IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(Bid Protest)

MVL USA, INC., *et. al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case Nos. 1:24-cv-01057; 1:24-cv-1077; 1:24-cv-1144; 1:24-cv-1219; 1:24-cv-1398; 1:24-cv-1433; 1:24-cv-1461

Judge Ryan T. Holte

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTIVE RELIEF AND RESPONSE TO GOVERNMENT'S MOTION TO DISMISS

Respectfully submitted on March 3, 2025.

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Plaintiffs MVL USA, Inc. ("MVL"), Environmental Chemical Corporation ("ECC"), JCCBG2, and Harper Construction Company, Inc. ("Harper") (collectively, "Plaintiffs") respectfully file this reply in support of their Motion for Permanent Injunctive Relief (D.E. 111) and response to the Motion to Dismiss of Defendant, the United States (the "Government") (D.E. 112).

The Court should deny the Government's Motion to Dismiss and, correspondingly, enter a permanent injunction because the Government's alleged corrective actions to date are premised on the erroneous assumption that E.O. 14036 and the regulations implementing it, including FAR 52.222-33, and FAR 52.222-34

(the "PLA Requirements"),[1] do not violate the Competition in Contracting Act ("CICA"). *See* D.E. 112 at 8; D.E. 110 at 2. The Government fails to acknowledge that this Court's January 19 Opinion and Order found that the Federal Property and Administrative Services Act ("FPASA") does not support E.O. 14036, and therefore there is no statutory support for ***any*** Executive Order to authorize a mandatory Project Labor Agreement ("PLA")—whether under E.O. 14036 or any future Executive Order, unless and until Congress specifically passes a law authorizing a mandatory PLA. *See* D.E. 97 at 25. Simply put, the Court found that E.O. 14036 is not supported by statutory authority and therefore violates CICA, and the E.O. has a self-executing provision that makes it void if it violates existing law. *See id.*; E.O. 14063 Sec. 8. As a result, the Government by law is unable to rely on the PLA requirements now or in any future procurement. The fact that the Government affirms that it will continue evaluating future solicitations under the exceptions process set forth in the existing PLA Requirements, notwithstanding that this is in direct contravention of this Court's ruling, *see* D.E. 97 (the "Ruling" or "Holding"),

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[1] Relatedly, the policy section of FAR Part 36 (Construction and Architect-Engineer Contracts) provides as follows and must be rescinded:

(c)(1) Agencies shall require the use of a project labor agreement for Federal construction projects with a total estimated construction cost at or above $35 million, unless an exception applies (see subpart 22.5).
(2) Contracting officers conducting market research for Federal construction contracts, valued at or above the threshold in paragraph (c)(1) of this section, shall ensure that the procedures at 10.002(b)(1) involve a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a project labor agreement, and to understand the availability of unions, and unionized and non-unionized contractors. Contracting officers may coordinate with agency labor advisors, as appropriate.

See FAR 36.104(c)(1)–(2).

establishes a reasonable likelihood that CICA violations will continue to occur, notwithstanding the actions the agencies have so far taken in response this this Court's Ruling. *See* D.E. 110 at 2; D.E. 112 at 20. This case should, therefore, not be considered moot under prevailing law. Finally, this Court has jurisdiction to afford Plaintiffs their requested relief under the Tucker Act. This Court is the only forum in which bid protesters can obtain injunctive relief premised on the validity of federal regulations that are actively causing the Government to violate procurement law both now and in the future. Thus, the Plaintiffs are entitled to a decree of injunctive relief.

I. The Government Somehow Misconstrues this Court's Ruling To Conclude that Federal Property and Administrative Services Act ("FPASA") Authorizes the PLA Requirements.

