IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

APEX MECHANICAL & FABRICATION, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. N24C-06-204 PAW CCLD
MILFORD SCHOOL DISTRICT, RICHARD Y. JOHNSON & SON, INC., and BUCK SIMPERS ARCHITECTS & ASSOCIATES,	)	
Defendants.	)	

Submitted: February 6, 2025
Decided: May 14, 2025

Upon Defendant Milford School District's Motion to Dismiss;
GRANTED.

Upon Defendant Richard Y. Johnson & Son, Inc.'s Motion to Dismiss;
GRANTED.

Upon Defendant Buck Simpers Architects & Associates' Motion to Dismiss;
GRANTED.

MEMORANDUM OPINION AND ORDER

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Aaron E. Moore, Esq.; and John H. Osorio, Esq., of Marshall Dennehey, LLC, *Attorneys for Defendant Richard Y. Johnson & Sons, Inc*.

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WINSTON, J.

I. INTRODUCTION

This action arises out of the Milford Middle School, Bid Pack B-New Construction project ("MMS Project"), a major public-works development to expand and modernize Milford Middle School.[1] Defendants oversee the MMS Project with Defendant Milford School District ("MSD"), serving as the designated contracting agency; Defendant Richard Y. Johnson & Son, Inc. ("RYJ & Son"), acting as the construction manager; and Defendant Buck Simpers Architects + Associates ("BSAA"), providing architecture services.[2] Pursuant to their statutory duties as bid solicitors, Defendants prepared "plans and specifications" for each of the individual construction contracts within the MMS Project.[3] The B-17 Project plans and specifications ("B-17 Plans"), did not include a 2023 amendment to the Delaware Prevailing Wage Statute (the "2023 Amendment"), which expanded the class of workers covered by the law.[4]

Plaintiff APEX Mechanical & Fabrication, Inc. ("APEX"), bid on the B-17 project (the "APEX Bid").[5] After Defendants unsealed the B-17 Project bids, they

[1] Complaint (hereinafter "Compl.") ¶ 1 (D.I. 1).

[2] *Id.* ¶¶ 4-6.

[3] *Id.* ¶¶ 18, 20-21; 29 *Del. C.* § 6960(b).

[4] Compl. ¶¶ 9, 13-17, 20-23.

[5] *Id.* ¶¶ 2-3.

presumptively awarded APEX the contract as the lowest bidder.[6] The APEX Bid, however, did not account for the 2023 Amendment in its labor cost calculations.[7] When confronted with that fact, APEX responded that, despite its awareness of the 2023 Amendment, it followed the B-17 Plans which did not include the change in law.[8] Defendants then presented APEX with a choice, voluntarily withdraw its bid for the return of its bid-bond, or complete the project for the original amount.[9] APEX withdrew its bid and initiated this litigation.[10]

Before the Court are three Motions to Dismiss (the "Motions"), one filed by each Defendant.[11] The Motions each seek dismissal of all Counts asserted in the Complaint for failure to state a claim under Superior Court Civil Rule 12(b)(6).[12]

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[6] *Id.* ¶¶ 18(g), 74-75, 82.

[7] *Id.* ¶¶ 89-92.

[8] *Id.* ¶¶ 78-81.

[9] *Id.* ¶¶ 95-100.

[10] *Id. see generally* Compl.

[11] *See generally* Defendant, Richard Y. Johnson & Son, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) (hereinafter "RYJ & Son MTD") (D.I. 16); Opening Brief of Defendant Milford School District in Support of its Motion to Dismiss (hereinafter "MSD MTD") (D.I. 21); Defendant Buck Simpers Architects + Associates Opening Brief in Support of its Motion to Dismiss (hereinafter "BSAA MTD") (D.I. 22).

[12] *See generally* RYJ & Son MTD; MSD MTD; BSAA MTD.

The Motions advance different, though at times overlapping, theories of nonliability.[13] For the reasons discussed below the Motions are **GRANTED**.

II. BACKGROUND

A. THE PARTIES

Plaintiff Apex is a Delaware commercial and industrial contractor, providing construction services for large projects, including public-funded developments.[14] Defendant MSD is the Delaware school district that operates Milford Middle School.[15] MSD "served as an 'agency' and designated 'contracting party' authorized by 29 *Del. C.* § 6962(b) to enter public-works contracts for commercial construction services."[16] Defendant RYJ & Son contracted to act as "MSD's designated construction manager" for the MMS Project.[17] Similarly, MSD hired Defendant BSAA "to serve and operate on the [MMS] Project . . . as the agency's contractual, professional services 'Architect.'"[18]

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[13] *Id.*

[14] Compl. ¶ 3.

[15] *Id.* ¶ 4.

[16] *Id.*

[17] *Id.* ¶ 5.

[18] *Id.* ¶ 6.

