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.

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

APPELLANT'S REPLY TO APPELLEE LOS ALAMOS NATIONAL SECURITY, LLC'S ANSWER BRIEF

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I.
ARGUMENT

In its Answer Brief, Appellee Los Alamos National Security, LLC ("LANS") argues that a claim for breach of an implied-in-fact contract may *never* lie against it in the bidding and procurement context, no matter what representations it made or the factual circumstances, because it is not a public or governmental agency. LANS also attempts to stretch the New Mexico Supreme Court's holding in *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994) to include a blanket rule that would preclude injunctive relief in procurement cases regardless of the underlying facts of the case. To reach these conclusions, LANS both misstates the facts that led to its breach of contract[1] and misinterprets the holding in *Planning and Design* and other cases dealing with

[1] LANS begins its Answer Brief by claiming that there are "glaring omissions" in the fact section of Orion's Brief-in-Chief, but then fails to explain what "omissions" it refers to. LANS then proceeds to provide its own version of the facts surrounding the breach of contract alleged by Orion. *See* Answer Brief at 4-6. These alleged facts are irrelevant. Because the district court's decision dismissing Orion's claims is based on LANS' Motion for Judgment on the Pleadings, this Court must accept the allegations of Orion's Complaint as true and ignore LANS' twist on the events leading up to this lawsuit. *See Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 299-300, 587 P.2d 444, 446-47 (Ct. App. 1978). Moreover, the fact that LANS finds it necessary to recite a litany of facts it believes are significant in connection with the appeal of an Order granting its Motion for Judgment on the Pleadings highlights Orion's contention that whether or not an implied-in-fact contract existed in this case is a factual matter to be determined by the fact finder. And it defies credibility to believe that a RFP the size of a telephone book, which was approved by the DOE and required over two years and more than a hundred thousand dollars to prepare a

implied contracts. LANS then resorts to an improper and desperate plea requesting that this Court, without the benefit of expert evidence, engage in an economic analysis of implied contracts in the procurement process, and argues that holding it accountable for its breach in this instance would be bad for New Mexico business.

None of these assertions, however, have merit. The law in New Mexico is clear – implied-in-fact contracts may exist where the parties, by course of conduct or other evidence of a meeting of the minds, show an intention to be bound by an agreement. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989); *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669, 857 P.2d 776, 780 (1994). There is no exception to, or blanket immunity from, an implied contract cause of action for private companies, who, like LANS, choose to make specific representations regarding how they intend to conduct the bidding and selection process for contract procurements.

LANS is also incorrect when it argues that, as a matter of law, injunctive relief is never available - no matter what the factual circumstances – to a bidder in the procurement context. None of the cases LANS cites for this proposition are applicable to this case and, even if they were, none stand for the proposition asserted by LANS. This Court should thus reverse the district court's decision

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responsive proposal, would contain no representation regarding the manner in which the procurement and award selection process would be conducted.

dismissing Orion's claim for breach of implied contract as a matter of law and its decision that injunctive relief is never available in the procurement context, and remand this case to the district court for further proceedings.

A. There is No General Rule of Law That Precludes Orion from Asserting a Breach of Implied-in-Fact Contract Theory Against LANS.

LANS misstates Orion's claims and the law that controls them. Despite LANS' repeated mischaracterization, Orion is not claiming that a contract was created between the parties merely because LANS issued a request for proposals and Orion responded to it. Orion's claim is that an implied-in-fact contract concerning the manner in which the bid process and selection would be conducted was created by LANS' specific representations in its voluminous request for proposals ("RFP") about how it would proceed with choosing the winner of the subcontract at issue here - representations that were consistent with the custom and norm for M&O procurements that LANS knew bidders would rely upon in deciding whether to engage in the expensive process of submitting such bids. *See New England Insulation Co. v. General Dynamics Corp.*, 26 Mass. App. Ct. 28, 522 N.E. 2d 997 (Mass. App. Ct. 1988) (explaining that, despite the lack of published cases on the issue, implied-in-fact contract and promissory estoppel theories are equally applicable to private solicitations, noting that "[t]here is surely no policy which would be served by allowing solicitors of bids in the private sector

