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BRIEFING PAPERS® SECOND SERIES

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THE KEYS TO THE KINGDOM: OBTAINING INJUNCTIVE RELIEF IN BID PROTEST CASES BEFORE THE U.S. COURT OF FEDERAL CLAIMS

By Matthew H. Solomson

Once upon a time, in bid protests before the U.S. Court of Federal Claims (COFC), an award of bid preparation and proposal costs was the most relief that a successful plaintiff could hope to secure.[1] The primary goal of today's bid protests, however, is not simply to recover the costs incurred in preparing a bid or proposal, but to force some change in the Government's conduct of a procurement via injunctive relief. In a preaward bid protest, for example, a protester ordinarily seeks to change the parameters of a solicitation, while, in a postaward bid protest, a plaintiff protester may seek an order to disqualify the putative awardee or to require the Government to reconsider the plaintiff's proposal. Often, securing a temporary restraining order and/or a preliminary injunction is a necessary first step on the road to permanent injunctive relief. In addition, modern bid protest practice frequently involves litigating the Government's override of the automatic statutory stay imposed by the Competition in Contracting Act upon the filing of a timely bid protest at the Government Accountability Office.

This Briefing Paper discusses the strategic and legal issues that protesters frequently must confront and litigate in the pursuit of injunctive relief in

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The Potential Impact Of eBay Inc. v. MercExchange, L.L.C.

Matthew H. Solomson is a Trial Attorney with the Commercial Litigation Branch, United States Department of Justice. He also serves as an Adjunct Professor at the University of Maryland School of Law, where he teaches government contracts law. The views expressed herein are those of the author only and do not necessarily reflect the views of either the Department of Justice or the University of Maryland. *Many thanks to Kirk Manhardt, Assistant Director, Commercial Litigation Branch, for his valuable suggestions and insights on the topics addressed in this Paper.*

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a bid protest or CICA stay override action before the COFC. First, this Paper examines a number of procedural and substantive legal issues with respect to preliminary and permanent injunctive relief. Second, the Paper addresses similar issues in the context of a CICA stay override action. Finally, this Paper assesses the possible impact of the U.S. Supreme Court's *eBay Inc. v. MercExchange, L.L.C.*[2] decision on bid protests before the COFC.

Preliminary & Permanent Injunctive Relief

■ Why Injunctive Relief?

The statute governing bid protests before the COFC, 28 U.S.C.A. § 1491(b), authorizes, in essence, just two (or arguably three) forms of relief that the court may award to a successful plaintiff in a bid protest. In particular, pursuant to the Tucker Act, as amended by the Administrative Disputes Resolution Act of 1996,[3] the COFC may award "declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[4]

Government contractors are in business not merely to recoup costs invested in preparing bids and proposals, but to win contracts and thereby earn profits. In that regard, the goal in most bid protests ultimately is to obtain a permanent injunction, bringing the protester one step closer to securing the contract itself. Routinely, however, when a contractor files a postaward bid protest, each day that the Government is permitted to move forward with its procurement increases the chance that permanent injunctive relief will be denied.[5]

Accordingly, a protester—along with its complaint initiating the bid protest—ordinarily should consider the filing of a motion for a preliminary injunction and a request for a temporary restraining order. The point of both filings is to obtain a court order staying the conduct of the procurement until the protest can be resolved by the court. As will be demonstrated below, the failure to request and secure such preliminary relief may have consequences further down the protest road. In contrast to the automatic stay of a procurement triggered by the filing of a timely bid protest with the Government Accountability Office,[6] a preliminary injunction or temporary restraining order is far from guaranteed in the COFC. A plaintiff contractor, before filing a bid protest, therefore must possess an understanding of what it will be expected to demonstrate to the court.

■ Securing A Preliminary Injunction Or Temporary Restraining Order

At the outset, protesters must understand that "[t]he decision on whether or not to grant an injunction is within the sound discretion of the trial court."[7] In other words, a contractor is not guaranteed the relief it wants—including either a preliminary or permanent injunction—even if there is clear merit to the protest. Indeed, the COFC routinely characterizes injunctive relief as "extraordinary relief."[8] That descriptive phrase is not mere hyperbole, but rather reflects the fact that many of the court's decisions have held that a protester "must demonstrate its right to injunctive relief by 'clear and convincing evidence.'"[9]

As is the case with many of the topics covered by this Briefing Paper, the evidentiary burden for

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injunctive relief is far from a settled matter, with a number of decisions having held that a protester is required to satisfy only a "preponderance of the evidence" standard.[10] For example, one COFC judge has been highly critical of the tougher standard, commenting that "[a]lthough some judges of the Court of Federal Claims insist upon the higher 'clear and convincing' standard for injunctive relief, this court repeatedly has noted that such an approach is utterly without binding precedential support."[11] That judge opined that "[t]his debate is not semantic" because "[s]ecuring injunctive relief is a costly process that places upon the protestor a sufficiently heavy burden without hobbling those who come to court with the challenge of" complying with "oxymoronic legalisms."[12]

On the other hand, the U.S. Court of Appeals for the Federal Circuit—the appellate court that reviews COFC decisions—has opined that the application of the "clear and convincing" evidentiary standard is consistent with the extraordinary nature of injunctive relief against the Government.[13] In addition, courts have consistently recognized that they should interfere with the Government's procurement process only in limited, extraordinary circumstances.[14]

In any event, there are four factors the COFC considers in deciding whether to issue a temporary restraining order[15] or a preliminary injunction: "(1) the likelihood of plaintiff's success on the merits of its complaint; (2) whether plaintiff will suffer irreparable harm if the procurement is not enjoined; (3) whether the balance of hardships tips in the plaintiff's favor, and (4) whether a preliminary injunction will be contrary to the public interest."[16]

The "likelihood of success on the merits" prong of the temporary restraining order/preliminary injunction analysis is straightforward. The responsibility of the court at this stage of the proceedings is to provide a preliminary evaluation of the relative merits of the case.[17] Because its analysis is just that—preliminary—the court, regardless of whether it grants plaintiff's motion or not, does not express an opinion as to the ultimate viability or merit of plaintiff's protest. Nevertheless, a protester should carefully consider whether to seek a preliminary injunction where, for example, it already has lost its protest before the GAO, or where the court will have insufficient information due to the administrative record not having yet been filed by the agency. The problem in such cases is that, while the court's temporary restraining order/preliminary injunction analysis should be distinct from the court's final analysis (i.e., on the merits), a protester may well find itself in a weaker position having lost the temporary restraining order/preliminary injunction dispute, an outcome that itself is more likely following a failed GAO protest or an insufficient record.

In assessing whether a protester will suffer irreparable harm or injury, the court asks "'whether plaintiff has an adequate remedy in the absence of an injunction.'"[18] Generally, "an injury is not considered 'irreparable' if the only injury alleged is monetary loss."[19] In other words, "economic loss alone does not constitute irreparable harm."[20] Nevertheless, the COFC consistently has recognized that "there are occasions, particularly in the arena of government contracting, in which an economic loss will not be compensable with money damages; in these situations, economic loss can rise to the level of irreparable injury."[21]

For example, in *Seattle Security Services, Inc. v. United States*, the court agreed with the plaintiff's argument that it would "suffer irreparable harm if an injunction is not granted because the only other available relief—the potential for recovery of bid preparation costs—would not compensate it for its loss of valuable business on this contract."[22] The court explained that "[t]his type of loss, deriving from a lost opportunity to compete on a level playing field for a contract, has been found sufficient to prove irreparable harm."[23] In addition, the court noted that "[s]upport also exists for the proposition that the denial of the right to have a bid fairly and lawfully considered constitutes irreparable harm."[24]

At least one other decision has gone even further in searching out sources of possible irreparable harm. In *Information Sciences Corp. v. United States*, the court noted that the protesters had "committed substantial resources to challenge the procurement in the Government Accountability Office and the United States Court of Federal Claims," and thus an award of monetary relief would only

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compensate plaintiffs "in part."[25] This decision, however, appears anomalous.

Although the COFC often appears willing to assume the existence of harm to protesters, such an approach may be subject to challenge by the United States, in addition to intervening defendants, typically putative awardees, that frequently participate in a bid protest on the same side as the Government. Indeed, there are significant potential problems with the COFC's current approach, discussed in more detail below with respect to the Supreme Court's decision in *eBay*.