The Government contends that the Court "did not hold that E.O. 14,063 and the regulations implementing it facially violate CICA…" D.E. 112 at 14. The Court ***did*** hold that E.O. 14036 and the regulations implementing it, including FAR 52.222-33 and FAR 52.222-34, lack statutory authority and violate CICA. D.E. 97 at 25, 37. Absent future Congressional action authorizing a socio-economic set aside for PLAs (the absence of which the Ruling acknowledges), the Court rightly prohibited the Government from applying the PLA Requirements because the PLA Requirements themselves lack a statutory basis and violate federal law. D.E. 97 at 25, 37 ("[T]he 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." (citations omitted)). Thus,

the Court concluded the PLA Requirements offend CICA's full and open mandate, and therefore, must be rescinded.

A. The Court Rejected the Government's Assertion that FPASA Authorized the PLA Requirements.

The Court concluded that FPASA does not authorize the Government to implement and enforce the PLA Requirements. The Court agreed with Plaintiffs, who argued that merely citing FPASA does not provide sufficient legal authority to ground presidential policy without specific statutory reference. *See* D.E. 97 at 24–25. The Court thus "[left] to Congress the matter of addressing the President's authority under FPASA to issue expansive construction industry labor policies." D.E. 97 at 25.

Specifically, the Court found the Eleventh Circuit's reasoning in *Georgia v. President of the United States*, 46 F.4th 1283, 1294–95 (11th Cir. 2022) persuasive:

> In *Georgia v. President of the United States*, the Eleventh Circuit opined on the President's authority under FPASA, explaining "[t]he President must stay within the confines of [FPASA] of course; but his actions must *also* be consistent with the policies and directives that Congress included in the statute." Applying this limitation to the CICA context, the Eleventh Circuit reasoned the "explicit legislative polices" which cabin the President's authority "include the rule that agencies must 'obtain full and open competition' through most procurement procedures." According to the Eleventh Circuit, the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1976), suggests "the President's authority should be based on a 'specific reference' within [FPASA]" if the President is going to solely rely on FPASA as his authority to implement policies. In *Chrysler*, the Supreme Court reviewed an EO prohibiting employment discrimination by federal contractors based upon the Procurement Act. Though the Supreme Court identified other potential statutory sources to support the President's policy, the Supreme Court observed in a footnote that while FPASA "explicitly authorizes Executive Orders 'necessary to

> effectuate [its] provisions,'" FPASA makes no "specific reference to employment discrimination." The Eleventh Circuit interpreted the footnote as an indication the Supreme Court "doubted [ ] the Procurement Act on its own delegated sufficient authority" to support the EO.

See D.E. 97 at 24–25 (citations omitted).

In other words, the Government's attempted reliance on FPASA was misplaced because FPASA did not confer upon the executive branch the requisite statutory basis to restrict full and open competition under CICA. Based on the Court's holding, any future requirement for PLAs on all large-scale construction procurements would need to be justified under CICA's exceptions to full and open competition—not under the PLA Requirements or on a class basis.[2] Because the Government holds the materially

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[2] During Oral Argument on Motions for Judgment on the Administrative Records, which was held on January 16, 2025, Plaintiffs' counsel pointed out that the Government may potentially use a PLA *based on CICA's exception* to full and open competition, but not based on the E.O. or FAR:

> Mr. Haire: … I do think if you look at each of the Executive Orders over time, from the first Bush order, you could make some arguments that other than the mandatory Biden order, there are ways to read CICA and CICA's exceptions that would be consistent with allowing a discretionary PLA. But I think the mandatory—
>
> The Court: But is that only because … the previous Executive Orders were discretionary, they actually didn't do anything?
>
> Mr. Haire: I think it's partly that. I think you could also make an argument that in rare circumstances in, say, for example, a heavily union location, such as downtown Chicago, where, you know, there could be specific instances where the Government could be consistent with CICA on a single contract basis and do market research and find an evaluation that it's more of a union market than a nonunion market, and that there could be very specific reasons on an isolated, specific procurement where a PLA would make sense. And I think that's kind of what the Obama-era PLA is getting at. I mean, the problem with this—
>
> …

incorrect assumption that it can still follow E.O. 14036 and the regulations implementing it, the Government's Motion to Dismiss (D.E. 112) mootness argument fails, and its Motion should be denied. *See* D.E. 110 at 2; D.E. 112 at 20.