to ignore the conditions they themselves set and ask others to rely upon."). It bears repeating that the breach of the implied-in-fact contract Orion alleges stems from LANS' decision to ignore the representations it made in its RFP and, for whatever reason, engage in an entirely different approach to choose the winner of the subcontract at issue - a company (Appellee COMPA) that did not meet the requirements of the RFP. *See* Amended Complaint at ¶¶ 59-95 [RP 0560-0567]. Orion has never claimed that LANS was required to select it as the winning bidder or that a binding contract was created simply because Orion submitted a response to LANS' RFP. The controversy before this Court concerns LANS' representation in connection with the bidding process and whether those representations, coupled with the well-established customs and norms for similar M&O contracts, created an implied-in-fact contract regarding the manner in which the bidding and selection process would be conducted. This is a question of fact to be determined by the trier of fact. *See, e.g., Garcia v. Middle Rio Grande Conservancy District*, 1996-NMSC-029, ¶ 10 (holding that whether an implied contract exists is a question of fact). The general rule of contract law that LANS cites - that ordinarily an offer to bid does not entitle a bidder to claim that it must be awarded the underlying contract - is a red herring and is not relevant to the issue before the Court.

B. LANS' Misinterprets the Supreme Court's Decision in *Planning and Design.*

There is no dispute that in *Planning and Design* the Supreme Court recognized implied-in-fact contracts could arise in the bidding and procurement context. *See Planning & Design,* 118 N.M. at 707, 885 P.2d at 630. Orion and LANS also agree that *Planning and Design* involved a public procurement engaged in by the City of Santa Fe. *See id.* LANS is incorrect, however, when it argues that, by recognizing the existence of an implied-in-fact contract in that case, the Supreme Court created an exception to a "general rule" against an implied-in-fact cause of action in the bidding context. A simple reading of *Planning and Design* confirms this is not the case. In its Answer Brief, LANS ignores the pertinent language in *Planning and Design* demonstrating that, by recognizing an implied-in-fact contract between the City of Santa Fe and the plaintiff bidder, the Supreme Court was not creating an "exception," but was instead extending well-recognized implied-in-fact contract principles that have long existed in the private arena to the public bidding acquisition process. As the Court stated, under its decision, implied-in-fact contract disputes in public procurements would "be interpreted under the same rules that govern contracts involving private citizens." *Id.* at 631, 710. *Planning and Design* simply does not stand for the proposition that an implied-in-fact contract, as a matter of law, could never exist between two private parties in the bidding context.

C. Even if LANS Keeps its Acquisition Practices and Policies and Source Selection Plan Secret, That is Irrelevant to Whether an Implied-In-Fact Contract Existed Between the Parties.

Citing to *Planning and Design*, LANS argues that in order for there to be an implied-in-fact contract between the parties in this case, LANS would have to be bound by the New Mexico Procurement Code or statutes or regulations that govern the manner in which LANS conducts its procurements. *See* LANS' Answer Brief at 8-9. But that is not the law of implied-in-fact contracts. In the private context, specific representations made by LANS, on which Orion reasonably relied, would give rise to an implied contract if the "words and conduct" of the parties showed an intention to follow those representations. *See, e.g., Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 748 P.2d 597 (1988) (holding that a handbook distributed to all employees and requiring certain procedures for termination gave rise to an implied-in-fact contract); *Kestenbuam v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988) (recognizing the existence of an implied contract based on the words and conduct of the parties, notwithstanding the lack of a manual or handbook). In addition, New Mexico law has long provided that "Evidence of custom or course of conduct between the parties may give rise to a contract implied in fact." *Sanchez v. Martinez*, 99 N.M. 66, 70, 653 P.2d 897, 901 (Ct. App. 1982); *see also Gordon v. New Mexico Title Co.*, 77 N.M. 217, 218, 421 P.2d

433, 434 (1966) ("Unquestionably, custom or course of conduct may give rise to a contract implied in fact"); *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).

