IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ORION TECHNICAL RESOURCES, LLC,

Plaintiff/Appellant,

vs.

No. 30,928

LOS ALAMOS NATIONAL SECURITY, LLC and
COMPA INDUSTRIES, INC.

Defendants/Appellees.

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

ANSWER BRIEF OF DEFENDANT-APPELLEE LOS ALAMOS NATIONAL SECURITY, LLC

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STATEMENT OF COMPLIANCE

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I. SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Appellant Orion Technical Resources, LLC's ("Orion") appeal arises from a request for proposals ("RFP") for vendor management services ("VMS") issued on June 29, 2007 by Appellee Los Alamos National Security, LLC[1] ("LANS"). RP 555. Orion and Appellee COMPA Industries, Inc. ("COMPA") were among the entities that responded to the RFP. LANS' evaluation of proposals concluded in March of 2008, and on or about March 31, 2008, LANS notified COMPA that it had been conditionally selected for the VMS Subcontract. See Sealed Envelope No. 8, LANS Motion for Summary Judgment at p. 5, ¶ 6. The contract was formally awarded to COMPA following approval by the United States Department of Energy (DOE) on or about January 21, 2009 (*Id.* at ¶ 8). COMPA and LANS entered into the VMS Subcontract on or about April 3, 2009. *Id.* at p. 6 ¶ 9.

After LANS announced the award of the VMS contract to COMPA, Orion filed a protest from COMPA's selection by LANS on February 2, 2009. RP104. LANS denied the protest on March 31, 2009. RP 170. Orion waited another six weeks before filing this action in the Second Judicial District Court on May 15,

[1] LANS is a private, for profit limited liability company and, pursuant to contracts with the Department of Energy and the National Nuclear Security Administration, serves as the incumbent management and operations contractor for Los Alamos National Laboratories.

2009. RP 1. Four days later, Orion filed a motion for preliminary injunction requesting that the district court enjoin LANS and COMPA from proceeding with the performance of the VMS contract. RP 65. On June 2, 2009, COMPA filed a motion to dismiss Orion's complaint pursuant to NMRA 1-012(b)(6). RP 257. That motion was later denied on September by Order of September 10, 2009. RP 572.

On June 22, 23 and 26, 2009, the Court held an evidentiary hearing on Orion's Motion for Preliminary Injunctive Relief. TR Vol. 1-3. In a Memorandum Opinion and Order dated June 29, 2009 the District Court denied Orion's request for preliminary injunctive relief, finding that the requested injunction was not in the public interest and that Orion had failed to demonstrate that it would likely prevail on the merits of its claim. RP 439.

After the district court declined to stay implementation of the VMS Subcontract between LANS and COMPA, Orion filed an amended complaint. RP548. The Amended Complaint alleged three causes of action. In Count I, Orion alleged that LANS breached an implied in fact contract to fairly and honestly consider its bid in accordance with the terms of the RFP. RP 567-68. In Count II, Orion alleged that LANS breached the implied duty of good faith and fair dealing inherent in the alleged implied in fact contract. RP 568-69. Finally, in Count III, Orion asserted a claim for promissory estoppel. RP 569. Orion sought the following relief: reimbursement of the costs it incurred in preparing its bid; a

permanent injunction prohibiting LANS and COMPA from continuing to perform their contract; and costs and attorney fees. RP 560.[2]

On February 12, 2010, LANS filed a motion for judgment on the pleadings on Orion's claim for permanent injunctive relief, RP 774, and a motion for summary judgment. RP773, sealed envelope No. 8. COMPA filed a motion for summary judgment on plaintiff's claim for injunctive relief on March 18, 2010. RP 866.

On March 29, 2011, Orion filed a motion seeking leave to file a second amended complaint. RP 885. The proposed second amended complaint contained the same counts for breach of implied contract, breach of the implied covenant of good faith and fair dealing and promissory estoppel as the first amended complaint, but added counts for "Intentional Breach of Contract" and "Prima Facie Tort." RP 918-19.

On March 31, 2010, LANS filed a motion for judgment on the pleadings directed at Orion's entire First Amended Complaint. RP 954. LANS' motion was premised on the fact that New Mexico does not recognize an implied in fact

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[2] Orion's claims were all based on two alleged failures of LANS to fairly evaluate proposals submitted in response to the VMS RFP in accordance with procedures applicable to the procurement process. Orion contends that (1) LANS inappropriately negotiated with COMPA concerning a software license issue, RP 560-62; and (2) LANS improperly allowed COMPA to substitute a different program manager than the one included in COMPA's proposal. RP 563-66.

contract in the procurement arena except in the case of public procurements conducted pursuant to publicly enacted rules and regulations.