In the bid protest context, the court's analysis of the "public interest" factor frequently reflects, if not replicates, the irreparable harm assessment. For example, in *Seattle Security Services*, the court explained that "[i]t is beyond peradventure that the public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor's bid."[26] Recent cases take the same approach in concluding that "[i]t has long been understood that the public interest is served by an injunction that is designed to ensure that the procurement process is conducted pursuant to law."[27]

On the other hand, 28 U.S.C.A. § 1491(b)(3) provides that, in deciding whether to award injunctive relief, "the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." This statutory command strongly favors the Government, particularly in a protest that involves a military or other procurement affecting national security.[28] In *PGBA, LLC v. United States*, the Federal Circuit concurred with the Government and the contract awardee that 28 U.S.C.A. § 1491(b)(3) is "a 'super-priority' provision, which instructs courts to give extra consideration to issues of national defense and national security before reaching judgment in a case."[29] Indeed, § 1491(b)(3) "provides a basis, in certain circumstances, for denying injunctive relief *even if* plaintiff would be otherwise entitled to such relief."[30] Alternatively, the court may take the public interest and national security considerations "into account not only in deciding whether injunctive relief is appropriate, but also in crafting appropriate injunctive relief."[31] In sum, a protester challenging the conduct of a procurement that may be related to national security or defense should anticipate the Government invoking 28 U.S.C.A. § 1491(b)(3).

Finally, before awarding injunctive relief, the court must assess the relative hardships to the protester and the Government should an injunction be granted or denied.[32] However, "[w]hen balancing the respective harms that can flow from the grant of, or failure to grant, an injunction, the court may take into account not only the potential harm to the plaintiff and to the government, but also potential harm to third parties."[33] Under this prong, then, the court again must consider the injury to the plaintiff as compared to the harm to the Government and to any putative awardee, in addition to the interests of the public generally, including, for example, whether "an injunction risk[s] health and safety."[34]

■ Obtaining Permanent Injunctive Relief

Before the Federal Circuit's decision in *PGBA*, the COFC, in a number of cases, had declined to grant injunctive relief even where the protester had prevailed on the merits.[35] Not until *PGBA*, however, had the Federal Circuit ever directly addressed the COFC's equitable powers in a bid protest case.[36] In that decision, the Federal Circuit confirmed that the COFC's consideration of the equitable relief factors discussed above is proper, and that the court possesses the discretion to deny injunctive relief even to an otherwise successful protester.[37] *PGBA* thus unequivocally established that the injunctive relief factors discussed above (with respect to preliminary injunctive relief) are applicable where the protester seeks a permanent injunction. In so holding, the Federal Circuit rejected the protester's contention that it could avoid the injunctive relief factors merely by requesting a declaratory judgment rather than a permanent injunction. Indeed, the Federal Circuit agreed that the protester's "motivation for distinguishing between declaratory and injunctive relief appears to be a desire to avoid the equitable calculus associated with injunctive relief" and that the protester's request "to have the award set aside…is coercive and has the same practical effect as an injunction."[38]

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Accordingly, protesters seeking permanent injunctive relief in the COFC should be prepared to meet the test for a permanent injunction, which "is almost identical to that for a temporary restraining order or preliminary injunction, but rather than the likelihood of success on the merits, a permanent injunction requires success on the merits."[39] This raises another point of controversy within the COFC: there appears to be a disagreement, with respect to both preliminary and permanent injunctive relief, regarding whether all of the injunctive relief factors simply are weighed against each other, or whether certain factors are mandatory "gateways" through which the protester must pass to obtain the requested relief.

For example, in *Seattle Security Services*, the COFC held that "[n]o one factor is dispositive to the court's inquiry as 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'"[40] Similarly, in *MTB Group, Inc. v. United States*, the court held that "[n]o one of the four factors is determinative."[41] In that case, the court concluded, after examining the Government's actions, that the "plaintiff cannot succeed on the merits of its claim."[42] Nevertheless, the court commented that it would "consider the alleged harm plaintiff will suffer" should the procurement process continue.[43] In *Blue & Gold Fleet, LP v. United States*, the COFC held that "[w]hile success on the merits is the most important factor, '[n]o one factor, taken individually, is necessarily dispositive.'"[44] Notwithstanding that the plaintiff in that case failed to succeed on the merits, the court noted that "[p]laintiff has shown irreparable harm" but explained that "[t]he financial harm to plaintiff is displaced by the harm to the [Government agency] and intervenors because of plaintiff's utter failure on the merits."[45]

In contrast, other COFC decisions have held that the protester must succeed on the merits prong to be eligible for injunctive relief. For example, in *International Resource Recovery, Inc. v. United States*, where the plaintiff had "not demonstrated actual success on the merits of its claims," the court concluded that "[a] plaintiff that cannot show that it will actually succeed on the merits of its claim cannot prevail on its motion for injunctive relief."[46] The COFC, in that case, relied upon a Federal Circuit decision holding that "a movant is not entitled to a preliminary injunction if he fails to demonstrate a likelihood of success."[47] In other words, "a court cannot use an exceptionally weighty showing on one of the other three factors to grant a preliminary injunction if a [protester] fails to demonstrate a likelihood of success on the merits."[48]

In *Labat-Anderson, Inc. v. United States*, the COFC also explicitly held that because the protester "did not succeed on the merits of its claim,…an examination of the other standards for injunctive relief is unnecessary. Plaintiff must meet all four criteria."[49] In yet another case, the court similarly concluded that "[a] plaintiff that has not actually succeeded on the merits of its claim cannot prevail on its motion for injunctive relief."[50]

Although the COFC has not yet recognized this conflict in its jurisprudence, the approach of *International Resource Recovery* clearly commands the endorsement of the Federal Circuit.[51] Indeed, the suggestion of a court granting a protester permanent relief even when it has not prevailed upon the merits of its claim makes no sense whatsoever.[52]

■ The Importance Of Seeking Preliminary Injunctive Relief

The importance of seeking preliminary injunctive relief in a postaward bid protest should not be underestimated. Indeed, in certain factual settings, failing to seek preliminary or temporary injunctive relief may weigh against the protester at the permanent injunctive relief stage.

In that regard, the COFC has relied, at least in part, upon a protester's delay in seeking relief from the court or failure to move for a preliminary injunction to deny permanent injunctive relief. In *PGBA*, the COFC concluded that the plaintiff's arguments for permanent injunctive relief were "undermined by the fact that [it] elected not to seek a [preliminary] injunction against the implementation of the [contract at issue]."[53] On appeal, in the decision discussed earlier in this Paper, the Federal Circuit noted that the COFC below had "considered [the plaintiff's] failure to seek a preliminary injunction as a factor weighing against a grant of injunctive

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relief" but nonetheless upheld the trial court's denial of such relief.[54] Although arguably nonbinding dicta, the Federal Circuit clearly was not troubled that the COFC had relied, in part, upon the plaintiff's failure to seek a preliminary injunction in denying the protester permanent relief.

In any event, when deciding whether to issue a permanent injunction, the COFC's consideration of a protester's delay or failure to seek preliminary relief simply makes sense. Remember, the COFC will have to examine the irreparable injury to the protester (if a permanent injunction does not issue), in addition to how the Government, the public, and the putative awardee (if there is one) might be harmed if the injunction *is* granted. The problem for the protester that does not seek a preliminary injunction is that the court may be skeptical of a claim of irreparable injury. In other words, the COFC may well ask: if the injury is truly as bad as the protester argues, why did it fail to move for a preliminary injunction? In addition, if the procurement is not enjoined preliminarily, the Government likely will argue that it has been proceeding with the procurement and will be harmed if it is forced to stop. The Government's (and any awardee's) position will be that the protester failed to halt the procurement, whether in a timely manner or at all, and the Government and awardee should not have to bear the costs of the protester's choice.