B. The Court Held that the PLA Requirements Violate CICA.

The Court explicitly found that "the PLA mandates have no substantive performance relation to the substance of the solicitations at issue ***and violate CICA's requirement*** that procuring agencies 'obtain full and open competition through the use of competitive procures.'" (citations omitted) (emphasis added). D.E. 97 at 37. E.O. 14063, FAR 52.222-33, and FAR 52.222-34 are invalid because the PLA Requirements do not apply when they violate law (*i.e.*, CICA's requirement for full and open competition). *See* 41 U.S.C. § 3301.

Notably, ***the self-executing provision*** of E.O. 14063 states that the E.O. cannot violate existing law, which means that the E.O., by its own terms, cannot apply to any existing or future federal procurement because they have been deemed by this Court to be violative of CICA's full and open competition requirements. *See* E.O. 14063 at Sec. 8 ("… the FAR Council, ***to the extent permitted by law***, shall propose regulations implementing the provisions of this order") (emphasis added). Accordingly, the Government erred when it stated that the Court "did not

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> The Court: So FPASA does not give the Executive Branch authority to make directives related to project labor in this way?
>
> Mr. Haire: That is my view. I don't think Congress has ever spoken to this either…

Tr. at 119:1–120:10.

hold that E.O. 14,063 and the regulations implementing it facially violate CICA…" D.E. 112 at 14.

II. The Government Has Failed to Satisfy Its Burden that these Proceedings Are Now Moot, Nor Can It.

This case is not moot because the Government is continuing to evaluate the applicability of the PLA Requirements in derogation of the Court's Ruling, thus creating the reasonable expectation (which, as discussed below, is now a certainty) that the Government will continue to violate CICA. *See* D.E. 110 at 2; D.E. 112 at 20. Where the Government initiates corrective action to address a plaintiff's claims, the Government "bears the burden of demonstrating that [such] agency action moots a pending case." *NetCentrics Corp. v. United States*, 169 Fed. Cl. 453, 458 (2024) (citations omitted). "The burden of demonstrating mootness 'is a heavy one.'" *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). Here, the Government fails to meet its "heavy" burden to demonstrate mootness because the Government has: (1) failed to follow and implement the Court's Holding; and (2) failed to demonstrate that there is no reasonable expectation that CICA violations will recur.

A. This Case is Not Moot Because the Government Is Still Implementing the PLA Requirements, in Derogation of the Court's Holding.

In considering whether corrective action moots Plaintiffs' claims, "[t]he salient question is whether [an agency's] corrective action has 'completely and irrevocably eradicated the effects of the alleged violation' of law or the solicitation." *AccelGov, LLC v. United States*, 166 Fed. Cl. 606, 610 (2023) (citations omitted). "Moreover, where a plaintiff challenges an agency's corrective action as improper, this Court

considers 'the underlying specific statutory or regulatory requirements' to decide whether the 'corrective action [is] rationally related to the procurement defect.'" *Id.* at 611 (citations omitted). "In conducting that assessment, this Court, '*per force*, must review the improprieties—whether alleged or actual—that gave rise to the proposed corrective action."" *Id.* (citations omitted, emphasis in original).

In the case at hand, the Government's corrective actions have not completely and irrevocably eradicated ongoing CICA violations because the Government continues to argue that the Court "did not hold that E.O. 14,063 and the regulations implementing it facially violate CICA..." D.E. 112 at 14. However, as explained in Section I, *supra*, the Court held exactly that. Because Government action continues to occur in direct violation of the Court's Holding, the Government cannot argue that its alleged corrective action has fully cured the procurement defect of which the Plaintiffs complained. Because the Government has failed to completely and irrevocably eradicate the effects of the CICA violations, the Government has failed to even approach satisfying its hefty burden, and the mootness doctrine does not apply.