B. THE DELAWARE PREVAILING WAGE STATUTE AND THE B-17 PLANS

The Delaware Prevailing Wage Statute mandates laborers working on public-funded construction projects be paid a certain wage determined by the Department of Labor.[19] In addition to state prosecution, the law provides a private cause of action for laborers to enforce their wage rights.[20] Prior to the 2023 Amendment, the wage mandate only applied to "mechanics and laborers employed directly upon the site of the work."[21] The 2023 Amendment, however, expanded the Prevailing Wage Statute's coverage to include "laborers . . . engaged in any custom fabrication work, *regardless of where the work is performed*."[22]

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[19] 29 *Del. C.* § 6960(b).

[20] Compl. ¶ 50 (citing 29 *Del. C.* § 6960(f)) (granting employees' a "right of action against [their] employer in any court of competent jurisdiction to recover treble the difference between the amount so paid and the prevailing wage rate.").

[21] *Id.* ¶¶ 9-12.

[22] 29 *Del. C.* § 6960(b) (emphasis added). The full text of the Prevailing Wage Statute is not relevant to resolving the parties' dispute. Nevertheless, the Prevailing Wage statute provides, "[e]very contract based upon these specifications must contain a stipulation that the employer must pay all mechanics and laborers employed directly upon the site of the work or engaged in any custom fabrication work, regardless of where the work is performed, unconditionally and not less often than once a week and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the employer and such laborers and mechanics. The specifications must further stipulate that the scale of wages to be paid must be posted by the employer in a prominent and easily accessible place at the site of the work[.]" *Id.* Similarly, the definition of "custom fabrication" is not relevant because there is no dispute that the B-17 Plans required any bidder, including APEX, to provide custom fabrication services. *See* Compl. ¶ 64. Nevertheless, the 2023 Amendment

As a public-works project, the MMS Project had to comply with the Delaware Procurement Statute.[23] The Procurement Statute imposed several obligations on Defendants.[24] First, Defendants were required to provide "suitable plans and specifications . . . for all contracts" which comprised the MMS Project.[25] Second, the Procurement Statute regulated the process by which Defendants solicited, accepted, and opened bids for the various MMS Project contracts.[26] Third, the Procurement Statute obligated Defendants to award any contract "to the lowest responsive and responsible bidder" within 30 days of opening the bids.[27] Finally,

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defined custom fabrication as "the offsite fabrication, assembly, or other production of nonstandard goods or materials, including components, fixtures or parts thereof, specifically for a public works project. Such goods and materials shall include those used in the following trades or systems: (a) Plumbing or pipe fitting systems, including heating, ventilating, air-conditioning, refrigeration systems, sheet metal or other duct systems; (b) Electrical systems; (c) Mechanical insulation work; (d) Ornamental iron work; (e) Commercial signage that does not attempt or appear to direct the movement of traffic . . . ." 29 *Del. C.* § 6902(8).

[23] 29 *Del. C.* § 6920.

[24] *See* 29 *Del. C.* § 6962.

[25] Compl. ¶¶ 18, 20.

[26] *Id.* ¶ 18(e); *see* 29 *Del. C.* § 6962(d)(12) ("Bids shall be opened publicly . . . at the time and place designated in the plans and specifications [and] [b]ids shall be unconditionally accepted without alteration. After the bid opening, no corrections in bid prices or other provisions of bids prejudicial to the interests of the State or fair competition shall be permitted.").

[27] 29 *Del. C.* § 6962(d)(13).

Defendants had to hold an open pre-bid meeting to clarify any ambiguities in the project plans.[28]

Pursuant to their Procurement Statute obligations, Defendants prepared the B-17 Plans to solicit bids for the B-17 Project.[29] All Defendants "knew, had duties or reasons to know, or should have known," about the 2023 Amendment.[30] This notwithstanding, the B-17 Plans did not account for the 2023 Amendment.[31] Specifically, Article 4.5 of the B-17 Plans—titled "PREVAILING WAGE REQUIREMENT"—required bidders to pay the "mandatory prevailing-wage payments only for workers employed and working directly on the primary construction site in Milford, Delaware."[32]

Beyond giving technical details, the B-17 Plans provided bidders with certain instructions.[33] Relevant here are three such provisions. First, the B-17 Plans stated, "[b]y submitting a Bid, the Bidder represents that: . . . [t]he Bidder has read and understands the Bidding Documents and that the Bid is made in accordance

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[28] 29 *Del. C.* § 6962(d)(10).

[29] Compl. ¶ 20.

[30] *Id.* ¶ 19.

[31] Compl. ¶¶ 28-29, 32, 34, 41.

[32] *Id.* ¶ 41(b).

