IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ORION TECHNICAL RESOURCES, LLC,
Plaintiff/Appellant,

Ct. App. No. 30,928

vs.

LOS ALAMOS NATIONAL SECURITY, LLC and
COMPA INDUSTRIES, INC.
Defendants/Appellees

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
OCT 12 2011

Appeal from the Second Judicial District Court
County of Bernalillo, State of New Mexico
Honorable Beatrice Brickhouse, Judge
D-202-CV-2009-5659

ANSWER BRIEF OF DEFENDANT/APPELLEE COMPA INDUSTRIES, INC.

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I. INTRODUCTION

Los Alamos National Security, LLC ("LANS") is under contract to the United States Department of Energy ("DOE") to manage Los Alamos National Laboratory. LANS supplements its permanent staff through the use of one or more subcontracts for various types of labor. In 2007, LANS issued a Request for Proposals ("RFP" or "Solicitation") for a major staff augmentation and computerized vendor management system ("VMS") subcontract. COMPA Industries, Inc. ("COMPA") submitted a proposal and was awarded the subcontract ("VMS Subcontract"). Orion Technical Resources, LLC ("Orion") also submitted a proposal but was not selected for award.

After submitting a protest directly to LANS and receiving only partial relief [RP 0104 *et seq.,* RP 0170 *et seq.*], Orion filed this case in the Second Judicial District. Orion named COMPA as a defendant solely because Orion sought injunctive relief which would affect COMPA's rights as the awardee of the VMS Subcontract. [RP 0008, ¶¶24, 25]. In its Amended Complaint, Orion asked for damages and also asked that the "Court permanently enjoin LANS and COMPA from proceeding with the performance of the VMS Subcontract at issue." [RP 0570]. However, Orion, in its Complaint, its Amended Complaint and throughout the conduct of the proceeding below, never alleged that COMPA had acted in any way detrimental to Orion.

COMPA filed a motion for partial summary judgment on the single issue of Orion's claim for injunctive relief. [RP 0866 *et seq.*] Disposition of this issue in favor of COMPA would dispose of Orion's claims with respect to COMPA. In its motion for partial summary judgment, COMPA demonstrated that monetary damages are adequate and, for that reason, injunctive relief is not warranted. COMPA also established that the injunctive relief requested would offer no relief at all to Orion while it would improperly punish and harm LANS and COMPA. Orion responded by admitting all the material facts in COMPA's motion for partial summary judgment, but arguing that Orion was nonetheless entitled to injunctive relief for various reasons. [RP 0985 *et seq.*]

The District Court heard argument on COMPA's motion as well as several other motions by LANS and Orion. Transcript of Proceedings, October 13, 2010. The District Court granted COMPA's motion for partial summary judgment in its Opinion and Order of October 18, 2010, as well as LANS's motion for judgment on the pleadings and LANS's motion for judgment on the pleadings regarding Orion's claim for injunctive relief. [RP 1589]. After entry of Final Judgment [RP 1642-1643], Orion filed this Appeal.

COMPA agrees with the District Court and with LANS that there is no implied-in-fact contract between LANS and Orion because LANS is not a governmental entity. If this Court finds there is no basis for an implied-in-fact

contract, then, of course, the issue of injunctive relief is moot. Should the Court find a basis for an implied-in-fact contract against LANS, however, injunctive relief against COMPA should nonetheless be denied because Orion has an adequate legal remedy and because enjoining continued performance of the VMS Subcontract would provide no benefit to Orion and would be punitive to COMPA and LANS.

II. STANDARD OF REVIEW

Grants of summary judgment are reviewed *de novo*. As the Supreme Court recently summarized the standard:

> In *Romero v. Philip Morris Inc.* (*Philip Morris*), 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, we repeated the following standards regarding appeals of summary judgments. Our review of summary judgment on appeal is de novo. *Id.* ¶ 7. Summary judgment will be affirmed if we conclude that "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks and citation omitted). We "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Id.* (internal quotation marks and citation omitted). The party moving for summary judgment has the "initial burden of establishing a prima facie case for summary judgment" by presenting "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id.* ¶ 10 (internal quotation marks and citation omitted). Once the moving party has met this burden, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citations omitted). To determine which facts are material, a court's focus should be on whether, under the pertinent substantive law, "the fact is necessary to give rise to a claim." *Id.* ¶ 11 (internal quotation marks and citation omitted).

City of Rio Rancho v. AMREP Southwest, Inc., 2011-NMSC-037, ¶14, __ N.M. __, __ P.3d __.

COMPA filed a motion for partial summary judgment challenging the availability of injunctive relief under the facts of this case. [RP 0866-0876]. Orion responded and admitted each of the facts contained in COMPA's statement of undisputed material facts supporting its motion. [RP 0986-0988]. Orion did not allege different facts in its response, but argued, on a purely legal basis, that injunctive relief was appropriate because Orion was barred from seeking lost profits under the holding in Planning & Design Solutions v. City of Santa Fe ("Planning & Design"), 118 N.M. 707, 885 P.2d 628 (1994). [RP 0992-0993]. Because Orion, the non-movant, did not demonstrate the existence of specific evidentiary facts which would require trial on the merits, the only question here is whether COMPA is entitled to judgment as a matter of law.