■ The Administrative Record & Injunctive Relief

As a general rule, when considering motions for judgment on the administrative record within the context of a bid protest proceeding, the COFC focuses its review on "'the administrative record already in existence.'"[55] As explained in one recent case, "[t]he force of the general rule that the court focuses its review on the administrative record already in existence has been strengthened both by changes in the [Rules of the U.S. Court of Federal Claims (RCFC)] and related Federal Circuit precedent."[56] In particular, the Federal Circuit in *Bannum, Inc. v. United States* found that, in the context of a bid protest action, "judgment on an administrative record is properly understood as intending to provide for an expedited trial on the record."[57] Thus, in assessing whether a protester is prejudiced by an alleged procurement irregularity, the court ordinarily is restricted to the evidence contained within the agency record, as may be supplemented consistent with the rules of the court.[58]

In line with *Bannum*, the Government typically vigorously opposes any attempt by protesters to supplement the administrative record with respect to the merits of the protest. But, with respect to the other prongs of injunctive relief, the COFC will permit a protester to submit evidence to "create the necessary record to substantiate its factual assertions regarding the injunction factors for irreparable harm, balancing of the harms, and the public interest."[59] Notably, the Federal Circuit implicitly has sanctioned the COFC's allowing such additional evidence or supplementation of the record, explaining, in *PGBA*, that the COFC properly denied the protester's request for injunctive relief after conducting "an evidentiary hearing in order to create a complete record regarding the consequences of granting or denying injunctive relief."[60] Indeed, in *PGBA*, the Government's witness provided critical testimony upon which the COFC relied to deny the injunction sought.[61]

■ Directed Contract Awards

Plaintiff protesters occasionally ask the COFC to issue a permanent injunction awarding the contract at issue directly to the protester itself. It is fairly well settled, however, that the court does not have the authority either to select a contractor on behalf of the Government or to order the award of a contract to a protester.[62]

In *CCL Service Corp. v. United States*, the COFC explained that the "[s]election of a contractor among the protestors and award of the contract are improper exercises of the court's authority."[63] Similarly, the COFC, in *Beta Analytics International v. United States*, rejected a protester's request to "have the Court essentially oversee the re-procurement process, retaining jurisdiction to police compliance with [its injunctive relief] order and directing the scope and evaluation methodology for the new solicitation."[64] The court, in that case, grounded its holding in separation of powers terms:[65]

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> [C]ourts are not administrative or executive bodies, and must be careful not to usurp the policymaking role of federal agencies. Although the power granted our Court in this area is rather broad—the power to "award any relief that the court considers proper, including declaratory and injunctive relief," 28 U.S.C. § 1491(b)(2) (2000)—a court has to know its limitations. Courts generally lack the expertise necessary to judge whether a particular combination of functions in an agency contract is appropriate, and to the extent this determination requires discretion, it must be left to the more politically-accountable branches of our government. Oversight of the re-procurement process, or second-guessing the scope and eligibility requirements of the new solicitation, are not properly within the normal province of a court.

Other decisions, however, appear to take a slightly less skeptical tone. In *Seattle Security Services*, the COFC acknowledged that other "courts have concluded that a court may order such an award where 'it is clear that, but for the illegal behavior of the agency, the contract would have been awarded to the party asking the court to order the award.'"[66] On the other hand, even in that case, the COFC refused such relief and declined to opine on whether it was available to a successful protester.[67]

In sum, although there are a number of cases in which the COFC has issued injunctive relief that approaches the goal of a directed award,[68] "[c]ourts have been virtually unanimous in declining to direct the award of contracts, believing that this decision is properly left to the discretion of the contracting agency."[69]

CICA Stay Litigation

As explained above, one of the first objectives of a postaward bid protest is to halt the awardee's and the Government's performance under the contract as quickly as possible. In this respect, the GAO offers a considerable advantage—the CICA stay. Under CICA, the timely filing of a protest with the GAO automatically stays the performance of a challenged award until (1) GAO decides the protest on the merits or (2) the head of the procuring activity or agency certifies in writing that statutory requirements for overriding the stay have been met.[70] Absent any additional data or considerations, contractors might be inclined to conclude that the GAO is the better forum, at least in terms of halting contract performance during the pendency of a protest. Unfortunately, the calculus is not that simple.

This Briefing Paper does not review the proper procedures for triggering the CICA stay, a topic addressed well by the Briefing Papers No. 08-11.[71] Instead, the focus of this Paper is on the so-called "override action" that a protester must file to preserve the automatic stay should the Government agency override the CICA stay.

■ Standard Of Review Of Agency Override Decision

Following the timely filing of a GAO protest, an agency may not award a contract while the protest is pending unless the head of the procuring activity authorizes the award of the contract "upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision."[72] If the protest is postaward, an agency may only authorize the contractor to proceed with performance if the head of the procuring activity issues a written finding that (a) "performance of the contract is in the best interests of the United States" or (b) "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest."[73] As noted above, a protester may challenge any such override decision—if issued by the agency—in the COFC.[74]

The problem for both protesters and the Government is that particular COFC judges have different approaches to CICA override cases. In particular, COFC judges seem to have disparate views on precisely how much discretion should be afforded to an agency seeking to override a CICA stay. In one of the COFC's earliest override cases, *PGBA, LLC v. United States*,[75] which related to the unsuccessful GAO protest that preceded the COFC protest and the Federal Circuit decision discussed above, the COFC granted the plaintiff protester's request for a preliminary injunction, finding that the "plaintiff has demonstrated a likelihood of success on the merits."[76] In that regard, it is important to note that what is at issue in an override case is the merits of the agency's decision to proceed with the procurement, not

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the merits of the protest itself. Accordingly, a preliminary injunction in the context of an override case seeks to stay the procurement until the court can decide the merits of the override challenge (i.e., whether the override should stand or whether the CICA stay should be reimposed by either declaratory or injunctive relief).

In *PGBA*, the COFC's view was that it "simply cannot subscribe to the notion that the same Congress that, as repletely indicated in the legislative history of CICA, sought to bolster the GAO stay and prevent agencies from undercutting the protest review process would then arm agencies with an override option that could easily defeat those purposes."[77] Given that premise, it is not surprising that the court undertook a meticulous review of the "massive Administrative Record" in concluding that "nothing that defendants have pointed to…supports, to any real degree, the [agency] Director's critical assumption" underlying the override.[78] Moreover, the COFC found for the protester on the remainder of the injunctive relief factors, concluding that "there is no real indication that reinstituting the [CICA] stay will impair services to a significant extent" and that "the public's interest likewise lies in preserving the integrity of the competitive process" particularly given "Congress' view…that, except in circumstances not yet demonstrated here, the automatic stay should prevail."[79]

In contrast, in *Sierra Military Health Services, Inc. v. United States*,[80] the COFC declined to invalidate the agency's override. *Sierra* involved the GAO bid protest of a contract closely related to the procurement at issue in *PGBA*. Indeed, the same agency head issued the override decision contested in both cases. The COFC in *Sierra* concurred with the court's holding in *PGBA* "that the standard of review applicable to an action seeking to overturn a post award override decision" is whether, pursuant to the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A), the agency's override decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[81] Under 28 U.S.C.A. § 1491(b)(4), the COFC applies the standards of the APA, 5 U.S.C.A. § 706, in exercising its bid protest jurisdiction. Thus, the court in *Sierra* had to determine whether the agency's override decision "lacked a rational basis."[82] Nonetheless, the COFC's review of the administrative record in *Sierra* was decidedly less critical and more deferential than in *PGBA*.[83]

Moreover, *Sierra* offered a much different view of the other injunctive relief prongs. For instance, according to *Sierra*, the plaintiff's "loss of its employees, increased borrowing costs due to a lack of a long-term contract, decreased stock prices of its parent corporation, duplicate costs from dealing with two contracts, and problems with its beneficiaries" are "not the types of harm that constitute irreparable injury."[84] According to *Sierra*, "'[o]nly economic loss that threatens the survival of a movant's business constitutes irreparable harm.'"[85]

While *PGBA* and *Sierra* at least agreed upon the nominal standard of review applicable in the COFC's review of an override decision, the COFC, in *Kropp Holdings, Inc. v. United States*, refused even to reach the merits of the plaintiff's complaint that an override decision was arbitrary and capricious.[86] In declining to review the agency override decision at issue in that case, the COFC first referenced prefatory language of the APA, 5 U.S.C.A. § 706: "*To the extent necessary to decision*, and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[87] The court also pointed to 28 U.S.C.A. § 1491(b)(3), which, as discussed above, provides that the court "shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." Relying upon on those two provisions, the COFC, in *Kropp*, concluded that, "where legitimate 'interests of national defense and national security' have been asserted and established to the court's satisfaction, it is 'not necessary' for the court to reach the merits of whether [CICA] was violated 'in connection with a procurement.'"[88]

While the COFC indicated in *Kropp* that it was "not holding that an agency override decision is not justiciable" per se, the COFC *did* conclude that when "legitimate 'interests of national defense and national security' are raised and established to the court's satisfaction," the court should rarely reach the merits of an override decision.[89] Notably,

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despite the fact that the Federal Circuit issued its *PGBA* decision (discussed above) before *Kropp*, the latter case did not address the Federal Circuit's holding in *PGBA* that 28 U.S.C.A. § 1491(b)(4) "only incorporates the standard of review of section 706(2)(A) [of the APA]."[90] Moreover, in *PGBA*, the Federal Circuit held that 28 U.S.C.A. § 1491(b)(3) "merely instructs courts to give due regard to the issue of national defense and national security in shaping relief."[91] Despite those omissions, *Kropp* cannot be discounted as an anomalous decision, however, as the COFC adhered to the views of *Kropp* in yet another case, *Maden Tech Consulting, Inc. v. United States.*[92] Indeed, in *Maden Tech*, the COFC referred to 28 U.S.C.A. § 1491(b)(3) as a "qualifie[r] [to] the court's jurisdiction."[93] In a recent COFC override decision, another judge expressed a fair amount of skepticism regarding, and refused to follow, the approach of *Kropp* and *Maden Tech*, commenting that "[t]he all too evident national-security considerations here present no bar to the court's exercise of jurisdiction."[94] It remains to be seen whether the view of *Kropp* or *Maden Tech* will gain traction with other COFC judges.