The district court heard argument on these pending motions, on October 13, 2010. Vol. 5, TR 3-190, and issued its Opinion and Order on October 18, 2010. RP 1589. The district court granted LANS' motions for judgment on the pleadings, granted COMPA's motion for partial summary judgment, and granted in part Orion's motion for leave to file a second amended complaint, but only to the extent of allowing Orion to assert a claim for prima facie tort. RP 1598.

Orion advised the district court that Orion had elected not to file a second amended complaint to pursue the prima facie tort claim. The district court then entered a final judgment on November 10, 2010 dismissing all claims in Orion's first amended complaint with prejudice. RP 1644. This appeal followed.

B. SUMMARY OF MATERIAL FACTS

LANS' Statement of Facts will focus on some glaring omissions in Statement of Facts set forth in Orion's brief-in-chief. LANS issued the RFP for the VMS contract on June 29, 2007. RP 555. LANS prepared a Source Selection Plan for the VMS procurement for its internal use. LANS did not provide the Source Selection Plan to any of the offerors who submitted proposals in response to the VMS RFP. Vol. 1 TR 90:22 to 91:4; *See* also sealed envelope No. 6, LANS response to motion for preliminary injunction at Exhibit F, Pace Affidavit at ¶ 12. LANS also conducted the VMS procurement in accordance with its own

proprietary Acquisition Practices Manual. Pace affidavit ¶ 12. LANS did not provide its Acquisitions Practices Manual to any of the offerors who submitted proposals in response to the VMS RFP. Vol. 1 TR 90-91. Indeed, Orion's original complaint alleged and acknowledged that LANS kept its Acquisition Practices "secret." RP 25

LANS based its procurement decision on the original proposals, oral presentations by the three finalists, as well as site visits during which the finalists had the opportunity to demonstrate their VMS systems. Vol. 2 TR 109:14-18. Once the conditional selection was made, LANS' Acquisition Practices Manual explicitly allowed LANS to conduct discussions with the putative awardee in the course of finalizing the form of the contract. RP 449-50.

After making the conditional award, LANS engaged in discussions with COMPA over the form of an "end-user license agreement" ("EULA") pertaining to the software package used in COMPA's VMS system. RP 440. The RFP did not require offerors to submit EULAs as part of their proposals, nor were EULA's considered or evaluated during the selection process. RP 449; Vol. 2 TR-. Accordingly, the modifications in COMPA's EULA that LANS and COMPA arrived at during their discussions did not alter the original proposal on which LANS based its selection of COMPA. *Id.*

After COMPA was formally notified of the VMS contract award in January, 2009, COMPA requested to make a change in the program manager it had listed in

its original proposal submitted in September of 2007. The VMS contract expressly allowed personnel substitutions of this type subject to LANS' approval. RP447-48. COMPA obtained the required approval from LANS before making the substitution. RP 448.

II. STANDARD OF REVIEW

LANS agrees that the standard of review on its motions for judgment on the pleadings is *de novo.* "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim, that is, to test the law of the claim, not the facts that support it." *Gonzales v. United States Fidelity & Guaranty Co.*, 99 N.M. 432, 433, 659 P.2d 318, 319 (Ct. App. 1983); *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978); *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct. App. 1975).

However, the district court's dismissal of Orion's claim for injunctive relief was based in part on COMPA's motion for partial summary judgment on that issue. RP 1589. The standard of review on orders granting or denying summary judgment is also *de novo*. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. But, unlike a motion to dismiss pursuant to Rule 1-012(b)(6) NMRA, plaintiff may not simply rely on the allegations in its complaint. Rather, "[t]he non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.*

III. ARGUMENT

A. THE DISTRICT COURT CORRECTLY DETERMINED THAT NEW MEXICO DOES NOT RECOGNIZE AN IMPLIED IN FACT CONTRACT IN THE CONTEXT OF PROCUREMENTS BETWEEN PRIVATE COMPANIES.

Orion's first amended complaint ("FAC") rests entirely on the alleged existence of an implied in fact contract. Four out of five of the counts in Orion's proposed second amended complaint ("SAC") are likewise dependent on the alleged existence of an implied in fact contract.[3] Orion voluntarily abandoned the fifth count in its SAC for prima facie tort in order to bring this appeal.

