, single contractor:

> 11. A "total end-to-end service support solution" for a project like the Idaho Education Network means that a single contractor is to assume responsibility for all aspects of content, connectivity and coordination necessary for the delivery for an interactive learning environment. . . .
>
> 12. Syringa and [ENA] combined, in response to [the] recommendation in Section 3.2 of the IEN RFP quoted above, for the purpose of preparing a response to the IEN RFP and to provide the "total end-to-end support solution" solution [sic] the RFP requested.

R. Vol. I, p. 568 (*Lowe Aff.*, ¶¶ 11-12). The State did not accept this proposal and instead issued two SBPO's, one to ENA and one to Qwest. The State's action in this regard constitutes a rejection of the IEN Alliance's proposal. *See Heritage Excavation, Inc.*, at 43, 105 P.3d at 703 (stating that an acceptance that does not mirror the offer is a rejection of the offer).

ii. The State Rejected the IEN Alliance Proposal a Second Time When it Issued Amended SBPO's Assigning to Qwest the Connectivity Services for the IEN

If the original SBPO's did not clearly reject the IEN Alliance's proposal, then the issuance of the Amended SBPO's clearly did. The Amended SBPO's that issued on February 26, 2009, unilaterally awarded the connectivity services portion of the IEN to Qwest to the exclusion of Syringa. Under the definition of "award" as contained in the RFP, the State had the right to make an "award to multiple bidders in whole or in part." R. Vol. I, pp. 1875-1879 (RFP ¶ 2.0). In the month that intervened between the award and the Amendments, the State analyzed how best to divide the work between the two awardees. In the Amendments of February 26, the State awarded Qwest the backbone/connectivity portion of the IEN. As the district court concluded in an earlier ruling, "[t]he work assigned to Qwest apparently included all of the work that ENA and Syringa had proposed for Syringa. These amendments precluded Syringa from participating in the work." R. Vol. I, pp. 1655-1661; *see also* R. Vol. I, p. 1144.

iii. The State's Decision to Reject the IEN Alliance's Proposal was Unilateral

As stated by the district court, "[t]here is no evidence that ENA requested [the State] to award to Qwest the work that the IEN Alliance proposed for Syringa." R. Vol. I, p. 2595.

Further, "[o]nce the work was awarded to Qwest, ENA had no authority to assign or award to Syringa any portion of the work that the [State] awarded to Qwest." *Id.*

Mike Gwartney, the Director of the Department of Administration for the State of Idaho, explained in his letter of July 24, 2009, this unilateral decision in direct response to Syringa's challenge to the award:

> After the initial award, Administration then unilaterally determined how best to divide the work between the two awardees/contractors. Administration's determination was based upon the individual strengths of each awardees/contractors' proposals. For example, ENA had expertise in providing E-rate services and providing video teleconferencing operations. Qwest had expertise in providing the technical operation (i.e. backbone). Before Amendment 1 to the SBPO 01308 and SBPO 01309 were issued, Administration contemplated various ways to divide the responsibilities between Qwest and ENA, including but not limited to dividing the services to be provided by Qwest and ENA regionally. However, the division of responsibilities reflected in the Amendments is a reflection of what Administration believed would serve the best interests of the State of Idaho and the schools.

R. Vol. I, p. 1854 (emphasis added). "Qwest was awarded the technical services portion of the IEN (i.e. the backbone). ENA was not." *Id.* Syringa can point to no evidence that creates any issue of fact that the State's decision regarding the Amendments was not unilateral.

3. Alternate Grounds Exist for Affirming the District Court's Grant of Summary Judgment

The district court granted summary judgment without deciding ENA's alternate theories, which ENA now presents as an alternative basis for this Court to affirm the district court's decision. This Court may affirm the district court's decision if an alternative basis to support such a decision exists. *Thomas v. Thomas*, 150 Idaho 636, 644, 249 P.3d 829, 837 (2011) (quoting *Johnson v. McPhee*, 147 Idaho 455, 466, 210 P.3d 563, 574 (2009)).

a. *Even if the Teaming Agreement is an Enforceable Contract, Performance Never Became Due Because of the Failure of a Condition Precedent*

"A condition precedent is an event that is not certain to occur, but which must occur, . . . before performance under a contract will become due." *Maroun*, at 614, 114 P.3d at 984. "Whether a provision in a contract amounts to a condition precedent is generally dependent on what the parties intended, as adduced by the contract itself." *Johnson v. Lambros*, 143 Idaho 468, 474, 147 P.3d 100, 106 (Ct. App. 2006). The failure of the condition precedent must be through no fault of the parties. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005).

