IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

MVL USA, Inc., *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	Nos. 24-1057, 24-1077,
v.	)	24-1144, 24-1219, 24-1398
	)	24-1433, 24-1461
THE UNITED STATES,	)	(Judge Holte)
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF

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TABLE OF CONTENTS

Index to Appendix

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

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DEFENDANT'S MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF

Defendant, the United States, respectfully moves to dismiss these consolidated cases as moot and responds to the motion for permanent injunctive relief filed by plaintiffs MVL USA, Inc. (MVL), Environmental Chemical Corporation (ECC), JCCBG2, and Harper Construction Co. Inc. (Harper) (collectively movants). Movants request "a permanent injunction rescinding President Biden's Executive Order 14063, [Federal Acquisition Regulation (FAR)] Subpart 22.5, and FAR Clauses 52.222-33 and -34." ECF No. 111 at 1.[1] The Court should deny the motion and dismiss this case as moot.

Plaintiffs in these consolidated cases (movants and Hensel Phelps Construction Co. (HPCC)) have challenged the inclusion of a requirement to enter into a project labor agreement (PLA) in seven specific solicitations. After the Court's decision granting plaintiffs' motions for judgment on the administrative record and directing the Government to "explain[] the agencies plan for each solicitation moving forward," ECF No. 97 at 41-42, the Government has cancelled four of the solicitations at issue and amended the other three to remove the challenged PLA

[1] For purposes of this motion, in citing to the filings in this case, we cite to the page number in the ECF banner of the filing, not necessarily the page number of the brief.

requirements. There is no reasonable expectation that the Government will reverse the cancellations or amendments, and, thus, the actions taken by the Government have completely and irrevocably eradicated the effects of the allegedly illegal inclusion of PLA requirements in the seven solicitations at issue. Moreover, the Department of Defense (DoD) has issued a FAR deviation prohibiting DoD entities from requiring PLAs in large-scale construction solicitations, and the United States General Services Administration (GSA) has excepted land port of entry construction solicitations from the PLA mandate. Accordingly, this case is moot and must be dismissed.

In their motion for permanent injunctive relief, movants do not seek any further relief regarding the seven procurements at issue in this case. Instead, they request that this Court take the unprecedented step of directing the Government to rescind an executive order and the regulations implementing that order. There are multiple reasons why the Court should deny movants' request.

First, the Court has no authority to direct the rescission of regulations and executive orders in a bid protest under 28 U.S.C. § 1491(b). This Court may decline to enforce an executive order or regulation in particular procurements or proposed procurements when an agency's application of the executive order or regulation in those procurements or proposed procurements contravenes a statute, but the Court may not broadly enjoin the Government from applying a regulation or executive order with regard to other offerors in other procurements.

Second, contrary to movants' argument, this Court did not "determine that Executive Order 14063, FAR Subpart 22.5, and FAR Clauses 52.222-33 and -34 are not permitted by law because they violate" the Competition in Contracting Act (CICA). ECF No. 111 at 8. Rather, the Court concluded that "the *functionality* of the mandate *as applied to the individual contracts*

in this case stifles competition and violates" CICA. ECF No. 97 at 2 (emphasis added). Indeed, the authorities that movants seek to rescind contain an exception to the PLA mandate when requiring a PLA for a particular project would be inconsistent with a statute, such as CICA. FAR 22.504(d)(1)(iii); Exec. Order No. 14,063, Use of Project Labor Agreements for Federal Construction Projects, 87 Fed. Reg. 7,363, 7,364 (Feb. 4, 2022) (E.O. 14,063). Even if the Court *could* direct the rescission of regulations and executive orders in a bid protest, which it cannot, it would be improper do so based upon a holding that the agencies' application of those authorities to particular procurements contravened the law.

Third, movants have not demonstrated irreparable harm in the absence of the injunction that they seek. As we noted above, all of the solicitations that plaintiffs have challenged in this litigation have either been cancelled or amended to remove the PLA requirements. Movants erroneously allege that they "will suffer irreparable harm if the Government continues to mandate through the FAR that procurement agencies include the unlawful PLA Requirements in all large-scale construction solicitations on which [they] may bid in the future." ECF No. 111 at 8. Movants have not demonstrated a likelihood that the Government will include a PLA requirement in a future solicitation for which movants are likely to submit bids or proposals, let alone do so unlawfully. Movants have only protested DoD procurements, and DoD has issued a FAR deviation prohibiting DoD entities from requiring PLAs in large-scale construction solicitations. Given the Court's opinion, the DoD FAR deviation, and GSA's class exception, it is speculative to suggest that DoD or any other agency will apply FAR subpart 22.5 in the future in a manner that would violate CICA. Moreover, movants may protest the inclusion of a PLA requirement in a future solicitation for a large-scale construction contract, so the speculative harm of the inclusion of a PLA requirement in a future solicitation is not irreparable.