It is well-established that a "request for bids 'is not an offer but a request for offers' and bidders are making offers when they submit bids." *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 714, 885 P.2d 628, 635 (1994) (quoting Restatement (Second) of Contracts § 28 cmt. c (1979)); *see also Wisznia v. Human Servs. Dept.*, 1998-NMSC-011, ¶ 12, 125 N.M. 140, 958 P.2d 98. Accordingly, there is no contract between a party soliciting for bids and a party submitting a bid until the bid is accepted. *Id.* This is a generally accepted rule (*see,*

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[3] An underlying contract is an essential prerequisite to a claim for breach of the implied covenant of good faith and fair dealing *See Sanders v. FedEx Ground Package Sys., Inc.*, 2008-NMSC-040, 7, 144 N.M. 449, 188 P.3d 1200 (stating that the implied covenant of good faith and fair dealing is implicit in every contract). The promissory estoppel doctrine is not distinct from an implied contract theory. *See Planning & Design Solutions v. City of Santa Fe,* 118 N.M. 707, 885 P.2d 628, fn. 2 (1994).

e.g., Restatement (Second) of Contracts § 26(d) (1981) (noting that an invitation to bid indicates no offer is being made). The only recognized exception to this rule in New Mexico is in the context of public procurement, in which a disappointed bidder may have a claim for breach of an implied contract.

In *Planning & Design*, the New Mexico Supreme Court recognized and set the parameters for the implied contract cause of action in the context of public procurements. The *Planning & Design* court held that a public entity, by requesting bids, "entered into an implied or informal contract that it would 'fairly consider each bid in accordance with all applicable statutes.'" 118 N.M. at 714, 885 P.2d at 635 (quoting *Neilsen & Co. v. Cassia & Twin Falls Cty. Jt. Class A Sch. Dist.*, 647 P.2d 773, 775 (Idaho App. 1982)). Procurement by the City of Santa Fe in that case was governed by the State Procurement Code and by the City's own purchasing regulations. The *Planning & Design* court's decision was based on the two critical elements: 1) the party soliciting the bid was a governmental entity; and 2) the rules of competitive bidding were defined by the statutes and regulations.

Orion fails to satisfy these two critical elements. First, Orion acknowledges that LANS is a private corporation, not a governmental or public agency. RP 549. Second, Orion's FAC and SAC do not allege that LANS is bound by the competitive bidding requirements in the New Mexico Procurement Code or any

other statutory or regulatory bidding requirements. At most, Orion alleges that LANS is required to have formal policies, practices and procedures to be used in the award of subcontracts. RP 553, 899. LANS admittedly has formal procurement policies and procedures in the form of its Acquisition Practices Manual. But unlike the publicly available statutes and regulations in *Planning & Design*, LANS considers it procurement policies and procedures to be proprietary and business sensitive, and therefore, does not make them generally available to the public. *See* Vol. 1, TR 90-91; sealed Envelope No. 6, Exhibit "A" Affidavit of Francis Pace, Jr. at ¶ 12. That is why the FAC and SAC do not contain any allegation that Orion read or relied on the policies and procedures set forth in the Acquisition Practices Manual when submitting its response to the RFP. Indeed, Orion's original complaint alleged and acknowledged that LANS keeps its acquisition practices secret. RP 5.

Orion's FAC and SAC allege that LANS did not follow its Source Selection Plan. RP 548-49, 896. However, the FAC and SAC do not contain any allegations that Orion read or relied upon the Source Selection Plan when submitting its response to the RFP, because, like its Acquisition Practices Manual, LANS did not publish or provide its Source Selection Plan to Orion or any other offerors. *See* Vol. 1, TR 90-91; Sealed Envelope No. 6, Exhibit "A" Affidavit of Francis Pace, Jr. at ¶ 12. Orion became privy to the contents of the Acquisition Practices Manual

and the Source Selection Plan only after it filed this lawsuit and LANS produced these documents subject to a Protective Order. RP 281-293.

In order to resolve the disappointed bidder's claim, the court in *Planning & Design* acknowledged that it was required to compare the city's actions with the strictures of the Procurement Code and the city's purchasing regulations. The court noted that the purposes of the Procurement Code include treating persons involved in public procurement fairly and equitably, maximizing the purchasing value of public funds, and maintaining a public procurement system of quality and integrity. *Id.* at 710, 885 P.2d at 631 (quoting NMSA 1978, § 13-1-29(C)). The court recognized the most important interest was the public interest in competitive bidding and that an economical and efficient system directly benefits taxpayers, ensures the public entity gets the best product at the best price, and protects against favoritism and similar evils. *Id.* Thus, the City's duty was based on the requirements of and purposes underlying the Procurement Code and the City's regulations—which provided the necessary foundation for an implied contract that the City would "fairly consider each bid in accordance with all applicable statutes." *Id.* at 714, 885 P.2d at 635.

