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¶ 14 PRELIMINARY INJUNCTION BONDS: An Emerging Bid Protest Issue

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Injunction bonds are trending in bid protests at the U.S. Court of Federal Claims. This development deepens the strategic divide between protest practice at the court and the Government Accountability Office. While there are few published decisions grappling with injunction bonds in Government contract cases, there is enough precedent to outline the basic standards and best practices.

Context: Automatic “CICA Stay” vs. Preliminary Injunction

One of the most extraordinary features of the GAO protest process, as codified in the Competition in Contracting Act, is that in almost all cases a timely protest will trigger an automatic “CICA stay”—akin to an automatic preliminary injunction. Daniel I. Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489 (2013); *The Protest Role of the Government Accountability Office: An Assessment*, 22 NCR ¶ 27; Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225 (2007). While an agency can “override” a CICA stay—overrides are relatively rare. It is the agency’s burden to justify the override, and the protester can challenge the rationality of the agency’s override decision at the COFC. *RAMCOR Services Group, Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999), 41 GC ¶ 361; *Bid Protests: The RAND Study of DOD Protests at the GAO and the COFC*, 32 NCRNL ¶ 10.

The situation is basically reversed at the COFC. Filing a bid protest complaint at the COFC does not halt an agency’s procurement process. If the protester wants the court to stop the agency from moving forward with a procurement and preserve the *status quo*, then the protester must move for preliminary injunctive relief, and the protester bears the heavy burden of justifying that relief.

In practice, most bid protests at the COFC begin with the Department of Justice and the protester agreeing to forgo preliminary injunction briefing in return for a “voluntary stay” of the protested procurement action. With some encouragement from the DOJ, the procuring agency typically agrees to a short voluntary stay, which justifies the court ordering an expedited schedule for the protest briefing and decision. This outcome is usually the ideal scenario for the DOJ, the protester, and the court—although it can feel like a raw deal from the perspective of the procuring agency and any defendant intervenor (particularly if the stay results in a sole-source bridge contract to the protester). See *Harmonia Holdings Group, LLC v. U.S.*, 145 Fed. Cl. 84

(2019) (“An agency’s willingness to voluntarily stay performance provides a benefit to the plaintiff, to the Court, and to the effective administration of justice alike. Often, in order to confer that benefit, it becomes necessary for the agency to enter into a bridge contract to avoid a gap in service, particularly in circumstances that could impact the health, safety, or national security of the United States and its citizens. Awarding a bridge contract to avoid such a gap in service—even in a situation in which the bridge contract covers the exact same scope of work as the underlying contract—is fundamentally different from violating a stay.”)

Occasionally, the parties cannot agree to a voluntary stay, forcing expedited briefing of a preliminary injunction motion. This is an uphill battle for the protester. The plaintiff must establish (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer irreparable harm if the agency is not enjoined *during the pendency of the litigation*; (3) that the likely harm to the plaintiff is not outweighed by harm to the other parties; and (4) that the public interest weighs in favor of preliminary injunction. The trial court has significant discretion to weigh the injunction factors and narrowly tailor any relief. In extraordinary cases the U.S. Court of Appeals for the Federal Circuit can step in to curtail an overbroad injunction order. *Continental Service Group, Inc. v. U.S.*, 722 F. App’x 986 (Fed. Cir. 2018).

In a preliminary injunction fight, the Government will almost certainly dispute the merits of the protest. But, that can be challenging because the full administrative record is often not yet available, and the DOJ attorneys may still be scrambling to understand the nuances of the procurement. The Government will, therefore, bolster its defense by disputing the protester’s ability to establish likely irreparable harm. Protesters often do the Government a favor by giving short shift to the injunction factors in their motion papers. Protesters frequently fail to adequately establish that any irreparable harm will occur if the procurement is permitted to proceed while the litigation progresses; they fail to articulate why the court cannot wait until final judgment to provide the plaintiff with a full remedy. Even if the plaintiff does establish a real risk of irreparable harm, the Government will typically submit a declaration from the Contracting Officer or other program official explaining the disruption (and even national security risk) that is expected to result from the preliminary injunction.

Increasingly, the Government will also argue that any preliminary injunction must be conditioned on the plaintiff posting an injunction bond. In essence, the Government is asking the court to require the plaintiff to provide security to cover any money damages the agency suffers from an improvident injunction. Typically, the Government will support its bond request with a declaration from an agency official attempting to calculate expected damages from a preliminary injunction. In the heat of a fast-moving preliminary injunction fight, it can be difficult, even impossible, for the protester to meaningfully dispute the agency’s proffered calculation—particularly if the agency’s declaration is filed under seal.

Competing Policy Concerns

What is the point of an injunction bond? Why are they relevant to bid protests at all?