■ Declaratory vs. Injunctive Relief In CICA Stay Override Actions

A growing chorus of COFC decisions has concluded that a plaintiff seeking to invalidate a CICA stay override need not address the typical injunctive relief factors.[95] Instead, according to those decisions, a plaintiff that succeeds on the merits—and demonstrates that the agency's decision is arbitrary and capricious—is entitled to declaratory relief without bearing the burden of having to prevail on the traditional equitable relief factors. The underlying rationale of those decisions is that the CICA stay is a default, statutory setting; accordingly, when the COFC issues a declaratory judgment invalidating the agency's override decision, the automatic statutory stay is reinstated by operation of law.[96]

A recent *Feature Comment* in The Government Contractor presents a spirited and thoughtful defense of the declaratory relief approach.[97] Although that commentary criticizes[98] the COFC's decision in *Superior Helicopter LLC v. United States*—wherein the court analyzed the injunctive relief factors before issuing equitable relief—the COFC's approach in that case is more soundly grounded in binding Federal Circuit precedent than the more lenient approach discussed above.[99]

In *Superior Helicopter*, the plaintiffs requested "that the court grant them equitable relief by setting aside the...override of the automatic stay" via a declaratory judgment "rather than 'impose...unnecessary burdens of proof' required by injunctive relief."[100] The COFC correctly rejected that request, noting that "[t]he Federal Circuit [in *PGBA*]...has explained that if a declaratory judgment and an injunction would have the same practical effect in a case, consideration of declaratory relief under injunctive relief standards is appropriate."[101] In particular, "[g]iven that plaintiffs' requested relief—a set-aside of the [agency's] override—is, with one exception, identical whether in the form of a declaratory judgment or an injunction," the COFC concluded it should "apply the four-factor test for injunctive relief."[102] The COFC also pointed out that "the only difference between a declaratory judgment and an injunction [in the CICA stay override context] is that an injunction would require the [agency] to seek the court's permission before issuing any subsequent override."[103]

According to the above-cited *Feature Comment*, there is a fundamental difference between ordinary bid protests and CICA stay override cases:[104]

> Requesting temporary and preliminary injunctive relief appears to make sense in the bid protest context because permanent injunctive relief is the ultimate objective of a suit. CICA override challenges, however, are not traditional bid protests in this sense. In an override challenge, plaintiffs are not asking the court to cancel the award, reevaluate proposals or take any other coercive action. Instead, plaintiffs are asking the court to provide a simple yes or no answer on a limited issue: Does the agency's override decision withstand scrutiny under the Administrative Procedure Act's standard of review? If not, the COFC need only declare the override decision invalid, and the statute, i.e., CICA, not the court, acts to resurrect the stay.

But that is precisely the argument that was made earlier by the protester in *PGBA* and that was rejected by the Federal Circuit: "[The protester] still claims that it is entitled to further relief in the form of an order setting aside the award and *thereby* stopping performance by [the agency

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and the awardee] under [the contract]. This is tantamount to a request for injunctive relief."[105] Thus, the protester in *PGBA* itself argued that it should not have to meet the injunctive relief factors because it did not request a coercive order requiring any particular agency action. The protester's view was that it simply asked the COFC to set-aside—or declare unlawful—the contract award at issue. The Federal Circuit, however, concluded that the protester's position elevated form over substance because the net effect of the declaratory judgment sought would have been coercive; thus, the equitable relief factors applied, whether the relief was characterized as declaratory or injunctive.[106]

Accordingly, based upon *PGBA*, there is good reason to question the above-cited *Feature Comment*'s contention that, in CICA override cases, "declaratory relief is not tantamount to an injunction because there is no coercive action on the part of the court."[107] What *PGBA* held, however, is that the COFC should consider whether the *effect* of the requested declaratory judgment is coercive; if so, the COFC must apply the equitable relief standards applicable to requests for an injunction. On that question, even the COFC cases that avoid the equitable relief factors concur with *Superior Helicopter* that "the declaratory judgment will reinstate the stay and vacate the override, *having the same effect as an injunction*."[108] In that regard, the cases that dispense with the injunctive relief factors feel compelled to explain that the effect of their putatively noncoercive declaratory judgment is to prevent the Government from proceeding with the procurement.[109] Apparently, then, the effect of "merely" declaring the override unlawful is not so obvious. In any event, "[a] judicial order that prevents a statute, regulation, or *administrative decision* from taking effect is an injunction and must be justified under the standards commonly used to evaluate judicial interference with the decisions of the political branches of government."[110]

To be fair, the COFC, in *Chapman Law Firm Co. v. United States*, explicitly did reject the applicability of the Federal Circuit's decision in *PGBA*, but it did so without analyzing any of the above-quoted language from that case.[111] According to *Chapman*: "Congress did not require any evaluation of injunctive relief factors as a prerequisite to a stay of contract performance upon the filing of a protest with the GAO. Thus, it would be contrary to the legislative scheme to impose such an additional requirement, upon finding that an agency override determination lacks validity, in order to reinstate the statutory stay applicable during the GAO protest period."[112] The problem with that view is that it is somewhat question begging; in other words, while it is true that Congress did not provide for an evaluation of injunctive relief factors as prerequisite for the automatic CICA stay, neither did Congress provide for judicial review of an agency's override decision in the first place. Instead, such jurisdiction in the COFC is predicated upon the Federal Circuit's decision in *RAMCOR Services Group, Inc. v. United States*, interpreting 28 U.S.C.A. § 1491(b)(1), which grants the COFC "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[113] Inferring that a plaintiff should not have to meet the injunctive relief prongs when challenging an override decision based upon congressional silence requires a great deal of imaginative speculation regarding what Congress would have said had it expressly provided for judicial review. In that regard, *Chapman*'s view does not deal with *PGBA*'s holding that the COFC must look to the effect of a declaratory judgment; if its effect is coercive, the usual equitable relief factors must be considered.

Finally, the more lenient override cases frequently cite the putative "incongruity in forcing a plaintiff to meet the high burden necessary for obtaining extraordinary relief, when the statute gives presumptive weight to the otherwise required showings of irreparable harm and public interest."[114] The validity of this claim—as well as the COFC's general approach to irreparable harm and the public interest prongs of the injunctive relief calculus—is questionable in light of the Supreme Court's *eBay* decision, discussed in more detail below.

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The Potential Impact Of eBay Inc. v. MercExchange, L.L.C.

In *eBay Inc. v. MercExchange, L.L.C.*, the Supreme Court granted certiorari to consider the propriety of the Federal Circuit's "'general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.'"[115] The Court, after reciting the "familiar" four-factor test for injunctive relief, explained that these "principles apply with equal force to disputes arising under the Patent Act."[116] In so holding, the Court rejected the Federal Circuit's "general rule in favor of permanent injunctive relief" even though it was based upon a patent's having "the attributes of personal property," including the "statutory right to exclude" others "'from making, using, offering for sale, or selling the invention.'"[117] The Court thus likewise noted that it "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed."[118]

Although the Supreme Court held that the district court improperly appeared to adopt a categorical rule against injunctive relief where a patent holder did not commercially practice its patents, the Court also held that the Federal Circuit "departed in the opposite direction from the four-factor test."[119] In other words, "[j]ust as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief."[120] The Court thus effectively remanded the case to the district court to apply the correct "framework in the first instance."[121]

On remand, the district court explained that it was "not blind to the reality that the nature of the right protected by a patent, the right to exclude, will frequently result in a plaintiff successfully establishing irreparable harm in the wake of establishing validity and infringement."[122] The district court nevertheless concluded that "the language of the Supreme Court's decision" supported defendant eBay's "position that such presumption [of irreparable harm upon a finding of patent validity and infringement] no longer exists."[123]