LANS, tacitly admitting that it did not follow its own internal procedures in conducting the procurement at issue, focuses on the reliance factor relevant to implied contracts and asserts that Orion could not have relied on its Acquisition Practices Manual or its Source Selection Plan because it keeps those documents secret. *See* LANS' Answer Brief at 8-11. But Orion does not and never has claimed that it relied on those documents in deciding to bid on the VMS Subcontract, or that those documents created an implied-in-fact contract between the parties. Instead, Orion asserts that the voluminous RFP issued by LANS set forth specific procedures that LANS would follow in choosing the winner of the subcontract at issue and outlined the requirements each bidder would have to meet in order to be eligible for the subcontract. *See* Amended Complaint at ¶¶ 36-44 [RP 0555-0557]. The RFP, along with the well-established custom and norm for similar procurements by M&O contractors, including prior procurements at Los Alamos National Laboratories, provided Orion with the reasonable expectation that LANS would follow specific procedures and would not have private discussions with a single bidder (COMPA), collude with the bidder to change its bid proposal, or award the VMS Subcontract to a company that did not meet the requirements set forth in the RFP. *See, e.g., Forrester v. Parker*, 93 N.M. 781, 782, 606 P.2d 191,

192 (1980) (implied-in-fact contract created because plaintiff had reasonable expectation that defendant would follow its own representations). LANS is thus wrong when it pronounces there is "no parallel to the Procurement Code [which was at issue in *Planning & Design*] that Orion could have relied upon as the basis for an implied-in-fact contract when it submitted its response to the RFP," because the parallel here was the RFP itself and the custom and norm in the industry. LANS' Answer Brief at 10.[2] In any event, these are factual matters to be determined by the trier of fact, not decided on a motion to dismiss.

D. LANS Fails to Distinguish the Case Law Recognizing That Implied-in-Fact Contracts Can Arise in Private Procurements.

In the face of cases like *New England*, that recognize it makes no sense to limit implied-in-fact contract theory to public procurements, LANS struggles to maintain the integrity of its primary argument. LANS claims, without explanation, that the holding of *New England* is *dicta*, when it is plainly not, and tries, but fails, to make a reasoned argument distinguishing *New England* from the one before this Court. LANS then points to actual *dicta* in an earlier case from the same court and, surprisingly, takes the position that the earlier case controls the latter. None

[2] The relevancy of LANS' Acquisition Practices Manual and its Source Selection Plan, and the reason they are cited in Orion's Amended Complaint, is that both of these documents show that LANS' understanding of how the bidding and selection process would be administered matched Orion's understanding of the process and is consistent with the customs and norms for similar M&O contracts, establishing a "meeting of the minds" with respect to the procurement process.

of these contentions make any sense, but LANS' concern with *New England* is understandable; the case and its reasoning are on all fours with the issue raised here and strongly support Orion's argument before this Court.

In *New England*, the Massachusetts Court of Appeals addressed *precisely the same issue* raised in this appeal. In that case, a private unsuccessful bidder, New England Insulation Co., brought suit for breach of an implied-in-fact contract against General Dynamics Corp., a private solicitor of a bid, to perform subcontract work. *See* 26 Mass. App. Ct. 28, 522 N.E.2d 997 (Mass. App. Ct. 1988). The trial court dismissed the claims brought by the bidder and the bidder appealed.

On appeal, General Dynamics, the solicitor of the bid, raised the same argument that LANS raises here – *i.e.,* that there was no basis in law for the bidder's suit because "requests for bids are usually nonbinding invitations for offers," and thus because it "retained discretion to choose the insulation company with which it would contract . . . It was not bound to accept the plaintiff's bid, or indeed any bid." *Id.* at 30, 999. The Massachusetts Court of Appeals agreed, but then went on to explain:

> It does not necessarily follow, however, that General Dynamics could not limit its freedom to act by making representations in its invitations to bid which it knew or should have known would be reasonably relied upon by the plaintiff.

