fied by judicial construction and omissions resulting from outright lack of assent often is drawn between mere failure to discuss a matter as distinguished from outright discussion and failure to agree.[9]

§ 2:9 Express contracts—Definite contract or "agreements to agree"—Teaming agreements

The issue of whether expressions of intent are enforceable is of direct interest to contractors who engage in the common practice of collaborating in the pursuit of large contracts under written

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Cir. 2007) (holding that no subcontract was formed following months of negotiation because the contractor did not rely on the subcontractor's multiple offers and did not include various terms requested by the subcontractor in its counteroffers).

[9]See I Farnsworth on Contracts § 3.27 (2d ed. 1998):

> It is essential to distinguish one other cause of incompleteness of agreement—a failure to agree. If the seller and the buyer of apples do discuss the matter of the seller's responsibility for their quality and are unable to agree on how that matter is to be resolved, the incompleteness of their agreement in that respect will be fatal to the enforceability of their agreement—not because of lack of definiteness, but because of lack of assent. There is a critical distinction between remaining silent on such a matter and discussing it but failing to agree.

See also Scott, A Theory of Self-Enforcing Indefinite Agreements, 103 Colum. L. Rev. 1641 (2003):

> All agreements are incomplete. There are indefinite states of the world and the capacities of contracting parties to condition their future performance on each possible state are finite, but incomplete contracts differ along key dimensions. Many contracts are incomplete because parties decline to condition performance on uncertain future states that they cannot observe or verify to courts. In these cases, incompleteness is exogenous to the contract; that is, the parties are incapable of contracting efficiently over measures of performance that cannot be verified. Other agreements, however, appear to be "deliberately" incomplete, in the sense that parties decline to condition performance on available, verifiable measures that could be specified in the contract at relatively low cost. Thus, incompleteness is endogenous to these agreements, suggesting that the parties had other reasons for leaving the terms in question unspecified.
>
> These deliberately incomplete agreements are unenforceable under Traditional Contracts Doctrine. One of the core principles of contract law is the requirement of definiteness. An agreement will not be enforced as a contract if it is uncertain and indefinite in its material terms. A contract, that is, must be sufficiently complete such that a court is able to determine the fact of breach and provide an appropriate remedy. Only then does the doctrine direct courts to enforce the agreement by filling contractual gaps where necessary. Otherwise, the doctrine directs courts to deny enforcement and leave the losses to lie where they fall. It is widely believed, however, that the Indefiniteness Doctrine is largely ignored by contemporary courts. Conventional wisdom holds that courts should (and do) strive whenever possible to fill contractual gaps with general standards of reasonableness and good faith.

"teaming agreements."[1] Under such "teaming agreements," contractors with diverse capabilities seek to define their relationships, rights, and responsibilities during both the pursuit of the contract award and, if a contract is awarded based on their joint efforts, their respective performance obligations regarding the awarded contract. In construction, teams of contractors and designers may pursue design-build and other collaborative contracts,[2] and have obligations to negotiate in good faith.[3] "Teaming agreements" not reasonably complete, definite, and clear, may be declared unenforceable,[4] and such agreements can be superseded

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[Section 2:9]

[1]Contractor teaming agreements are widely used by contractors seeking the award of federal government and other competitively bid or negotiated public contracts. Such teaming arrangements are acceptable to the government where "arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective." See F.A.R. § 9.603. See also Murtha, The Enforceability of Teaming Agreements in Government Contracting and Its Effect on Contract Formation, 49 Proc. Law. 22 (Summer 2014) (discussing the liberal, moderate liberal and conservative views regarding enforcement of teaming agreements); Hanseman & Kidd, Enforceability of Teaming Agreements, 46 Proc. Law. 18 (Fall 2010) (discussing hurdles to enforcement of a "teaming agreement"); Humphries and Irwin, Teaming Agreements/Edition III, Briefing Papers (Sept. 2003); Killian and Fazio, Creating and Enforcing Teaming Agreements, 25 Constr. Law. 5 (Spring 2005); Strauss & Dyer, Enforcement of Teaming Agreements, 37 Proc. Law. 5 (Fall 2001); Greenberg and Hummell, Teaming Agreements for Design-Build Projects, Construction Briefings No. 2001-9 (2001); Newton, The Legal Effect of Government Contractor Teaming Agreements: A Proposal for Determining Liability and Assessing Damages in the Event of Breach, 91 Colum. L. Rev. 1990 (1991).

[2]See Design-Build Teaming Agreement Guide, in Design-Build Manual of Practice (2015).

[3]See Cyberlock Consulting, Inc. v. Information Experts, Inc., 939 F. Supp. 2d 572 (E.D. Va. 2013), aff'd, 549 Fed. Appx. 211 (4th Cir. 2014) (refusing to enforce a teaming agreement that was construed to be no more than an agreement to negotiate a subcontract in good faith at some point in the future, and thus was a mere agreement to agree). An "agreement to agree" does pose an obligation upon the parties to negotiate in good faith. See North Star Steel Co. v. U.S., 477 F.3d 1324, 1332 (Fed. Cir. 2007) ("a provision which calls upon the parties to a contract to agree in the future on a specified point or contract term, often referred to as an 'agreement to agree', imposes an obligation on the parties to negotiate in good faith").