The problem in the bid protest context is that the COFC arguably has its collective judicial thumb on the scales of equitable relief analysis, contrary to *eBay*. Irreparable injury to a protester and harm to the public interest, as explained above, virtually are presumed by the COFC upon a finding on the merits in a protester's favor.[124] Under the Supreme Court's *eBay* decision, however, such an approach is of questionable validity. Moreover, even before *eBay*, the presumption of irreparable harm in the patent context was tied to the notion that a patent has indicia of property and thus carries with it the right to exclude others.[125] In contrast, courts have long held that a Government contractor has "no right…to have the contract awarded to it in the event the…court finds illegality in the award of the contract."[126]

While the COFC often points to the potential lost profits of a successful protester, the Federal Circuit has rejected that very argument in patent infringement cases, holding that "potential lost sales" do not demonstrate irreparable harm *per se*.[127] Indeed, according to the Federal Circuit, "acceptance of the [patentee's] position would require a finding of irreparable harm to every manufacturer/patentee sufficient, 'regardless of circumstances,' to demonstrate irreparable harm."[128] In any event, the reason a successful protester cannot recover its putative lost profits is because 28 U.S.C.A. § 1491(b)(2) provides that "any monetary relief shall be limited to bid preparation and proposal costs." In limiting the monetary recovery available to a successful protester, Congress might be surprised to learn that it actually created an irreparable harm presumption in favor of the protester. Finally, a successful protester's allegation that it has suffered irreparable harm due to putative lost profits is the type of speculative harm found to be inadequate to substantiate an injunction.[129]

Returning to *eBay*, plaintiff MercExchange argued on remand that a "violation of the right to exclude and the potential loss of market share constitute irreparable harm" that supported its entitlement to injunctive relief.[130] The district court noted that the Supreme Court already had rejected the argument that the right to exclude alone justifies a general rule in favor of permanent injunctive relief.[131] Likewise, the district court rejected "the *potential* for loss of market share" as constituting irreparable harm because, otherwise, "a scenario would never arise where an injunction did not issue."[132]

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With respect to the public interest prong, the district court in *eBay* concluded on remand that "while preserving the integrity of the patent system will always be a consideration in the public interest analysis, it cannot be allowed to dominate such analysis lest a presumption result."[133] The COFC, in contrast, routinely assumes that this prong favors a successful protester, due to the putative harm to the procurement process, without considering, for example, the benefits to the Government of permitting it to proceed with the procurement without judicial interference.[134]

In sum, the Supreme Court's *eBay* decision has the potential to fundamentally alter the bid protest landscape with respect to the COFC's apparent proclivity for awarding successful protesters permanent injunctive relief. In particular, pursuant to *eBay*, the COFC arguably should require a protester actually to prove that it will be irreparably injured in the absence of an injunction, instead of merely presuming such injury based upon the protester's success on the merits. The same is true with respect to the public interest prong of the injunctive relief test; the COFC, under *eBay*, arguably must take a more expansive view of the public interest, instead of focusing almost exclusively on the presumed harm to the procurement system. Ultimately, whether *eBay* is applicable in the manner suggested here—or is limited to the area of patent law—remains an open question for the COFC and the Federal Circuit to decide.

GUIDELINES

These *Guidelines* are intended to assist you in litigating bid protests involving claims for injunctive relief. They are not, however, a substitute for professional representation in any specific situation.

1. Particularly with respect to a postaward bid protest, a contractor should consider whether it requires a preliminary injunction or temporary restraining order to preserve the status quo until the court can resolve the merits of the protest.

2. In seeking either preliminary or permanent injunctive relief, a protester should consider whether it can meet the "clear and convincing" evidentiary burden or only the "preponderance of evidence" burden.

3. In meeting either evidentiary burden, a protester must be prepared to provide evidence to the court—possibly via a motion to supplement the administrative record—with respect to the nonmerits prongs of injunctive relief (e.g., irreparable injury, balance of harms, and the public interest). Protesters ordinarily will not be permitted to add to the administrative record with respect to the merits of the protest. Likewise, intervening awardees should be prepared to present evidence regarding how injunctive relief would affect them.

4. A protester should understand that the COFC need not grant injunctive relief even where the protester succeeds on the merits. In that regard, a protester must pay careful attention to whether its protest implicates national defense or security concerns; if so, even a successful protester may well be denied a permanent injunction.

5. Recognize that a successful protester's chance of obtaining a directed award of the contract at issue is virtually nil. Indeed, such relief may well be outside the power of the court to award.

6. A contractor should consider filing its protest in the GAO, rather than at the COFC, to obtain an automatic stay of the procurement pursuant to CICA.

7. If an agency overrides the automatic CICA stay, the protester should consider filing an action in the COFC to challenge the override. On the other hand, such actions may be costly and, in any event, unnecessary because agencies rarely, if ever, refuse to comply with the GAO's protest decisions.

8. In a CICA stay override action, keep in mind that the focus of the case centers on the agency's override decision and not on the merits of the protest itself. Also, decisions from the COFC appear to vary widely in terms of the amount of deference afforded to an agency's override.

9. Even where a protester purports to seek only a declaratory judgment, the protester should be prepared to meet the ordinary injunctive relief standards. Intervening awardees should argue that a protester must meet the injunctive relief standards even where the protester purports to seek only declaratory relief. Both protesters and

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awardees must consider the practical implications of the relief sought; if coercive, PGBA suggests that the COFC must apply the ordinarily injunctive relief factors.

10. Protesters and intervening awardees should consider the impact of the Supreme Court's decision in eBay. In that regard, a successful protester, to obtain permanent injunctive relief, may be required to demonstrate irreparable injury with particularity and evidence; in other words, protesters may be precluded from simply relying upon presumptions of irreparable injury and harm to the public interest. Protesters should argue that eBay is a patent case and thus of limited use in a bid protest.

★ REFERENCES ★

1/ Heyer Prods. Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956) ("[A]n unsuccessful cannot recover the profit he would have made out of the contract, because he had no contract. But this is not to say that he may not recover the expense to which he was put in preparing his bid."); Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803, 808 n.8 & n.9 (1993), 35 GC ¶ 717 ("The court's rationale in awarding bid and proposal preparation costs 'is that the recipient was injured by the unjust denial of recovery of such costs, which recovery presumably would have occurred had it obtained the contract.'" (quoting Vulcan Eng'g Co. v. United States, 16 Cl. Ct. 84, 88 (1988))).

2/ eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

3/ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (repealing former 28 U.S.C.A. § 1491(a)(3) and adding § 1491(b)).

4/ 28 U.S.C.A. 1491(b)(2).

5/ Schaengold, Guiffré & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008) (explaining that "if the awardee is permitted to proceed with performance while the protest is pending, performance could advance to such a stage that it becomes more difficult to establish that terminating the contract and resoliciting the procurement is an appropriate remedy").

6/ 31 U.S.C.A. § 3553(c), (d); see Schaengold, Guiffré & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008) (comparing GAO and COFC protests).

7/ CSE Constr. Co. v. United States, 58 Fed. Cl. 230, 261 (2003).

8/ CSE Constr., 58 Fed. Cl. at 261; KSEND v. United States, 69 Fed. Cl. 103, 112 (2005); Avtel Servs., Inc. v. United States, 70 Fed. Cl. 173, 226 (2005).

9/ Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 566 (1999), 42 GC ¶ 51 (quoting Bean Dredging Corp. v. United States, 22 Cl. Ct. 519, 522 (1991)); see also CSE Constr., 58 Fed. Cl. at 261; KSEND, 69 Fed. Cl. at 112 (citing cases, including PGBA, LLC v. United States, 389 F.3d 1219, 1223 (Fed. Cir. 2004), 46 GC ¶ 489); Avtel Servs., 70 Fed. Cl. at 226; KSD, Inc. v. United States, 72 Fed. Cl. 236, 266 (2006).

10/ Spherix, Inc. v. United States, 62 Fed. Cl. 497, 505 (2004), 46 GC ¶ 455; International Resource Recovery, Inc. v. United States, 64 Fed. Cl. 150, 159 (2005); MTB Group, Inc. v. United States, 65 Fed. Cl. 516, 525 (2005); Textron, Inc. v. United States, 74 Fed. Cl. 277, 286–87 (2006); Career Training Concepts, Inc. v. United States, 83 Fed. Cl. 215, 219 (2008), 50 GC ¶ 369.

11/ Textron, 74 Fed. Cl. at 287; accord Career Training, 83 Fed. Cl. at 219 ("no definitive, binding precedent has been found in the context of injunctive relief" to support the "clear and convincing standard").