III. ARGUMENT

Orion has brought and pursued this case on the belief that if LANS had followed what Orion believes to be the correct procedures for this subcontract procurement, then Orion would necessarily have been the awardee.[1] This position

[1] If the alleged contract to consider bids "fairly" had been performed and Orion was not found to be the successful bidder, then Orion would have suffered no injury and would not be entitled to damages at all.

is fundamentally flawed. Even if Orion could prove that there was an implied-in-fact contract, and that Orion should have been awarded the VMS Subcontract after the elimination of other offerors, Orion cannot prove that it is entitled either to perform the VMS Subcontract or to receive a damages award because LANS reserved the right to award no subcontract at all. [RP 0095]. Therefore, there is nothing to enforce.

Nevertheless, even if Orion could somehow prove that it was entitled to award of the VMS Subcontract, injunctive relief would not be proper because the injunction requested provides no benefit to Orion and Orion's legal remedy is both adequate and readily ascertainable.

A. COMPA is entitled to judgment as a matter of law because money damages would be adequate compensation if Orion could prove its case and because the undisputed facts show that injunctive relief would not benefit Orion and would be punitive to COMPA and LANS.

COMPA agrees that the District Court properly dismissed Orion's claim on the grounds that "an implied breach of contract claim in a disappointed bidder situation can only be found when a governmental entity is soliciting the bids." [RP 1596]. Thus, the issue of appropriate relief arises only in the event this Court determines that the District Court's ruling was in error on this legal point. However, a reinstatement of Orion's claim does not alter the legal conclusion that injunctive relief is not available with respect to COMPA.

1. Injunctive relief is not available to Orion because Orion's monetary damages are readily ascertainable and would be sufficient to compensate Orion if Orion could prove it had been harmed.

Injunctions are harsh and drastic remedies and should only issue in extreme cases of pressing necessity. Scott v. Jordan, 99 N.M. 567, 572, 661 P.2d 59, 64 (Ct. App. 1983). Injunctions are warranted only where there is no adequate legal remedy. Leonard v. Payday Professional, 2008-NMCA-034, ¶14, 143 N.M. 637, 640, 179 P.3d 1245, 1248, *cert. denied* 2008-NMCERT-2, Wilcox v. Timberon Protective Assoc., 111 N.M. 478, 486, 806 P.2d 1068, 1076 (Ct. App. 1990) *cert. denied* 111 N.M. 529, 807 P.2d 227 (1991). An injury warranting injunctive relief must be one "for which compensation cannot be measured by any certain pecuniary standard." State v. City of Sunland Park, 2000 NMCA-044, ¶19, 129 N.M. 151, 157, 3 P.3d 128, 134, *cert. denied* 129 N.M. 207, 4 P.3d 35 (2000). Injunctions are granted only when damages cannot be measured. Id. If Orion could state a claim for relief and prove the necessary elements to prevail on its claim, Orion would have an adequate legal remedy because its damages can be readily calculated. Therefore, there is no legal basis for an injunction.

a. Orion's legal remedy (money damages) is readily measured by Orion's bid expenses or by its lost profits and is adequate.

Orion seeks to enforce an alleged implied-in-fact contract between LANS and bidders who responded to the VMS Solicitation. Should Orion succeed in

proving the existence of such an implied-in-fact contract, the breach thereof, and, that, but for the breach, Orion would have been awarded the VMS Subcontract, there are two potential measures of damages that would provide an adequate legal remedy. Reliance damages and lost profits are alternative methods of valuing the damage suffered through breach of contract. 3 Dobbs, Law of Remedies, 2d. Ed. §§12.1, 12.3 (West 1993).

> Damages remedies most frequently aim at protecting the plaintiff's expectation or expectancy interest. This means that the damages remedy attempts to give the plaintiff the kind of gains he would have made if the contract had been performed, no more, no less.
>
> . . .
>
> the plaintiff has the option of claiming and recovering reliance expense or loss rather than the expectancy. . . . reliance claim must be considered an option when the plaintiff cannot prove expectancy damages with reasonable certainty.

Id., §§12.1(1), 12.3. To give Orion the "kind of gains" it would have made if the contract had been performed, damages can be calculated based either on reliance - the amount Orion spent in preparing and presenting its proposal – or on the profits it can reasonably show it would have earned had it been awarded the VMS Subcontract. Under either scenario, the alleged damages would be readily ascertainable.