Accordingly, the Court should deny movants' request for a permanent injunction and dismiss this case as moot.

STATEMENT OF THE CASE

I. Plaintiffs' Challenges To PLA Requirements In Seven Specific Solicitations

This case consolidates seven related bid protests, each of which challenges the inclusion of a PLA requirement in a particular solicitation issued by the United States Army Corps of Engineers (USACE), Naval Facilities Engineering Systems Command (NAVFAC), or GSA. ECF No. 64 at 1-3; ECF No. 65 at 1-3; ECF No. 66 at 1-3; ECF No. 67 at 1-3; ECF No. 68 at 4; ECF No. 69 at 4; ECF No. 70 at 4. In their seven motions for judgment on the administrative record, each plaintiff requested that the Court: 1) declare that inclusion of a PLA requirement in the solicitation(s) that it is challenging violates CICA; and 2) issue injunctive relief prohibiting the Government from applying the PLA requirement in the solicitation(s) that it is challenging. *See* ECF No. 64 at 3; ECF No. 65 at 3; ECF No. 66 at 3; ECF No. 67 at 3; ECF No. 68 at 24; ECF No. 69 at 22-23; ECF No. 70 at 31.[2]

II. Court's Decision Granting Plaintiffs' Motions For Judgment On The Administrative Record

On January 19, 2025, the Court issued an opinion granting plaintiffs' motions for judgment on the administrative record. ECF No. 97 at 1 n.*, 2. The Court concluded that "the *functionality* of the mandate *as applied to the individual contracts in this case* stifles competition and violates" CICA. ECF No. 97 at 2 (emphasis added); *see id.* at 28 ("the Court finds the FAR requirements in the solicitations violate CICA as applied to the contracts at issue here."), 37 ("In

[2] HPCC also requested that the Court direct the procuring agency "to reissue the Solicitation in accordance with law and [its] actual requirements" and prematurely requested that the Court award "HPCC its attorneys' fees and costs in pursuing this action[.]" ECF No. 68 at 24; ECF No. 69 at 23; ECF No. 70 at 31.

sum, the PLA mandate 'precludes full and open competition by effectively excluding [a non-PLA] offeror from winning an award'—both in the function of the mandatory rule itself and in the apparent policy to deny exceptions even when the agency itself commissions data indicating an exception should be made."). The Court did not, however, grant the plaintiffs any injunctive relief, but instead determined that "the circumstances surrounding the individual solicitations and the varying needs of three different agencies (USACE, NAVFAC, and GSA) warrants the agencies be afforded a short period of time to reassess their PLA decision on an individual basis." *Id.* at 41. Accordingly, the Court directed the parties to "file a joint status report explaining the agencies['] plan for each solicitation moving forward" and "the agencies' proposed timeframe required to properly address" each procurement that plaintiffs challenged. *Id.* at 41-42.

III. The Agencies' Post-Decision Actions

In compliance with the Court's order, the parties filed a joint status report on February 10, 2025, informing the Court of the agencies' plans for the solicitations at issue in this case. ECF No. 110. The parties notified the Court that: 1) for the solicitations protested by MVL, ECC, and JCCBG2, USACE intended to cancel the solicitations and re-solicit the construction projects without a PLA requirement; 2) for the USACE solicitations protested by Harper and HPCC, USACE intended to amend the solicitations to remove the PLA requirements; 3) NAVFAC intended to amend its solicitation that HPCC has protested to remove the PLA requirement and to allow all interested sources to submit new proposals; and 4) GSA intended to cancel the land port of entry construction solicitation that HPCC has protested and issue a new solicitation, after further considering its requirements for the project, including whether a PLA is

necessary to meet its needs for the project, the change in administration, and the new executive orders. *Id.* at 1-2.

