Bloomberg BNA

Federal Contracts Report™

Bid Protests

The Government's Unsupported Attempts to Raise the Bar for Demonstrating Irreparable Harm in Bid Protests at the Court of Federal Claims

BY RICHARD J. VACURA AND PABLO A. NICHOLS

Private practitioners who litigate bid protests before the U.S. Court of Federal Claims are all too familiar with the Government's repeated, largely unsuccessful attempts to impose undue burdens on a contractor seeking injunctive relief. According to the Government, the Court may only direct an agency to correct its prejudicial error(s) when the plaintiff presents *clear and convincing evidence* that it will suffer harms that threaten the *survival of the company*.[1] The Government proposes that it is not enough for a contractor to be wrongfully denied the opportunity to compete fairly for a multiyear, multibillion-dollar contract which the Court finds the contractor had a substantial chance of winning. The Government further proposes that it is immaterial that the loss of that contract could block the contractor from the marketplace for several years and cause the contractor to lose or lay off employees or even shut down factories or divisions of the company. In the eyes of the Government, only clear and convincing evidence showing the near-death of the company will suffice to satisfy the irreparable harm test.

Thankfully, the Court of Federal Claims has declined to adopt the Government's proposed irreparable harm test. Yet despite repeated setbacks over *decades*, the Government continues to advocate for its heightened irreparable harm test in bid protest litigation at the Court. With a new group of four jurists about to join the Court, practitioners should expect the Government to continue its past efforts.

This article surveys the Court's irreparable harm jurisprudence as applied in bid protests, examines the Government's proposed test and the Court's near-uniform rejection of that proposed test, and inquires whether it is in the public interest for the Court to adopt such an extreme test for contractors seeking to enforce their rights in bid protests.

Proving Irreparable Harm in Bid Protests at the Court of Federal Claims. ''As its name implies, the irreparable harm inquiry seeks to measure harms that no damages payment, however great, could address.'' *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed.

[1] Recall that courts apply a four-factor test to assess whether injunctive relief is warranted, the second factor of which is that the movant will suffer irreparable harm if the requested injunction is not issued. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004). Not all four factors must be satisfied; weakness on one factor may be overcome by strength on another. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

Richard J. Vacura is a partner and chair of the government contracts practice at Morrison & Foerster. Pablo A. Nichols is a senior associate and a member of the firm's government contracts practice.

 ISSN 0014-9063

Cir. 2012) (citations omitted).[2] For example, in a non-bid protest context, ''[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.'' *Id.* (citations omitted); *see also Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1337 (Fed. Cir. 2013) (affirming the district court's finding that the plaintiff's lost ''market share'' and ''exclusion from a fair opportunity to compete for design wins constitutes irreparable harm''). In contrast, injuries that can later be compensated through an action at law, no matter how severe, are insufficient to demonstrate irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974).

For more than *thirty years*, the Court of Federal Claims and its predecessor courts have applied these principles and repeatedly held that lost anticipated profits from an unlawfully denied contract award qualifies as irreparable harm because an ''action at law would be unavailing'' as it would allow the plaintiff to recover only its bid preparation costs, but not lost anticipated profits. *See, e.g.*, *Essex Electro Eng'rs, Inc. v. United States*, 3 Cl. Ct. 277, 287 (1983).[3] Additionally, because a contractor has no right to recover damages for the loss of the opportunity to compete fairly for a government contract, a nearly equally lengthy line of Court of Federal Claims cases have held that the related ''lost opportunity to compete for a contract'' constitutes irreparable harm. *See, e.g.*, *HP Enter. Servs., LLC v. United States*, 104 Fed. Cl. 230, 245 (2012) (citing *ViroMed Labs., Inc. v. United States*, 87 Fed. Cl. 493, 503 (2009); *Hosp. Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618, 624 (2005); *Overstreet Elec. Co. v. United States*, 47 Fed. Cl. 728, 744 (2000)).[4]

In light of this authority, establishing irreparable harm in a bid protest at the Court of Federal Claims would seem to be a relatively straightforward matter: a plaintiff establishes irreparable harm by showing that the agency's prejudicial errors prevented the plaintiff from having a fair opportunity to compete for the contract or receiving lost anticipated profits from the contract. Importantly, a plaintiff need only make this showing by a preponderance of the evidence. *See, e.g.*, *MORI Assocs.*, 102 Fed. Cl. at 553 n.60 (citing *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 287 (2006); *Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 723-24 (2004), *aff'd*, 404 F.3d 1346 (Fed. Cir. 2005)).