12/ Textron, 74 Fed. Cl. at 287 (criticizing KSD, 72 Fed. Cl. at 266, for "adopt[ing] this remarkable and bizarre standard"). But see 72 Fed. Cl. at 267 (citing Yakus v. United States, 321 U.S. 414, 440 (1944), for the proposition that "a movant is confronted by a more substantial burden of proof of proof when it seeks injunctive relief which would interfere with and infringe upon governmental operations if granted").

13/ St. Paul Fire & Marine Ins. Co. v. United States, 6 F.3d 763, 768–69 (Fed. Cir. 1993) (quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 58 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3770, for the proposition that "[b]ecause pre-importation challenges to Customs' rulings in essence seek injunctive relief, Congress noted that 'the party bringing the civil action must demonstrate by clear and convincing evidence that he would suffer irreparable harm if forced to obtain judicial review [following importation of the merchandise]'").

14/ M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1300 (D.C. Cir. 1971) (explaining that "judicial interjection" should be withheld "unless it clearly appears that the case calls for an assertion of an overriding public interest" in forcing agencies to follow procurement regulations); Diebold v. United States, 947 F.2d 787, 804 (6th Cir. 1991) ("Congress has affirmed this judicial reluctance to enjoin contract awards, recognizing that 'courts ordinarily refrain from interference with the procurement process by declining to enjoin the Government from awarding a contract.' S. Rep. No. 275, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 11, 33."); United States v. John C. Grimberg Co., 702 F.2d 1362, 1372 (Fed. Cir. 1983) (court's equitable powers "should be exercised in a way which best limits judicial interference in contract procurement").

15/ The procedures for obtaining a temporary restraining order are governed by RCFC 65(b). See Hospital Klean of Texas, Inc. v. United States, 65 Fed. Cl. 618, 621, 624–25 (2005) (discussing RCFC 65(b) and temporary restraining order procedures); Branstad v. Glickman, 118 F. Supp. 2d 925, 935–37 (N.D. Iowa 2000) (discussing distinction between temporary restraining order and preliminary injunction).

16/ CSE Constr. Co. v. United States, 58 Fed. Cl. 230, 261 (2003) (quoting ES-KO, Inc. v. United States, 44 Fed. Cl. 429, 432 (1999)); KSEND v. United States, 69 Fed. Cl. 103, 113 (2005).

17/ Northern States Power Co. v. Federal Transit Admin., 2001 WL 1618532, *6 (D. Minn. 2001); see also Smith v. Maher, 468 F. Supp. 2d 466, 475 (W.D.N.Y. 2006) ("As is generally the case with claims whose resolution involves a balancing of multiple factors, it is often difficult to predict with certainty a party's likelihood of success on the merits…."). But see Uncle B's Bakery, Inc. v. O'Rourke, 920 F. Supp. 1405, 1418 (N.D. Iowa 1996) ("for the purposes of a preliminary injunction, the court may not need to make even a provisional credibility finding, because the court's role

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is to determine the movant's likelihood of success on the merits, not predict the outcome of the movant's claim").

18/ Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 571 (1999), 42 GC ¶ 51 (quoting Magellan Corp. v. United States 27 Fed. Cl. 446, 447 (1993)).

19/ Chapman Law Firm Co. v. United States, 67 Fed. Cl. 188, 193 (2005).

20/ Chapman, 67 Fed. Cl. at 193.

21/ Chapman, 67 Fed. Cl. at 193 (explaining that "because a disappointed bidder cannot recover lost profits, the plaintiff's allegation was sufficient to constitute irreparable harm").

22/ Seattle Sec. Servs., 45 Fed. Cl. at 571.

23/ Seattle Sec. Servs., 45 Fed. Cl. at 571 (citing cases, including United Int'l Investigative Servs., Inc. v. United States, 41 Fed. Cl. 312, 323 (1998), for the proposition that the "opportunity to compete for a contract and secure any resulting profit has been recognized to constitute significant harm").

24/ Seattle Sec. Servs., 45 Fed. Cl. at 572 n.19; see also Information Sciences Corp. v. United States, 73 Fed. Cl. 70, 127 (2006).

25/ Information Sciences, 73 Fed. Cl. at 127–28.

26/ Seattle Sec. Servs., 45 Fed. Cl. at 572 (citing cases).

27/ Information Sciences, 73 Fed. Cl. at 128; see also Information Sciences Corp. v. United States, 80 Fed. Cl. 759, 799–800 (2008) (holding that "the public interest" favors "ensuring that the ultimate awardee offers the 'best value' to the Government, pursuant to the terms of the Solicitation and applicable procurement regulations").

28/ CSE Constr. Co. v. United States, 58 Fed. Cl. 230, 262 (2003) ("A solicitation that addresses military preparedness implicates interests of national defense, which, thus, becomes a factor the court must consider in the balance of harms."); Avtel Servs., Inc. v. United States, 70 Fed. Cl. 173, 228 (2005) ("A solicitation that addresses military preparedness implicates national security, which, thus, becomes a factor the court must consider in the balance of harms."); 70 Fed. Cl. at 229 (describing the "government's national security" as being "of paramount significance").

29/ PGBA, LLC v. United States, 389 F.3d 1219, 1225 (Fed. Cir. 2004), 46 GC ¶ 489.

30/ Isometrics, Inc. v. United States, 5 Cl. Ct. 420, 423 (1984) (emphasis added).

31/ Seattle Sec. Servs., 45 Fed. Cl. at 572.

32/ Femme Comp Inc. v. United States, 83 Fed. Cl. 704, 772 (2008) ("To assess the balance of hardships, the court must examine the harm to the government in issuing a permanent injunction.").

33/ Chapman Law Firm Co. v. United States, 67 Fed. Cl. 188, 193 (2005).

34/ Chapman, 67 Fed. Cl. at 194–95 ("While the factors that are relevant to the public interest determination have been raised in other parts of the preliminary injunction analysis, due to their importance, they bear repeating here.").

35/ See, e.g., Gentex Corp. v. United States, 58 Fed. Cl. 634, 656 (2003), 45 GC ¶ 528; CSE Constr. Co. v. United States, 58 Fed. Cl. 230, 262–63 (2003); Naplesyacht.com, Inc. v. United States, 60 Fed. Cl. 459, 478 (2004).

36/ PGBA, LLC v. United States, 389 F.3d 1219, 1226 (Fed. Cir. 2004), 46 GC ¶ 489 (noting that the Federal Circuit's prior decisions did not "directly address the issue of whether an award that is found arbitrary and capricious must be set aside").

37/ PGBA, 389 F.3d at 1227 ("Although it abolished Scanwell jurisdiction [i.e., the U.S. District Courts' jurisdiction to hear bid protests] in an effort to create uniformity, nothing indicates Congress [in ADRA] intended to eliminate the Court of Federal Claims' discretion in deciding whether to issue injunctive relief.").

38/ PGBA, 389 F.3d at 1228.

39/ CSE Constr., 58 Fed. Cl. at 262.

40/ Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 571 (1999), 42 GC ¶ 51 (quoting FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993)).

41/ MTB Group, Inc. v. United States, 65 Fed. Cl. 516, 525 (2005) (citing FMC Corp., 3 F.3d at 427).

42/ MTB Group, 65 Fed. Cl. at 525.

43/ MTB Group, 65 Fed. Cl. at 530, 533–34 ("The materials provided by plaintiff also create the necessary record to substantiate its factual assertions regarding the injunction factors for irreparable harm, balancing of the harms, and the public interest.").

44/ Blue & Gold Fleet, LP v. United States, 70 Fed. Cl. 487, 514 (2006) (quoting FMC Corp., 3 F.3d at 427).

45/ Blue & Gold Fleet, 70 Fed. Cl. at 514.

46/ International Resource Recovery, Inc. v. United States, 64 Fed. Cl. 150, 164 (2005) (citing National Steel Car, Ltd. v. Canadian Pacific Ry., Ltd., 357 F.3d 1319, 1325 (Fed. Cir. 2004)).

47/ International Resource Recovery, 64 Fed. Cl. at 164 (quoting National Steel Car, 357 F.3d at 1325, noting that "the likelihood of success on the merits and the irreparable harm factors" are "necessary showings to obtain a preliminary injunction").

48/ International Resource Recovery, 64 Fed. Cl. at 164 (quoting National Steel Car, 357 F.3d at 1325).

49/ Labat-Anderson, Inc. v. United States, 65 Fed. Cl. 570, 577 (2005), 47 GC ¶ 297 (citing PGBA, LLC v. United States, 389 F.3d 1219, 1226–27 (Fed. Cir. 2004), 46 GC ¶ 489). But see 65 Fed. Cl. at 580–81 (court considered remaining injunctive relief factors in detail).