Id. The Massachusetts Court of Appeals then squarely rejected the idea that an implied-in-fact contact theory could not apply simply because the bid solicitor and the bidder were private companies, stating, "To the extent that the decisions are based on an implied contract or on promissory estoppel, however, those bases for recovery may be equally applicable to private solicitations for bids." *Id.* at 31-32, 1000. The Court's decision in *New England* was clearly not *dicta*; it was the central issue before the Court.

Even less persuasive is LANS' argument that a single statement in *Roblin Hope Indus., Inc. v. J.A. Sullivan Corp.*, 6 Mass. App. Ct. 481, 377 N.E. 2d 962 (Mass. App. Ct. 1978), an *earlier* decision by the *same* court, somehow controls over the holding in *New England.* Even if the two cases were irreconcilable, *New England*, the later case, would control, *see, e.g., Erickson v. Ames*, 264 Mass. 436, 163 N.E. 70, 72 (Mass. 1928).[3] However, this Court does not have to consider that well-recognized rule because the statement in *Roblin* is undoubtedly *dicta* and has no relation to the issue currently before this Court. *Roblin* concerned a suit by a subcontractor against a general contractor – who was not the solicitor of the subcontract procurement at issue in that case. It was not a bid case in which the plaintiff claimed there was an implied-in-fact contract. In *Roblin*, the plaintiff

[3] Holding that more recent cases from the same court control earlier and irreconcilable cases. *Id.* at 442, 72.

argued that Massachusetts law required the general contractor to substitute it for the subcontractor the general contractor had included in its bid. *Roblin*, 6 Mass. App. Ct. at 485, 377 N.E. 2d at 965. The language cited by LANS from *Roblin* was addressing the Massachusetts's court's concern that because General Dynamics, the general contractor/defendant, was not the solicitor of the bid, and therefore no contract could be implied between it and the plaintiff Roblin, the court was required to fashion a remedy not grounded under an implied-in-fact theory. *See id. Roblin* is inapposite and does nothing to support LANS' argument here.

E. LANS' Citation to a Treatise and Case Law That Do Not Concern the Type of Claim Brought by Orion is Unavailing and Irrelevant.

LANS cites a treatise on government contracts for the proposition that, unlike government procurements, there is no inherent requirement that procurements between private companies ensure "open and fair competition," thus, according to LANS, Orion has no bases upon which to question its award in this case. LANS' Answer Brief at 13-14. LANS tries to buttress this argument by citing cases, including an unpublished case from California, all of which hold that bidders in the private context ordinarily cannot rely on the implied promise of honest and fair consideration inherent in government procurements. *See King v. Alaska State Housing Auth.*, 633 P.2d 256 (Alaska 1981); *Hoon v. Pate Constr.*

Co., 607 So.2d 423 (Fla. Dist. App. 1992);[4] *J&P Riverside Hotel Corp. v. Topdanmark, Inc.*, 2001 Cal. App. Unpub. Lexis 1898 (Nov.6, 2001). There are two glaring problems with LANS' observation and its reliance on these three cases. First, Orion's claim of breach of an implied-in-fact contract does not center on a vague claim of LANS' failure to engage in a fair and open procurement process. Instead, as Orion has repeated in all of its briefing on the issue, and as specified in its detailed Complaint, Orion's claim is that LANS failed to follow the requirements and representations of its own RFP - which reflected the custom and norms of similar M&O procurements - and upon which Orion relied in determining whether to bid on the subcontract at issue. *See* Appellant's Brief in Chief at 20-21 (distinguishing these cases and demonstrating that that this precedent does not apply to the claims Orion brings in this suit). Second, although LANS proclaims in its briefing before this Court that it is not required to ensure a fair and competitive process, LANS has previously (and correctly) admitted that the purpose of its internal acquisition procedures are to ensure fair and open competitive process in procuring subcontract work. *See* LANS' Answer to Orion's Amended Complaint at ¶2 ("LANS admits that its acquisition practices and

[4] LANS criticizes Orion's citation to *New England Insulation Co.*, observing that it is a "twenty-three year old case," but then relies heavily on *King*, which is a thirty year old case and *Hoon*, which is only a few years more recent than *New England*. LANS does not explain why the vitality of the reasoning in *New England* has been in any way diminished.

procedures ensure a fair and competitive process.") [RP 0640-641]. LANS fails to cite to *any* cases that support its contention that under the detailed facts pled in this case a breach of implied-in-fact contract claim is unavailable to Orion.