The Government's Oft-Rejected ''Survival of the Business'' Test for Establishing Irreparable Harm. In the face of this mountain of authority stretching back over 30 years, the Government continues to advocate for different irreparable harm test. According to the Government, a plaintiff bears the burden of establishing irreparable harm by ''clear and convincing'' evidence. *E.g.*, *MORI Assocs.*, 102 Fed. Cl. at 553 n.60. Regarding what qualifies as irreparable harm, the Government uniformly asserts *in every bid protest* that the plaintiff's specific assertions of harm, including a lost opportunity to fairly compete for the contract, lost anticipated profits, loss of key personnel, loss of a competitive advantage in future procurements or the marketplace, and disruption to the plaintiff's business operations, are merely ''economic'' and do not qualify as irreparable harm. *See, e.g.*, *Caddell Constr. Co.*, 111 Fed. Cl. at 115 (arguing, unsuccessfully, that the plaintiff's lost business opportunity, including the opportunity to gain valuable experience that could help win future competitions, was ''only economic in nature'').[5] The Government asserts that only when the alleged harm is so ''severe that it threatens the survival of the movant's business'' may the Court find that the irreparable harm element has been met. *See Rush Constr., Inc. v. United States*, 117 Fed. Cl. 85, 101 (2014) (''Because RUSH has made no allegation that the loss of this contract would imperil its business, argues defendant, RUSH's allegation of harm fails to rise to the level of irreparable harm.'').

As noted above, the touchstone of irreparable harm analysis is ''whether plaintiff has an adequate remedy in the absence of an injunction.'' *Rush Constr.*, 117 Fed. Cl. at 101 (quotation omitted).[6] While the Government consistently characterizes all harms to bid protesters as ''economic harms,'' it never addresses the fact that plaintiffs in bid protests at the Court of Federal Claims cannot recover for ''economic harms'' other than their lost bid and proposal costs. *See, e.g.*, *Bannum, Inc.*, 60 Fed. Cl. at 730 (finding that the plaintiff satisfied the irreparable harm prong because ''[a]n action at law only

---

[2] *See also Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) (''Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., *irreparable*.'') (emphasis added); 13-65 Joseph T. McLaughlin, *Moore's Federal Practice*, § 65.06[2] (3d ed. 2015) (''An irreparable injury is defined as a harm that a court would be unable to remedy even if the movant would prevail in the final adjudication.'').

[3] *See also, e.g.*, *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 48-49 (2012) (''The court has repeatedly held that 'the loss of potential profits' from a government contract constitutes irreparable harm.'') (citing three supporting Court of Federal Claims decisions); *MORI Assocs., Inc. v. United States*, 102 Fed. Cl. 503, 552-53 (2011) (same, citing five supporting Court of Federal Claims decisions); *MVM, Inc. v. United States*, 46 Fed. Cl. 137, 142-23 (1999) (''If the Court does not enjoin performance by Akal, MVM will lose an opportunity to earn the profit that it would have made if the contract had been awarded to it. This loss of profit, for which there is no adequate remedy at law, is accepted as a 'specific, irreparable injury' that warrants the entry of an injunction.'') (citing five supporting Court of Federal Claims decisions).