[33] While the B-17 Plans are not attached to the Complaint, the Court can consider their text when evaluating the Motions because they are integral to Plaintiff's claims and incorporated by reference into the Complaint. *See In re General Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 169 (Del. 2006).

therewith."[34] Second, the B-17 Plans informed bidders that "[a]ny errors, inconsistencies or omissions discovered [in the plans] shall be reported to the Architect immediately."[35] Third, the B-17 Plans obligated bidders to:

> carefully study and compare the Bidding Documents with each other, and with other work being concurrently or presently under construction to the extent that it relates to the Work for which the Bid is submitted, shall examine the site and local conditions, and shall report any errors, inconsistencies, or ambiguities discovered to the Architect.[36]

On October 11, 2023, Defendants published the B-17 Plans.[37] Defendants held the statutorily required pre-bid meeting on October 31, 2023, which resulted in seven addenda to the B-17 Plans.[38] The only reference to the Prevailing Wage statute in the meeting agenda or addenda was a statement that State prevailing wage rates apply.[39] After the meeting, Defendants began receiving bids for the B-17 project.[40]

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[34] BSAA MTD, Ex. A (hereinafter "B-17 Plans") § 2.2.1.

[35] *Id.* § 3.1.3.

[36] *Id.* § 3.2.1.

[37] *See generally id.*

[38] Compl. ¶ 38.

[39] *Id.*

[40] *Id.* ¶¶ 42, 73.

C. THE APEX BID

After Defendants published the B-17 Plans, APEX began preparing the APEX Bid.[41] APEX recognized that the B-17 Plans failed to account for the 2023 Amendment.[42] Despite this recognition, APEX did not seek clarification from Defendants regarding the prevailing wage rate before the November 27, 2023, deadline imposed by the B-17 Plans.[43] Rather, cognizant of its obligation to submit "fully 'responsive' bids based strictly and compliantly on the [B-17 Plans]," the APEX Bid only contemplated paying the prevailing wage rate to on-site laborers.[44]

On December 5, 2023, Defendants unsealed all bids for the B-17 project.[45] Defendants notified Plaintiff that the APEX Bid was the lowest, and thus APEX was "presumptively" the awardee.[46] The next day, "during the parties' post-award 'descoping' discussions . . . APEX inquired as to [Defendants'] failure to include" the 2023 Amendment in the B-17 Plans.[47] Defendants "declined to answer APEX's inquiry or offer APEX any specific reasons for the B-17 Plans[] exclusion of 'offsite'

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[41] *Id.* ¶¶ 35-38.

[42] *Id.* ¶ 41.

[43] *Id.* ¶¶ 41, 80.

[44] *Id.* ¶¶ 41-42, 57, 67, 80-81.

[45] *Id.* ¶ 82.

[46] *Id.* ¶¶ 82-83, 87.

[47] *Id.* ¶ 89.

prevailing-wage payments."[48] Rather, Defendants maintained that APEX had an obligation to conform its bid to all applicable laws, regardless of what the B-17 Plans stated.[49] While Defendants did not reject the APEX Bid, they claimed its failure to account for the 2023 Amendment made it non-responsive.[50] Accordingly, Defendants offered APEX a choice: voluntarily withdraw the APEX Bid for the return of its $700,000 bid-bond, or complete the B-17 project for the original price.[51] Recognizing that if the 2023 Amendment applied the APEX Bid was deficient by $300,000, APEX withdrew its bid.[52] APEX then filed this litigation to challenge Defendants' actions throughout the bidding process.[53]

D. PROCEDURAL HISTORY

APEX initiated this litigation by filing its Complaint on June 24, 2024.[54] The Complaint asserts three causes of action against all Defendants: (1) Count I,

[48] *Id.* ¶ 90.

[49] *Id.* ¶¶ 91-92.

[50] *Id.* ¶¶ 86, 92.

[51] *Id.* ¶¶ 95-96.

[52] *Id.* ¶ 96.

[53] *See generally id.*

[54] *See generally id.*

Declaratory Judgments;[55] (2) Count II, Violation of 6 *Del. C.* § 2513;[56] and (3) Count IV, Unjust Enrichment."[57] Additionally, Count III of the Complaint alleges MSD willfully breached an implied-in-fact contract.[58]

All Defendants filed a Motion to Dismiss.[59] Yet, only MSD and BSAA filed briefs supporting their Motions.[60] In December 2024, APEX filed an omnibus brief opposing all Motions.[61] The parties completed briefing on January 8, 2025, with only MSD filing a reply brief.[62] The Court heard oral argument on February 6, 2025, and took the Motions under advisement.[63]

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[55] *Id.* ¶¶ 104-106. Plaintiff seeks declarations that: (1) the B-17 Plans were not "suitable" because they did not account for the 2023 Amendment; (2) an implied-in-fact contract was created when Defendants notified APEX that the APEX Bid was the lowest and presumptive winner of the B-17 project; (3) Defendants willfully breached the implied-in-fact contract by not awarding the B-17 project to APEX; (4) Defendants failure to provided suitable plans, resulted in their unjust enrichment and APEX's impoverishment. *Id.* ¶ 106.