The goal of the IEN Alliance was to become the single, statewide contractor for the IEN. "The IEN is composed of two major components: educational content and telecommunications services." R. Vol. I, p. 18. The IEN Alliance was formed because, standing alone, neither Syringa nor ENA had the ability to provide a complete, statewide bid in response to the RFP. R. Vol. I, p. 1807, ll. 1-17. "Under the IEN Alliance, Syringa was responsible for the IEN telecommunication services and equipment, including local access connections, routing equipment, network and backbone services." R. Vol. I, p. 23 (*Complaint*, ¶28); *see also* R. Vol. I, p. 1808, ll. 9-21. In marrying the E-rate strength and expertise of ENA with the connectivity services of Syringa under the Teaming Agreement, the condition precedent to a future working relationship was the award of both the E-rate and the connectivity services under the IEN. Within the IEN Alliance, Syringa's goal was to be the single "carrier of record" for those connectivity services statewide. R. Vol. I, p. 1809, l. 17 - p. 1812, l. 5.

The condition precedent to an enforceable contract between ENA and Syringa was not satisfied because the IEN Alliance was not awarded the entire IEN contract. The Teaming Agreement expressly contemplated the IEN Alliance being awarded the entire IEN project (including the connectivity portion), which it was not. The Teaming Agreement cannot form the basis of an enforceable contract because the condition precedent to the formation of that contract was never met.

Furthermore, as discussed at length above, neither the IEN Alliance nor ENA were awarded the connectivity services that were the condition precedent to Syringa's performance. "The amended blanket purchase order very clearly put the handcuffs on ENA's ability to execute its teaming agreement." R. Vol. I, p. 1796, ll. 19-21. The State intended from the issuance of the letter of intent on January 20, 2010, that the IEN was to be split by having ENA provide E-rate and Qwest provide connectivity. R. Vol. I, p. 1823, l. 15 - p. 1825, l. 2. ENA never had the ability to direct any of the connectivity work for the IEN, as contemplated by the Teaming Agreement, to Syringa. The award of the entire IEN project, including connectivity, was a condition precedent to formation of a formal contract between ENA and Syringa. Therefore, even if the Teaming Agreement was a final and complete agreement between ENA and Syringa, performance would never have become due because of the failure to satisfy a condition precedent.

b. *Alternatively, the Teaming Agreement is Unenforceable Because Its Commercial Purpose Was Frustrated When Qwest Was Awarded the Entire Connectivity Portion of the IEN That Was Contemplated for Syringa Under the Teaming Agreement*

An event that substantially frustrates the object contemplated by parties when they made the contract excuses performance of the contract. *See* Restatement (Second) of Contracts § 269 (1981) (citing with approval in *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995)). Frustration of commercial purpose is measured on an objective, rather than subjective, basis. *Rasmussen v. Martin*, 104 Idaho 401, 406, 659 P.2d 155, 160 (Ct. App. 1983).

i. *The Purpose of the IEN Alliance, Which was to Obtain the Contract for the IEN Statewide, was Frustrated When the State Issued the Award to ENA and Qwest.*

