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 COMPA INDUSTRIES, INC.'S ANSWER BRIEF

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ARGUMENT

Defendant COMPA's Motion for Partial Summary Judgment was restricted to a single issue — whether Orion was entitled to injunctive relief under the circumstances of this case. *See* Motion of Defendant COMPA Industries, Inc. for Partial Summary Judgment on Plaintiff's Claim for Injunctive Relief [RP 0866 - 0876]. Orion addresses this issue below. However, on appeal, COMPA now raises several other issues which were not raised in its Motion for Partial Summary Judgment and thus are not properly before this Court. *See, e.g., Wolfley v. Real Estate Comm'n*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983) ("It is well established in this state that theories, defenses, or other objections will not be considered when raised for the first time on appeal."); *Groendyke Transport, Inc. v. New Mexico State Corporation Commission,* 85 N.M. 718, 516 P.2d 689 (1973) (same); *Hinger v. Parker & Parsley Petroleum Co.*, 120 N.M. 430, 440, 902 P.2d 1033, 1043 (Ct. App. 1995); *Bloom v. Lewis,* 97 N.M. 435, 438, 640 P.2d 935, 938 (Ct.App.1980), *aff'd in part, rev'd in part,* 96 N.M. 63, 628 P.2d 308 (1981).

Notwithstanding the procedural and jurisdictional deficiencies of COMPA's Answer Brief, none of the issues COMPA raises have merit, with the possible exception of the first issue addressed below.

A. Orion Does Not Take Issue with COMPA's View That if Expectancy Damages Are Available, Then Injunctive Relief is Not Necessary.

Orion argued below that injunctive relief was required in this case because it had no adequate remedy at law. Orion has proceeded thus far with the understanding that in cases involving claims of breach of an implied contract in a bidding and procurement process, the only damages for breach of contract available at law to the claimant/unsuccessful bidder are the cost of preparing the bid and going through the bidding process. Obviously, in a $400 million subcontract procurement such as this, such damages are inadequate and injunctive relief is required. *See* Orion's Brief-in-Chief at 23-26. COMPA argues that expectancy damages, *i.e.* lost profits, are available to Orion if it prevails on its claims; that lost profits are easily determined, and therefore, no equitable relief in the form of an injunction is required or permissible. COMPA's Answer Brief at 11-18. In the event this Court determines that lost profits are available as damages to Orion if it prevails on its breach of contract and promissory estoppel claims, then Orion agrees with COMPA that injunctive relief would not be necessary. If, on the other hand, the Court decides that lost profits are not available as a remedy to Orion with respect to the claims it has raised, then injunctive relief should not be excluded as a matter of law.

B. COMPA is Wrong When It Argues That Orion Would Derive No Benefit From an Injunction Because it Does Not Seek Specific Performance and Therefore Seeks Only to "Punish" COMPA or LANS.

COMPA asserts that Orion's request for injunctive relief before the district court is inappropriate because Orion does not seek specific performance and therefore Orion's request for injunctive relief was made solely to punish LANS and COMPA. *See* COMPA's Answer Brief at 20-24. COMPA is incorrect. Orion does not seek to punish LANS or COMPA, but instead has always sought specific performance by requesting that the district court enjoin the continued performance of the subcontract at issue until LANS rectifies the breach of contract by either: 1) reevaluating COMPA's flawed submission under the requirements of the RFP issued by LANS (as it was required to do in the first place); or 2) engaging in discussions and negotiations with the remaining subcontract bidding finalists, as it was required to do under its own Source Selection Plan, which embodied the customary and normal practice in M&O procurements.[1] Orion has not spent

[1] The Source Selection Plan is the document created by LANS that was intended to "document the procedures and evaluation factors" to be used in the VMS Subcontract procurement - the subcontract at issue in this litigation. The Source Selection Plan embodied the custom and norm in M&O procurements, and provided that, if LANS did not award the subcontract on the initial proposals submitted by offerors, "a competitive range will be established and discussions will be held *with all Offerors* who are in the competitive range." Ex. D to LANS' Motion for Summary Judgment at 6, Section D (emphasis added) [RP 0773]. In this case, a competitive range was established consisting of Orion, COMPA and LaSer, another bidder not a party to this suit. Orion alleges that LANS held

considerable resources and time simply to punish the defendants in this case. Orion seeks to have the VMS Subcontract at issue enjoined so that Orion will have a fair and reasonable opportunity to be awarded the contract. Orion has clarified this point numerous times throughout this litigation. *See* Plaintiff's Motion for Leave to File Second Amended Complaint at 5, filed March 29, 2010 [RP 889] (clarifying Orion's request "that the Court grant relief to Plaintiff under the doctrine of specific performance in order to rectify the breach of the implied-in-fact contract by LANS"].[2] COMPA's assertion that Orion is not seeking specific performance in this case is simply wrong and Orion's request for injunctive relief is proper.