[4] *See also, e.g.*, *Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49, 114-15 (2013) (' 'The Court of Federal Claims has repeatedly held that a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract.' ') (quoting from and citing to twelve supporting Court of Federal Claims opinions); *NetStar-1 Gov't Consulting, Inc. v. United States*, 98 Fed. Cl. 729, 735 (2011) (the ''lost opportunity to compete may constitute an irreparable harm'') , *aff'd without op.*, 473 F. App'x 902 (Fed. Cir. 2012); *Rhinocorps Ltd. v. United States*, 87 Fed. Cl. 673, 679 (2009) (''[C]ourts have found consistently that the loss of an opportunity to compete for a contract on a level playing field sufficiently establishes irreparable harm.''); *Overstreet Elec. Co.*, 47 Fed. Cl. at 744 (holding that the plaintiff satisfied the irreparable harm prong where it argued that absent an injunction, it would lose the opportunity ''to compete in a fair competitive bidding process for a contract,'' and potentially lose ''valuable business on this contract'') (citing Court of Federal Claims decisions dating back to 1991).

[5] *See also, e.g.*, *HP Enter. Servs.*, 104 Fed. Cl. at 245 (arguing that the loss of key employees, loss of competitive advantage in the follow-on procurement, disruption of overseas operations, lost profits, and lost opportunity to fairly compete were ''too speculative to constitute irreparable harm'').

[6] *See also, e.g.*, *Caddell Constr. Co.*, 111 Fed. Cl. at 114 (same) (quotation omitted); *supra* note 2.

  FCR ISSN 0014-9063

allows recovery of 'bid preparation costs in a suit for damages, but not loss of anticipated profits,' leaving a bid protestor irreparably harmed'') (citation omitted).[7] The Government's failure to address this critical fact renders its labeling of all harms as ''economic harms'' both incomplete and unpersuasive. *See, e.g.*, *HP Enter. Servs.*, 104 Fed. Cl. at 245 (Government failed to explain how the plaintiff could recover for the harms if injunctive relief were not granted, and the Court found that the ''monetary and non-monetary harms'' to the plaintiff were irreparable).

The Government points to two decisions to support its view regarding what qualifies as irreparable harm in a bid protest: *Minor Metals, Inc. v. United States*, 38 Fed. Cl. 379 (1997) and *Sierra Military Health Services, Inc. v. United States*, 58 Fed. Cl. 573 (2003). *See Caddell Constr. Co.*, 111 Fed. Cl. at 115 (''Defendant cites [*Minor Metals*] for the proposition that ''economic harm, without more, does not seem to rise to the level of irreparable injury,'' and [*Sierra Military*] for the position that '' '[o]nly economic loss that threatens the survival of a movant's business constitutes irreparable harm.' ''); *RLB Contracting, Inc. v. United States*, 118 Fed. Cl. 750, 760-61 (2014) (same); *Rush Constr.*, 117 Fed. Cl. at 101 (same). The Government's reliance on *Minor Metals* and *Sierra Military*, however, repeatedly has been criticized and rejected by the Court of Federal Claims. *See, e.g.*, *Rush Constr.*, 117 Fed. Cl. at 102-03; *RLB Contracting*, 118 Fed. Cl. at 760-61; *MORI Assocs.*, 102 Fed. Cl. at 552.

The Court has rejected the Government's reliance on *Minor Metals* and *Sierra Military* for good reason. *Minor Metals* involved a plaintiff that had lost on the merits of its solicitation defect challenge, and sought an emergency stay pending its appeal. In finding that the plaintiff did not satisfy the irreparable harm test, the Court found that the plaintiff's claims of lost profits fell short in large part because the plaintiff was not precluded from participating in the solicitation, it had the ''same chance'' as all other bidders, and its alleged harm was ''purely speculative.'' 38 Fed. Cl. at 381-82. As part of its analysis, the Court cited to a *non-bid protest* decision from the Federal Circuit as ''implying'' that ''economic harm without more, does not seem to rise to the level of irreparable injury.'' *Id.* (citation omitted). The Court did not explain, however, how this implied rule applied in the context of a bid protest where plaintiffs are barred from recovering for any ''economic harm'' other than bid and proposal costs. *Minor Metals*' unique facts and analysis relying on an ''implied'' rule inapplicable in the bid protest context to decide a solicitation defect challenge in which the protester could not identify *any* harm, is hardly a strong endorsement of the Government's position.