The District Court noted that if Orion had been able to pursue its claim under Planning & Design, its relief would have been limited to reliance damages. [RP 1596-1597]. The proper remedy under Planning & Design is to return Orion

to the position it would have been in if the Solicitation had never been issued. Planning & Design, 118 N.M. at 715, 885 P.2d at 636, *see also* King v. Alaska State Housing Authority, 633 P.2d 256, 263 (Alaska 1981) (Damages limited to reliance damages since express contract never came into existence.) That would mean reimbursing Orion for its expenditures for its bid, a number readily ascertainable from Orion's books and records.

Orion asserts that reliance damages are inadequate given the magnitude of its injury, that it is barred from claiming expectancy damages by Planning & Design, and it is therefore entitled to an injunction permanently halting performance of the VMS Subcontract. [RP 0992-0993]. This argument fails because (1) LANS is not a governmental entity so the restrictions on damages applied to a governmental entity as discussed by Planning & Design do not apply here; and (2) between private parties, reliance damages and expectancy damages are simply two alternatives for compensating a successful plaintiff in a breach of contract matter. "When the defendant breaches an enforceable, bargained-for promise, the plaintiff has the option of claiming and recovering reliance expense or loss rather than expectancy." 3 Dobbs, Law of Remedies, 2d Ed., §12.3 (West 1993). Both types of damages are readily determinable here, and Orion is not barred from claiming one or the other.

b. Unlike a subcontractor to a governmental entity, Orion's recoverable damages are not limited by statute or regulation.

Orion clings to its reliance on Planning & Design, and insists, without explanation, that "it cannot seek, as a remedy for the breach of implied contract, the loss of profits it would have made had it won the VMS Subcontract." [RP 0992]. Orion then relies on bid protest cases from the United States Court of Federal Claims ("COFC") and a Connecticut municipal procurement case for its proposition that injunctive relief is appropriate here because expectancy damages are not available. Brief-in-Chief, 25-26, *see also* [RP 0993]. Nowhere does Orion explain that all these cases deal with procurement statutes which govern the rights of bidders for government contracts. That is, each of these cases, state and federal, deals with bid protests against sovereigns, as opposed to a private entity such as LANS. The only reason anyone can bring a bid protest against a governmental entity is that the government has conferred such rights by statute thereby waiving sovereign immunity.

When governments waive sovereignty, they also generally establish limits on the relief available. For example, the federal government and the State of New Mexico limit money damages in bid protest cases. By statute, the COFC has "jurisdiction to render judgment on an action by an interested party objecting to . . . the award of a contract" by a "Federal agency" and restricts relief available as follows:

> To afford relief in such an action the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that *any monetary relief shall be limited to bid preparation and proposal costs*.

28 USC §1491(b)(2) (emphasis added). As Orion admits, LANS is not a federal agency. [RP 0549, ¶4]. COFC has no jurisdiction over Orion's case, and the statutory limitation on relief does not apply to Orion's action here. The COFC cases cited by Orion for the proposition that expectancy damages are unavailable to it are totally irrelevant to whether Orion has an adequate remedy at law in the State of New Mexico.

Similarly, the State of New Mexico has provided for disappointed bidders to challenge procurements by the state and local governments. The state procurement statutes provide that "any bidder . . . aggrieved in connection with . . . award of a contract may protest . . . ." NMSA 1978 §13-1-172. The state purchasing agent is authorized to resolve protests but this authority "shall not include the authority to award money damages or attorneys' fees." NMSA 1978 §13-1-174. This limitation applies only to procurements conducted by governmental entities, not to those conducted by commercial enterprises such as LANS. Orion's reliance on Planning & Design is therefore misplaced with regard to the claimed limitation on damages.

c. *Orion's failure to plead a claim for expectancy damages does not render injunctive relief available.*

Under New Mexico law applicable to a non-governmental breach of contract, *if* Orion can prove not only that there was an implied-in-fact contract, but also that LANS did in fact breach it, and also that Orion would have been awarded the VMS Subcontract *but for* LANS's breach, *then* Orion can prove its lost profits as a measure of expectancy damages. Damages are awarded for breach of express, oral, or implied-in-fact contracts and Orion has identified no relevant authority to the contrary.[2] *See, e.g.,* Newberry v. Allied Stores, 108 N.M. 424, 773 P.2d 1231 (1989) (Damages awarded under implied-in-fact employment contract by jury, reversed and remanded on other grounds), Watson v. Blankinship, 20 F.3d 383 (10th Cir. 1994) (Same).