COMPA also argues that permanent injunctions are not an appropriate means to remedy past conduct. While that statement may be true, it is inapplicable here because Orion does not seek an injunction solely for conduct taken in the past.

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discussions with COMPA, but not the other offerors in the competitive range, including Orion. Based on these impermissible discussions, COMPA was then permitted to materially change its proposal, a change not allowed under the RFP bidding procedures. [Amended Complaint at ¶¶ 69-77, RP 0561-0653]

[2] It is well-settled in New Mexico that courts can use equitable relief to award specific performance to remedy a breach of contract. *See, e.g., Collado v. City of Albuquerque*, 2002-NMCA-048, ¶ 23, 132 N.M. 133 ; *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 106 N.M. 19, 20, 738 P.2d 513, 514 (1987) (stating the plaintiff had the right to what she could have reasonably expected had there been no breach of contract): *Otero v. City of Albuquerque*, 1998-NMCA-137, ¶ 7, 125 N.M. 770 ("equity and justice demand the specific performance of the contract") (citation omitted).

Instead, Orion seeks to enjoin the *continued* performance of the VMS Subcontract at issue in this litigation, which constitutes a violation of a continuing nature that, under New Mexico law, is appropriately remedied by injunctive relief. *See, e.g., Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.*, 91 N.M. 661, 664 (N.M. 1978) (explaining that permanent injunctions are appropriate to address situations "[w]here the imminent harm or conduct is or will be of a continuous nature. . ."). New Mexico's position on the issue is consistent with the long held view of the United States Supreme Court, which has also explained that, "All it takes to make the cause of action for relief by injunction is a real threat of future violation *or a contemporary violation* of a nature likely to continue or recur." *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) (emphasis added). The fact that LANS continues to work with COMPA under the improperly awarded VMS Subcontract fits squarely within this well-established rule.

COMPA next argues that, "[A]ny idea that Orion entertains that it would benefit from LANS choosing to issue a new solicitation for the VMS work is so remote and speculative that it cannot be considered a benefit to Plaintiff." COMPA's Answer Brief at 22. COMPA's point is again off the mark for two reasons. First, whether Orion would benefit from the issuance of an injunction is a factual matter properly decided by the district court. In this case, the district court

made no such factual finding. Second, Orion never requested that the VMS Subcontract be rebid, but only that LANS rectify its breach of contract by either sending COMPA's proposal back to the Source Selection Committee for reevaluation of its flawed proposal under the requirements of LANS' solicitation (as the experts agree should have been done in this procurement),[3] or order LANS to engage in discussions and negotiations with all of the remaining finalists in the competitive range, as it was required to do under the custom and norm in the industry and pursuant to its own Source Selection Plan.[4]

Despite COMPA's conclusory assertions, it is certainly not too remote to believe that once proposals are reevaluated properly in light of the requirements of

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[3] *See* Ex. 10 to Plaintiff's Response to LANS' Motion for Summary Judgment (Testimony of LANS Employee Francis Pace explaining that proposals should be sent back to Source Evaluation Committee if a serious flaw in the proposal is discovered) [RP 0980a].

[4] The Source Selection Plan states that:

> If the SEC determines that the award will not be based on the initial proposals, a competitive range will be established ***and discussions will be held with all Offerors who are in the competitive range.*** In conjunction with the SEC, the CA will establish a common cutoff date by which Offerors may submit final revisions to their proposals, and a Best and Final Offer, as appropriate.

Ex. D to LANS' Motion for Summary Judgment at 6, Section D (emphasis added) [RP 0773].