Here, there simply is no parallel to the Procurement Code that Orion reasonably could have relied upon as the basis for an implied-in-fact contract when it submitted its response to the RFP. Thus, the facts and allegations here are clearly

distinguishable from those before the *Planning & Design* court. Accordingly, there is no factual or legal basis for extending the holding in *Planning & Design* to the arena of private procurements as Orion requests.

Furthermore, in *Planning & Design*, the court relied on cases from other jurisdictions that had recognized similar claims against governmental entities. *Id.* at 714, 885 P.2d at 635 (citing *inter alia Heyer Prods. Co. v. U.S.*, 177 F. Supp. 251, 252 (Ct. Cl. 1959); *Nielsen & Co.*, 647 P.2d at 775); *Swinerton & Walberg Co. v. City of Inglewood*, 114 Cal. Rptr. 834, 837 (Cal. App. 1974)). The court did not expressly include, nor did it imply, that private procurement processes fell within the scope of its decision—to the contrary, its decision was expressly based on a public entity's procurement responsibilities as defined by the applicable purchasing statutes and regulations and its direct accountability to the public. *Id.*

Holding LANS potentially liable to other private enterprises for LANS' procurement decisions on an implied contract theory would constitute a broad and unprecedented expansion of the holding in *Planning & Design*. In announcing its decision to dismiss Orion's implied contract claims, the district court noted that Orion failed to cite any case from New Mexico or any other jurisdiction that supported an implied contract in the context of private procurements. RP 1593 (citing *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984)

("We assume when arguments in briefs are unsupported by cited authority, counsel, after a diligent search, was unable to find any supporting authority.")).

In its Brief-in-Chief, Orion cites for the first time to a solitary twenty-three year old case out of Massachusetts styled *New England Insulation Company v. General Dynamics Corp.*, 26 Mass. App. Ct. 28, 522 N.E.2d 997 (1988), for the proposition that New Mexico should recognize an implied in fact contract in the context of a private procurement. Orion's reliance on *New England* is misplaced for a number of reasons.

First, the *New England* court's comments about whether an implied in fact contract can arise in a private procurement were clearly *dicta* and not the holding of the case. Indeed, the *New England* court cited to *Roblin Hope Indus., Inc. v. J.A. Sullivan Corp.*, 377 N.E. 2d 962 (Mass. App. 1978), which held that the theory of an implied in fact contract in connection with the invitation to bid does not apply in the case of a private contractor. *Roblin* is still good law in Massachusetts.

Second, the *New England* case is distinguishable on its facts. That case involved allegations of bid-rigging and kickbacks between employees of the general contractor and one of the bidders on a subcontract. *New England,* 522 N.E.2d at 998-99. In the general contractor's bid solicitation, it had promised that all submissions would be retained in a locked file and would only be opened after the bid closing dates. *Id.* However, employees of the general contractor shared the

plaintiff's bid, including confidential engineering and design work, with another bidder prior to the bid closing dates in an effort to ensure that the other bidder would obtain the contract. 522 N.E.2d at 999.

The *New England* court expressly did not decide or base its decision on the theory of an implied in fact contract to give fair and impartial consideration, but rather on the specific and egregious facts alleged in that case, which bear no resemblance to the allegations in Orion's first or second amended complaints:

> Assuming, without deciding, that a promise to give fair and impartial consideration to all bids cannot be implied, that does not mean that, as matter of law, a promise not to divulge engineering and design work is not binding.

Id. at 32, 522 N.E.2d at 1000.

Third, the *New England* case is clearly an outlier that has not been cited by any federal court or state court outside of Massachusetts. And no Massachusetts appellate court has cited to *New England* for the proposition that an implied in fact contract can arise in the context of a private procurement.

While New Mexico has not addressed the issue, other authorities have properly distinguished between procurement in the public and private sectors and have found that a private party soliciting bids does not act under the same constraints as a public entity or have the same obligations or duties. Thus, it is widely recognized that while there is a requirement for full and open competition in government contracts, "[n]o such competition requirement exists for commercial

contracts." R. Lieberman & K. O'Brien, ELEMENTS OF GOVERNMENT CONTRACTING, 20 (2004). Disappointed bidders in the commercial world therefore "have virtually no basis upon which to question the selection of a contractor that has been made by another private entity." *Id.*