50/ Argencord Mach. & Equip., Inc. v. United States, 68 Fed. Cl. 167, 176 (2005), 47 GC ¶ 459; see also KSD, Inc. v. United States, 72 Fed. Cl. 236, 268 (2006) ("Because the plaintiff has not proven that the government's actions were arbitrary, capricious, or otherwise not in accordance with the law, or that the plaintiff was prejudiced, the court denies the plaintiff's motion for preliminary and permanent injunctive relief.").

51/ National Steel Car, 357 F.3d at 1325 (Fed. Cir. 2004) ("Although in some instances '[t]hese factors, taken individually, are not dispositive' because the district court's conclusion results from a process of overall balancing, Hybritech, Inc. v. Abbott Labs., 849 F.2d 1446, 1451 (Fed.Cir.1988), a movant is not entitled to a preliminary injunction if he fails to demonstrate a likelihood of success on the merits.") .

52/ See Allied Materials & Equip. Co. v. United States, 81 Fed. Cl. 448, 463 (2008), 50 GC ¶ 205 ("For a permanent injunction plaintiff must show 'actual success' on the merits….Here, plaintiff has not succeeded on the merits and therefore is not entitled to a permanent injunction.").

53/ PGBA, LLC v. United States, 60 Fed. Cl. 196, 221 (2004), aff'd, 389 F.3d 1219 (Fed. Cir. 2004), 46 GC ¶ 489.

54/ PGBA, 389 F.3d at 1229; see also T.J. Smith & Nephew Ltd. v. Consolidated Med. Equip., Inc., 821 F.2d 646, 648 (Fed. Cir. 1987).

55/ Al Ghanim Combined Group Co. Gen. Trad. & Cont. W.L.L. v. United States, 56 Fed. Cl. 502, 508 (2003), 45 GC ¶ 274 (quoting Camp v. Pitts, 411 U.S. 138 (1973) (per curiam)).

56/ Allied Materials, 81 Fed. Cl. at 450–51 n.2 (2008) (discussing RCFC 52.1 and Bannum, Inc. v. United States, 404 F.3d 1346 (Fed. Cir. 2005), 47 GC ¶ 266).

57/ Bannum, 404 F.3d at 1356.

58/ Bannum, 404 F.3d at 1356.

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59/ MTB Group, Inc. v. United States, 65 Fed. Cl. 516, 533 (2005); see also Gulf Group, Inc. v. United States, 61 Fed. Cl. 338, 349 (2004) (paragraphs in declaration "relating to the harm [the protester] alleges it would suffer absent an injunction should be added to the record, for the sole purpose of determining the propriety of injunctive relief"); Gentex Corp. v. United States, 58 Fed. Cl. 634, 649 (2003), 45 GC ¶ 528 (record may be supplemented with testimony relating to requested relief or to demonstrate prejudice).

60/ PGBA, LLC v. United States, 389 F.3d 1219, 1229 (Fed. Cir. 2004), 46 GC ¶ 489 ("Based largely on testimony from this evidentiary hearing, the court denied [the protester's] request for injunctive relief….").

61/ PGBA, 389 F.3d at 1232.

62/ Innovative Resources v. United States, 63 Fed. Cl. 287, 290 n.5 (2004); see also CW Gov't Travel, Inc. v. United States, 46 Fed. Cl. 554, 559 (2000), 42 GC ¶ 202 (citing Parcel 49C Ltd. P'ship v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994), 36 GC ¶ 480); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970); CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1575 (Fed. Cir. 1983); ManTech Telecomms. & Info. Sys. Corp. v. United States, 49 Fed. Cl. 57, 79 (2001), 43 GC ¶ 196 ("there are serious questions as to whether this court is ever authorized to award directly a contract"); Arrowhead Metals, Ltd. v. United States, 8 Cl. Ct. 703, 711 (1985); Contract Custom Drapery Serv., Inc. v. United States, 6 Cl. Ct. 811, 820 (1984), aff'd without opinion, 785 F.2d 321 (Fed. Cir. 1985).

63/ CCL Serv. Corp. v. United States, 43 Fed. Cl. 680, 688 (1999) (citing Scanwell Labs., 424 F.2d at 869 ("It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties."); see Durable Metals Prods., Inc. v. United States, 27 Fed. Cl. 472, 476–77 ("Moreover, the equitable jurisdiction of this court does not include the authority to award a contract as plaintiff requests."), aff'd, 11 F.3d 1071 (Fed. Cir. 1993); Parcel 49C, 31 F.3d at 1152–53.

64/ Beta Analytics Int'l, Inc. v. United States, 69 Fed. Cl. 431, 432 (2005), 47 GC ¶ 524.

65/ Beta Analytics, 69 Fed. Cl. at 432.

66/ Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 572 n.20 (1999), 42 GC ¶ 51 (quoting Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 204 (D.C. Cir. 1984)).

67/ Seattle Sec. Servs., 45 Fed. Cl. at 572 n.20 ("Leaving aside the question whether this legal standard is correct, it remains that this is not a case in which it is clear that, but for the errors committed, the plaintiff would have been awarded the contract.").

68/ Alfa Laval Separation, Inc. v. United States, 47 Fed. Cl. 305, 315 (2000) (explaining, in postaward bid protest, where there were only two offerors, "[t]he Federal Circuit's prejudice finding requires the granting of an injunction foreclosing further Navy purchases from intervenor under the subject contract"); PCI/RCI v. United States, 36 Fed. Cl. 761, 776 (1996) (noting that "the other offerors were not entitled to the award because plaintiff submitted the lowest responsive bid"); Bean Dredging Corp. v. United States, 19 Cl. Ct. 561 (1990) (plaintiffs were "the lowest responsive and responsible bidders" and challenged "the defendant's authority to cancel the [IFB]"); TRW Envtl. Safety Sys., Inc. v. United States, 18 Cl. Ct. 33 (1989) (plaintiff was unsuccessful bidder and intervenor's contract tainted by conflict of interest); Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68, 72 (1984) ("Plaintiff's was the lowest responsive bid and no other deficiencies have been suggested. Award of the contract to another, therefore would be inconsistent with [law and regulation]."); Essex Electro Eng'rs, Inc. v. United States, 3 Cl. Ct. 277, 288 (1983) (plaintiff was "the lowest responsive bidder").

69/ Bannum, Inc. v. United States, 56 Fed. Cl. 453, 459 (2003), 47 GC ¶ 266 (citing Parcel 49C Ltd. P'ship v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994), 36 GC ¶ 480; Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970); ManTech Telecomms. & Info. Sys. Corp. v. United States, 49 Fed. Cl. 57, 79 (2001), 43 GC ¶ 196; CCL Serv. Corp. v. United States, 43 Fed. Cl. 680, 688 (1999)).

70/ 31 U.S.C.A. § 3553(d).

71/ Schaengold, Guiffré & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008).

72/ 31 U.S.C.A. § 3553(c).

73/ 31 U.S.C.A. § 3553(d).

74/ RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999), 41 GC ¶ 361.

75/ PGBA, LLC v. United States, 57 Fed. Cl. 655 (2003).

76/ PGBA, 57 Fed. Cl. at 663 (analyzing the override under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A)).

77/ PGBA, 57 Fed. Cl. at 660.

78/ PGBA, 57 Fed. Cl. at 661.

79/ PGBA, 57 Fed. Cl. at 663.

80/ Sierra Military Health Servs., Inc. v. United States, 58 Fed. Cl. 573 (2003), 45 GC ¶ 525.

81/ Sierra, 58 Fed. Cl. at 579; see 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b).

82/ Sierra, 58 Fed. Cl. at 579; see 28 U.S.C.A. § 1491(b)(4).

83/ Sierra, 58 Fed. Cl. at 579–81 (holding that override decision "is found to have a rational basis").

84/ Sierra, 58 Fed. Cl. at 582.

85/ Sierra, 58 Fed. Cl. at 582 (quoting Foundation Health Fed. Servs. v. United States, No. 93-1717 NHJ, 1993 WL 738426 (D.D.C. Sept. 23, 1993)).

86/ Kropp Holdings, Inc. v. United States, 63 Fed. Cl. 537, 538 (2005), 47 GC ¶ 131.

87/ Kropp, at 63 Fed. Cl. at 548 (emphasis in original) (quoting 5 U.S.C.A. § 706).

88/ Kropp, 63 Fed. Cl. at 548 (quoting 28 U.S.C.A. § 1491 and 5 U.S.C.A. § 706).