The State's decision to issue the award to ENA and Qwest frustrated the object of the Teaming Agreement, which was to obtain the entire, statewide contract for the IEN. The uncontroverted facts, indeed the very basis of Syringa's claim, are that the commercial purpose of the IEN Alliance has been frustrated by the award of the connectivity portion of the IEN project to Qwest. Syringa's responsibilities under the Teaming Agreement, as expressly set forth in paragraph ¶3(b), was to provide connectivity services. Further, "[u]nder the IEN Alliance, Syringa was responsible for the IEN telecommunication services and equipment, including local access connections, routing equipment, network and backbone services." R. Vol. I, p. 23 (*Complaint*, ¶28). The commercial purpose of the Teaming Agreement was to provide ENA the E-rate work and Syringa the connectivity services. Even if the Teaming Agreement was an enforceable contract, it is clear that the SBPO's and the Amendments to the SBPO's have frustrated one of the primary commercial purposes of the Teaming Agreement.

ii. Syringa Cannot Perform its Anticipated Duties under the Teaming Agreement Because Those Duties Were Awarded by the State to Qwest

The State frustrated that commercial purpose of the Teaming Agreement by awarding Qwest the connectivity services required by the IEN to the exclusion of Syringa. The State awarded "Qwest all of the IEN telecommunications services." R. Vol. I, p. 18. "With minor differences in language, a side-by-side comparison demonstrates that the services for which Syringa was responsible under the Teaming Agreement and the services for which Qwest was responsible under the Amended SBPO's are the same services." R. Vol. I, pp. 570-571 (*Lowe Aff.*, ¶ 27). Mr. Lowe set forth in his affidavit a side-by-side comparison which demonstrates this very concept:

Syringa Responsibilities Under Paragraph 3(c) of the Teaming Agreement			**Qwest Responsibilities Under Paragraphs 1 – 4 of Amendment One (1) to SBPO1308**	
3(c)	Syringa shall be responsible for (i) providing the statewide backbone for the services, (ii) providing and operating a network operations center for the backbone, (iii) providing for co-location of core network equipment, (iv) procuring and owning all customer premises equipment not provided by ENA, (v) coordinating field service for non-school or library sites, (vi) managing the customer relationship for non-school or library sites, and		1. 2.	Qwest will be the general contractor for all IEN technical network services. The Service Provider listed on the State's Federal E-rate Form 471, Education Networks of America (ENA) is required to work with the dedicated Qwest Account Team for ordering, and provisioning of, ongoing maintenance, operations and billings for all IEN sites. Qwest, in coordination with ENA, will deliver IEN technical network services using its existing core MPLS network and backbone services.

	(vii) procuring, managing and provisioning last mile circuits for non-school or library sites.		3.	Qwest, in coordination with ENA, will procure and provision all local access connections and routing equipment, making reasonable efforts to ensure the most cost efficient and reliable network access throughout the State to include leveraging of public safety network assets wherever economically and technically feasible.
			4.	Qwest, in coordination with ENA, will provide all Internet services to IEN users.

As demonstrated by Greg Lowe, the State frustrated Syringa's "commercial purpose" in forming the Teaming Agreement by awarding to Qwest all of the communication services that were identified as Syringa's responsibilities under the Teaming Agreement.

The very foundation upon which the Teaming Agreement was made is gone; that is, for Syringa to provide the entire connectivity portion of the IEN statewide. Even if the Teaming Agreement constituted an enforceable contract, ENA does not have the ability to direct to Syringa the connectivity services required by the IEN. *See* R. Vol. I, p. 1833, l. 17 - p. 1834, l. 1 (stating that ENA may not order directly from Syringa without approval of the State and Qwest); *see also* R. Vol. I, p. 1847, l. 4 - p. 1851, l. 3 (according to the contracts with the State, ENA may only contract for connectivity services with Qwest's agreement). Syringa's fundamental purpose of the Teaming Agreement has been frustrated by the State's decision to split the award between multiple parties. Therefore, ENA's performance under the Teaming Agreement never became due.

C. ENA IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

The parties do not dispute that ENA and Syringa are involved in a commercial transaction. Therefore, if ENA is the prevailing party in this appeal, ENA is entitled to attorney's fees pursuant to Idaho Code § 12-120(3):

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

"The crucial test in determining whether a civil action arose out of a commercial transaction is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is attempting to recover." *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008); *see also Ervin Constr. Co. v. Van Orden*, 125 Idaho 695, 705, 874 P.2d 506, 516 (1993) (finding a commercial transaction was the gravamen of an action brought for breach of a construction contract). "Where an action is one to recover in a commercial transaction, that claim triggers the application of section 12-120(3) and the prevailing party may recover fees 'regardless of the proof that the commercial transaction did in fact occur.'" *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 415, 179 P.3d 1064, 1017 (2008).

