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 BRIEF-IN-CHIEF

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ORAL ARGUMENT REQUESTED

STATEMENT OF COMPLIANCE

Pursuant to the requirements of Rule of Appellate Procedure 12-213, this Brief in Chief, exclusive of caption, signature block and Certificate of Service, contains 6,331 words, as determined by the word count program of the word processing system used, WordPerfect, Version X3 and per Rule 12-305 is Times New Roman 14 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW MEXICO STATE CASES

OTHER STATE CHASES

RULES

MISCELLANEOUS

I.
SUMMARY OF PROCEEDINGS

Appellant Orion Technical Resources, LLC, a small, minority-owned New Mexico business (hereinafter referred to as "Orion"), initiated this action by Complaint filed on May 15, 2009, asserting claims of breach of an implied-in-fact contract, breach of the implied covenant of good faith and fair dealing[1], promissory estoppel[2] and fraud in the inducement against Los Alamos National Security, LLC (hereinafter "LANS"). See Orion Technical Resources Complaint for Injunctive Relief and Punitive Damages [RP 0001-30]. COMPA Industries, Inc. (hereinafter "COMPA"), a party needed for just adjudication under Rule 1-019 NMRA, was also named as a defendant. *Id.* On September 1, 2009, Orion filed an Amended Complaint that more fully set forth its claims and dropped the fraud in the inducement claim and request for punitive damages against LANS. See Amended Complaint [RP 548-71].

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[1] The claim of breach of the implied covenant of good faith and fair dealing is dependent on the existence of an underlying contract. Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, 133 N.M. 669, 685, 68 P.3d 909, 925. Because the district court dismissed Orion's implied contract claim, it did not address Orion's claim for breach of the covenant.

[2] In dismissing Orion's Amended Complaint, the district court noted that claims for implied contract and promissory estoppel are "very similar" and determined that Orion's promissory estoppel claim is not distinguishable from its implied contract claims. Opinion and Order, fn 1, p. 2 [RP1590-91]. For purposes of this appeal, Orion does not distinguish between the two claims.

I.
SUMMARY OF PROCEEDINGS

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Orion's claims against LANS arose from LANS' Request for Proposals ("RFP") issued on June 29, 2007, for a major staff augmentation and computerized vendor management system subcontract at Los Alamos National Laboratory valued at approximately $400 million dollars over five years with an option to renew for another five years. [RP 0555] Orion and COMPA were two of the companies that bid on the subcontract. In its Amended Complaint, Orion alleged that LANS breached an implied-in-fact contract with Orion when it departed substantially 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, in order to select COMPA for the subcontract at issue through the use of a seriously flawed procurement process. *Id.* [RP 0548-49].

On June 12, 2009, the district court granted Orion's application for a temporary restraining order [RP 0337], but then, on June 29, 2009, denied Orion's motion for a preliminary injunction despite its determination that Orion would be irreparably harmed if a preliminary injunction was not issued. Memorandum Opinion and Order [RP 0439-52 at 445].

On June 1, 2009, COMPA moved to dismiss the action brought by Orion pursuant to Rule 1-012B(6) NMRA [RP 0245-54] on the basis that no cause of action could lie for breach of an implied-in-fact contract in the private bidding

context. The district court denied COMPA's motion to dismiss by written order on September 10, 2009. [RP 0572].

On February 11, 2010, and March 31, 2010, LANS filed two Motions for Judgment on the Pleadings. [RP 0774-783; RP 0954-967]. In its Motion for Judgment on the Pleadings on Orion's Amended Complaint, LANS made the same arguments asserted by COMPA in the unsuccessful motion it had filed months before – that no cause of action could lie against LANS for breach of implied-in-fact contract in a bidding process because LANS was not a governmental agency. In its Motion for Judgment on the Pleadings on Orion's Claim for Permanent Injunctive Relief, LANS also claimed that Orion could not, under any circumstances and any set of facts, be entitled to injunctive relief. [RP 0779]. On March 17, 2010, COMPA filed a document styled "Motion for Summary Judgment," [RP 0866-78] which, regardless of how styled, did not claim that Orion had failed to demonstrate the existence of genuine issues of material fact, but instead was simply another motion to dismiss the claims against COMPA as a legal matter.