LANS' RFP, Orion's proposal will be rated higher than COMPA's flawed proposal.[5] First, as noted in Plaintiff's Response to LANS' Motion for Summary Judgment, COMPA and Orion were rated equally on their initial proposals. *See* Plaintiff's Response to LANS' Motion for Summary Judgment at 16-18; Ex. 16 to Plaintiff's Response to LANS' Motion for Summary Judgment at 6 (LANS' own Procurement Summary confirming that after initial proposals were submitted, four bidders, including COMPA and Orion, were rated equally) [RP 0980a]. It was not until after a competitive range was established and oral presentations were made that COMPA's technical proposal (with its fatal flaw obscured from LANS at the time) received a "Green" rating, and Orion received a "Green-". *See* Ex. 16 to Plaintiff's Response to LANS' Motion for Summary Judgment at 6-8 (confirming that it was not until after the oral presentations by the finalists in the competitive range that COMPA's VMS technology was rated slightly higher than Orion's) [RP 0980a]. Second, expert testimony supports Orion's assertion that upon proper reevaluation, it probably would be awarded the VMS Subcontract. In fact, Charles Dan, an expert with almost thirty years of experience in M&O subcontracts, testified that COMPA could be eliminated from consideration altogether because its non-conforming proposal was flawed, just as another bidder

[5] Although this issue, like many of the issues raised by COMPA, is not relevant to this appeal, Appellant Orion is compelled to address it because COMPA's assertions misstate the record.

had been eliminated when its flawed proposal was discovered prior to final evaluation by the Source Evaluation Committee. *See* Ex. 2 to Plaintiff's Response to LANS' Motion for Summary Judgment at TR 183 (Hearing Testimony of Expert Charles Dan) [RP 0980a]. In the event COMPA is eliminated (which should have occurred in the first place) after proposals are reevaluated in a manner that considers the flaw in COMPA's proposal, it is not unlikely Orion would be awarded the VMS Subcontract (assuming LANS does not engage in additional manipulative practices).

In sum, COMPA's argument that Orion's request for injunctive relief is inappropriate is wrong on both the facts and the law.

C. The Fact That LANS is an M&O Contractor for the Department of Energy Does Not Mean it is Free to Breach the Contracts it Enters into Without Consequence.

COMPA further argues that no injunction may issue from the district court because "in the federal procurement system, bid protest law does not provide review for disappointed subcontractors under prime contracts." COMPA's Answer Brief at 25. This was not an issue raised before or considered by the district court and is therefore not part of this appeal. *See Wolfley*, 100 N.M. at 189, 668 P.2d at 305; *Hinger*, 120 N.M. at 440, 902 P.2d at 1043. However, assuming for the sake of argument that this issue was properly before the Court, and assuming COMPA correctly states the law under the federal procurement system, COMPA's point has

no applicability to the claims in this case. Orion is not making a claim under federal laws or regulations and COMPA does not now, and never has, claimed that federal law preempts Orion's common law claim for breach of an implied contract. COMPA cites no cases in support of this argument and, significantly, LANS does not raise or rely on it. COMPA also fails to cite any federal regulation or other authority that would permit M&O contractors such as LANS to make specific representations regarding the bid and procurement process to subcontract bidders who rely on such representations, but then ignore the representations and assurances, claiming that governmental oversight provides it with immunity for these very representations. In sum, COMPA's assertion on this issue does not support its request to affirm the district court's order.

D. Implied-in-Fact Contracts Can and Have Existed Between Private Parties in the Procurement Process.

COMPA also argues that, as a matter of law, there can never exist facts which could evidence an implied-in-fact contract between two private entities in the bidding context. *See* COMPA's Answer Brief at 26-27. Like LANS, however, COMPA fails to cite to any case law that directly supports this contention and COMPA wholly avoids cases like *New England Insulation Co. v. General Dynamics Corp.*, 26 Mass. App. Ct. 28, 522 N.E. 2d 997 (Mass. App. Ct. 1988), which explain that implied-in-fact contract and promissory estoppel theories are equally applicable to private solicitations because"[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." In further reply to COMPA's argument, Orion refers the Court to the argument presented in its Reply to Appellee LANS' Answer Brief at 2-14, filed contemporaneously with this Reply.

E. Orion Has Sufficiently Pled a Cause of Action for Implied-in-Fact Contract and Promissory Estoppel.

COMPA also argues, for the first time on appeal, that Orion's complaint should be dismissed because Orion "fail[s] to plead the elements necessary to state a claim for an implied-in-fact contract between LANS and Orion." COMPA's Answer Brief at 29. It bears repeating that, because COMPA did not raise this issue with the district court in its Motion for Partial Summary Judgment, it is not properly before this Court and should be rejected. *See Wolfley*, 100 N.M. at 189, 668 P.2d at 305; *Hinger*, 120 N.M. at 440, 902 P.2d at 1043. Again, assuming for the sake of argument that COMPA had raised this before the district court, COMPA's argument is wrong and this Court should not, on its own, dismiss Orion's claim for breach of implied-in-fact contract on this basis.