Sierra Military fares no better. As the *MORI Associates* court explained, the plaintiff in *Sierra Military* did not allege that it suffered lost profits, one of the two principle types of irreparable harm under the Court's jurisprudence. *MORI Assocs.*, 102 Fed. Cl. at 552 (citing *Sierra Military*, 58 Fed. Cl. at 582). Moreover, *Sierra Military* involved a request for a preliminary injunction in the face of the agency's stay override decision following a protest at GAO.[8] In that specific circumstance, the Court found: ''This is not a situation where a new contractor now steps in and performs the required work, thereby depriving Sierra of business and profit. . .In the event that its protest is sustained, Sierra will still have the opportunity to obtain the contract.'' *Sierra Military*, 58 Fed. Cl. at 582. That critical finding renders *Sierra Military* inapposite to ordinary post-award bid protests in which the plaintiff will be denied the fair opportunity to compete for and derive profit from the unfairly awarded contract.

Perhaps most importantly, the source of *Sierra Military's* ''survival of a movant's business'' rule is a citation found in a 1993 stay override challenge in the District Court for the District of Columbia. *Sierra Military*, 58 Fed. Cl. at 582 (quoting *Found. Health Servs. v. United States*, No. 93-1717 NHJ, 1993 WL 738426 (D.D.C. Sept. 23, 1993)). *Sierra Military* quotes *Foundation Health* for the following proposition: '' '[E]conomic loss does not, in and of itself, constitute irreparable harm.' Only economic loss that threatens the survival of the movant's business constitutes irreparable harm.'' *Id. Foundation Health's* support for this statement comes from the following quote from a 1985 D.C. Circuit decision in a non-bid protest:

> It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. As this court has noted:
>
> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.
>
> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925. Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C.Cir.1977).

Wis. Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985) (bold emphasis added).

Unfortunately, *Foundation Health* mistakenly removed from the *Wisconsin Gas* rule the critical words ''Recoverable monetary loss.'' In making this mistake, *Foundation Health* made a material departure from the long-held rule that irreparable harm is that which a court may not remedy absent injunctive relief. Where a plaintiff is barred by statute or sovereign immunity from recovering damages to compensate for so-called ''economic harms'' caused by the defendant's conduct, as it is in a bid protest, those ''economic harms'' are in fact irreparable. This is precisely why numerous decisions from the Court of Federal Claims have held that lost profits constitute irreparable harm in the context of a bid protest. Unfortunately, *Sierra Military* relied upon *Foundation Health's* material alteration of the *Wisconsin Gas* rule, and applied that rule to a stay override

[7] *See also*, *e.g.*, *Bean Dredging Corp. v. United States*, 22 Cl. Ct. 519, 524 (1991) (''It is true that without injunctive relief a disappointed bidder would be irreparably harmed, because the plaintiffs could recover only bid preparation costs, not lost profits, through an action at law.''); *supra* note 3.

[8] There is substantial doubt regarding whether *Sierra Military's* application of ordinary injunctive relief factors in the context of a stay override decision was even necessary. *See CIGNA Gov't Servs., LLC v. United States*, 70 Fed. Cl. 100, 114 (2006) (declaratory judgment alone reinstated CICA stay and court need not reach issue of injunctive relief); *Chapman Law Firm Co. v. United States*, 65 Fed. Cl. 422, 424 (2005).

challenge at the Court. The Government has been relying on that questionable rule for its ''survival of the business'' test ever since.