F. LANS Fails to Distinguish the New Mexico Precedent Regarding Implied-in-Fact Contracts.

In its Brief-in-Chief, Orion discusses the New Mexico case law regarding implied-in-fact contracts and observes that courts have found the cause of action applicable, even where ordinarily binding contracts are not found, if the factual circumstances support it. *See, e.g., Garcia*, 1996-NMSC-029, ¶ 10; *Kestenbaum, Pennzoil Co.*, 108 NM. at 20, 766 P.2d at 280; *Forrester,* 93 N.M. at 781, 606 P.2d at 191. LANS, however, attempts to distance this case from the legal precedent, arguing that the above cases arose in the employment context and therefore Orion's claim for breach of implied-in-fact contract is not viable here. *See* LANS' Answer Brief at 17-18. LANS, however, does not even attempt to distinguish the cases which recognize that an implied-in-fact cause of action can arise in a myriad of situations, if the factual circumstances support it, regardless of whether the case involves an employer-employee relationship. *See, e.g., Sanchez*, 99 N.M. at 70, 653 P.2d at 901 (confirming that an implied-in-fact contract was created between insured husband and wife and insurance agent when agent made representation that he would procure fire insurance on the couple's behalf because custom or course of trade could give rise to the cause of action); *Gordon v. New Mexico Title Co.*, 77

N.M. 217, 218, 421 P.2d 433, 434 (1966) (recognizing that implied-in-fact cause of action could exist between homeowner and title company if there was sufficient evidence of custom that could establish a breach of the contract); *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).

While LANS may ignore long-standing contract principles, the decision to do so does not lend support to its argument.

G. LANS Misstates the District Court's Decision Below and Misinterprets *Planning and Design's* Holding with Regard to the Availability of Injunctive Relief in Procurement Cases.

LANS responds to Orion's argument regarding the availability of injunctive relief by rewriting the district court's order on the issue. LANS then relies on its misinterpretation of the district court's order in fashioning its response. Contrary to LANS' assertion, the district court did not determine that, under the facts of this case, injunctive relief was not available. Instead, the district court incorrectly held that as a matter of law, injunctive relief is not available in the procurement and bidding context. *See* Order at 8-9 [RP 1589-1599]. The district court determined that injunctive relief was not a remedy Orion could pursue because "*Planning and Design* concludes that reliance damages is the proper remedy in this type of case." Order at 9 [RP 1597].

As discussed in Orion's Brief-in-Chief, there is no New Mexico law that establishes a blanket rule against the availability of injunctive relief when there has

been a breach of contract – in any context. *See* Orion's Brief-in-Chief at 23-26. Moreover, in *Planning and Design*, the Supreme Court *did not* hold that in procurement cases the district courts were stripped of their broad equitable powers, including their power to fashion equitable relief, if appropriate, when a contract is breached. Instead, the Court simply determined that, under the specific facts of *Planning and Design*, injunctive relief would be "pointless." *Planning and Design*, 118 N.M. at 715, 885 P.2d at 636.[5]

LANS tries to convert the district court's determination of this issue as a legal matter into a factual finding that precludes injunctive relief in this case. But the district court made no such finding – in fact, nowhere in the district court's order is there a single finding of fact, despite LANS' attempt to characterize the district court's decision as containing such findings. *See* Order, *passim* [RP 1589-1599].