The fact that Orion chose not to seek expectancy damages in its several Complaints does not affect whether or not damages are actually available and

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[2] It is instructive to look at New Mexico's Uniform Jury Instructions ("UJI") applicable to contract cases. At one time the UJI included a separate definition for "implied contract" as "an agreement in which the parties by a course of conduct [and custom and usage] have shown an intention to be bound by such agreement." McGinnis v. Honeywell, Inc., 110 N.M. 1, 791 P.2d 452 (1990) *quoting* (former) UJI 803 on implied contract. This definition has now been incorporated into UJI 13-801 CONTRACT; DEFINITION. UJI 13-843, CONTRACTS; MEASURE OF DAMAGES; GENERAL INSTRUCTION states: "If you should decide in favor of [plaintiff] on . . . claims of breach of contract, then you must fix the amount of money damages which will restore to [plaintiff] what was lost by [defendant's] breach . . . ." As the UJI make clear, damages are available for implied as well as express contracts under New Mexico law.

adequate. Lett v. Westland Development Co., Inc., 112 N.M. 327, 815 P.2d 623 (1991) *citing* Moore's Federal Practice, pp. 54.60, 54.62 (2d. Ed. 1991) ("prevailing party should be given whatever relief he is entitled to under the facts pleaded and proved at trial.") Orion cannot become entitled to an injunction by simply failing to plead expectancy damages, since there is still an adequate legal remedy in lieu of injunction.

d. The expectancy damages of lost profits could be readily calculated if Orion could prove its claim.

Where a seller has contracted to get only the price (money), the proper recovery is damages and "it is difficult to make out a case that the legal remedy is inadequate." Dobbs, Handbook of the Law of Remedies, §2.5, 58-59 (West 1973). Here, Orion proposed to sell services to LANS under the VMS Subcontract in return for its profit per hour of labor supplied. The Solicitation for the VMS Subcontract required offerors to propose two factors which would be applied to the actual direct cost of labor: (1) a multiplier which was to include all indirect costs, such as overhead and general and administrative expenses, and (2) a fixed dollar amount per hour of contract labor as profit. [RP 0878]. For example, if an hour of contract labor cost $20 in wages, that $20 would be multiplied by the factor representing the other allowable costs to the subcontractor and to that amount the subcontractor would then add the dollar amount for profit. So if the multiplier in

the subcontract were, for example, 1.5, then the cost of an hour of contract labor at $20 in wages would become $30. In addition to that $30, the subcontractor would receive its fixed dollar amount for profit, for example, $1 per hour. The total charge to the subcontract would then be $31 for the hour of contract labor: $30 to cover the total cost of the labor to the subcontractor and $1 for profit. If the subcontractor supplied, for example, 1000 hours of contract labor, the subcontractor would receive $1000 in profit (1000 hours times $1/hour).

In calculating damages alleged to arise from being improperly deprived of award of the VMS Subcontract, then, a "certain pecuniary standard" measuring Orion's alleged damages would start with the rate of profit per hour found in Orion's proposal multiplied by the number of hours of contract labor during the relevant period. *See* Dobbs, 3 Law of Remedies, §12.1(1) ("Damages remedy attempts to give the plaintiff the kind of gains he would have made if the contract had been performed, no more, no less.") Since Orion would not have incurred any cost to perform the contract, the measure of damages would simply be lost profit.[3] Orion's alleged damages are readily ascertainable, and an injunction is therefore not available as a remedy.

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[3] Less any deductions for losses or unreimbursable expenses which might have occurred in performance.

2. An injunction would not redress Orion's claimed harms and would be impermissibly punitive.

It is axiomatic that the relief granted in a lawsuit must in some way compensate a plaintiff for harm suffered at the hands of the defendant. Normally, especially in contract cases, the appropriate compensation for the harm suffered by a plaintiff is money damages. "[O]nly in extreme cases of pressing necessity and only where there is a showing of irreparable injury for which there is no adequate and complete remedy at law" should an injunction issue. Leonard, 2008-NMCA-034, ¶14, 143 N.M. at 640, 179 P.3d at 1248. "Injunctions are harsh and drastic remedies" not to be granted without weighing the equities between the parties. Id., Padilla v. Lawrence, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct. App. 1984) *cert. denied* 101 N.M. 419, 683 P.2d 1341. Even if Orion could not claim lost profits, Orion would not be entitled to injunctive relief because injunction would not remedy Orion's alleged claim of wrong and would be punitive to COMPA and LANS.

a. Orion would derive no benefit from an injunction terminating performance of the VMS Subcontract.

Orion's Amended Complaint requested that the "Court permanently enjoin LANS and COMPA from proceeding with the performance of the VMS Subcontract at issue." [RP 0570]. Orion did not ask the Court to provide specific performance of the alleged implied-in-fact contract but only to stop the parties

from continuing performance of the VMS Subcontract. In other words, Orion is asking that LANS be left without a source for its staff-augmentation labor and that COMPA be deprived of the opportunity to continue to provide this labor without a corresponding benefit to Orion or anyone else.

In deciding whether to grant injunctive relief, a court must consider (among other things) "the relative adequacy to the plaintiff of an injunction." Insure New Mexico, LLC v. McGonigle, 2000-NMCA-018, ¶6, 128 N.M. 611, 614, 995 P.2d 1053, 1055. Here, the requested injunction would not redress any harm alleged by Orion because it provides no actual relief to Orion. Orion has no reasonable expectation of benefitting in any way from a termination of the VMS Subcontract between LANS and COMPA.[4] If LANS could no longer obtain contract labor from COMPA via the VMS Subcontract, LANS would have to find other ways to acquire the needed services. There is nothing in the requested injunction that requires LANS to obtain those services from Orion or any other subcontractor.