B. This Case is Not Moot Because the Government Fails to Establish that the CICA Violations Will Not Recur.

The Government's CICA violation continues. Generally, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Los Angeles Cnty.*, 440 U.S. 625 at 631. "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)

(citation omitted). "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Id.*; *see also SEKRI, Inc. v. United States*, 165 Fed. Cl. 21, 37 (2023) (finding that the plaintiff's complaint was not moot and noting that the agency "has not established that there is no reasonable expectation that the alleged violation will recur.").

The Government fails to meet its "heavy burden" that CICA violations cannot reasonably be expected to recur. The Government specifically states that "[t]he United States General Services Administration (GSA) intends to cancel its solicitation that HPCC has protested (Fed. Cl. No. 24-1461C, Solicitation No. 47PH0824R0007) 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." D.E. 110 at 2 (emphasis added). In other words, for Solicitation No. 47PH0824R0007, which is a land port of entry procurement, there is a reasonable expectation that GSA will continue to employ the PLA Requirements' exception procedures (instead of CICA's procedure to properly forgo full and open competition). Moreover, it is unclear why GSA would follow the FAR PLA Requirements exception procedures for a land port of entry project, since GSA has issued a "Class Exception to Requiring a Project Labor Agreement for Land Ports of Entry." D.E. 112-1 at 4. This contradiction and confusion demonstrably creates a reasonable risk and uncertainty that the unlawful PLA Requirements process will continue to be

utilized.[3] The result? GSA will continue to consider mandating PLAs for most of its large-scale construction procurements, and it remains unclear what it will do on land port of entry procurements given the conflicting statements by the Government. Therefore, the Government cannot satisfy its heavy burden of establishing that CICA violations cannot reasonably be expected to continue.

More to the point, the Department of Veterans Affairs (the "VA") ***last week*** amended Solicitation No. 36C10F24R0075 on February 24, 2025, to "reinstate all Project Labor Agreement language and clauses." *See* Solicitation No. 36C10F24R0075 (A0004).[4] This action came just a few days after the VA issued a separate memorandum titled, "Federal Acquisition Regulation (FAR) Class Deviation from FAR Parts 22, 36, and 52 – Waiver of Project Labor Agreement Requirements," ("Memo"), which required contracting officers to "amend solicitations to remove project labor agreement requirements, including the provision at 52.222-33, Notice of Requirement for Project Labor Agreement, and the clause at 52.222-34, Project Labor Agreement, as prescribed at FAR 22.505." *See* Department of Veterans Affairs, *Federal Acquisition Regulation (FAR) Class Deviation from FAR Parts 22, 36, and 52*

[3] GSA's class exception to the PLA Requirements applies only to land port of entry procurements, leaving the unlawful PLA mandate intact for all other GSA large-scale construction procurements.

[4] The solicitation is available at https://sam.gov/opp/ef39cadb4e8a45dcb9cbfabee208035f/view. "The Court of Federal Claims may take judicial notice consistent with the provisions of Federal Rule of Evidence (FRE) 201." *Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698, 711 (2017), *aff'd,* 745 F. Appx. 166 (Fed. Cir. 2018); *see Price v. United States*, No. 19-1408, 2025 WL 452657, at *15 n.3 (Fed. Cl. Feb. 10, 2025) (noting that "the Court derives its findings of fact from the parties' Joint Stipulation, the trial transcript, the exhibits admitted into evidence during trial, and matters of which the Court is permitted to take judicial notice pursuant to FRE 201. *See* FED. R. EVID. 201 (detailing when the Court may take judicial notice of adjudicative facts).").

– *Waiver of Project Labor Agreement Requirements* (Feb. 13, 2025), https://www.va.gov/oal/docs/business/pps/deviation-far-20251302.pdf. Interestingly, the Memo references this Court's Holding and notes that "[n]o injunction relief was included in the order." *Id.* The Government demonstrably lacks a clear understanding of the Court's Holding, which the Court can clarify by issuing a permanent injunction removing the unlawful PLA Requirements.