[56] *Id.* ¶¶ 107-111. 6 *Del. C.* § 2513's common title is the Delaware Consumers Fraud Act. *Id.* ¶ 108. Accordingly, the Court refers to that statute as the "CFA."

[57] *Id.* ¶¶ 115-122.

[58] *Id.* ¶¶ 112-114.

[59] *See generally* MSD MTD; BSAA MTD; RYJ & Son MTD.

[60] *See generally* MSD MTD; BSAA MTD.

[61] *See generally* Plaintiff's Answering Brief in Opposition to Defendants' Motions to Dismiss Plaintiff's Complaint (hereinafter "MTD Opp'n") (D.I. 29).

[62] *See generally* Reply Brief of Defendant Milford School District in Support of its Motion to Dismiss (hereinafter "MSD MTD Reply") (D.I. 30).

[63] *See* Judicial Action Form for Defendant(s) Motion to Dismiss before Judge Winston on February 6, 2025 (D.I. 31).

III. STANDARD OF REVIEW

On a Rule 12(b)(6) motion to dismiss, the Court: (i) accepts all well-pleaded factual allegations as true; (ii) credits vague allegations if they give the opposing party notice of the claim; (iii) draws all reasonable inferences for the non-moving party; and (iv) denies dismissal if recovery on the claim is reasonably conceivable.[64] The Court does not, however, accept conclusory allegations unsupported by the facts or draw unreasonable inferences in favor of the nonmovant.[65]

IV. ANALYSIS

The Motions articulate eight reasons why the Court should dismiss all, or portions of, the Complaint.[66] Specifically, Defendants argue APEX's claims:

> (1) are premised on an inactionable opinion of or mistake in the law; (2) are barred by the state tort claims act . . . ; (3) seek a . . . impermissible advisory opinion and are barred because a declaratory judgment action is . . . not available; (4) do not meet the pleading requirements of the Consumer Fraud Act; (5) are barred because the procurement statutes have a 30 day requirement to issue contracts; (6) are barred under the standing doctrine; (7) fail to state a claim because the contract has a . . . duty to report errors in the plans and specifications; and (8) fail to adequately plead a claim for unjust enrichment.[67]

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[64] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).

[65] *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020).

[66] *See* MSD MTD at 5-23; BSAA MTD at 8-18.

[67] MTD Opp'n at 13.

Several of these arguments, however, are alternative theories about why the same claim fails.[68] Accordingly, instead of addressing each contention, the Court focuses its analysis on whether any of the Complaint's claims for relief survive. For the reasons discussed below, the Court concludes all Counts fail to state a claim.

A. COUNT I FAILS TO STATE A VALID DECLARATORY JUDGMENT CLAIM.

The Motions ask the Court to dismiss Plaintiff's declaratory judgment claim, because APEX allegedly seeks an advisory opinion.[69] MSD correctly notes that Plaintiff's claims for declaratory judgment fall into two categories.[70] First, APEX seeks a declaration that an implied-in-fact contract existed between the parties,

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[68] For example, arguments two and four both address Count II and arguments one, three, and six all address Count I. Moreover, Defendants advance a general argument that APEX cannot recover based on a misstatement of law in the B-17 Plans, because all parties are presumed to know the law. *See* MSD MTD at 9. While the parties vigorously dispute whether the exclusion of the 2023 Amendment from the B-17 Plans was a misstatement of law, or a graver error which rendered the plans unsuitable, resolution of the Motions does not turn on that issue. *Compare id.* at 6, *and* BSAA MTD at 8-13, *with* MTD Opp'n at 9-13. The Court, therefore, does not address the B-17 Plans' suitability or whether failing to include the 2023 Amendment was a mistake of law, beyond what is required to resolve the Motions.

[69] MSD MTD at 6-10; BSAA MTD 13-16.

[70] MSD MTD at 6-8. Briefly, Defendants contend that the requirement for a bid solicitor to provide a "'suitable' set of statutory 'plans and specifications,'" cannot be read to "require[] the Defendants to make an express representation as to whether specific statutory amendments, such as those to the prevailing wage statute, apply to the bidding process[.]" *Id.* at 8-9 (quoting 29 *Del. C.* § 6962(d)(13)). Thus, MSD argues that if Plaintiff relied upon any legal opinion in the Project B-17 Plans, it did so at its own risk. *Id.* at 9 (citing *Wal-Mart*, 872 A.2d at 629).

which Defendants willfully breached, resulting in their unjust enrichment.[71] That request does not state a claim, because the declarations APEX seeks are completely duplicative of the Complaint's affirmative counts.[72]