On October 13, 2010, the district court conducted a hearing on the dispositive motions filed by LANS and COMPA. On October 18, 2010, in a Memorandum Opinion and Order [RP 1589-99], the district court granted LANS' Motions for Judgment on the Pleadings and COMPA's motion, reconsidered its

prior ruling and determined that, as a matter of law, because LANS was a private entity [RP 1596], there could be no facts or circumstances, no matter how compelling, under which a cause of action could lie against LANS and COMPA arising from the bid/procurement process.

The district court also determined in *dicta* that as a matter of law and regardless of facts and circumstances at the time, an injunction could never issue even if it was shown that LANS had in fact breached an implied-in-fact contract with respect to the bidding process, and that Orion would have been limited to recovering its bid and proposal costs in the event there had been a breach of an implied-in-fact contract.

On November 10, 2011, the district court entered its Final Judgment. [RP 1634-36] Timely Notice of Appeal followed on November 16, 2010. [RP 1640-44].

II.
STATEMENT OF FACTS

LANS is the Management and Operations ("M&O") contractor that operates the Los Alamos National Laboratory for the United States Department of Energy.[3] Amended Complaint [RP 0549; 0552]; LANS' Answer to Amended Complaint at ¶

[3] Although LANS, as an M&O contractor that operates Los Alamos National Laboratories for the Department of Energy, is technically a private company, 100% of its funding is derived from taxpayer dollars. Under LANS prime contract with DOE it is required to ensure that all subcontractors with it are procured through a fair and competitive process. Amended Complaint [RP 0049-50].

1, [RP 0640]. On June 29, 2007, LANS issued a very lengthy and comprehensive Request for Proposal ("RFP") for a "Vendor Management System" subcontract at the Los Alamos National Laboratory. Through its RFP, LANS provided detailed information to prospective bidders regarding, among other things, the exact methods and procedures it would use to choose the winner of the subcontract and the qualifications and requirements for bidding on the subcontract. In addition, LANS developed a Source Selection Plan which specified the manner in which the bidding and procurement process would be conducted, a manner consistent with both LANS policies and procedure for the procurement bidding process and with the customs, norms and course of dealing in the M&O contracting community.[4] These methods and procedures were consistent with Orion's understanding of the bidding process that would be followed. Amended Complaint [RP 0552-55]; LANS' Motion for Judgment on the Pleadings [RP 0954-67 at 0956-57]; LANS Answer to Amended Complaint [RP 0640-41].

Orion reviewed the comprehensive Request for Proposal issued by LANS and determined that it possessed the necessary requirements and qualifications to bid on LANS' subcontract. Orion also determined that it would expend the

[4] *See C.R. Anthony Company v. Loretto MallPartners*, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991)("When there is a contract dispute regarding terms of a contract the court may hear evidence of the circumstances surrounding the making of the contract and any relevant usage of trade, course of dealing, and course of performance").

significant resources necessary to bid on the subcontract because it understood that the methods and procedures to be used in the procurement process would ensure fair, open and competitive bidding procedures and guard against arbitrary actions by LANS, the subcontracting entity. These procedures were also embedded in LANS Acquisition Practices Manual which was approved by the United States Department of Energy. The selection process included the determination of a competitive range of finalists who each would have the opportunity to provide best and final offers without having unilateral discussions with LANS. Amended Complaint [RP 0552-58].