Courts have similarly distinguished between private and public obligations in the procurement process. In *J&P Riverside Hotel Corp. v. Topdanmark (California), Inc.*, 2001 Cal. App. Unpub. Lexis 1898 (Nov. 6, 2001), the court rejected the disappointed bidder's claim that the soliciting party had breached an implied contract in the private sale of a promissory note. In addition to citing California cases refusing to find implied contracts in the public domain, the court distinguished *Planning & Design*, noting that the duty of good faith and fair dealing in the bidding process required the city to abide by the Procurement Code and regulations, which were designed to protect the public in the bidding process. *Id.* at * 18. In contrast, the defendant in the case before it was not a public entity and was not bound by statutes governing the bidding process; the defendant therefore was not required "to consider all submitted bids fairly." *Id.* at * 19.[4]

[4] California Rule of Court 8.1115 prohibits citation or reliance on decisions such as *J&P* that are not certified for publication. In contrast, Rule 12-405(C) NMRA requires all formal opinions be published but provides that an order, decision and memorandum opinion, because it is unreported and not uniformly available, shall not be published or cited as precedent. While cases from other jurisdictions are not binding on New Mexico courts in any event, LANS believes the decisions cited in

The court in *King v. Alaska State Housing Auth.*, 633 P.2d 256 (Alaska 1981), applied similar reasoning in rejecting the housing authority's argument it should not recognize an implied contract because it would establish a disparity between public and private contracts:

> Although it is quite true that it would not be feasible to imply a promise to consider all bids fairly and honestly on the part of a private party soliciting bids, we believe that such a distinction operates in favor of adoption of the ... rule [that public entities are held to an implied promise to consider bids honestly and fairly]. Private parties who solicit contractors' bids do not act under a duty, as do public entities, to select the bid most consistent with the public interest.
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> ***
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> The rule recognizes that a promise of honest and fair consideration of bids can reasonably be implied in the public contract context, whereas such a promise cannot be implied in the private sphere.

Id. at 262.

Orion's attempt to distinguish *King* is unavailing. *King* involved a bid protest in the context of a public procurement involving an RFP issued by the Alaska State Housing Authority ("ASHA"). Citing *Heyer Products Company, Inc. v. United States,* 135 Ct. Cl. 63, 140 F. Supp. 409, 412 (Ct. Cl. 1956), the *King* court adopted the rule that a governmental agency's solicitation of bids gives rise to an implied contract that bids will be considered honestly and fairly. *King* 633

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this section may be of assistance to this Court given the absence of New Mexico case law that is directly on point.

P.2d at 263. In arguing against adopting the implied contract rule in public procurements, ASHA argued that doing so would create a disparity between the law of public and private contracts. The *King* court had little difficulty in recognizing that public procurements present a different situation, both factually and legally, than private procurements. *Id.* at 262.

In *Hoon v. Pate Constr. Co.*, 607 So.2d 423 (Fla. Dist. App. 1992), the court agreed with the defendant architects that no cause of action for breach of contract could arise from the defendants' failure to award the private construction project to the lowest bidder:

> The general rule in the case of private construction, as distinguished from construction for governmental bodies or agencies, is that the owner or contractor receiving the bid has the freedom to accept or reject it, whether it is high, low, or in between, responsive or non-responsive.

Id. at 425 (quoting L. Lieby, *Florida Construction Law Manual* § 5.01 (2d ed. 1988)); *see also Christensen Forest Products, Inc. v. Potlatch Corp.*, 2003 U.S. Dist. Lexis 10394, ** 8-9 (D. Minn. June 10, 2003) (noting that because it was a private bidding process, the party soliciting bids was not bound to award the project to the lowest bidder).

The analysis in each of these cases applies here and is consistent with the analysis applied in *Planning & Design*, where the court's recognition of a disappointed bidder's claim for breach of implied contract was based on the public

status of the soliciting party whose responsibilities as to competitive bidding were defined by statutes and regulations and who was directly accountable to the public. Extending the holding in *Planning & Design* to private commercial entities such as LANS would not only be an unprecedented expansion of New Mexico law, it finds no support in other legal authorities.

Orion's reliance on New Mexico cases that have found an implied in fact contract in the employment context is also misplaced. Unlike private procurements, in the employment context there is a pre-existing contractual relationship. The employer offers a job applicant a job, and the applicant accepts the offer in consideration for wages. The general rule is that the newly hired employee may be terminated at will, unless the employer, through statements or conduct, has indicated that the employment will only be terminated for just cause. *Cf. Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 668-69, 857 P.2d 776, 779-80 (1993).

The procurement process at issue here is analogous to the private employer's initial decision to hire one individual among multiple job applicants, not the employer's decision to later terminate someone's employment. No New Mexico case has recognized an implied in fact contract in the context of a private company's hiring decisions. In short, the New Mexico employment cases that Orion relies upon are completely inapposite.