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. This does not mean, however, that unless a plaintiff uses the magic words "mutual assent," any claim for breach

of implied-in-fact contract must be dismissed – as argued here by COMPA. Instead, New Mexico courts have held that in order to establish a claim of breach of implied contract based upon representations made by a defendant, a plaintiff is required only to demonstrate that those representations created a reasonable expectation of contractual rights. *See Ruegsegger v. Board of Regents of Western New Mexico University*, 141 N.M. 306, 312, 154 P.3d 681 (Ct. App. 2006). 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." *Garcia*, 1996-NMSC-029, ¶10; *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 670, 857 P.2d 776, 781 (1994) (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"); *see also Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 748 P.2d 507 (1988); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988).

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 well-known customs and norms used for M&O contract bids, and on the basis of the bid evaluation criteria. 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]. Thus, alleged Orion:

> An implied-in-fact contract between LANS and Orion arose out of the RFP bid solicitation for the VMS Subcontract [because] Orion responded to the RFP for the VMS Subcontract based on the promise and understanding that LANS would consider all bidders fairly and honestly and that the awardee of the VMS Subcontract would be selected in accordance with the evaluation criteria stated in the RFP, the Source Selection Plan and customary and normal practices and procedures

> for M&O procurements. These terms created a reasonable expectation of contractual rights.

Amended Complaint [RP 0567].

Despite COMPA's assertion, Orion sufficiently pled a cause of action for breach of an implied-in-fact contract. COMPA cites to no law which required ORION to use the specific words "mutual assent," and therefore its argument fails.

F. The Fact That LANS Was Not Bound to Award the Subcontract Has Nothing to Do With Whether an Implied-in-Fact Contract Existed Between the Parties.

COMPA also argues that because LANS reserved the right in the RFP to make no award, there can be no implied-in-fact contract in this case. COMPA did not raise this issue in its Motion for Partial Summary Judgment filed in the district court and the lower court did not address it; therefore, this Court should reject consideration of this argument. *See Wolfley*, 100 N.M. at 189, 668 P.2d at 305; *Hinger*, 120 N.M. at 440, 902 P.2d at 1043. But even if COMPA had properly raised this issue or preserved it on appeal, it misses the mark. In this case, LANS did not withdraw the RFP or decide to make no award. Instead, Orion alleges that LANS, in making the award to COMPA, violated the representations it had made in the RFP and the well-established customs and norms for the process of awarding such contracts. While LANS may have been free to award no contract, once it chose to go forward with the procurement process and make an award, it could not

violate the terms and conditions set forth in the RFP and relied on by Orion when it made its bid.

Moreover, even if the language of the RFP relied upon by COMPA was of relevance here, it does not mean that judgment as a matter of law is appropriate because the creation and existence of an implied contract is a question of fact that must be determined by the fact finder. As the Supreme Court of New Mexico has explained, "[E]ven where a [document] purports to disclaim any intentions of forming contractual obligations enforceable against a [defendant], a fact finder may still look to the totality of the parties' statements and actions, including the contents of a [document], to determine whether contractual obligations were created." *Beggs v. City of Portales*, 2009-NMSC-023, ¶ 20, 146 N.M. 372, 377, 210 P.3d 798, 803 ; *see also Cockrell v. Board of Regents of New Mexico State University*, 2002-NMSC-009, ¶ 26, 132 N.M. 136, 45 P.3d 876. Thus, the district court clearly would have erred if it granted COMPA's Motion for Partial Summary Judgment on this basis. *See Beggs*, 2009-NMSC-023, ¶ 22 ("Reviewing this evidence in the light most favorable to [plaintiffs], we conclude that [plaintiffs are] entitled to have the factual issue of whether an implied contract exists resolved by a fact-finder at a trial on the merits."); *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 21, 135 N.M. 128, 85 P.3d 252 (2003) (holding summary judgment improper, even where employer and employee "essentially agree[d] on the

conversation giving rise to the alleged implied contract" because finding an implied-in-fact contract is a factual question meant for the jury).

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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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 3,606 words, as determined by the word count program of the word processing system used, Word 2003.