Orion submitted its bid for the subcontract and it is not disputed that Orion met all the requirements necessary to compete for the subcontract. Orion, with two other bidders, including COMPA, was selected as a finalist in the competitive range. [RP 0558-59]. However, Orion alleges that during the evaluation and selection process, LANS departed significantly (and inexplicably) from the methods and procedures it had stated it would follow in its RFP for choosing the winner of the subcontract–COMPA–without giving the other finalists in the competitive range an opportunity to provide best and final offers. [RP 0559-63]. Orion also alleges that, contrary to the representations LANS made in its RFP, as well as the customs, norms and course of dealing used for M&O contract bidding procedures, and in violation of LANS own Acquisition Policies and Procedures

and Source Selection Plan, LANS impermissibly engaged in unilateral discussions with COMPA and allowed COMPA to alter its proposal, which did not meet a critical requirement of the RFP. *Id.* Without the improper discussions and modifications, Orion alleges, COMPA would have been ineligible to win the subcontract. [RP 0560-63]. Ultimately, after improper alterations to COMPA's proposal were made, and after gaining approval from the U.S. Department of Energy, which was unaware of LANS' improper discussions with COMPA and COMPA's modification of its proposal, LANS awarded COMPA the high-value subcontract. [RP 0560-66].

III.
STANDARD OF REVIEW

"A motion to dismiss on the pleadings...is similar to a motion to dismiss for failure to state a claim upon which relief can be granted...and is treated identically." *Shovelin v. Central N.M. Elec. Corp.*, 115 N.M. 293, 302, 850 P.2d 996, 1005 (1993). "In determining whether a complaint states a claim upon which relief can be granted, [the courts] assume as true all facts well pleaded... Moreover, a motion to dismiss for failure to state a claim is granted infrequently." *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).

The standard of review on appeal is *de novo*, when, as in this case, the district court dismissed the claims against LANS and COMPA as a matter of law.

See Mitchell-Carr v. McLendon, 1999-NMSC-025, ¶ 30, 127 N.M. 282, 980 P.2d 65 (whether defendant was entitled to judgment as a matter of law is reviewed de novo); *see also Kokoricha v. Estate of Keiner*, 2010 -NMCA- 053, ¶ 11, 148 N.M. 322, 236 P.3d 41.

IV.
ARGUMENT

A. The District Court Erred When it Determined That, as a Matter of Law and Even Where the Facts and Circumstances Would Otherwise Support the Claim, an Implied-in-Fact Contract Can Never Exist Between Private Companies in the Bidding and Procurement Context.

1. Whether an implied-in-fact contract exists is a question of fact that depends on whether the elements of the claim are met, not whether the contract is between private parties in the bidding context.

Implied-in-fact contracts have been part of the common law for decades, both in federal and state jurisdictions. Implied-in-fact contracts are "founded upon a meeting of the minds, which, although not embodied in an express contract, [are] inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules, Inc. v. United States*, 516 U.S. 417 (1996) (quoting *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)). As described by New Mexico courts, "Implied-in-fact contracts are based on parties' mutual assent manifested by their conduct." *Garcia v. Middle Rio Grande Conservancy District*, 1996-NMSC-029, ¶15, fn.1.

The New Mexico Supreme Court has further made clear that whether an implied-in-fact contract exists in any given scenario is not a question of law, it is a question of fact, to be determined by the trier of fact, and may be "found in written representations . . . in oral representations, in the conduct of the parties, or in a combination of representations and conduct." *Id.* at ¶10 (citing *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669 (1994). Thus, in New Mexico, implied-in-fact contracts have been recognized under a number of different factual situations, including those between private parties as well as in the public context. *See, e.g., Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427 (1989) (stating, in the private context, that an implied contract is an agreement in which parties by course of conduct have shown an intention to be bound by the agreement); *Planning and Design Solutions v. City of Santa Fe*, 118 N.M. 707, 710 (1994) (recognizing that implied-in-fact contracts may be applicable to public procurements just as they are in the private context). New Mexico appellate courts have never taken the position that rights enforceable under an implied contract theory are limited to public entities, even in the bidding and procurement context.