After the parties filed the February 10, 2025 status report, the Government implemented the corrective actions described in the status report by cancelling four of the solicitations at issue in these consolidated cases and amending the other three solicitations to remove the PLA requirements.[3] *See* MTD App. 5-165.[4]

Additionally, on February 7, 2025, pursuant to FAR 1.404(b) and 48 C.F.R. § 201.404(b), DoD's Principal Director, Defense Pricing, Contracting, and Acquisition Policy, issued a DoD-wide FAR deviation directing that, "[e]ffective immediately, contracting officers shall not use project labor agreements for large-scale construction projects, implemented at [FAR] subpart 22.5 and 36.104(c)[,]" and "[c]ontracting officers shall amend solicitations to remove project labor agreement requirements, including any solicitation provisions and contract clauses prescribed at FAR 22.505." MTD App. 1. On February 12, 2025, pursuant to FAR 22.504(d), GSA's Senior Procurement Executive issued a class exception from the FAR 22.503(b) requirement to mandate PLAs for all land port of entry construction projects. MTD App. 2-4. This class exception is effective immediately. *Id.* at 4.

[3] Regarding the cancelled solicitations, USACE anticipates that its new solicitations for the construction projects at issue in the cases filed by MVL, ECC, and JCCBG2, will be issued no earlier than March 17, 2025, and GSA anticipates that its new solicitation for the land port of entry construction project at issue in one of the cases filed by HPCC (No. 24-1461C) will be issued no earlier than August 2025. ECF No. 110 at 1-2.

[4] "MTD App. __" refers to the appendix attached to this brief.

ARGUMENT

I. These Consolidated Protests Must Be Dismissed As Moot

These consolidated protests are moot because the Government has either cancelled the solicitations at issue or amended them to remove the PLA requirements that plaintiffs challenged.

"[M]ootness . . . is a threshold jurisdictional issue." *Myers Investigative and Sec'y Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (2002). "When, during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed." *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007). Corrective action by the defendant renders a case moot "when there clearly is no 'reasonable expectation' that the alleged violation will recur and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

It is well-settled that cancellation of the solicitation at issue moots a bid protest. *See, e.g.*, *Madison Servs., Inc. v. United States*, 90 Fed. Cl. 673, 680 (2010); *CW Gov't Travel, Inc. v. United States*, 46 Fed. Cl. 554, 558-59 (2000); *CCL Serv. Corp. v. United States*, 43 Fed. Cl. 680, 689-90 (1999). Because the solicitations at issue in four of the consolidated cases have been cancelled by USACE or GSA (*MVL*, Fed. Cl. No. 24-1057C, *ECC*, Fed. Cl. No. 24-1144C, JCCBG2, Fed. Cl. No. 21-1219C, and *HPCC*, Fed. Cl. No. 24-1461C), those cases are moot. *See* MTD App. 5-12. There is no reasonable expectation that the new solicitations for these construction projects will contain a PLA requirement in violation of the Court's interpretation of CICA, in light of the Court's opinion, DoD's FAR deviation prohibiting DoD entities from

requiring PLAs in large-scale construction solicitations, and GSA's class exception to the PLA mandate for land port of entry construction projects (like the construction project at issue in *HPCC*, 24-1461C). *See* MTD App. 1-4. Moreover, if plaintiffs are dissatisfied with future solicitations for these projects, they "may, of course, challenge the new solicitation[s]." *CW Gov't Travel*, 46 Fed. Cl. at 559.

Regarding the other three consolidated cases (*Harper*, Fed. Cl. No. 24-1398C, *HPCC*, Fed. Cl. No. 24-1077C, and *HPCC*, Fed. Cl. No. 24-1433C), USACE and NAVFAC have amended the solicitations at issue to remove the PLA requirements. *See* MTD App. 23-165. There is no reasonable expectation that USACE or NAVFAC will reverse course, especially considering DoD's FAR deviation, and, thus, the amendments have completely and irrevocably eradicated the effects of the allegedly illegal PLA requirements. Due to these amendments, Harper and HPCC are now able to compete for the contracts without being subject to PLA requirements.

Accordingly, these consolidated protests are moot and must be dismissed.