APEX's first category of declaratory judgment requests is duplicative of Counts III and IV. Under Delaware law, there is no need for a declaratory judgment where a claimant has recourse under common law.[73] Thus, "to survive dismissal, a declaratory count must be 'distinct' from the affirmative counts in the complaint such that a decision on the affirmative counts would not resolve the declaratory count."[74] Here, Count III alleges Plaintiff and Co-Defendant MSD entered an implied-in-fact contract which MSD willfully and materially breached.[75] Count IV alleges that as a result of that breach, MSD unjustly enriched themselves to the corresponding impoverishment of APEX.[76] Resolution of those Counts necessarily addresses the merits of APEX's requested declaration that an implied-in-fact contract existed, which MSD willfully breached, resulting in their unjust

[71] Compl. ¶¶ 106(b)-(d).

[72] *Lehman Brothers Holdings, Inc. v. Kee*, 268 A.3d 178, 198 (Del. 2021) (affirming dismissal of declaratory judgment claims that "are duplicative of [plaintiff's] other claims.").

[73] *Blue Cube Spinco LLC v. Dow Chemical Company*, 2021 WL 4453460, at *15 (Del. Super. Sept. 29, 2021) (citations omitted).

[74] *Id.* (citations omitted).

[75] Compl. ¶¶ 113-114.

[76] *Id.* ¶ 121.

enrichment.[77] Accordingly, APEX's first set of declaratory judgment requests are duplicative of its affirmative claims, and must be dismissed.[78]

APEX's second category of requests asks the Court to declare the B-17 Plans were "[n]ot '[s]uitable'" because they did not include the 2023 Amendment.[79] The parties heavily dispute whether the failure to include the 2023 Amendment was "an *opinion* as to the law that was incorrect,"[80] or a factual misstatement that "taint[ed] the entire bid process."[81] Resolution of the declaratory judgment dispute, however, turns on the more fundamental actual controversy issue.

Before the Court can adjudicate a dispute before it, including declaratory relief, a justiciable controversy must exist.[82] Delaware courts "appl[y] the *Rollins* test to determine whether a complaint constitutes an actual case or controversy."[83]

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[77] *Id.* ¶ 106(b)-(d).

[78] *See Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at *25 (Del. Super. Aug. 16, 2021) (dismissing declaratory judgment claims as duplicative because "[w]hether TransCore breached the License necessarily will be decided, positively or negatively, in the resolution of Intermec's express breach-of-contract count. And whether Intermec is entitled to damages, too, necessarily will be resolved through that count and through TransCore's implied covenant count for overpayment. There is, then, no need for a declaration on this issue.").

[79] Compl. ¶ 106(a).

[80] MSD MTD at 6-9; *see* BSAA MTD at 9-13.

[81] MTD Opp'n at 9-13.

[82] *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas,*962 A.2d 205, 208 (Del. 2008) (internal quotations omitted); *see* 10 *Del. C.* § 6501.

[83] *In re COVID-Related Restrictions on Religious Services*, 302 A.3d 464, 494 (Del. Super. Aug 28, 2023), *aff'd*, 326 A.3d 626 (Del. 2024) (citations omitted). *Rollins*

Based on that standard, "Delaware courts will . . . not issue declaratory relief when it can have no practical effect on the injury complained of."[84] It is undisputed that APEX withdrew the APEX Bid and Defendants returned its deposit.[85] Therefore, the interests of the parties are not currently adverse and granting APEX's declaratory judgment request would have no practical effect on the parties.[86] This suggests there is no actual controversy underlying APEX's second declaratory judgment request. Similarly, APEX lacks standing to bring its second declaratory judgment request, because the relief requested is not likely to remedy the alleged violation."[87] Even if the B-17 Plans were unsuitable, a declaratory judgment to that effect would not change the parties' current relationship given that APEX withdrew its bid. This Court will not grant declaratory judgment merely to satisfy a party's desire for an advisory opinion or allow a declaratory judgment claim to progress solely on the

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held that for an actual controversy to exist: "(1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; [and] (4) the issue involved in the controversy must be ripe for judicial determination." *Rollins Int'l v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973).

[84] *In re COVID*, 302 A.3d at 493 (citations omitted).

[85] Compl. ¶¶ 96-97.

[86] *In re COVID*, 302 A.3d at 495.

[87] *Id.* at 496 (citing *State v. MacColl*, 2022 WL 2388397, at *8 (Del. Super. July 1, 2022)).

possibility that it may bring Plaintiff satisfaction to receive a declaration that Defendants' conduct was unlawful.[88] Hence, dismissal is proper because APEX lacks standing to bring its "suitability" declaratory judgment claim, and there is no underlying actual case or controversy.[89] The Motions are **GRANTED** as to Count I.