GSA and the VA are not alone in their confusion. As another example, on October 8, 2024, the Federal Bureau of Investigation (FBI) published a "sources sought" under notice no. 15F06725S12000000001 (https://sam.gov/opp/29f39fe6a9a8460c97cf57beb85dc82b/view), seeking to ascertain whether the PLA Requirements will be required for that solicitation: "In addition, this project is anticipated to exceed the threshold specified in EO 14063, which will require the awarded firm to enter a Project Labor Agreement to the satisfaction of the requirements described in the Executive Order and FAR 22.504." This solicitation is currently pending. Without the permanent injunction, there is a reasonable expectation that the FBI will require a PLA for this pending large-scale construction solicitation. Undersigned counsel for Plaintiffs has been in contact with an administrative official with personal knowledge of this FBI procurement who is not authorized to comment publicly, and, upon information and belief, supervising Government officials continue to believe that the FBI must follow the PLA Requirements to incorporate the PLA Requirements into this large-scale construction procurement in contravention of the Court's Holding.

Absent clear direction, it is also possible that the Government could likewise rescind the Department of Defense's (DoD) class FAR deviation which states that "[t]his class deviation remains in effect until rescinded," with the stroke of a pen, just as the VA has done according to the Solicitation No. 36C10F24R0075 amendment. *See* D.E. 112-1 at MTD App'x 1. Therefore, because there is a likely expectation that the CICA violations will recur, this Case is not moot. It is ripe for a decree enjoining the Government's continued violations of the most fundamental precept of CICA—full and open competition.

III. This Court Has Jurisdiction to Afford Plaintiffs Their Requested Relief Under the Tucker Act.

It is within this Court's exclusive jurisdiction to render judgment on Plaintiffs' bid protest claims alleging violations of CICA in connection with federal procurements. The plain text of the Tucker Act authorizes this Court to do so, and this Court is in fact the only forum capable of granting such relief. Therefore, Plaintiffs respectfully request the Court to exercise its authority and issue a permanent injunction ordering the Government to rescind the PLA Requirements.

A. Congress Expressly Authorized this Court to Provide Plaintiffs their Requested Relief.

There is only one court with jurisdiction to hear cases brought by bid protesters seeking equitable relief in federal court: the Court of Federal Claims. *See IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 67 (2022) (discussing divesture of *Scanwell* jurisdiction in United States district courts); 28 U.S.C. § 1491(b)(1)–(2) (the "Tucker Act"); D.E. 111 at 2–3. The Tucker Act provides this Court with jurisdiction to afford "***any relief*** that the court considers proper" when

reviewing, in relevant part, "***any alleged violation of statute or regulation in connection with a procurement***." 28 U.S.C. 1491(b)(1)–(2) (emphasis added). Congress has squarely addressed the situation in which this Court may hear a protest premised on the validity of a regulation, and Congress has expressly authorized the Court to afford "any relief" it deems proper, which necessarily includes the relief which Plaintiffs seek in the instant case.

Federal courts must comply with clear statements from Congress concerning their jurisdictional bounds, and there can be no clearer jurisdictional framework established by Congress to achieve its goal of requiring all federal bid protest disputes through this Court to ensure uniformity of decisions and to prevent forum shopping. *See Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001); *Wilkins v. United States*, 598 U.S. 152, 158–59 (2023) (emphasizing the importance of jurisdictional "clear statements" in the context of determining whether a rule is procedural or jurisdictional). It is axiomatic that Congress knows how to exempt government actions from judicial review. *See Raytheon Co. v. United States et al.*, No. 24-1824-C at 11 (Fed. Cl. Feb. 24, 2025). The Government can point to no Congressional statement restricting this Court's ability to review the validity of the PLA Requirements. *See id.* ("Nothing in the statutory scheme or legislative history behind the grant of OT authority suggests that Congress intended to exempt awards under these contracting vehicles from judicial scrutiny. The government does not contend otherwise."). Therefore, the Court has the authority to grant Plaintiffs' requested relief.

B. The *Boeing* Decision Confirms Jurisdiction Exists in the COFC to Review the Validity of Regulations at the Heart of Bid Protest Disputes.