In this case, taking Orion's allegations as true, it sufficiently pled a cause of action for breach of an implied-in-fact contract. Orion alleges that LANS invited Orion (and other bidders) to respond to its RFP and submit a bid to perform the subcontract work at issue. Amended Complaint [RP 0548 at 55]. Orion further

alleges that it reviewed the RFP, understood and relied on the terms under which LANS was representing it would determine the awardee of the subcontract, and submitted its bid. *Id.* [RP 0555-58]. From the bid solicitation process, and in particular the evaluation criteria in the RFP itself, Orion reasonably expected that LANS would abide by its promise to choose an awardee under the specific procedures outlined in the RFP, the customs and norms used for M&O contract bids and on the basis of the bid evaluation criteria. *See Ruegsegger v. Board of Regents of Western New Mexico University*, 141 N.M. 306, 312 (Ct. App. 2006) (holding that in order to establish a claim of breach of implied contract based upon the terms of guidelines issued by a defendant, a plaintiff is required only to demonstrate that those terms created a reasonable expectation of contractual rights). This implied-in-fact contract was not one that guaranteed that Orion would win the award if it responded to the RFP, and Orion has never made such a claim. Instead, the implied contract was one in which the parties agreed that, in return for Orion making a bid and engaging fully in the bidding process, LANS would follow the procedures it outlined in its RFP, the customary procedures used for bids on M&O contracts, and apply the evaluation criteria stated in it. Amended Complaint [RP 0548-71]. Furthermore, LANS represented that it would ensure the procurement was fair and competitive, as required in its Prime Contract with the DOE. *Id.* The district court erred when it agreed that, as a matter of law, because

LANS was a private company and not a public entity (i.e., a municipality or a government agency), Orion was not permitted to plead a cause of action against LANS based on a claim of implied contract, no matter what the facts and circumstances might be.

While New Mexico courts have not directly addressed this issue, other courts have. In *New England Insulation Company v. General Dynamics Corp.*, 26 Mass. App. Ct. 28, 522 N.E. 2d 997 (Mass. App. Ct. 1988), the Massachusetts Court of Appeals addressed the same argument raised by LANS and COMPA in this case. There, as in the instant case, an unsuccessful bidder brought an action against the solicitor of the bid to recover for damages, including lost profits, sustained in connection with the submission of the bid. The plaintiff alleged that the defendant, *a private non-governmental company*, had, among other things, breached an implied-in-fact contract between the parties when it departed from the representations it made in its request for bids. *Id.* at 29-30; 998-99. As is the case here, the defendant in *New England* argued that no implied contract could lie against it as a matter of law because ordinarily requests for bids are nonbinding invitations for offers and because the procurement at issue was between private parties. *Id.* at 30-31; 999-1000.

The appellate court, however, disagreed with the defendants that an implied contract could not, as a matter of law, exist between private parties in the bidding

context. The appellate court began by recognizing the general rule that bids are ordinarily non-binding invitations for offers and that a private solicitor retained discretion to choose the company with which it would contract, and was not bound to accept the plaintiff's bid, or indeed any bid. *Id.* at 30; 999. The appellate court then continued its analysis, and noted, "It does not follow, however, that [the private solicitor] could not limit its freedom to act by making representation in its invitations to bid which it knew or should have known would be reasonably relied upon by the plaintiff." *Id.* The court then rejected the defendants' contention that implied contracts were limited to the public procurement context, stating:

> To the extent that the decisions [involving public procurements] are based on implied contract or on promissory estoppels, however, those bases for recovery may be equally applicable to private solicitations for bids. . . There 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."

Id. at 31; 1000. The appellate court thus reversed the judgment dismissing the plaintiff's complaint and remanded the case for further proceedings. *Id.* at 34; 1001.

In this case, Orion does not quibble with the contention that the RFP issued by LANS did not itself create a contract between the parties, or that LANS ordinarily may have the ability and discretion to choose the companies that perform subcontract work for the laboratory. However, as recognized by the appellate court in *New England Insulation Co.*, a private

company like LANS is not at liberty to ignore the representations it makes in its request for proposals or the customs, norms and course of dealing for similar M&O procurements, especially where, as here, LANS knew that bidders like Orion would rely on those representations and customs and norms in determining whether to expend hundreds of thousands of dollars in bidding on the subcontract. Orion alleges that LANS made these representations and intended that the procurement process would follow the customs and norms in the M&O industry, as demonstrated by LANS Source Selection Plan and its written Acquisition Policies and Procedures. Orion further alleges that these representations created a reasonable expectation that LANS would follow certain well-recognized bidding methods and procedures used for M&O procurements, but that LANS did not follow these procedures, and Orion was harmed as result. Orion sufficiently pled a cause of action against LANS for breach of an implied-in-fact contract regardless of whether LANS is a private or governmental entity.