B. COUNT II DOES NOT STATE A CLAIM UNDER THE CONSUMER FRAUD ACT.

The Motions next ask the Court to dismiss Count II, APEX's Consumer Fraud Act ("CFA") claim. Defendants assert Plaintiff's CFA claim fails as a matter of law, as the scope of the CFA does not apply to the transaction at issue.[90] Specifically, Defendants argue the Complaint lacks allegations that their conduct "falls within the CFA's definitions of 'advertisement' or 'sale.'"[91] Defendants note that an advertisement must "induce" the claimant to "enter into a binding and enforceable

[88] *In re COVID*, 302 A.3d at 497 (citing *Sprint Nextel Corp v. iPCS, Inc.,*2008 WL 2737409, at *12 (Del. Ch. July 14, 2008)).

[89] Because the Court concludes the B-17 Plans' suitability does not present an actual case or controversy, it need not address BSAA's argument that even if the B-17 Plans were unsuitable, APEX had an obligation to seek clarification from Defendants, and its failure to do so precludes any recovery. BSAA MTD at 15-16.

[90] MSD MTD at 11-14.

[91] *Id.* at 11-12.

obligation."[92] Yet, the "very nature of the bidding process" shows the B-17 Plans' purpose was to induce *Defendants*, not APEX, to act.[93]

APEX rejects Defendants' position and argues Count II survives, because the Complaint alleges fraud in connection with the advertisement or sale of services, goods, or otherwise.[94] Plaintiff asserts the CFA applies because there was an "'advertisement" of "merchandise" as defined by the CFA.[95] That position, however, ignores how the meaning of "advertisement," applies to the Complaint's facts.

The CFA provides: "[a] private cause of action shall be available to any victim of a violation of this subchapter,"[96] where:

> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.[97]

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[92] MSD MTD at 12; *see* 6 *Del. C.* § 2511(1).

[93] *Id.*

[94] MTD Opp'n at 21-27.

[95] *Id.* at 26-27. The CFA defined "Advertisement" as "the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in, any merchandise." 6 *Del. C.* § 2511(1). The CFA defines "Merchandise" as "any objects, wares, goods, commodities, intangibles, real estate or services." 6 *Del. C.* § 2511(6).

[96] 6 *Del. C.* § 2525(a).

[97] *Id*. § 2513(a).

Based on that text, to assert a CFA claim, a complaint must allege: "(1) a defendant engaged in conduct which violated the statute; (2) the plaintiff was a 'victim' of the unlawful conduct; and (3) a causal relationship exists between the defendant's unlawful conduct and the plaintiff's ascertainable loss."[98] While the CFA does not "require[] that a plaintiff actually rely on the false advertising[,] . . . the false advertising [must] cause the plaintiff's injury."[99]

Here, the Parties' dispute centers on the first element—whether Defendants' conduct was "an 'advertisement' of 'merchandise' as defined by the CFA."[100] The CFA defines "[a]dvertisement" as "the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any persons to enter into an obligation or acquire any title or interest in, any merchandise."[101] "Merchandise" is defined as "any object, wares, goods, commodities, intangibles, real estate or *services*."[102] Clearly, the B-17 Plans contemplated APEX providing "services"—fabrication for the MMS Project. Thus, whether Count II states a claim, turns on if the B-17 Plans constitute an advertisement.

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[98] *Teamsters Local 237 Welfare Fund v. AstraZeneca Pharmaceuticals LP*, 136 A.3d 688, 693 (Del. 2016) (citing 6 *Del. C.*§§ 2513, 2525).

[99] *Id.* at 694.

[100] MTD Opp'n at 26-27.

[101] 6 *Del. C.*§ 2511(1).

[102] *Id.*§ 2511(6) (emphasis added).

While the B-17 Plans stylize themselves as an "ADVERTISEMENT FOR BID,"[103] the plans were not an "advertisement" under the CFA. An advertisement must "induce" the recipient "to enter into an obligation."[104] Dictionaries define "induce" as "to move by persuasion or influence" and "to cause the formation of."[105] The Complaint contains no non-conclusory allegations regarding how the B-17 Plans persuaded or influenced APEX to submit a bid.[106] Nor is it a reasonable

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[103] Compl. ¶ 35.

[104] 6 *Del. C.*§ 2511(1).

[105] *Induce*, MERRIAM-WEBSTER (2024); *see Induce*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS (4th Ed. 2013) ("[t]o persuade someone to do something" and "to cause something to happen."). *See also Freeman v. X-Ray Associates, P.A.*, 3 A.3d 224, 227-28 (Del. 2010) ("Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words, we often rely on them for assistance in determining the plain meaning of undefined terms.") (citations omitted).