In the earliest years of bid protest practice in the federal courts, Judge Nichols articulated a rationale for injunction bonds in bid protests (or at least the early model of bid protests that existed at the time) through his concurring opinion to *Allen M. Campbell Co. v. U.S.*, 467 F.2d 931 (Ct. Cl. 1972):

I suggest that trial courts should make their interventions “circumspect and infrequent”. . . . Circumspection would include requiring an unsuccessful bidder, when plaintiff, to post security guaranteeing to make good any loss to any party that judicial interference may cause, if it is not ultimately upheld. Courts that do not observe these precautions will sometimes leave wounds the Court of Claims will be in no position to heal. That is the purport of our decision here. In the instant case, one would have expected a bond in the District Court, or other security in some amount, on some conditions, in view of [Federal Rule of Civil Procedure] § 65(c). . . .

Of course, not every preliminary injunction threatens real monetary damage to the enjoined party, and bonds should not become a financial barrier to plaintiffs that legitimately seek to preserve the *status quo* pending judicial review:

[D]espite the apparently mandatory language of [Federal Rule of Civil Procedure] 65(c), we believe that the security requirement is in fact and has been frequently held within the discretion of the court. If we accepted all the various items alleged by the defendants as proper elements of the security bond, and agreed to require the plaintiffs to post twenty million dollars, the security requirement would effectively prevent judicial review of the Secretary’s decision in this and in every other case. . . . We cannot accept the proposition that Rule 65(c) was intended to raise virtually insuperable financial barriers insulating the agency’s decisions from effective judicial scrutiny.

Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968) (cleaned up).

These sentiments are most often articulated in public interest litigation and may not ring true in every protest. *Requirement of Security for the Issuance of a Preliminary Injunction or Temporary Restraining Order*, 11A FED. PRAC. & PROC. CIV. § 2954 (3d ed.). But, it is important to keep in mind the central premise and justification for bid protest litigation: private companies often stand in the best position to ensure agencies follow the contracting rules before spending tax dollars:

[T]he essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The COFC Rules And Emerging Standards

COFC Rule 65 governs preliminary injunctions, and paragraph (c) addresses the requirement for security:

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

While the rule is written in mandatory terms, decisions from the COFC and Federal Circuit indicate that the trial court has significant discretion to issue a preliminary injunction without requiring a bond. See *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368 (Fed. Cir. 2006); *LEGO A/S v. ZURU Inc.*, 799 F. App'x 823 (Fed. Cir. 2020); *IgniteAction JV, LLC v. U.S.*, 174 Fed. Cl. 62 (2024). But see *Myriddian, LLC v. U.S.*, 165 Fed. Cl. 650 (2023).

In a protest, the Government will have "the burden of establishing the amount of a bond necessary to secure against the wrongful issuance of the injunction." *LEGO A/S v. ZURU Inc.*, 799 F. App'x 823 (Fed. Cir. 2020). The COFC has rejected Government bond estimates that are too speculative or unsupported. See *IgniteAction JV, LLC v. U.S.*, 174 Fed. Cl. 62 (2024); *General Dynamics Mission Systems, Inc. v. U.S.*, 136 Fed. Cl. 355 (2018).

Nevertheless, the COFC has also recognized that "some degree of uncertainty or speculation is inherent in [a] defendant's attempt to quantify the harm it may suffer as a result of the preliminary injunction" and the court has granted security estimates that are calculated in a "good faith effort" and are "reasonable." *Amazon Web Services, Inc. v. U.S.*, 147 Fed. Cl. 146 (2020), 62 GC ¶ 72; *Myriddian, LLC v. U.S.*, 165 Fed. Cl. 650 (2023); *Serco, Inc. v. U.S.*, 101 Fed. Cl. 717 (2011); *Bona Fide Conglomerate, Inc. v. U.S.*, 96 Fed. Cl. 233 (2010), 53 GC ¶ 34.

Concluding Thoughts And Emerging Best Practices

From the little precedent we have, a few best practices appear to emerge for protesters, the Government, and the COFC.

For the protesters: Do not take for granted the possibility of a voluntary stay, and do not underestimate the standard for preliminary injunctive relief. If a motion for preliminary injunction does not clearly demonstrate a risk of irreparable harm, then the court is likely to deny the motion on that basis alone, without ever discussing an injunction bond. Even if a motion is strong on the merits and equitable factors, be prepared to quickly dispute the Government's bond estimate and, if necessary, actually post the bond.

For the Government: Remember that the Government bears the burden of establishing a credible bond estimate, including explaining why the agency is likely to incur any monetary harm from the injunction. The cases confirm that the COFC judges will not rubber stamp unsupported, speculative bond estimates.

For the court: Exercise careful discretion on a case-by-case basis, tailoring bond amounts, if any, to the parties and procurement at issue. It is one thing to require a \$40 million bond from one of the world's largest companies before preliminarily enjoining one of the decade's most high-profile defense contracts. Cf. *Amazon Web Services, Inc. v. U.S.*, 147 Fed. Cl. 146

(2020). But in most cases an appropriate bond will not approach that order of magnitude. Exaggerated, perfunctory bond estimates—often prepared in the heat of litigation and filed under seal—must not become an inequitable barrier to entry for the COFC protest process that permits agencies to thwart judicial review before it begins. *NEC & Sierra A. Paskins*