LANS also fails to distinguish the cases Orion cites to concerning the availability of injunctive relief in procurement cases. While many of those cases involved injunctive relief awarded at different points in time relevant to the contracts at issue, none stand for the proposition that, as a legal matter, once work pursuant to a contract has begun injunctive relief is never available. Whether

[5] In *Planning and Design*, the City of Santa Fe had withdrawn the RFP after the district court had rendered its opinion. Therefore, on appeal, there was no longer a contract to enjoin. *See Planning and Design*, 118 N.M. at 715, 885 P.2d at 636.

injunctive relief is available after work on a contract has begun is clearly a factual determination taking into consideration the type of contract at issue, the potential for disruption if an injunction is issued, how an injunction may be implemented to mitigate any such disruption, as well as other considerations. All of the cases cited by Orion stand for the proposition that injunctive relief is available in procurement cases, a point that directly contradicts LANS' argument here. *See*, e.g., *Spiniello Const. Co. v. Town of Manchester*, 189 Conn. 539, 456 A.2d 1199 (Conn. 1983); *Ashbritt, Inc. v. United States*, 87 Fed. Cl. 344, 378-379 (2009); *Klinge Corp. v. United States*, 87 Fed. Cl. 473, 480 (2009); *Ala. Aircraft Indus., Inc. v. United States*, 85 Fed. Cl. 558, 562-65 (2009).

H. The Court Should Reject LANS' Argument That Holding it Accountable for a Breach of Contract Would Devastate Business in New Mexico.

LANS makes a legally unsupportable plea to the Court that recognizing implied-in-fact contracts in the private bidding process would be bad for business in New Mexico. LANS'Answer Brief at 18-20. As an initial matter, this argument is in derogation of Rule 1-012 NMRA. Motions brought under Rule 1-012C are intended to test the *legal* sufficiency of a claim for relief, not to advance a "sky is falling" argument to the Court. *See Shovelin v. Central New Mexico Cooperative, Inc.,* 115 N.M. 293, 302, 850 P.2d 996, 1005 (1993). Even setting that defect aside, the Court should deny LANS' request that the Court ignore the principles of

contract law and dismiss this case because LANS claims it would be bad for business. LANS references letters from the former Governor stating that New Mexico is a pro-business state; but that has nothing to do with whether LANS breached its implied-in-fact contract with Orion. LANS provides no economic analysis (which would require expert testimony) to support its contention. Moreover, enforcing an implied-in-fact contract in the procurement context that rests on representations such as those made by LANS, would encourage and provide assurances to small businesses, like Orion, before they invest hundreds of thousands of dollars and significant manpower in responding to such solicitations. Without the assurance that representations regarding the manner in which the bidding and selection process will be conducted are enforced, it is unlikely small businesses will, in the future, be able or willing to respond to these types of large, complex and technical solicitations.[6] That is what would be bad for business in New Mexico.

[6] These types of subcontracts are commonly known as "small business set-asides" and are required by DOE of its M&O contractors. Those "set-asides" are intended to stimulate the small business environment in the location where an M&O contractor, such as LANS, operates a government facility, in this case, Los Alamos National Laboratory. (RP 0773, LANS' Motion for Summary Judgment, Ex. D at ORN00079.326)

II.
CONCLUSION

For the foregoing reasons, Orion requests that this Court reverse the decision of the district court and reinstate Orion's Amended Complaint in its entirety.

Dated: November 4, 2011

Respectfully submitted,

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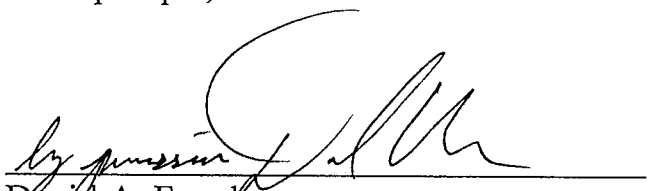

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STATEMENT OF COMPLIANCE PURSUANT TO NMRA 12-213

Pursuant to the requirements of Rule of Appellate Procedure 12-213, this Reply Brief, exclusive of caption, signature block and Certificate of Service, contains 4,380 words, as determined by the word count program of the word processing system used, Word 2003.