Although there are no published New Mexico cases discussing implied-in-fact contracts between private parties in the M&O bidding context, it does not follow that, if the factual circumstances support such a claim, it cannot be brought as a matter of law. The rationale behind the holdings in a line of New Mexico employment cases dealing with implied contracts demonstrates the point.

New Mexico courts have long recognized that employment contracts in New Mexico are "at will," meaning that ordinarily the employment of an individual is terminable at the will of either party unless there is a contract stating otherwise. *See Garcia*, 1996-NMSC-029 at ¶10; *Hartbarger*, 115 N.M. at 668, 857 P.2d at 779. However, beginning with *Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980), the New Mexico Supreme Court began to articulate that, despite the "at will" status of employees in New Mexico, an implied-in-fact contract for employment could be found between private parties if the factual circumstances supported it. In *Forrester,* the employer argued that as a matter of law a binding contract for employment could not exist between it and the plaintiff employee and therefore the plaintiff had failed to state a cause of action against the employer for failing to abide by the terms of the employer's employment handbook. The district court agreed, holding that plaintiff's termination was lawful because he was an employee at will who could be discharged, even without cause. *Id.* at 782; 192. The Supreme Court of New Mexico, however, disagreed and reversed the district court. The Court found that the employee handbook contained certain representations regarding the procedures for termination which the employee should have and did expect the employer to follow. *Id.* According to the Court, the employment handbook thus constituted an implied contract, arising from the "words and conduct" of the parties. *Id.* After *Forrester*, New Mexico courts

have continued to recognize that, despite the fact that this State continues to be an "at will" employment jurisdiction, implied-in-fact contracts can exist in the employment context if the factual circumstances support it. *See Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 748 P.2d 507 (1988) (holding that a handbook distributed to all employees and requiring warning and suspension procedures for termination gave rise to an implied-in-fact contract.); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988) (recognizing exception to at-will employment for an implied contract based on the words and conduct of the parties, notwithstanding the lack of a manual or handbook); *Newberry*, 108 N.M. at 427 (same); *Hartbarger,* 115 N.M. at 670 (holding that "where there is proof of a promise sufficient to support an implied contract, the consideration sufficient to support the implied contract will be implied as a matter of law"); *Garcia*, 121 N.M. at 731-732 (holding that a personnel policy guide that made representations regarding the terms of employment constituted an implied contract).

As in the employment context, an implied-in-fact contract can arise between private parties in the bidding context if the facts support such a claim, including facts that demonstrate written or oral representations which bidders can reasonably expect will be followed. The district court erred in holding otherwise.

2. **In *Planning and Design Solutions*, the Supreme Court of New Mexico did not create an "exception" to a rule that implied contracts cannot lie between private companies in the bidding and procurement process; instead it recognized the opposite–that a claim of breach of an implied-in-fact contract, which had long been recognized in the private context, was equally applicable to public procurements.**

The district court below held that in *Planning and Design Solutions*, the Supreme Court merely articulated an exception for public procurements to the general rule that a request for bids is not an offer, but a request for offers. Opinion and Order at p. 4 [RP 1592]. According to the district court, that exception was not available to Orion because LANS was not a governmental entity. *Id.* [RP 1591] The district court, however, was plainly wrong. Nowhere in *Planning and Design Soutions* did the Supreme Court state it was creating an "exception" applicable only to public procurements. In fact, the Court recognized that its decision was one expanding the contract claims long available to private parties to the realm of public procurements. *See Planning and Design Solutions*, 118 N.M. at 710 ("public works contracts involving a municipality will be interpreted under the same rules that govern contracts involving private citizens."). More importantly, the Court's analysis of the plaintiff's claim in that case makes clear that, if the factual circumstances warrant it, an implied-in-fact contract can be created between parties in the bidding context, regardless of whether the solicitor of the bid is a private or governmental entity.