As noted above, the Court of Federal Claims routinely declines to follow the irreparable harm tests announced in *Minor Metals* and *Sierra Military*. The Government's response has been to assert that more than three decades of decisions affirming the lost profits/lost opportunity test for irreparable harm in bid protests are erroneous because they ''create a presumption in favor of injunctive relief which is contrary to Supreme Court precedent.'' *Rush Constr.*, 117 Fed. Cl. at 101-02 (citing to *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-93 (2006); *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 544-45 (1987)).[9] This argument too has been rejected repeatedly by the Court. For example:

> The government also unconvincingly cites two relatively recent Supreme Court opinions which it argues have ''called into question'' our opinions finding lost profits irreparable. One opinion merely stands for the proposition that the four-factor test—which our court applies in bid protest cases—cannot be displaced by a general rule automatically granting injunctions for certain violations. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 392–93, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). But to recognize that meritorious bid protests that involve lost profits will satisfy the irreparable harm factor is not the same as automatically granting an injunction, as the other two factors must still be considered. The other opinion similarly recognizes that a court may not presume that injunctions should issue in particular types of cases absent a reason not to issue them, but ''rather, a court must determine that an injunction *should* issue under the traditional four-factor test.'' *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S.Ct. 2743, 2757, 177 L.Ed.2d 461 (2010). But the Court is not aware of any opinions of our court which advocate scrapping the four-factor test when an arbitrary procurement action may have the consequence of depriving a bid protester of potential profits. Certainly, this is not one.

MORI Assocs., 102 Fed. Cl. at 552; *see also Rush Constr.*, 117 Fed. Cl. at 102 (''The case at hand is distinguishable from the *eBay* and *Amoco Production* cases because contrary to defendant's characterization, the acceptance of lost profits as a satisfactory showing of irreparable harm does not create a presumption that the court will award a permanent injunction. Nor does the court purport to establish such a presumption.'').

Finally, with respect to the question of whether a plaintiff must prove irreparable harm by a preponderance of the evidence, or, as the Government suggests, by clear and convincing evidence, the Government's view has been thoroughly examined and rebuffed on numerous occasions by the Court. *See, e.g., Textron, Inc. v. United States*, 74 Fed. Cl. 277, 287 (2006) (describing the clear and convincing standard as ''remarkable and bizarre'' and noting that it is ''utterly without binding precedential support'') (citation omitted); *Career Training Concepts, Inc. v. United States*, 83 Fed. Cl. 215, 218-19 (2008) (conducting a thorough analysis of the two standards and concluding that utilizing the preponderance standard was the wiser approach because it ''is more user friendly to the parties and furthers the public policy goal of open, accessible and fair government procurement in which each offeror becomes a participant and ombudsman to ensure those goals'').[10] As the Court explained in detail in *Bannum, Inc. v. United States*, the clear and convincing evidence standard derives from a misreading of a 10th Circuit case, first announced in *Baird Corp. v. United States*, 1 Cl. Ct. 662, 664 (1983). 60 Fed. Cl. 718, 723-24 (2004) (examining the *Baird* line of cases and the 10th Circuit decision on which they were based), *aff'd*, 404 F.3d 1346 (Fed. Cir. 2005). In contrast, the *Scanwell* line of cases, which Congress specifically directed the Court of Federal Claims to follow when it conferred the Court's bid protest jurisdiction in 1982, ''did not require proof by clear and convincing evidence.'' *Id.* at 724 (citations omitted).

The Government's Proposed Test Is Not in the Public Interest. Even though the Court of Federal Claims consistently has rebuffed the Government's proposed clear and convincing evidence standard and its proposed ''survival of the business'' test for irreparable harm, the Government continues to request that these heightened hurdles be put in place for *meritorious* bid protesters. While such zealous advocacy may be in the interests of its clients, it likely harms the public interest.

Under the ''survival of the business'' test, nearly all large and mid-sized contractors would be incapable of satisfying the irreparable harm element, and thus very likely ineligible for injunctive relief.[11] One cannot imag-

[9] *See also, e.g., Caddell Constr.*, 111 Fed. Cl. at 115 (''Defendant argues that this line of cases is erroneous . . .''); *HP Enter. Servs.*, 104 Fed. Cl. at 245 (''Defendant asserts that recent precedent shows that this court has not properly applied the 'irreparable harm' factor in bid protest cases, and that economic harm is not sufficient for an injunction to issue in favor of a bid protestor.'').