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[4] In its Response to COMPA's Motion for Partial Summary Judgment, Orion speculated that the Court would issue an order to LANS to "rectify its breach" not just stop performance of the VMS Subcontract. [RP 0990-0991] Orion then proposed a series of improbable events which included reevaluating the original proposals, eliminating all other offerors, and awarding the VMS Subcontract to Orion. The VMS Subcontract has been in place for well over two years, the original proposals were submitted in 2007 and are outdated, and Orion did not ask for affirmative injunctive relief, only to stop performance.

Moreover, any idea that Orion entertains that it would benefit from LANS choosing to issue a new solicitation for the VMS work is so remote and speculative that it cannot be considered a benefit to Orion. Not only would LANS have to decide to issue a new solicitation for the VMS work, but Orion would also have to submit the winning proposal and be found financially and organizationally qualified to perform. Orion is essentially out of business according to Orion's counsel's representations to the District Court.[5] Therefore, if the requested injunction were to be issued and LANS chose to seek a new supplier for VMS subcontract labor, Orion is unlikely to qualify to supply such labor.

b. An injunction preventing continued performance of the VMS Subcontract would be impermissibly punitive.

The purpose of an injunction is remedial rather than punitive. Metzler v. IBP, Inc., 127 F.3d 959, 963 (10th Cir. 1997). As discussed above, Orion's

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[5] 4 MR. FREEDMAN: Your Honor, they are not completely
5 out of business in the sense that they have folded up and no
6 longer are a going concern. If that were the case, Your
7 Honor -- I mean, they have very little business right now,
8 but they have kept them afloat for this lawsuit, so that if,
9 in fact, they win, they would then be able to reinflate
10 themselves. That doesn't mean there is not an irreparable
11 injury. I'm sure you understand that, Your Honor. I mean,
12 they may not have everybody working for them; they may have
13 one or two people.

[RP 0871].

requested injunction does nothing to benefit Orion or to remedy the wrongs Orion alleges. Any harm suffered by Orion has already been suffered and would not be corrected by enjoining performance of the VMS Subcontract. Money damages, not injunctive relief, are awarded for past harm, because injunctive relief can only prevent future harm. Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1230 (10th Cir. 1997) *citing* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

On the other hand, both LANS and COMPA would be harmed – punished -- by an injunction preventing continued performance of the VMS Subcontract. COMPA would lose over 400 employees, the largest part of its company. COMPA would also lose the benefit of the investment COMPA made in bidding for the VMS Subcontract and organizing and preparing for its implementation. [RP 0445-0446]. In addition, COMPA would be deprived of the opportunity to earn profit for the remaining years of the VMS Subcontract.

LANS would suffer the disruption of losing the services of the more than 400 COMPA-provided contract personnel and the expense and disruption of finding another way to obtain those services, whether through direct hire or new solicitation or some other method. These negative effects would punish COMPA

and LANS without providing any benefit whatsoever to Orion.[6] It is black letter law that injunctions are not properly used to inflict punishment.

> The purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, and *injunctive relief is not used for the purpose of punishment* or to compel persons to do right but merely to prevent them from doing wrong. So, ordinarily, rights already lost and wrongs already perpetrated cannot be corrected by injunction. In such a case, the aggrieved party must seek some other remedy for redress which ordinarily is an action at law for damages.

43 Corpus Juris Secundum, Injunction §24, 808-810 (emphasis added). Orion's alleged "wrongs already perpetrated" cannot be corrected by preventing LANS and COMPA from performing the VMS Subcontract. The sole result of an injunction ending performance of the VMS Subcontract would be to punish the parties to the VMS Subcontract, not to provide relief to Orion. Orion has no valid purpose in law or in equity to demand an injunction against the performance of the VMS Subcontract and the District Court's grant of partial summary judgment to COMPA on this issue should be affirmed.

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[6] In its Response to COMPA's Motion for Partial Summary Judgment, Orion asserts that performance of the VMS Subcontract is "a violation of a continuing nature." [RP 0989-0990]. Orion fails to explain, however, how Orion is harmed by the continued performance of the VMS Subcontract by COMPA. If COMPA were prevented from continuing performance, Orion would not benefit, so it is impossible to see how continued performance is a continuing harm to Orion.

c. By requesting injunctive relief, Orion seeks to have the Court substitute its oversight for that assigned by regulation to the United States Department of Energy.

Orion argues that LANS's status as an Management and Operating ("M&O") contractor spending federal funds means it is "not an unfettered private company that is completely free to do business however it chooses" and simultaneously admits that LANS "operates a national laboratory under the direction of the United States Department of Energy which places certain restrictions and requirements on it." [RP 1111]. Orion seems not to recognize that LANS is not "unfettered" precisely because DOE exercises oversight of LANS's subcontracting activities. In the federal procurement system, bid protest law does not provide review for disappointed subcontract bidders under prime contracts. 28 USC §1491(b)(1); 31 USC §3551(1)(A), (3). The contracting agencies, not the federal courts, are responsible for assuring that the federal funds entrusted to its prime contractors, like LANS, are spent effectively.