In *Planning and Design Solution,* the Supreme Court of New Mexico reviewed on appeal a case brought by the top-ranked bidder in a public procurement conducted by the City of Santa Fe. *Id.* at 709. The plaintiff alleged that the City departed from its own purchasing manual and procurement code when it awarded the fourth ranked bidder the subcontract at issue based on the fact that the bidder was the highest *local* bidder, a factor not contemplated in the City's purchasing manual. *Id.* The plaintiff then filed a bid protest and the City responded by rejecting all bids on the project. *Id.*

The trial court found that an implied-in-fact contract was created between the City and the plaintiff. On appeal, the New Mexico Supreme Court agreed, finding that an implied-in-fact contract existed between the parties for two reasons. First, the Court recognized that "by requesting proposals, the City entered into an implied or informal contract [with bidders] that it would fairly consider each bid in accordance with all applicable statutes." *Id.* at 714. More relevant here is the fact that the Court also recognized that an implied-in-fact contract arose from the specific criteria the City represented it would consider in determining the awardee of the subcontract. *Id.* As explained by the Court:

> [T]he criteria provided by the City were an implied contract that if any bids were accepted, the acceptance would be based on the criteria and no others. [The plaintiff] had every reason to believe that the City would not violate its own rules. The City, on the other hand, could not have been unaware that preparation of a bid on a multi-million dollar project would involve numerous foreseeable expenditures on

> the part of the bidder including travel, graphic and textual reproduction, labor, shipping and mailing, electronic communication, consulting services, secretarial services, and other professional services. [The plaintiff] ***relied*** on a guarantee that any award would be based only on the four criteria published in the ***Request***. It changed its position by 'incurring expenses in preparing to perform, in performing, or in foregoing opportunities to make other contracts.' Restatement (Second) of Contracts §344 cmt. A (1979). Had the City made a different guarantee – that locality would be a criterion for example – PDS's expenditures would have been different. It might have chosen not to bid at all.

Id. at 714-715 (emphasis in original).

The Court's recognition of implied-in-fact contracts under the facts noted above demonstrates that LANS is not protected from the consequences of its breach in this case. That is because the basis for finding the implied contract described by the Supreme Court did not rest solely on whether the City was a public or private entity. The Court's analysis instead centered on the representations made by the City and the fact that the plaintiff had a reasonable expectation that the City would award the subcontract using the specific criteria it represented it would employ in the information provided to bidders. In this case, it is alleged that LANS set forth and made available to bidders the specific criteria on which it promised it would base its evaluation and acceptance of bids. Amended Complaint [RP 0555-56]. Like the plaintiff in *Planning and Design Solutions*, Orion had every reason to believe that LANS would not violate its own rules and, like the City in that case, LANS was undoubtedly aware that preparation of a bid

on a multi-million dollar project would involve numerous foreseeable expenditures on the part of Orion. Had LANS made different representations – that it would, at its discretion enter into exclusive discussions with, and allow one bidder in the competitive range to alter its proposal after submission, for example –Orion might well have chosen not to bid at all.

The district court, however, ignored the discussion in *Planning and Design Solutions* that demonstrates that under the right factual circumstances, such as when the solicitor of a bid makes specific representations to the bidder about how the procurement will be conducted, an implied-in-fact contract can be created between private parties in the bidding context. Instead, the district court incorrectly adopted the argument that private contractors such as LANS, in the bidding process, are a protected class who are immune from claims involving implied contracts, no matter the facts or circumstances that might support such claims, a contention that has no legal support.

3. The cases relied upon by the district court are inapposite and do not support the contention that implied-in-fact contracts in the bidding context are limited to public procurements.