[106] *See* Compl. ¶¶ 33, 59, 67, 106(d)(i). There is also a question regarding whether APEX's submission of the APEX Bid was an "obligation" given that the mere submission of a bid does not mandate APEX to do anything unless there bid is accepted. Dictionaries define "obligation" to mean "something that [one] must do." *Obligation*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS (4th Ed. 2013); *see Obligation*, MERRIAM-WEBSTER (2024) ("something (such as a formal contract, a promise, or the demands of conscience or custom) that obligates one to a course of action."). APEX's mere submission of its bid did not obligate it to do anything. The procurement statute's plain text shows APEX would *only* be required to act if the APEX Bid was "the lowest responsive and responsible" submission. 29 *Del. C.* 6962(d)(13)(a). Indeed, precedent shows the purpose of the procurement statute's 30-day window between unsealing bids and awarding a contract, is to allow the soliciting agency to exercise its "broad discretion in determining whether a bid is responsive" and responsible. *Julian v. Delaware Dept. of Transp.*, 53 A.3d 1081, 1083 (Del. 2012) (holding a soliciting agency "acted within its discretion in rejecting [plaintiff's] bid as non-responsive."); *see* 29 *Del. C.* 6962(d)(13) (allowing agencies 30 days from the time of unsealing bids to award the at-issue contract). Accordingly,

inference that the non-inclusion of the 2023 Amendment induced the APEX Bid, given that the Complaint alleges APEX only discovered the exclusion during its "final process of reviewing" its completed bid.[107] Thus, the Complaint fails to allege the B-17 Plans were an advertisement that induced the APEX Bid such that the CFA applies.[108] The Motions are **GRANTED** as to Count II.

C. COUNT III FAILS, BECAUSE THE COMPLAINT DOES NOT ALLEGE AN IMPLIED-IN-FACT CONTRACT EXISTED BETWEEN THE PARTIES.

Defendants next ask the Court to dismiss Plaintiff's implied-in-fact contract claim. An implied-in-fact contract "is legally equivalent to an express contract; the only difference between the two is the proof by which the contract is established."[109] Accordingly, to state a claim for breach of an implied-in-fact contract, a complaint must allege "that the parties, through their actions, demonstrated a meeting of the

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when APEX submitted the APEX Bid it could not reasonably expect that it was obligated to do anything. The Complaint's allegations confirm that conclusion, in stating that when the APEX Bid was unsealed, APEX was "presumptively" awarded the B-17 contract. Compl. ¶ 83. Therefore, even if the B-17 Plans were an "advertisement" under the CFA, they did not induce APEX to incur an obligation such that the CFA applies. As such, Count II is independently dismissible for failure to plead that APEX was induced to take on an obligation. This reasoning comports with the Court's implied-in-fact contract analysis. *See infra* IV.C.

[107] *Id.* ¶¶ 40-41.

[108] Because the Court concludes the Complaint fails to state a CFA claim against any of the Defendants, it need not address MSD's argument that the State Tort Claims Act immunizes it from liability. MSD MTD at 21-23 (citing 10 *Del. C.* § 4001).

[109] *Ridley v. Bayhealth Med. Ctr., Inc.*, 2018 WL 1567609, at *7 (Del. Super. Mar. 20, 2018) (citations omitted).

mind's on all essential terms."[110] Here, the parties' dispute boils down to whether the Procurement Statute obligated Defendants to award APEX the B-17 contract solely because it was the lowest bidder.

Defendants assert Plaintiff's implied contract claim is based on a misunderstanding of the Procurement Statute.[111] Contrary to Plaintiff's assertion, Defendants maintain "the Procurement Statute does not contain a specific provision mandating that an acceptance of a bid is a legally binding contract."[112] Rather, the soliciting agency must award a contract "to the lowest responsive and responsible bidder" within 30 days.[113] Plaintiff's "bid was ultimately rejected because it was found to be non-responsive," thus an implied-in-fact contract could not exist "solely on the basis of the initial decision to award the bid to" APEX.[114]

APEX counters, maintaining its bid was never found to be non-responsive. Accordingly, "MSD was required to award the public-works contract [to Plaintiff] within 30 days of bid opening [as] the lowest responsible bidder."[115] Thus, the parties formed an implied-in-fact contract once Defendants determined the APEX

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[110] *Id.* (internal quotations omitted).

[111] MSD MTD at 14-16.

[112] *Id.*

[113] *Id.* (quoting 29 *Del. C.* § 6962(d)(13)).

[114] *Id.* at 15-17.

[115] MTD Opp'n at 27-28.

Bid was the lowest. The Procurement Statute's text, and case law interpreting that provision, undermines APEX's argument.