DOE has chosen to exercise its stewardship of federal funds by requiring LANS and other M&O contractors to have written acquisition procedures approved by DOE, and through auditing compliance with those procedures. As stated by DOE:

> It is further the intention of the Department [of Energy] to perform its fiduciary responsibility by evaluating contractors' practices to ensure the appropriate expenditure of funds.

60 Fed. Reg. 28737, 28739. DOE specifically considered and declined to institute a subcontract bid protest process. Id. DOE, through the exercise of its executive powers, chose its system of overseeing the use of federal funds by M&O contractors and instituted that system through notice, hearing, and publication in the Federal Register. 60 Fed. Reg. 28737 *et seq.*

Any challenge to those regulations or their implementation by the agency would be properly brought only under the Administrative Procedures Act, 5 USC §701 *et seq.,* in federal court. Therefore, Orion's arguments that federal funding somehow creates a special duty for LANS in its purchasing which can be enforced by Orion in a state court is unavailing because overseeing the expenditure of federal funds by M&O contractors is assigned to DOE by federal regulation.

B. The District Court was correct in finding that there can be no implied-in-fact contract between two private entities concerning an evaluation of proposals because there is no statutory or regulatory basis defining the terms of such a contract.

The District Court granted LANS's motion for judgment on the pleadings finding that "Orion has not demonstrated that LANS is more a governmental entity than a private company." [RP 1596]. Orion's pleadings do not claim that LANS is a governmental entity. In fact, Orion's Amended Complaint specifically acknowledges that LANS is a Delaware limited liability company. [RP 0549, ¶4].

Nevertheless, Orion bases its case on Planning & Design's theory of implied-in-fact contract. The great gaping hole in Orion's theory is that the public interest in assuring that governmental entities conform to their statutory and regulatory authority when awarding contracts does not apply to commercial enterprises such as LANS. As discussed in Planning & Design, "when statutes and regulations define the rules of competitive bidding, these statutes and regulations will be strictly construed against the government entity that solicited bids" because of the "economic and moral interests" of the public. Planning & Design, 118 N.M. at 710-716, 885 P.2d at 631-637. LANS is not a governmental entity. Its procurement activity is not governed by statute and regulation but by its contract with the United States Government. [RP 0553 (Amended Complaint, ¶27)]. There is no statute or case law[7] that requires LANS or any other commercial enterprise to "follow the procedures it outlined in its RFP, [and] the

[7] The District Court noted that Orion had been unable to find any case law to support its disappointed bidder argument. [RP 1593]. Orion's Brief-in-Chief cites one case which it characterizes as holding that an implied contract could exist between private entities in a bidding situation. Brief-in-Chief, 11-12. The case, however, involved a promise by a prime contractor to keep proposal information locked up and protected. This promise was violated by rogue employees of the prime contractor. The Court stated, "Assuming, without deciding, that a promise to give fair and impartial consideration to all bids cannot be implied, that does not mean that, as a matter of law, a promise not to divulge engineering and design work is not binding." New England Insulation Co. v. General Dynamics Corp., 522 N.E. 2d 997, 1000, 26 Mass. App. Ct. 28, 32 (1988). The Court assumed just the opposite of Orion's position – that is, there is no implied contract to consider bids fairly and impartially.

customary procedures used for bids on M&O contracts." Brief-in-Chief, 10. There is no basis at all for equating LANS to the City of Santa Fe as Orion attempts to do. Planning & Design simply does not apply to Orion's claim.

In addition, it serves no public purpose to extend Planning & Design's concept of implied-in-fact contract in the bidding context to the private sector. The "economic and moral interests" of the public referred to in Planning & Design are accomplished through other mechanisms for corporate activity. Corporations (and limited liability companies) have shareholders (or members), investors, Boards of Directors (or Managing Members), and the marketplace to oversee and reward or penalize corporate decisions. Disregarding this vast difference between the public and private sectors, Orion would have the courts examine whether a particular company had followed its own internal procedures in making purchases, an unprecedented expansion of oversight by the courts into the internal operations of business entities.[8] This intrusion is doubly unnecessary in LANS's case because

[8] Orion analogizes the situation here to employment cases. Brief-in-Chief, 14-15. As Orion admits, in an employment case, there is already a contract between the employer and employee, and the question is the exact terms of that contract. In a bidding situation, there is no underlying contract to build on or interpret. The company soliciting the proposals may receive proposals from many entities and, under Orion's theory, would have entered into a contract with each of these responding entities, none of which would have had an underlying contract concerning the solicitation. Orion asks the Court to bring LANS into a contract relationship with anyone who submits a proposal, surely an unreasonable expansion of LANS's contractual liabilities.

its procurement activities are overseen by the DOE. *See discussion in III.2.c above.*

C. Orion failed to plead the elements necessary to state a claim for an implied-in-fact contract between LANS and Orion regarding the evaluation of proposals.