B. ALLOWING A CAUSE OF ACTION FOR BREACH OF IMPLIED CONTRACT IN THE PRIVATE PROCUREMENT CONTEXT WOULD ADVERSELY AFFECT BUSINESSES AND BUSINESS ACROSS THE STATE.

Private commercial entities should have certainty in their business relationships and the freedom to enter into lawful business transactions without the courts' interference. *See Moore v. State Farm Mut. Auto. Ins. Co.*, 119 N.M. 122, 126-26, 888 P.2d 1004, 1007-08 (Ct. App. 1994) (recognizing that New Mexico has "a strong public policy of freedom of contract" and that "[g]reat damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties") (citations omitted). Extending the holding in *Planning & Design* to the private sector would constitute judicial interference with contractual relationships between soliciting parties and successful bidders and impose on private businesses unwanted quasi-contractual relationships with disappointed bidders.

Applying *Planning & Design* to private procurements would also make private businesses soliciting bids potentially liable in damages to every unsuccessful bidder. This would encourage unprecedented litigation by disappointed bidders, it would have an adverse impact on the business community in this State, it would deter the use of the private procurement process, and it would increase the cost of doing business. Expanding the law to recognize a claim

for breach of implied contract in the context of private procurement is not only legally unsound, it is contrary to the established public policy of this State. *See generally* FY2009 Annual Report of New Mexico Economic Development Department at 2-3 (letters from Governor Richardson and Secretary Mondragon regarding New Mexico's pro-business attitude and their attempts to expand and grow New Mexico's economy by the creation of new businesses and jobs).

Furthermore, if this Court were to expand the law in the manner advocated by Orion, it will have a particularly harmful effect on federal contractors like LANS and the federal agencies themselves. The novel expansion of state law that Orion seeks would put state courts in the untenable position of second-guessing the federal government's decisions as to how its money is spent through its contracts with private entities. Contractors such as Boeing, Northrop Grumman, Lockheed Martin, Honeywell, and innumerable others are constantly procuring goods and services for which they are reimbursed with federal funds, pursuant to the terms of their contracts with the government. Through those prime contracts, the federal government determines the procedures for its contractors to procure necessary goods and services. As was pointed out to the district court, [Vol. 5 TR 76:3-16] LANS contends that it absolutely followed its internal policies and procedures in accordance with its prime contract, but if it does not, it is DOE's prerogative, as LANS' customer, to punish LANS, to refuse to approve the RFP, to refuse to

approve a contract award, or to impose other sanctions provided for in the prime contract. The sovereignty of federal agencies, and the vast network of economic transactions flowing from its contracts, would be threatened if every procurement decision by those contractors runs the risk of state court litigation by the disappointed bidders, particularly when founded on little more than their subjective, vague notions of what constitutes the "customs and norms" for M&O procurements.

C. THE DISTRICT COURT CORRECTLY DETERMINED THAT PERMANENT INJUNCTIVE RELIEF WAS NOT AN AVAILABLE REMEDY IN THE CONTEXT OF A CONTRACT WHERE PERFORMANCE IS WELL UNDERWAY.

Assuming for the sake of argument only that Orion could state a claim for breach of an implied in fact contract, the district court correctly determined that injunctive relief was not an available remedy under the facts of this case, where performance of the contract at issue is well underway. The district court's decision was based on the New Mexico Supreme Court's decision in *Planning & Design*. RP 1596-97.

In *Planning & Design*, the court held that reliance damages are the appropriate remedy for disappointed bidders, and those damages are to be measured by the costs and expenses incurred by the bidder in submitting a bid. *Id.* at 715, 885 P.2d at 636. The court reasoned that reliance damages will compensate the disappointed bidder by putting it in as good a position as it would have been if

not participated in the procurement. *Id.* The court also concluded that providing for an award of money damages would sufficiently deter future misconduct. "The public has both economic and moral interests in assuring that government entities strictly adhere to the Code as well as their own published regulations." *Id.* at 716, 885 P.2d at 637.

The *Planning & Design* court joined a number of other jurisdictions that have adopted the same measure of damages in the procurement context. *Neilsen & Co. v. Cassia and Twin Falls County Joint Class A Sch. Dist. 151,* 647 P.2d 773, 775-76 (Idaho App. 1982) (allowing damages for time expended, overhead, and attorney fees on trial, but denying lost profit damages and attorney fees on appeal); *State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 477 N.E.2d 509, 513 (Ill. App. 1985) (denying lowest responsive bidder damages for lost profits but permitting recovery of expenses incurred in preparing proposal when contract was awarded to nonresponsive bidder), *appeal denied, 483 N.E.2d 887 (1985)*; *Swinerton & Walberg Co. v. City of Inglewood,* 114 Cal. Rptr. 834, 838 (Cal. App. 1974)(limiting bidder's damages "to the expenses it incurred in its fruitless participation in the competitive bidding process"); *Paul Sardella Constr. Co. v. Braintree Hous. Auth.,* 329 N.E.2d 762, 767 (Mass. App. 1975) ("proper measure of recovery is the reasonable cost of preparing the bid").