The Federal Circuit's recent ruling in *Boeing Co. v. United States*, confirms this Court's jurisdiction over procurement disputes involving regulations. 119 F.4th 17 (Fed. Cir. 2024). In *Boeing*, the Federal Circuit stated that the Court of Federal Claims has jurisdiction under the CDA to resolve contract disputes ***and*** to determine the validity of regulations that are the ***basis*** of such disputes. *Id.* at 24. This was because the contract dispute at issue in *Boeing* was "inextricably intertwined with the validity of the [challenged] regulation." *Id.*

This Court correctly recognized that *Boeing* is relevant to Plaintiffs' consolidated protests, and stated in its January 19 Holding:

> "[T]he Federal Circuit has yet to weigh in on the applicability of *Boeing* to bid protests challenging the validity of federal procurement regulations—like the seven consolidated protests here—plaintiffs read *Boeing* as recognizing the Court's exclusive jurisdiction to review the agencies' inclusion of the PLA requirements in each solicitation … The Court notes that the Federal Circuit's *Boeing* instruction may be read as ***acknowledging the Court of Federal Claims' exclusive jurisdiction to review agency regulations impacting federal contract cases just as the Federal Circuit has permitted within the tax context***."

D.E. 97 at 26 n. 2 (citations omitted, emphasis added).

To the extent *Boeing* is inconsistent with prior decisions of court concerning its jurisdiction to review the validity of regulations in the bid protest context, the Court must adopt the Federal Circuit's reasoning to align itself with more recent, on point, binding precedent. *See id.*; *compare Dynamic Ed. Sys., Inc. v. United States*, 109 Fed.

Cl. 306, 322 (2013) ("The court's bid protest jurisdiction does not extend to striking down regulations.") *with Boeing*, 119 F.4th at 23–25 (permitting review of the validity of underlying regulations that were inextricably intertwined with a contract dispute); *e.g. Raytheon Co.*, No. 24-1824-C at 14–15 (proffering a definition of OTs and OTAs to resolve jurisdictional ambiguity in the Tucker Act). The Federal Circuit's manner of interpreting statutes and regulations is binding on this Court. *Garner v. United States*, 85 Fed. Cl. 756, 759 (2009). Under *Boeing*, this Court has jurisdiction to hear bid protests ***and*** to determine the validity of regulations at the heart of those protests, such as the PLA Requirements. As a result, since this Court has already determined that the PLA Requirements are ***invalid***, this Court has jurisdiction to fashion ***any injunctive relief*** it believes is appropriate and warranted. *See* D.E. 97 at 37.

i. <u>*Boeing* Provides No Basis for a Distinction Between CDA Claims Compared to Bid Protest Claims in This Context.</u>

The Government argues for the Court to adopt a distinction between CDA cases and bid protest cases because *Boeing* was decided on appeal from a CDA claim. D.E. 112 at 17–18. There is no reasonable basis for this distinction. If the Government is correct, then a contractor believing a federal regulation incorporated into a solicitation is unlawful would be required to: (1) file a pre-award bid protest in this Court seeking a determination that the challenged regulation, as applied to a specific procurement, is unlawful, and concurrently (2) file an action in a United States District Court challenging the validity of the underlying regulation itself. Such a result would unnecessarily propagate litigation and directly undermine

Congress' clear efforts to concentrate procurement cases in one judicial forum to avoid forum shopping, and most importantly here, uniformity of results. *See Emery Worldwide Airlines, Inc.*, 264 F.3d at 1079; *see e.g., Raytheon Co.*, No. 24-1824-C at 2–11[5]

Any such inconsistencies are avoided by adopting *Boeing's* rationale: this Court has jurisdiction to hear bid protests ***and*** has jurisdiction to determine the validity of regulations that are "inextricably intertwined" with the underlying protest itself. *Boeing*, 119 F.4th at 24. This achieves the purpose of "centralizing the resolution of government contract disputes in [this Court], rather than in district court," thereby ensuring national uniformity in government contract law. *Id.* at 24–25 (citations and quotations omitted). As discussed above, Congress has already determined that all bid protest jurisdiction is exclusive to this Court in order to have a consistent determination of federal bid protest law. *Emery Worldwide Airlines, Inc.*, 264 F.3d at 1079. This is not a case where there is doubt about Congressional intent.