[10] *See also, e.g., Rush Constr.*, 117 Fed. Cl. at 100-101 (examining applicable precedent and concluding that ''plaintiff must carry its burden by a preponderance of the evidence''); *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 494 n.7 (2013) (rejecting the Government's proposed ''elevated burden of proof''); *Contracting Consulting Eng'g LLC v. United States*, 103 Fed. Cl. 706, 709 n.2 (2012) (rejecting the clear and convincing standard as inconsistent with the *Scanwell* line of cases); *MORI Assocs.*, 102 Fed. Cl. at 553 n.60 (''It is clear from a review of the relevant precedents that the preponderance of the evidence test should apply.''); *Spherix, Inc. v. United States*, 62 Fed. Cl. 497, 505 n.5 (2004) (''There is no support in the law for applying a clear and convincing standard to a request for injunctive relief.''); *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 783 (1991) (recognizing that ''a few judges of the Claims Court'' have applied the clear and convincing standard, but rejecting it as ''bereft of any support in precedent or policy'' because ''[n]o federal appellate or other federal trial court requires a government contractor to prove entitlement to pre- or post-award injunctive relief by clear and convincing evidence''); *Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 227-28 (1992) (noting that ''Defendant's preferred standard tortures the legal lexicon,'' and describing the clear and convincing standard as ''making an already exacting burden of proof unsurmountable, as well as incomprehensible'').

[11] Multiple decisions from the Court of Federal Claims and the Federal Circuit have stated that the irreparable harm element is a required showing to merit injunctive relief. *See Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (''Our case law and logic both require that a movant cannot be granted a preliminary injunction unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm.'') (citations omitted); *Magic Brite Janitorial v. United States*, 69 Fed. Cl. 319, 321 (''[I]f a party either will suffer no amount of irreparable harm or has no chance of succeeding on the merits, an

  FCR ISSN 0014-9063

ine a contract so large or important that the loss of it would imperil the survival of companies like Google, Lockheed Martin, or hundreds of other government contractors. Only in the rarest of cases where the contractor is small enough *and* the contract is large and important enough will the loss of that specific contract award actually threaten the survival of the company.

To make matters worse, the Government's proposed clear and convincing evidence evidentiary standard would further limit the availability of meaningful relief to those few contractors that have a plausible argument that flawed agency action threatened the survival of the company. One could easily imagine a company submitting declarations demonstrating the severe impact of the loss of the contract award on the company's financial health, only to have the Government respond that the declarations are too ''speculative'' regarding future events to meet the heightened clear and convincing standard. The net result of the Government's heightened hurdles would be that in nearly all federal procurements in which the Court found that the agency made prejudicial errors, the agency would not be enjoined and directed to correct those errors.

Eliminating or drastically reducing the Court's ability to ensure that federal agencies comply with applicable procurement law is not in the public interest. The Court of Federal Claims and the Government Accountability Office serve a critical role by ensuring that the nation's roughly $530 billion in annual procurement spending is done in a rational manner consistent with applicable statutes and regulations. If left unchecked, Organizational Conflicts of Interest and awards that are irrational or inconsistent with the terms of the solicitation will cause many contractors to decline to compete in what is already a heavily regulated industry. Fewer competitors in the marketplace will lead to the Government receiving inferior products and services at a higher price to the tax payer.

Hopefully, the Government soon will abandon its unsupported attempts to impose undue burdens on meritorious bid protesters seeking injunctive relief at the Court of Federal Claims, and instead will encourage judicial review of agency action and focus on defending its clients' actions on the merits in those cases in which the plaintiff's complaints are baseless. Such a change would be a benefit to all.

---

injunction will rarely, if ever, issue.'') (citing *FMC Corp.*, 3 F.3d at 427).