89/ Kropp, 63 Fed. Cl. at 549. Although not strictly relevant here, Judge Braden, while refusing to reach the merits of the plaintiff's complaint, offered a substantial discourse on "the standard of review…utilized in other recent decisions of the [COFC]." 63 Fed. Cl. at 550–51 (arguing that "rational basis" review is inapplicable to "cases concerning an agency override").

90/ PGBA, LLC v. United States, 389 F.3d 1219, 1225–26 (Fed. Cir. 2004), 46 GC ¶ 489 ("when read together, sections 1491(b)(4) and 706(2)(A) compel the conclusion that section 1491(b)(4) only incorporates the arbitrary and capricious standard of review").

91/ PGBA, 389 F.3d at 1226.

92/ Maden Tech Consulting, Inc. v. United States, 74 Fed. Cl. 786 (2006).

93/ Maden Tech, 74 Fed. Cl. at 790.

94/ EOD Tech., Inc. v. United States, 82 Fed. Cl. 12, 18 (2008).

95/ Automation Techs., Inc. v. United States, 72 Fed. Cl. 723 (2006), 48 GC ¶ 357; Maden Tech, 74 Fed. Cl. 786; Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25 (2006), 48 GC ¶ 280; CIGNA Gov't Servs. v. United States, 70 Fed. Cl. 100 (2006), 48 GC ¶ 115; Chapman Law Firm Co. v. United States, 65 Fed. Cl. 422 (2005); E-Management Consultants, Inc. v. United States, 84 Fed. Cl. 1 (2008).

96/ CIGNA, 70 Fed. Cl. at 114 (granting "Plaintiff's request for a declaratory judgment, declaring the override decision invalid, resulting in a reinstatement of the stay"

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and explaining that "the automatic stay in [the plaintiff's] GAO protest is reinstated de jure"); see also Nortel Gov't Solutions, Inc. v. United States, 84 Fed. Cl. 243, 252 (2008), 50 GC ¶ 405 (discussing Chapman, 65 Fed. Cl. at 424).

97/ Boland, "Feature Comment: CICA Override Practice—The Case Against Injunctive Relief," 50 GC ¶ 1 (Jan. 9, 2008).

98/ 50 GC ¶ 1 ("[T]he rationale in Superior appears to be a step in the wrong direction.").

99/ Superior Helicopter LLC v. United States, 78 Fed. Cl. 181 (2007), 49 GC ¶ 358.

100/ Superior Helicopter, 78 Fed. Cl. at 194 (quoting plaintiff's motion).

101/ Superior Helicopter, 78 Fed. Cl. at 194 (citing PGBA, LLC v. United States, 389 F.3d 1219, 1228 (Fed. Cir. 2004), 46 GC ¶ 489).

102/ Superior Helicopter, 78 Fed. Cl. at 194.

103/ Superior Helicopter, 78 Fed. Cl. at 194 n.26.

104/ 50 GC ¶ 1.

105/ PGBA, 389 F.3d at 1228 (emphasis added).

106/ PGBA, 389 F.3d at 1228 (citing Samuels v. Mackell, 401 U.S. 66, 71–73 (1971) (explaining that when "the practical effect of the two forms of relief will be virtually identical," the "propriety of declaratory and injunctive relief should be judged by essentially the same standards"); and Md. Citizens for a Representative Gen. Assembly v. Governor of Md., 429 F.2d 606, 611 (4th Cir.1970) ("A declaratory judgment is not available as an academic exercise, and the coercive effect of one here would encounter all of the objections to injunctive relief.")).

107/ 50 GC ¶ 1.

108/ CIGNA Gov't Servs. v. United States, 70 Fed. Cl. 100, 114 (2006), 48 GC ¶ 115 (emphasis added); see also Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25, 36–37 (2006), 48 GC ¶ 280 ("Thus, despite the fact that Plaintiff requests an injunction, we find that a declaratory judgment achieves the same effect.").

109/ Advanced Sys. Dev., 72 Fed. Cl. at 37 ("By concluding, as we do, that the agency's CICA override lacks a rational basis and is contrary to law, we return the parties to the status quo ante—the automatic stay of performance is necessarily restored. In accordance with CICA, the [agency] cannot proceed with [the awardee's] performance of this contract. And by virtue of this ruling, the agency may not base some hypothetical future override on the reasons articulated in this litigation….").

110/ Illinois Bell Tel. Co. v. WorldCom Techs., Inc., 157 F.3d 500, 503 (7th Cir. 1998) (emphasis added).

111/ Chapman Law Firm Co. v. United States, 65 Fed. Cl. 422, 424 (2005).

112/ Chapman, 65 Fed. Cl. at 424 (2005).

113/ RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1288–89 (Fed. Cir. 1999), 41 GC ¶ 361.

114/ See, e.g., Advanced Sys. Dev., 72 Fed. Cl. at 36.

115/ eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (quoting MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005)).

116/ eBay, 547 U.S. at 391 (citing cases).

117/ eBay, 547 U.S. at 392 (quoting 35 U.S.C.A. § 154(a)(1)).

118/ eBay, 547 U.S. at 392–93 (citing cases).

119/ eBay, 547 U.S. at 393–94.

120/ eBay, 547 U.S. at 394.

121/ eBay, 547 U.S. at 394.

122/ MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 568–69 (E.D. Va. 2007) (citing cases).

123/ MercExchange, 500 F. Supp. 2d at 568–69 (E.D. Va. 2007). But see Amado v. Microsoft Corp., 517 F.3d 1353 1359 n.1 (Fed. Cir. 2008) (refusing to reach plaintiff-appellant's argument "that the district court 'improperly concluded that eBay eliminated the presumption of irreparable harm that follows a judgment of validity and infringement'").

124/ Global Computer Enters., Inc. v. United States, 81 Fed. Cl. 506, 507–08 (2008). But see Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 236 (2007) ("[T]he court notes that lost competitive advantage is a valid injury. That said, it is not an injury that provides, standing alone, a compelling justification for a preliminary injunction in this case.").

125/ Polymer Techs., Inc. v. Bridwell, 103 F.3d 970, 975 (Fed. Cir. 1996) (holding that "infringement of a valid patent inherently causes irreparable harm" because a patentee possesses the statutory "right to exclude" others from practicing the claimed invention).

126/ Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970); Parcel 49C Ltd. P'ship v. United States, 31 F.3d 1147, 1152 (Fed. Cir. 1994), 36 GC ¶ 480; OAO Corp. v. United States, 17 Cl. Ct. 91, 105 (1989) ("[P]laintiff had no legal right to receive pay for that entire contract. Plaintiff's expectation of a contract and its efforts before that award do not constitute fifth amendment property."); American Gen. Leasing Inc. v. United States, 218 Ct. Cl. 367, 374, 587 F.2d 54, 58–59 (1978) ("It is settled law that no assurance exists that a contractor will receive an award and that the Government retains, in its discretion, the right to reject all bids without liability, even after there have been extensive negotiations with a bidder."); Smith & Wesson v. United States, 782 F.2d 1074, 1081 (1st Cir. 1986) (citing Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970), for the proposition that "the deprivation of the right to bid on government contracts is not a property interest" because "procurement statutes are for the benefit of the government, not bidders").

127/ Illinois Tool Works, Inc. v. Grip-Pak, Inc., 906 F.2d 679, 683 (Fed. Cir. 1990).

128/ Illinois Tool Works, 906 F.2d at 683.

129/ Smith & Wesson, 782 F.2d at 1081–82 (holding that "[a]ward procedures are not designed to establish private entitlements to public contracts but to produce the best possible contracts for the government" and that "there is nothing in any of the numerous motions and memoranda filed in the district court stating or even suggesting the amount of loss of profits anticipated"); cf. AR Sales Co. v. United States, 49 Fed. Cl. 621 (2001) (explaining that "[p]laintiff cannot recover either lost profits it anticipated upon completion of the subject contract or lost profits it anticipated from other, unrelated contracts" due to "Termination for Convenience" clause).

130/ MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 577 (E.D. Va. 2007).

131/ MercExchange, 500 F. Supp. 2d at 577.

132/ MercExchange, 500 F. Supp. 2d at 577 (emphasis in original). On the other hand, a protester might establish harm by proving "damages to its reputation, goodwill, brand recognition, customer base or market share." 500 F. Supp. 2d at 584.

133/ MercExchange, 500 F. Supp. 2d at 586.

134/ But see Diebold v. United States, 947 F.2d 787, 804 (6th Cir. 1991) (injunctive relief will not issue "if that remedy will cost the government more than it will benefit the government").

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