The district court determined that implied-in-fact contracts in the bidding context "can only be found when a governmental entity is soliciting the bids." Opinion and Order at p. 8 [RP 1596]. For this determination the district court not only relied on its incorrect interpretation of *Planning and Design Solutions*, but

also on two cases from outside New Mexico that do not support the district court's decision.

In *King v. Alaska State Hous. Auth.*, 633 P.2d 256, 262 (Alaska 1981) the court did not hold that implied-in-fact contracts could never exist between private parties in the bidding context even if the factual circumstances warranted the claim. Instead, the Alaska court in that case addressed solely whether 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." *See id.* at 262. The court in *King* ultimately rejected the argument that a promise for fair consideration can automatically be assumed in the private sector, while it could be automatically assumed in the public procurement context. *Id.*

That holding, however, does not address the issue presented here. The court in *King* did not address whether an implied contract could be found between private parties if the solicitor of the bid made specific representations, and was required by a governmental agency (in this case DOE) to adhere to an approved procurement procedure, which bidders reasonably expected would be followed. Nor did the court in *King* consider whether an implied contract could exist between private companies in the bidding context if the facts demonstrated that there was a "meeting of the minds" between the parties or where the "words and conduct" of

the parties showed an intention to be bound by an agreement. In short, *King* is not relevant to the issue in this case.

The district court's reliance on *Hoon v. Pate Construction Co., Inc.*, 607 So.2d 423 (Fla. Dist. Ct. App. 1992, is similarly misplaced. Specifically, the district court erred when it relied on the language from *Hoon* that stated "[T]he 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." Opinion and Order at 7 [RP 1595] (quoting *Hoon*, 607 So.2d at 425). Again, the particular discussion in *Hoon* noted by the court had nothing to do with whether an implied-in-fact contract could be created by private parties under certain factual circumstances, such as where the solicitor of the bid decides to publish detailed and specific representations regarding how the procurement process will be conducted. Instead, the *Hoon* court simply made the unremarkable observation that ordinarily, and in the absence of representations regarding how the procurement process will be conducted, a private party is free to contract with whomever it chooses.

But here, the issue is whether an implied-in-fact contract can be created where, as alleged by Orion, LANS made specific representations regarding how the multi-million dollar subcontract at issue would be awarded which were

consistent with the customs and norms for M&O bidding procedures, and prepared a Source Selection Plan that was also consistent with those representations, customs and norms. As discussed in the employment cases in New Mexico and in the bidding procedure analyzed by the Massachusetts Court of Appeals in *New England Insulation*, that question must be answered in the affirmative. In *Lukoski*, the Supreme Court of New Mexico, faced with a similar question regarding whether employers in an at-will state should have the discretion to determine how and when to terminate employees, explained the following:

> Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract . . . [However,] if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Lukoski, 106 N.M. at 666-667.

The same rationale applies here. It does not matter whether the general rule is that, absent facts that imply a contract, private parties ordinarily have discretion with whom to contract. In this case, Orion alleges that LANS chose to publish and announce specific procedures and criteria it would follow in conducting the procurement for the subcontract at issue, and knew that bidders would reasonably expect that those specific procedures would be followed. Under New Mexico law, these facts support a claim for

an implied-in-fact contract. The district court erred when it relied on two cases that did not address the precise issue raised in this case.

B. The District Court Erred When it Determined That, as a Matter of Law, and Without Regard to the Factual Circumstances, Injunctive Relief Could Never be Available to Orion in the Bid/Procurement Process Under the Holding of *Planning and Design Solutions v. City of Santa Fe.*

It is axiomatic that the district courts of New Mexico have broad powers of equitable relief. *See, e.g., Smith v. McKee*, 116 N.M. 34, 37, 859 P.2d 1061, 1064 (1993) ("A trial court may create broad equitable remedies to achieve substantial justice between the parties and bring an end to the litigation."). "Sitting in its equitable capacity, a court may avail itself of those broad and flexible powers which are capable of being expanded to deal with novel cases and conditions." *Smith & Marrs, Inc. v. Osborn*, 2008-NMCA-043, ¶ 21, 143 N.M. 684, 180 P.3d 1183. Nevertheless, the district court ignored this well-settled principle and determined that, under its reading of *Planning and Design Solutions*, Orion's sole remedy is the recovery of its bid costs, even if it were to prevail on its breach of contract claim. Opinion and Order [RP 1596-97]. A more careful reading of *Planning and Design Solutions* demonstrates that the district court erred.