Orion argues that the *Planning & Design* court did not rule out injunctive relief, but simply found that injunctive relief would be unreasonable and pointless under the facts of that case. However, the cases relied upon by the *Planning & Design* court make clear that injunctive relief is not the appropriate remedy when, as here, the contract at issue has been awarded and COMPA has been performing under the contract since April of 2009.. For example, in *Swinerton & Walberg Co. v. City of Inglewood,* 40 Cal. App. 3d 98, 114 Cal. Rptr. 834, 838 (Ct. App. 1974), the court considered three types of relief that might be available to a disappointed bidder where a contract is mis-awarded: preventative, specific and monetary. 40 Cal.App.3d at 103. With respect to preventative or specific relief, the *Swinerton* court concluded that "it is now too late for such relief to be effective." *Id.*

Orion cites to *Spiniello Construction Co. v. Town of Manchester*, 456 A.2d 1199 (Conn. 1983) as an example where, due to irregularities in the procurement process, a court entered a permanent injunction restraining the Town of Manchester from entering into or performing certain public works contracts with the low bidder. *Id.* at 540, 456 A.2d at 1200. Unlike the instant case, *Spineillo* involved a public procurement. Moreover, the plaintiff in *Spineillo*, was successful in obtaining a temporary injunction and a permanent injunction before performance on the contracts commenced. *Id.* Here, Orion failed in its attempt to obtain a preliminary injunction because it failed to demonstrate that the requested

injunction would not be adverse to the public's interest or that Orion had a likelihood of success on the merits. RP 439, 446-451. *Spiniello* does not support the proposition that the injunctive relief that Orion seeks is still an available remedy years after a contract award.

Orion's reliance on *Ashbritt, Inc. v. United States*, 87 Fed. Cl. 344 (2009) is also misplaced. *Ashbritt* involved a public procurement conducted by the Army Corps of Engineers to award contracts for debris removal in the event of a major disaster. *Id.* at 349. Unlike Orion, the contractor in *Ashbritt* did not seek to enjoin the performance of any of the contracts that had already been awarded, but rather to enjoin the Army Corps of Engineers to redo the procurement to allow the contractor to fairly compete for future debris removal contracts. *Id.* fn. 2. Here, Orion seeks to enjoin LANS and COMPA from performing a contract that is already midway through its first five-year term.

At page 26 of Orion's Brief-in-Chief, it cites to a number of decisions by the Federal Court of Claims for the proposition that injunctive relief is an available remedy in this case. However, the cited cases are distinguishable on their facts. Furthermore, the available remedies in those cases are circumscribed by federal statutes that have no application in this case. *See* 28 U.S.C. §1491(b)(2).

In *Klinge Corp. v. United States*, 83 Fed. Cl. (2008), the court actually held that injunctive relief was not the appropriate remedy under the circumstances in

that case and like the court in *Planning & Design*, limited the plaintiff's recovery to bid preparation costs. *Id.* at 780.

In *Ala. Aircraft Indus., Inc. v. United States*, 85 Fed. Cl. 558 (2009) the court enjoined the Department of the Air Force from proceeding with a contract to perform maintenance and install modifications on the Air Force's aging KC-135 Stratotanker fleet and order the Air Force to resolicit the procurement. *Id.* at 559. The court also awarded the protesting bidder its bid preparation costs. At issue was whether the Court of Federal Claims could award both injunctive and monetary relief. *Id.* at 560. The court concluded that Congress had granted it the express authority to award both types of relief in the Tucker Act, 28 U.S.C. §1491(as amended by the Administrative Dispute Resolution Act of 1996). *Id.* at 561. The Tucker Act does not apply in the instant case.

In *CNA Corp. v. United States*, 83 Fed. Cl. 1 (2008), the court did not enjoin performance of an ongoing contract, but rather ordered the Department of Health and Human Services National Institute of Health to vacate and reconsider an adverse ethics decision that had disqualified an otherwise responsive proposal. *Id.* at 3.