II. The Court Should Deny Movants' Request For A Permanent Injunction Directing The Rescission Of E.O. 14,063 And The Regulations Implementing It

Even if the Court were to conclude that the consolidated protests are not moot, there are at least three reasons to deny movants' request for a permanent injunction directing the rescission of E.O. 14,063 and the regulations implementing it. First, this Court lacks the authority to direct the rescission of regulations and executive orders in bid protests. Second, contrary to movants' argument, this Court did not hold that E.O. 14,063 and the regulations implementing it facially violate CICA, but instead held that the agencies' application of those regulations to seven specific procurements violates CICA. Accordingly, even if this Court could direct the rescission of regulations and executive orders, which it cannot, there is no basis for the Court to do so in

this case. Third, movants have failed to demonstrate irreparable harm in the absence of the injunction that they seek. Therefore, the Court should deny movants' request for a permanent injunction.

A. Standard Of Review For Permanent Injunctive Relief

"'[A]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course,' and '[i]f a less drastic remedy' is sufficient to address the relevant injury, 'no recourse to the additional and extraordinary relief of an injunction [is] warranted.'" *SAGAM Securite Senegal v. United States*, No. 2021-2279, 2023 WL 6632915, at *7 (Fed. Cir. Oct. 12, 2023) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010)). Accordingly, "injunctions are to be used sparingly[,]" and "injunctive relief should be narrowly tailored to fit the specific legal violations." *Id.* (quoting *Gemveto Jewelry Co. v. Jeff Cooper Inc.*, 800 F.2d 256, 259 (Fed. Cir. 1986)); *see also Gill v. Whitford*, 585 U.S. 48, 66 (2018) ("a plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'") (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

If a plaintiff succeeds on the merits, the Court considers three other factors before granting injunctive relief: 1) "whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief"; 2) "whether the balance of hardships to the respective parties favors the grant of injunctive relief"; and 3) "whether it is in the public interest to grant injunctive relief." *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004). If a plaintiff does not demonstrate irreparable harm in the absence of an injunction, then the Court must deny its request for a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *PGBA*, 389 F.3d at 1228 n.6; *cf. 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.").

B. The Court Lacks The Authority To Direct The Rescission Of Regulations And Executive Orders In Bid Protests

The first reason to deny movants' request to direct the Government to rescind regulations and an executive order is because this Court lacks the authority grant this or any similar relief in a bid protest.

In *DGR Associates, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit stated that this Court lacks "the authority to invalidate properly promulgated regulations of an Executive Branch agency" in a bid protest. 690 F.3d 1335, 1341 (Fed. Cir. 2012). Similarly, in *Land Shark Shredding, LLC v. United States*, the Federal Circuit stated that "[c]hallenges to the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act." 842 F. App'x 589, 593 (Fed. Cir. 2021). In *Dynamic Educational Systems, Inc. v. United States*, this Court explained that the "court's bid protest jurisdiction does not extend to striking down regulations." 109 Fed. Cl. 306, 322 (2013).

The Federal Circuit's recent decision in *Boeing Co. v. United States*, 119 F.4th 17 (Fed. Cir. 2024), is not to the contrary. Rather, *Boeing* supports our position. In *Boeing*, the trial court dismissed three counts of the plaintiff's complaint – brought under the Contract Disputes Act (CDA) – based upon a "conclusion that the true nature of the action 'is a challenge to the validity of FAR 30.606' and therefore, 'is not a contract case.'" 119 F.4th at 23 (citation omitted). The Federal Circuit reversed, holding that the plaintiff's challenge to the validity of a FAR provision as part of a CDA claim did not remove the case from this Court's jurisdiction. *See id.* at 23-25.

In so holding, the Federal Circuit explained that the trial court was "correct that, in general, *for actions that do not involve contract-related claims*, the Court of Federal Claims's limited jurisdiction under the Tucker Act does not authorize review of pure challenges to the validity of a regulation." *Id.* at 24 (emphasis added). The Federal Circuit listed the cases relied upon by this Court for that proposition, including *Land Shark* and *Southfork Systems, Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998), which were both bid protests. *Boeing*, 119 F.4th at 24. The Federal Circuit then explained that the "trial court's erroneous jurisdictional conclusion . . . can easily be explained by *its reliance on* ***inapposite case law***. . . . the Federal Circuit precedent that the trial court relied on *did not involve contract disputes properly brought under the Court of Federal Claims's exclusive jurisdiction over CDA claims*." *Id.* at 25 (emphasis added). In other words, the Federal Circuit concluded that bid protests, such as *Land Shark* and *Southfork*, are distinguishable from CDA claims for purposes of analyzing whether this Court may determine the validity of a regulation. Indeed, the same judge authored both the *Land Shark* and *Boeing* opinions, with no suggestion that they were inconsistent. *Boeing*, 119 F.4th at 19, 23-25; *Land Shark*, 842 F App'x at 589.