Even if Orion were able to identify some other basis for its theory of an implied-in-fact contract, its claim fails because Orion did not even plead that there was a "meeting of the minds" between Orion and LANS. As Orion observes: "Implied-in-fact contracts are 'founded upon a meeting of the minds . . .'." Brief-in-Chief, 8. Orion does not plead that the parties had an actual meeting of minds, but only asserts that Orion had certain understandings arising from its own perceptions of the "customs and norms used for M&O contract bids" and its reading of the Solicitation. Id., 10.

The required elements for an implied-in-fact contract are the same as for an express contract. Maher v. United States, 314 F.3d 600, 606 (Fed. Cir. 2002). In order for a contract to be legally enforceable, "a contract must be factually supported by an offer, acceptance, consideration, and mutual assent." Hartbarger v. Frank Paxton Co., 115 N.M. 665, 669, 857 P.2d 776, 780 (1993), *see also* Heye v. American Golf Corp., 2003-NMCA-138, ¶ 9, 134 N.M. 558, 80 P.3d 495. It is unnecessary to address the first three elements because the pleadings fail to allege that there was mutual assent to the terms of the alleged contract. "Parties can be

said to mutually assent to a contract when they have the same understanding of the contract's terms." DeArmond v. Halliburton Energy Services, Inc., 2003-NMCA-148, ¶20, 134 N.M. 630, 81 P.3d 573, *cert. denied* 135 N.M. 51, 84 P.3d 668 (2003). In the absence of mutual assent no implied-in-fact contract between LANS and Orion could arise.

1. The only basis for Orion's alleged implied-in-fact contract is the Solicitation issued by LANS.

Orion must demonstrate that it had a reasonable expectation of contractual rights based on the information available to it when it chose to prepare and submit a bid to LANS. Ruegsegger v. Board of Regents, 2007-NMCA-030, ¶24, 141 N.M. 306, 312, 154 P3d. 681, 687, *cert. denied* 2006-NMCERT-11. (To establish a claim for breach of implied contract, plaintiff was required to demonstrate that terms of Student Handbook created a reasonable expectation of contractual rights.) Although Orion cites four bases for the alleged implied-in-fact contract, the only possible basis for an implied-in-fact contract between LANS and Orion is the VMS Solicitation. Orion argues that the alleged implied-in-fact contract arises from:

> (1) the representations it made to prospective bidders in its comprehensive RFP, (2) its Source Selection Plan, (3) its acquisition policies and procedures, and (4) the customs, norms and course of dealing in the industry.

Brief-in-Chief, 2. But two of these four were unavailable to Orion during its proposal preparation period and a third is irrelevant because of regulatory changes governing subcontract procurements by M&O contractors.

Orion's pleadings here do not claim that Orion possessed either the Source Selection Plan or LANS's acquisition policies and procedures during the period when it prepared its proposal. [RP 0548-0570]. Neither the Source Selection Plan nor the acquisition policies and procedures were known to Orion before the inception of this litigation and therefore could not form a basis for mutual assent during the proposal period.[9] Acquisition policies and source selection plans which are not provided to bidders cannot form the basis for an implied contract. Wilson 5 Service Company, Inc., B-285343.2, B-285343.3, 2000 Comp. Gen. Proc. ¶157, October 10, 2000 ("Requirements stated in source selection plans which are not disclosed to offerors do not give outside parties any rights."), Quality Systems, Inc., B-235344, B-235344.2, 89-2 Comp. Gen. Proc. ¶197, August 31, 1989 ("The alleged deficiencies in the agency's application of the source selection plan do not themselves provide a basis for questioning the validity of the award selection.")

[9] The original Complaint does not even mention the Source Selection Plan and complains that Orion was unable to obtain a copy of LANS' acquisition policies and procedures. [RP 0025-0026, ¶¶110-112], *see also,* [RP 0005, ¶10 ("LANS refused to provide a full copy of the policies and procedures to ORION and, to this day, continues to hold these policies and procedures secret.")].

Orion's fourth basis for the implied-in-fact contract -- "customs, norms and course of dealing in the industry" -- fails because LANS is required to follow its DOE-approved acquisition procedures, not some imagined standard of the industry. Orion's Amended Complaint, far from establishing that "customs, norms and course of dealing" are the standard for LANS's procurement, shows that LANS's procurement activities are governed by its contract with DOE:

> DOE, through its contracting officers, approves of and oversees the processes, policies and procedures that all M&O contractors (including LANS) use to determine the recipients of subcontract awards. . . .
>
> M&O contractors with the DOE (including LANS) are required by federal regulations to have in place purchasing systems that "shall identify and apply the best in commercial purchasing practices and procedures" . . .
>
> Under its Prime Contract with the government, LANS is specifically required to "implement and maintain formal policies, practices, and procedures to be used in the award of subcontracts" . . . The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE . . . .

[RP 0552-0553, ¶¶25-27].

At one time, DOE's M&O contractors were held to the "Federal norm," which required them, like federal executive agencies, to follow the procedures of the Federal Acquisition Regulation in their subcontracting. This changed in 1995 when DOE eliminated "the concept of the 'Federal norm'" and published new regulations for its M&O contractors based on "best commercial practices." 60 Fed. Reg. 28737, 28738 (June 2, 1995). As DOE noted then:

> The purpose of the change in the Department's policy regarding contractor purchasing systems and methods is to allow M&O contractors to make maximum use of efficient and effective commercial business practices in their subcontracting. . . . This approach provides these contractors with great discretion in designing their purchasing systems and methods. . . . It is further the intention of the Department to perform its fiduciary responsibility by evaluating contractors' practices to ensure the appropriate expenditure of funds.

Id., at 28739. DOE expects "that purchasing practices and procedures will vary among contractors." 48 CFR §970.4402-2(b). Where written DOE-approved practices and procedures are known to vary among M&O contractors, there can be no "customs and norms."

Because Orion did not have access to either the Source Selection Plan or the acquisition policies and procedures and because LANS's subcontracting is governed by its agreements with DOE, not by "customs and norms", the only possible basis for an implied-in-fact contract here is the Solicitation.

2. No implied-in-fact contract could arise from the Solicitation because LANS reserved the right to award no subcontract at all.

In relying on the Solicitation to form an implied-in-fact contract, Orion must take into account all of its terms, not just those favorable to its point of view. Gardner-Zemke Co. v. New Mexico, 109 N.M. 729, 735, 790 P.2d 1010, 1017, (1990) (Contract should be read as a whole construing each part harmoniously.)

> Mutual assent is based on objective evidence, not the private, undisclosed thoughts of the parties. . . . In other words, what is operative is the objective manifestations of mutual assent by the parties, not their secret intentions.

Pope v. The Gap, Inc., 1998-NMCA-103, ¶13, 125 NM 376, 961 P.2d 1283 (citations omitted). The objective evidence here is that LANS was not bound to award a subcontract under the Solicitation. [RP 0095, ¶D] ("LANS also reserves the right to make no award if it deems that decision to be in the best interest of LANS."). "Where a contract leaves it entirely optional for one of the parties to perform, the contract is not founded on mutual promises and is, generally, not binding or enforceable." Guest v. Allstate Insurance Co., 2009-NMCA-37, ¶13, 145 N.M. 797, 205 P.3d 844, *aff'd in part, rev'd in part*, 2010-NMSC-047 *citing* Acme Cigarette Services, Inc. v. Gallegos, 91 N.M. 577, 581, 577 P.2d 885, 889 (Ct. App. 1978). LANS had the option of not performing (making no award), thus the alleged contract was not "founded on mutual promises" and is not enforceable. As noted in Hoon v. Pate Construction Co., Inc., 607 So. 2d 423, 427 (Ct. App. Fl. 1992):

> To recognize an implied contract in a situation where the parties agree that the written document provides that the owner may "reject a bid for any reason" would be to emasculate the effect of that provision.

Thus, not only is there no mutual assent to the alleged implied-in-fact contract, there is no enforceable contract at all.

Reading the Solicitation as a whole, Orion could not have a reasonable expectation of contractual rights arising from it. As the New Mexico Supreme Court has noted:

> It is elementary in contract law that mutual assent must be expressed by parties to an agreement. . . . Acceptance of an offer must be manifestation of unconditional agreement to *all* of the terms of the offer and an intention to be bound thereby.

Stevenson v. Louis Dreyfus Corp., 112 N.M. 97, 99, 811 P.2d 1308, 1310 (1991) (internal citations omitted, emphasis added.) Here, Orion wishes to bind LANS to part of the offer and to ignore those terms inconvenient to Orion. No contract can have been formed under these circumstances.

Dismissal of an action is proper "when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." New Mexico Public Schools Insurance Authority v. Arthur J. Gallagher & Co., 2008-NMSC-067, ¶11, 145 N.M. 316, 198 P.3d 342. Orion cannot prove that it is entitled to recover or obtain relief on an implied-in-fact contract when such a contract could not exist based on the terms of the Solicitation.

The contract that existed in Orion's mind was not grounded in the reality of LANS's procurement requirements and Orion's (mis)understanding was not shared by LANS. There was no mutual assent to the terms of an implied contract between LANS and Orion and no implied-in-fact contract was formed. Therefore, COMPA and LANS are entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons discussed above, this Court should affirm the District Court's grant of COMPA's motion for partial summary judgment and LANS's motion for judgment on the pleadings regarding Orion's claim for injunctive relief, and LANS's motion for judgment on the pleadings on Orion's First Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2011, a copy of COMPA Industries, Inc.'s **Answer Brief** was mailed by first class mail, postage prepaid, to:

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