The Procurement Statute states the soliciting agency "shall award any public works contract within 30 days of the bid opening to the lowest responsive and responsible bidder."[116] Based on that texts' plain meaning, the mere determination that a bidder submitted the lowest bid, does not create a contract. If it did, there would be no need to state the agency "shall award" the contract within 30 days. That suggests Defendant's determination that APEX submitted the lowest bid was not an agreement, rather it was an "agreement to agree."[117] Moreover, the phrase "shall award" does not require the agency to award the lowest bidder a public-construction contract in every instance.[118] Specifically, Defendants could decline to award APEX the B-17 contract if the APEX Bid was nonresponsive or not a responsible bidder.[119] Accordingly, when Defendants informed APEX that it was the lowest bidder, APEX only had an expectation that it would be awarded the contract *if* its bid was responsive and responsible. Thus, there was no meeting of the minds when

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[116] 29 *Del. C.* § 6962(d)(13).

[117] *Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 WL 2173992, at *3 (Del. Ch. Sept. 1, 2005) ("It is a well-settled principal of Delaware law that an agreement to agree in the future . . . is unenforceable." (quoting *Hammond & Taylor, Inc. v. Duffy Tingue Co.,*161 A.2d 238, 239 (Del. Ch.1960))) (internal citations omitted).

[118] *Supra* IV.B.2.

[119] *See* 29 *Del. C.* § 6962(d)(13).

Defendants informed APEX it was "*presumptively* . . . awarded the [] B-17 contract."[120] Therefore, the Motions as to Count III are **GRANTED**.

D. COUNT IV DOES NOT STATE A REASONABLY CONCEIVABLE CLAIM FOR UNJUST ENRICHMENT.

The Motions' final contention concerns APEX's unjust enrichment claim. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[121] To state a claim for unjust enrichment, a complaint must plead: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[122] Failure to allege any element compels dismissal of an unjust enrichment claim.[123]

Defendants contend APEX has not pled any actual enrichment gained by the Defendants or suffered any impoverishment.[124] Defendants assert a contrary holding

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[120] Compl. ¶ 82. (emphasis added).

[121] *Fleer Corp. v. Topps Chewing Gum, Inc.,*539 A.2d 1060,1062 (Del. 1988) (citation omitted).

[122] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

[123] *Id.* ("[a]lthough the plaintiffs' complaint pleads the first four elements, it fails to establish the fifth requirement, that absent an unjust enrichment claim the plaintiffs will have no remedy to recover the benefit of which they were wrongfully deprived.").

[124] MSD Reply at 18-19.

would defeat the entire purpose of the Procurement Statute.[125] APEX maintains "[t]he Complaint details the unjust enrichment of Defendants and the corresponding impoverishment of APEX through the purposeful and unlawful shifting of their research/design/preparation costs, and all liabilities for non-payment of 'offsite' prevailing wages to APEX."[126] Thus, Plaintiff argues its "unjust enrichment claim is adequately pled and states a claim under notice pleading standards."[127] The parties' dispute therefore centers on whether the Complaint pleads that Defendants were enriched.[128]

An enrichment requires the defendants *retain* something of value.[129] The Complaint alleges Defendants were enriched by "shifting not only their significant research/design/preparation costs, but all potentially serious and costly primary liabilities for non-payment of 'offsite' prevailing-wages to APEX."[130] Yet, even if that constituted a gain for Defendants, the Complaint fails to allege that Defendants

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[125] BSAA MTD at 14-15. BSAA stylizes the purpose of the Procurement State as "protect[ing] the public against the waste of its funds by promoting 'free, open and competitive bidding on a common basis.'" *Id.* (quoting *Delaware Technical and Community College v. C & D Contractors, Inc.*, 338 A.2d 568, 569 (Del. Super. 1975)).

[126] MTD Opp'n at 30-31 (citing ¶¶ 120-121).

[127] *Id.* at 31.

[128] *See, e.g.*, BSAA MTD at 16-18.

[129] *Nemec*, 991 A.2d at 1130.

[130] Compl. ¶ 121.

retained any benefit. Rather, the Complaint asserts Defendants returned APEX's bid-bond after it withdrew the APEX Bid.[131] Thus, Defendants had to award the B-17 contract to a significantly higher-priced bidder.[132] Because APEX never worked on the B-17 project, there was also no risk of liability for non-payment of offsite prevailing-wage. That Defendants contracted with another bidder means it is not reasonable to conclude they retained any benefit from APEX's research/design/preparation costs. APEX's contention that it was unlawfully forced to withdraw its bid, does not alter that conclusion. Regardless of why APEX withdrew the APEX Bid, Defendants did not retain any benefit sufficient to support an unjust enrichment claim. Accordingly, the Complaint fails to allege an enrichment sufficient to sustain APEX's unjust enrichment claim. The Motions are **GRANTED** as to Count IV.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions.

IT IS SO ORDERED.

/s/ Patricia A. Winston
Patricia A. Winston, Judge

[131] *Id.* ¶¶ 95-97, 102.

[132] *Id.* ¶ 102.