To be sure, procuring agencies must comply with procurement statutes, including CICA, and a plaintiff may argue in a bid protest that the agency's application of a regulation to a particular procurement or proposed procurement violates a procurement statute. *See Dynamic*, 109 Fed. Cl. at 322 (stating that this Court "could refuse to enforce a regulation that was squarely at odds with mandatory procurement procedures set out by statute"). That would be similar to the argument made by the plaintiff in the *Boeing* CDA case, where the plaintiff argued that the Government's application of a cost accounting regulation to particular contracts between the plaintiff and the Government violated a statute, and, thus, the plaintiff was entitled to rescission

of a price adjustment made by the Government pursuant to the allegedly invalid regulation. *See* 119 F.4th at 22, 24. Although this Court may consider the validity of a regulation in this manner in a CDA case, there is no suggestion in *Boeing* that the trial court could direct the Government to rescind a regulation in a CDA case or categorically enjoin the enforcement of a regulation, such that the regulation would be inapplicable to *other contracts with other Government contractors*. Similarly, although this Court could, for a particular procurement or proposed procurement, "refuse to enforce a regulation that was squarely at odds with mandatory procurement procedures set out by statute," the "court's bid protest jurisdiction does not extend to striking down regulations." *Dynamic*, 109 Fed. Cl. at 322; *see also DGR*, 690 F.3d at 1341; *Land Shark*, 842 F. App'x 589, 593. Accordingly, even if the reasoning of *Boeing* were extended to bid protests, it would not give this Court authority to direct the rescission of regulations and executive orders.

As we noted above, the Federal Circuit has explained that "[c]hallenges to the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act." *Land Shark*, 842 F. App'x at 593. Indeed, a case is currently pending in the United States District Court for the Middle District of Florida challenging the validity of E.O. 14,063 and the FAR provisions that movants are seeking to enjoin here. *See Associated Builders And Contractors Fla. First Coast Chap., et. al. v. General Servs. Admin. et. al.*, No. 3:24cv318 (M.D. Fla.). The plaintiffs' complaint in *Associated Builders* requested an order "vacating" E.O. 14,063 and FAR provisions implementing it, as well as an order "permanently enjoining Defendants from implementing them." *Id.*, ECF No. 1 at 47. If such

relief were appropriate (which it is not), it would be a district court, not this Court, that could grant it.[5]

C. The Court Has Not Held That E.O. 14,063 And The Regulations Implementing It Are Invalid, So There Is No Basis For The Injunctive Relief That Movants Seek

Even if the Court had the authority to direct the rescission of executive orders and regulations in a bid protest, there would be no basis to do in this case, because the Court has not determined that E.O. 14,063 and its implementing regulations are facially invalid. "[I]njunctive relief should be narrowly tailored to fit the specific legal violations." *SAGAM*, 2023 WL 6632915, at *7 (quoting *Gemveto*, 800 F.2d at 259); *see also Gill*, 585 U.S. at 66 ("a plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'") (quoting *Lewis*, 518 U.S. at 357). Accordingly, it would be improper to universally prohibit the Government from applying regulations based upon a conclusion that the agencies' application of those regulations to particular procurements violated a statute.

Movants premise their requested injunctive relief upon an erroneous assertion that the Court "exercised its exclusive jurisdiction powers to determine that Executive Order 14063, FAR Subpart 22.5, and FAR Clauses 52.222-33 and -34 are not permitted by law because they violate CICA." ECF No. 111 at 8. The Court actually held that "the *functionality* of the mandate *as applied to the individual contracts in this case* stifles competition and violates" CICA. ECF No. 97 at 2 (emphasis added); *see id.* at 28 ("the Court finds the FAR requirements in the

[5] To be clear, it is our position that district courts lack plenary authority to vacate or universally enjoin regulations under the Administrative Procedure Act. *See, e.g.*, *United States v. Texas*, 599 U.S. 670, 693-704 (2023) (Gorsuch, J. concurring). This Court, however, need not opine on district courts' remedial authority in a direct challenge to Federal regulations. Rather, it is sufficient to conclude that *this Court* lacks jurisdiction to vacate or universally enjoin the application of executive orders and regulations *in a bid protest* challenging a particular procurement or proposed procurement.

solicitations violate CICA as applied to the contracts at issue here."), 37 ("In sum, the PLA mandate 'precludes full and open competition by effectively excluding [a non-PLA] offeror from winning an award'—both in the *function* of the mandatory rule itself and in the *apparent policy to deny exceptions* even when the agency itself commissions data indicating an exception should be made.") (emphasis added).