The Federal Circuit provided no limitation on this Court's ability to review the validity of regulations in the bid protest context in *Boeing*. The reason *Boeing* did not directly discuss bid protest jurisdiction was because the case on appeal from the lower

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[5] The Court's recent decision in *Raytheon* is instructive here. In *Raytheon*, the Court was asked to determine its jurisdictional authority over bid protests involving "other transaction" awarded by DoD. The Court endeavored to "streamline the litigation of [other transaction] jurisdictional issues in future cases, until such time as Congress or the United States Court of Appeals for the Federal Circuit is presented with the appropriate opportunity to resolve the issue or provide critical guidance in navigating this space." *Raytheon Co.*, No. 24-1824-C at 2. As in *Raytheon*, the Court should endeavor to streamline litigation in this Court. Here, that requires allowing bid protesters to obtain full and adequate relief for protests premised on the validity of federal regulations without needing to file a concurrent action in district court.

court was a CDA case and not a bid protest case. *See generally Boeing*, 119 F.4th 17 (Fed. Cir. 2024). However, both CDA and bid protest jurisdiction are derived from the same law—the Tucker Act. 28 U.S.C. § 1491(a)–(b). Further, the Federal Circuit recognized that the term "contract case" is not limited to CDA claims. *Boeing*, 119 F.4th 17 at 24–25 ("… when the action is a contract case—***and more importantly, a contract case that is subject to the CDA***—the Court of Federal Claims has exclusive jurisdiction to review the validity of the challenged regulation.") (emphasis added).

ii. Statutory Text Confirms Plaintiffs' Reading of *Boeing*.

There is an additional reason for the Court to refuse a jurisdictional distinction between review of regulations under CDA claims compared to bid protest claims: Congress provided no such distinction in its jurisdictional grants of authority at either 28 U.S.C. § 1491(a) (CDA claims) or (b) (bid protests). Congress has not limited this Court's authority to review the validity of regulations in connection with bid protests. *See* 28 U.S.C. § 1491(b). To the contrary, and as explained above, Congress specified that in hearing bid protests, this Court may afford "any relief that the court considers proper" when reviewing, in relevant part, "any alleged violation of statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(1)–(2).

Boeing cites to *Land Shark Shredding* and *Southfork Sys.*, two decisions from the Federal Circuit on appeal from this Court's review of bid protest actions, for the proposition that "for actions that ***do not involve contract-related claims***," this

Court may not review "pure challenges to the validity of a regulation."[6] *Boeing*, 119 F.4th at 24 (emphasis added). First, it is unclear how a bid protest is not a "contract-related claim." Second, Plaintiffs do not bring a "pure challenge to the validity of a regulation," but rather bring a bid protest (on which they have already succeeded) claiming that the Government is committing "violation[s] of statute or regulation in connection with a procurement," *i.e.*, CICA, for which Plaintiffs request the Court to provide "injunctive relief" and "any [other] relief that the Court considers proper." 28 U.S.C. § 1491(b)(1)–(2); *cf. Southfork Sys.*, 141 F.3d at 1135 ("Southfork's real complaint was that the [DOE] and DOD had acted arbitrarily in promulgating the regulations that the [government] followed in conducting [the procurement at issue]."). Plaintiffs are deprived of an adequate remedy if they cannot seek injunctive relief in this Court, and indeed, the plaintiff's claims in *Land Shark* were dismissed for lack of jurisdiction (and for failure to raise its claims while the procurement at issue was pending, which is not applicable to Plaintiffs' claims here). *Land Shark Shredding, LLC v. United States*, 842 Fed. Appx. 589 at 593 (Fed. Cir. 2021); *see Raytheon Co.*, No. 24-1824-C at 11–12 (refusing to adopt a jurisdictional interpretation that would present the "binary choice" for other transaction awardees to seek injunctive relief in a district court under the APA or file a breach of contract action in this Court under the CDA).