In sum, none of the cases cited by Orion support permanently enjoining parties from performance of a contract years after the contract award and after

performance is well under way. To do so would be unreasonable and contrary to the New Mexico Supreme Court's holding in *Planning & Design.*

Furthermore, the district court was correct in dismissing Orion's claim for permanent injunctive relief because the injunction would not serve any legitimate purpose. Injunctive relief is an extraordinary remedy that is not a matter of right, but which rests in the sound discretion of the trial court, to be exercised according to the facts and circumstances of each case. *See Hobbs v. Town of Hot Springs*, 44 N.M. 592, 595, 106 P.2d 856, 858 (1940). Orion's FAC sought an injunction barring performance of the LANS-COMPA VMS contract. Orion was not seeking to deter future conduct, but rather, simply to punish LANS and COMPA for alleged improper conduct during the course of the selection process. Permanent injunctions must be utilized to prevent future violations. *See, e.g. Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1230 (10th Cir. 1997) ("[t]he purpose of an injunction is to prevent future violations."); *MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp.2d 1197, 1214 (C.D. Cal. 2007) ("[M]onetary damages are awarded for past harm, while injunctive relief is intended to prevent future harm."). Permanent injunctions are not an appropriate means to remedy conduct or actions taken solely in the past. *See, e.g., Russell v. Douvan,* , 402, 5 Cal. Rptr. 3d 137, 140 (Cal. App. 2003) ("[A]n injunction serves to prevent future injury and is not

applicable to wrongs that have been completed. An injunction is authorized only when it appears that wrongful acts are likely to recur.")

Moreover, an injunction cannot be utilized to punish a party. *See, e.g. Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975) ("*The historic injunctive process was designed to deter, not to punish.*") (emphasis in original); *Minnesota Mining & Manuf. Co. v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001) ("An injunction is not a punitive tool, but rather a vehicle for preventing injury."); *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1549 (Fed. Cir. 1987) ("Punishment is not the purpose of an injunction."); *In re Marriage of DeRouge*, 88 Cal. Rptr. 2d 618 (1999) ("Injunctions operate only with future effect; their purpose is not to punish acts already completed and not likely to be repeated."); *State of Wisconsin v. Weller*, 327 N.W.2d 172, 176 (Wis. App. 1982) ("Injunctive relief is preventative, not punitive."). In sum, the district court was correct in dismissing Orion's claim for a permanent injunction against performance of the VMS contract because the injunction would have only served to punish LANS and COMPA for alleged past misconduct.

Orion's proposed SAC sought broader injunctive relief, to include requiring LANS to either award the VMS contract to Orion or to require LANS to enter into "meaningful negotiations with Orion" and "allow Orion to provide its best and final offer." RP 896. However, the hearing on Orion's motion for leave to file its

second amended complaint did not take place until October 13, 2010, more than eighteen (18) months after COMPA commenced performance on the VMS contract. Regardless of whether injunctive relief may have been permissible and appropriate at an earlier stage of the process, it was no longer a reasonable alternative by the time the district court ruled on the pending motions to dismiss. In short, this was the equivalent of the situation faced by the court in *Planning & Design*, where the requested injunctive relief would have been unreasonable and pointless. Regardless of whether the court's opinion in *Planning & Design* stands for the proposition that injunctive relief is never an available remedy to a disappointed bidder, the opinion most certainly supports the district court's ruling in this case. And while the district court did not articulate this line of reasoning in announcing its decision to dismiss Orion's claim for injunctive relief, "[i]t is hornbook law that the decision of a trial court will be upheld if it is right for any reason." *See Scott v. Murphy Corp.*, 79 N.M. 697, 700, 448 P.2d 803, 806 (1968); *Tsosie v. Foundation Reserve Ins. Co*, 77 N.M. 671, 676, 427 P.2d 29, 32 (1967) (stating that court will not be reversed when it reaches right result for wrong reason).

Furthermore, Orion was given a full and fair opportunity to obtain injunctive relief very early in this proceeding, including a three-day evidentiary hearing on its motion for preliminary injunction. TR Vol. 1-3. The district court denied Orion's

motion for preliminary injunction on June 29, 2009. RP 439. Significantly, Orion does not challenge that ruling in this appeal.

Finally, it is important to note that the district court's ruling did not leave Orion without a remedy, nor did it immunize LANS against suits by disappointed bidders regardless of the factual circumstances. The district court gave Orion leave to amend its complaint and pursue a claim against LANS for prima facie tort. RP 1597. Orion deliberately chose to abandon the prima facie tort claim in order to immediately pursue this appeal. RP1634.

IV. CONCLUSION

For the foregoing reasons, LANS requests that this Court affirm the decision of the district court and enter its mandate dismissing this action with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 13th day of October, 2011 by U.S. Mail, postage pre-paid to:

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