[4]See Abt Associates, Inc. v. JHPIEGO Corp., 104 F. Supp. 2d 523 (D. Md. 2000), judgment aff'd, 9 Fed. Appx. 172 (4th Cir. 2001) (holding unenforceable the teaming agreement that was not executed by the parties but under which the parties devoted substantial time and resources because there was no mutual agreement on "essential terms"); W.J. Schafer Associates, Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512, 33 U.C.C. Rep. Serv. 2d 1073 (1997) (holding

by subsequent conduct and course of performance.[5] Unless a "teaming agreement" is said specifically to be superseded by a following contractual agreement, the terms of the teaming agreement have been held to be part of the follow-on performance contract.[6]

"Teaming agreements" found to contain sufficient specificity of terms typically are enforced.[7] Illustrative is *Airtaces Corp. v. Trans World Communications, Inc.*,[8] in which two contractors

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unenforceable a signed teaming agreement as too uncertain).

[5]See J. Ray McDermott, Inc. v. Berry Contracting, L.P., 2003 WL 22990878 (E.D. La. 2003) (a pre-contract teaming agreement, called an "alliance agreement," was found to have been superseded by a subsequent blanket subcontractors' agreement entered into after the prime contract had been awarded to the contractor); Key Federal Finance v. General Services Administration, CBCA 411, CBCA 412, 07-1 B.C.A. (CCH) ¶ 33555, 2007 WL 1197780 (U.S. Civilian BCA 2007) (recognizing both the "contractor" and a team member as having direct contractual rights against the government, where, in addition to its formal contractual relationship with the "contractor," the government's relationship with the team member "went substantially beyond that of the normal contractor/subcontractor").

[6]See URS Corp. v. Transpo Group, Inc., 2015 WL 419021 (W.D. Wash. 2015) (limiting the liability of a subcontractor to a contractor based on liability limitation provisions in the parties' preceding teaming agreement that was never expressly superseded by the subsequent subcontract); Weatherproofing Technologies, Inc. v. Alacran Contracting, LLC, 2015 WL 505683 (W.D. Wis. 2015) (although the parties executed a "teaming agreement" to cooperate in pursuing a contract, the parties' legal arrangement during performance was that of contractor and subcontractor, and the subcontractor was entitled to full payment without obligation to share the contractor's alleged loss on the project). See also Navar, Inc. v. Federal Business Council, 291 Va. 338, 784 S.E.2d 296 (2016) (ruling an indefinite teaming agreement was a mere "agreement to agree" and thus was not enforceable).

[7]See GeoNan Properties, LLC v. Park-Ro-She, Inc., 2011 UT App 309, 263 P.3d 1169 (Utah Ct. App. 2011) (finding essential terms sufficiently definite to warrant enforcement of agreement); Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, 176, 107 Cal. Rptr. 2d 209 (1st Dist. 2001), as modified, (May 22, 2001) (upholding teaming agreements found to be sufficiently definite to warrant enforcement); Ulliman Schutte Const., LLC v. Emerson Process Management Power & Water Solutions, 2006 WL 1102838 (D.D.C. 2006) (enforcing "bid exclusivity agreement," which provided that the team leader contractor would not be required to award a subcontract to a team member unless the parties could reach agreement on subsequent subcontract terms and conditions, work scope, and final price); Fidelity and Deposit Co. of Maryland v. Rotec Industries, Inc., 392 F.3d 944 (7th Cir. 2004) (a defaulting team member was not allowed to enforce a teaming agreement as separate and divisible from the subsequent contract); Cable & Computer Technology Inc. v. Lockheed Sanders, Inc., 214 F.3d 1030, 2000-2 Trade Cas. (CCH) ¶ 72991 (9th Cir. 2000); Air Technology Corp. v. General Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (1964).

[8]ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659 (3d Cir.

entered into a teaming agreement to pursue the award of a contract from the Greek army for "communication shelters." One party agreed to assume financial responsibility for the contract, while the other party agreed to be a major subcontractor to assist in proposal preparation, and to provide a price quote for certain shelters and generators. The understandings of the parties were documented in a letter which described the relationship as a "strategic alliance," and which purported to confirm their agreement in principle. In reliance upon the agreement, the parties completed the proposal and exchanged a number of draft subcontracts that were never executed. After the Greek government awarded the contract, the prime contractor awarded the proposed subcontractor's work to another company that offered to do the work for $2 million less. Notwithstanding the lack of an executed subcontract, the United States District Court for the Eastern District of Pennsylvania upheld the "teaming agreement" as valid and enforceable, and this judgment was affirmed by the United States Court of Appeals for the Third Circuit as follows:

> We agree that the letter of intent and draft subcontracts exchanged between the parties clearly outline the terms of this transaction as an expression of the parties' intent. This is not . . . a simple "agreement to agree" given the specificity of the duties carefully described in the draft subcontracts and letters of intent. Nor do the parties indicate that the terms of their teaming agreement were subject to final execution of the subcontract.

§ 2:10 Implied-in-fact contracts

Although most contracts are formed by express mutual exchanges of promises[1] made either in writing or orally, the common law long has recognized that, in the absence of an express

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1998).

[Section 2:10]

[1]Where a contract is formed by an express mutual exchange of promises, and the dispute in question falls within the scope of the express contract, implied contract principles may not be invoked. See §§ 19:35, 19:38. See also Restatement Third, Restitution and Unjust Enrichment § 2, comment c ("Restitution is . . . subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach"). See also U.S. Sur. Co. v. Edgar, 2014 WL 1664818 (M.D. Fla. 2014) (denying recovery of quantum meruit under implied contract theory where an express contract exists between the parties); In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation, 22 F. Supp. 3d 1322 (N.D. Ga. 2014) (same); Total Indus. Plant Services, Inc. v. Turner Industries Group, LLC, 2013 MT 5, 368 Mont. 189, 294 P.3d 363 (2013) (concluding that "because all of the work completed by [the contractor] was done pursu-