As discussed above, in *Planning and Design Solutions* the unsuccessful bidder on the solicitation issued by the City of Santa Fe brought action against the City for breach of an implied-in-fact contract, alleging that the City failed to follow

the proper procedure and rules applicable to the procurement. *Planning and Design Solutions*, 118 N.M. at 709. The unsuccessful bidder requested the district court issue a preliminary injunction, which was granted. *Id.* Thereafter, the City rejected all eleven proposals for the development and determined that it would reissue the Request for Proposal with a change in the evaluation criteria to include locality. *Id.* The state district court eventually held that the City was liable to the unsuccessful bidder and awarded the bidder damages in the form of its bid costs. The City appealed to the Supreme Court, which affirmed the award of damages to the bidder. *Id.* at 715-716.

Importantly, and a point overlooked by the district court, is the fact that by the time the *Planning and Design Solution* case reached the Supreme Court, the City had withdrawn the bid at issue. No contract for the development at issue existed and no bidder had been awarded the newly-issued contract. *Id.* In other words, the Supreme Court in *Planning and Design Solutions* did not directly address whether a permanent injunction should lie – not because it was not an appropriate remedy, but because there was nothing to enjoin; the contract at issue had been rescinded after the district court issued its preliminary injunction. The Court thus rightfully determined, under the specific facts of that case, that "It [was] not reasonable at th[at] point to enforce the City's promise to award the contract to

the top-ranked bidder. . . Also, under the circumstances, injunctive relief [was] pointless." *Id.* at 715.[5]

The Supreme Court *did not* hold that in such cases the district courts were stripped of their broad equitable powers, including their power to fashion equitable relief when a contract is breached. Indeed, in a case relied upon by the Supreme Court in *Planning and Design Solutions* in support of its discussion regarding the judicial relief available to unsuccessful bidders, the Supreme Court of Connecticut affirmed a trial court's decision to permanently enjoin a contract that was entered into through a flawed procurement process. *See Spiniello Const. Co. v. Town of Manchester*, 456 A.2d 1199 (Conn. 1983). Moreover, in similar federal bid cases, permanent injunctions are regularly sought and often granted in improper procurement cases by courts using their equitable powers. *See, e.g., Ashbritt, Inc. v. United States*, 87 Fed. Cl. 344, 378-379 (2009) (permanent injunction issued after court determined that "the public interest is served by ensuring fair and open competition in the procurement process" and that "the loss of profits stemming from a lost opportunity to compete on a level playing field has been found sufficient to constitute irreparable harm."). Federal cases also make clear that injunctive relief and monetary damages are not mutually exclusive, and both are

[5] In this case, whether it would be futile for the district court to issue an injunction at this stage of the proceedings is not before this Court. However, it should be noted that the VMS contract at issue in this case is ongoing and subject to a 5-year renewal. [RP 0551].

available to unsuccessful bidders where there is an improper procurement process. *See Klinge Corp. v. United States*, 87 Fed. Cl. 473, 480 (2009) (noting that "recent decisions of this court make clear that injunctive and monetary relief are not mutually exclusive"); *Ala. Aircraft Indus., Inc. v. United States*, 85 Fed. Cl. 558, 562-65 (2009) (awarding injunctive and monetary relief); *CAN Corp. v United States*, 83 Fed. Cl. 1, 10-11 (2008) (same).

In sum, the district court erred when it ruled that injunctive relief is not an appropriate remedy in cases involving breach of implied-in-fact contracts in the procurement process.

V.
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.

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Respectfully submitted,

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