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[6] *Southfork* was decided before district courts were divested of bid protest jurisdiction, and so this jurisdictional question did not then exist. *See* Pub. L. No. 104-320, § 12(d) (Oct. 19, 1996) (divesting district courts of bid protest jurisdiction on January 1, 2001); *Southfork Sys., Inc. v. United States*, 141 F.3d 1124 (Fed. Cir. 1998).

IV. Plaintiffs Are Entitled to Injunctive Relief.

To determine entitlement to injunctive relief, this Court considers (1) whether a plaintiff has succeeded on the merits of its case; (2) whether a plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) 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).

First, Plaintiffs have already succeeded on the merits, as the Court has ruled that the PLA Requirements violate CICA's requirement for the Government to obtain full and open competition. D.E. 97 at 37. As discussed in Section I, *supra*, the Government misreads the Court's Holding. The Court left to Congress—not the agencies, and not the President—the authority to "issue expansive construction labor policies" such as the PLA Requirements. D.E. 97 at 24–25. FPASA does not support the existence of the PLA Requirements.

Second, Plaintiffs remain subject to the irreparable harm of the Government continuing to employ unlawful procedures to evaluate exceptions under the PLA Requirements in contravention of the Court's Holding. The Government continues to try to apply the unlawful PLA Requirements for purposes of evaluating whether current and future solicitations should include mandatory PLAs or whether an exception should apply. *See* D.E. 110 at 2; D.E. 112 at 20 ("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.")

(citation omitted). Under this Court's Ruling that FPASA does not support the PLA Requirements, that is the wrong standard.

The Government must utilize the "specifically outlined" circumstances where Congress permits an agency to avoid CICA's requirement for full and open competition. *Nat'l Gov. Servs., Inv. v. United States*, 923 F.3d 977, 986 (Fed. Cir. 2019); 41 U.S.C. § 3301(a). "The government conceded at oral argument if the Court were to find the PLA requirements violate CICA," (which it has done, *see* D.E. 97 at 37), "the government has not invoked Section 3301 or any other statutory exceptions." D.E. 97 at 37. And the Government apparently concedes in its opposition to Plaintiffs' request for injunctive relief that it continues to fail to invoke the procedures set forth in CICA to restrict competition but rather continues to apply procedures set forth in the PLA Requirements themselves. *See* D.E. 112 at 20; *see also* D.E. 110 at 2.

Third, the balance of hardships to the respective parties favors granting injunctive relief because such relief will provide the Government with clear directives and will reduce demonstrated confusion. The FAR still contains the PLA Requirements mandating inclusion of PLAs in all large-scale construction procurements, and agencies are confused about how to comply with these regulations that violate CICA's requirement for full and open competition. *See* FAR 52.222-33–34; *see DGR Assocs., Inv. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012). As explained in Section II, *supra*, federal agencies may seek to reinstate the PLA Requirements because "[n]o injunction relief was included in the [Holding]."

Granting injunctive relief will clearly instruct the Government how to comply with CICA's requirement for full and open competition.

Finally, the public interest favors granting injunctive relief. Plaintiffs and their federal contracting peers should not be required to play protest whack-a-mole as the Government continues to: (1) unlawfully restrict competition using the PLA Requirements absent statutory authorization; and/or (2) invoke the unlawful exception procedures set forth in the PLA Requirements instead of the Congressionally sanctioned CICA process for exceptions to full and open competition. *See* 41 U.S.C. § 3301 *et seq*. Finally, the public benefits when the Government complies with procurement laws because doing so leads to better services, more competition, and less corruption.

In conclusion, Plaintiffs seek an injunction rescinding the PLA Requirements and any other relief the Court deems appropriate pursuant to its jurisdictional authority to issue "any relief that the court considers proper, including declaratory and injunctive relief" in connection with Plaintiffs' challenge to the Government's "violation of statute or regulation in connection with a procurement." *See* 28 U.S.C. § 1491(b)(1)–(2).

Respectfully submitted on March 3, 2025.

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