There is no question that this action is a commercial transaction. The basis of Syringa's complaint arises from the State of Idaho's award of the IEN contract. The allegations against ENA were that ENA breached its Teaming Agreement with Syringa as a result of the State's award. Breach of contract claims are commercial transactions regardless of whether the

commercial transaction did or did not occur. If the Court finds in favor of ENA, ENA is entitled to fees pursuant to Idaho Code § 12-120(3) as the prevailing party in an action based on a commercial transaction.

Further, the provision in the Teaming Agreement that applies to attorney fees is not applicable to the present action. "Each party shall pay its own fees and expenses (including, without limitations, the fees and expenses of its agents, representatives, attorneys, and accountants) incurred in connection with the negotiation, drafting, execution, delivery, and performance of this agreement and the transactions it contemplates." R. Vol. I, p. 1860 (Teaming Agreement, ¶ 4) (emphasis added). The fees ENA incurred in defending this appeal were not "in connection with the negotiation, drafting, execution, delivery, and performance" of the Teaming Agreement. Instead, the fees incurred were in connection to the legal enforceability of the Teaming Agreement. There is nothing in the language of the attorney fees provision which suggests that the parties contemplated its survival independent of the unenforceability or termination of the Teaming Agreement. This is evidenced by: (1) the attorney fees provision applies only to the formation of the agreement and performance under the agreement; (2) the Teaming Agreement does not have a survival or severability provision; and (3) the Teaming Agreement does not have a provision which incorporates it into any subsequent agreement between Syringa and ENA. Therefore, if the Court finds that the attorney fees provision and language even applies to this action, which it does not, it would be impossible to find that the provision survived the Teaming Agreement's termination under Idaho law. Therefore, this Court should award ENA its attorney's fees pursuant to Idaho Code § 12-120(3).

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the breach of contract claim against ENA because (1) the Teaming Agreement is an agreement to agree; (2) the Teaming Agreement terminated by its own terms; (3) even if the Teaming Agreement is an enforceable contract, performance never became due because of the failure of a condition precedent; and (4) performance was excused because the commercial purpose of the Teaming Agreement was frustrated by the State's award of the Idaho Education Network. ENA further requests that the Court award it costs and fees.

DATED this 6th day of March, 2012.

FARLEY OBERRECHT WEST HARWOOD
& BURKE, P.A.

By _____
Phillip S. Oberrecht - Of the Firm
Leslie M.G. Hayes – Of the Firm

BRADLEY ARANT BOULT CUMMINGS LLP
Robert S. Patterson – Of the Firm
Attorneys for Defendant ENA Services, LLC, a Division of Education Networks of America, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of March, 2012, I caused to be served a true copy of **APPELLEE ENA SERVICES, LLC, A DIVISION OF EDUCATION NETWORKS OF AMERICA, INC.'S AMENDED RESPONSE BRIEF**, by the method indicated below, and addressed to each of the following:

David R. Lombardi
Amber N. Dina
GIVENS PURSLEY LLP
601 W. Bannock
P. O. Box 2720
Boise, ID 83701
Fax: (208) 388-1300

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy
X E-Mail

Merlyn W. Clark
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 W Main St, Ste 1000
PO Box 1617
Boise, ID 83701-1617
Fax: (208) 954-5210

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy
X E-Mail

Stephen R. Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS CHARTERED
101 S Capitol Blvd, 10th Fl
PO Box 829
Boise, ID 83701-0829
Fax: (208) 385-5384

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy
X E-Mail

B. Lawrence Theis
Steven Perfrement
BRYAN CAVE HRO
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Fax: (303) 866-0200

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy
X E-Mail

Phillip S. Oberrecht
Leslie M.G. Hayes