Moreover, the authorities that movants seek to invalidate contain an exception to the PLA mandate when requiring a PLA for a particular project would be inconsistent with a statute. FAR 22.504(d)(1)(iii); Exec. Order No. 14,063, 87 Fed. Reg. at 7,364. Accordingly, by their very terms, these authorities do not mandate that agencies require a PLA for a particular project where doing so would violate CICA. Although the agencies believed that requiring a PLA for the seven solicitations at issue did not violate CICA, the Court disagreed, and the agencies have since cancelled the solicitations or amended them to remove the PLA requirements. *See* MTD App. 5-165. Even if the Court *could* direct the rescission of regulations and executive orders in a bid protest, which it cannot, it would be improper do so based upon a holding that the agencies' application of those authorities to particular procurements contravened the law.

D. Movants Have Not Demonstrated Irreparable Harm In The Absence Of The Injunction That They Seek

Movants' request for permanent injunctive relief must also be denied because they have failed to demonstrate irreparable harm in the absence of an injunction. "The irreparable injury requirement erects a very high bar for a movant." *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the United States*, 840 F. Supp. 2d 327, 334 (D.D.C. 2012) (citation omitted). To obtain injunctive relief, it is not sufficient that a plaintiff demonstrate the mere "possibility" of irreparable injury; rather, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Each of the solicitations that plaintiffs have challenged in this action have either been cancelled or amended to remove the PLA requirements to which plaintiffs object. MTD App. 5-165. Accordingly, injunctive relief is no longer necessary to remedy any injury to plaintiffs.

Movants erroneously allege that they "will suffer irreparable harm if the Government continues to mandate through the FAR that procurement agencies include the unlawful PLA Requirements in all large-scale construction solicitations on which [they] may bid in the future." ECF No. 111 at 8. Movants' assumption that procuring agencies will illegally include PLA requirements in solicitations in which movants wish to participate in the future is speculative and unsupported. Movants have only challenged solicitations issued by DoD components USACE and NAVFAC. *See* ECF No. 64-67; *see also Harper Constr. Co. Inc. v. United States*, Fed. Cl. Nos. 24-1532C, 24-2054C, 24-2055C, 25-36C. As we have explained, DoD issued a class FAR deviation on February 7, 2025 prohibiting DoD entities from requiring PLAs in large-scale construction solicitations. MTD App. 1. Accordingly, there is no reason to believe that DoD will require PLAs in any future solicitations based upon the authorities that movants seek to enjoin.

Movants also have not demonstrated a likelihood that any other agencies will issue future solicitations in which movants intend to participate that include PLA requirements in an unlawful manner. As an initial matter, movants have not demonstrated a likelihood that they will submit bids or offers on future non-DoD construction solicitations. Moreover, considering the Court's opinion, DoD's class FAR deviation, and GSA's class exception to the PLA mandate for land port of entry construction projects, movants have not demonstrated a likelihood that future solicitations will include PLA requirements in an unlawful manner. In fact, HPCC's counsel has opined that "DOD's class deviation and GSA's class exception likely spell the death of the PLA

requirement." *Id.* at 167, available: https://www.smithcurrie.com/procurement-playbook/department-of-defense-ditches-project-labor-agreements-general-services-administration-issues-a-class-exception-for-land-port-of-entry-projects/.

Furthermore, if agencies decide to include PLA requirements in future solicitations for large-scale construction contracts in a manner that movants believe to be illegal, movants may protest the solicitations at that time. *See* 28 U.S.C. § 1491(b)(1); 31 U.S.C. §§ 3551(1), 3552(a). Therefore, movants are not irreparably harmed in the absence of an injunction directing the rescission of E.O. 14,063 and the FAR provisions implementing that order. *See Monsanto*, 561 U.S. at 162 ("if and when [the agency] pursues a partial deregulation that arguably runs afoul of [the National Environmental Policy Act of 1969], respondents may file a new suit challenging such action and seeking appropriate preliminary relief. . . . Accordingly, a permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm.").

CONCLUSION

For these reasons, the Court should dismiss these consolidated cases as moot and deny movants' motion for permanent injunctive relief.

Respectfully submitted,

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