IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

CONTINENTAL SERVICE GROUP, INC., Plaintiff, and PIONEER CREDIT RECOVERY, INC., Plaintiff, v. THE UNITED STATES, Defendant, and CBE GROUP, INC., FINANCIAL MANANGEMENT SYSTEMS, INC., GC SERVICES LIMITED PARTNERSHIP PREMIERE CREDIT OF NORTH AMERICA, LLC, VALUE RECOVERY HOLDINGS, LLC, WINDHAM PROFESSIONALS, INC., Intervenors.	No. 17-449C No. 17-499C (Consolidated) Chief Judge Susan G. Braden

DEFENDANT'S MOTION TO VACATE THE PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

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DEFENDANT'S MOTION TO VACATE THE PRELIMINARY INJUNCTION

Pursuant to Rule 7 of the Rules of the Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court lift the preliminary injunction enjoining the assignment of defaulted student loan accounts to uncontested, preexisting contracts. In addition

to our standing objections to the Court's injunctions, the Court's injunction is contrary to law because on May 2, 2017, the Court dismissed the claim underlying this injunction for lack of jurisdiction. The injunction is also contrary to the Competition in Contracting Act, 31 U.S.C. § 3553, which addresses a stay of performance of only an awardee's contract pending the protest of a procurement.

I. Background

On March 28, 2017, Continental Service Group, Inc. (Continental) filed its complaint in this Court. In its complaint, Continental challenged the Department of Education's (ED) determination that Continental was non-responsible under Solicitation No. ED-FSA-16-R-0009 (solicitation), for the collection of defaulted student loans under ED's Federal Student Aid (FSA) Program, and thus ineligible for award. Specifically, Continental alleged that its small business participation plan and subcontracting plans met the requirements of the solicitation. Cont. Compl. ¶¶ 68-106.[1]

Continental's complaint also alleged that it was not receiving as many accounts under its existing 2015 award term extension (ATE) debt collection contract as it had anticipated. Cont. Compl. ¶¶ 107-114. Continental alleged that it was entitled to accounts that were instead assigned to other valid, existing contracts. *Id.* The Court subsequently dismissed this claim for lack of jurisdiction by order dated May 2, 2017.

On March 29, 2017, the Court held an initial status conference in the *Continental* case. During the conference, counsel for Continental requested that the Court impose a stay of performance of the seven contracts awarded under the solicitation at issue in this protest. Continental also requested that the Court impose a stay of ED's assignment of defaulted student

[1] "Cont. Compl." refers to Continental's complaint, filed on March 28, 2017.

loans to any other existing contract, pursuant to Count VII of Continental's complaint. Counsel for the Government explained to the Court that the Court does not possess jurisdiction to entertain Count VII of Continental's complaint, and objected to Continental's request for an injunction on valid, existing contracts.

The Court issued a Temporary Restraining Order (TRO) the evening of March 29, 2017. In its TRO, the Court restrained ED from authorizing the awardees under the solicitation from performing work on their contracts. The TRO also enjoined ED from "transferring work to be performed under the contract at issue in this case to other contracting vehicles to circumvent or moot this bid protest for a period of fourteen days, *i.e.*, until April 12, 2017."

On April 4, 2017, although disagreeing with the TRO in all respects, we filed a motion to amend the TRO, and requested that the Court revise the TRO to rescind the Court's second prohibition, on ED's assignment of defaulted loan accounts to valid, existing contracts that are in place for those services. In our motion, we demonstrated that not only is the Court's prohibition contrary to established precedent involving stays of only protested contracts, but Continental's claim with respect to this issue is an administrative contract claim that should be pursued under the Contract Disputes Act, 41 U.S.C. § 7103 (CDA), and over which this Court does not possess jurisdiction. We explained that Continental's allegations contained in paragraphs 107 through 114 of its complaint, that it did not receive the expected volume of debt collection work under its existing ATE contract, should be submitted as a CDA-certified claim to the contracting officer for that contract. Indeed, this Court's bid protest jurisdiction does not confer jurisdiction over Continental's administrative contract claim. Furthermore, we contended that a stay of work under a contested contract should not preclude the Government from obtaining necessary services under other lawful, existing contracts.

The Court declined to revise the TRO, and instead extended the TRO in its entirely by orders dated April 10, 2017 and April 19, 2017. On May 2, 2017, the Court issued a preliminary injunction with the same requirements.

II. The Court Should Vacate The Preliminary Injunction Because The Court Has Dismissed The Underlying Claim

The Court's May 2, 2017 preliminary injunction enjoining the assignment of defaulted loan accounts to valid, existing contracts is contrary to law and should be rescinded because the Court has dismissed the claim underlying this injunction. On May 2, 2017, the Court granted defendant's motion to dismiss Count VII of Continental's complaint for lack of subject-matter jurisdiction. As we explained above, Count VII of Continental's complaint alleged that Continental was not receiving the anticipated volume of work on its 2015 contract because ED had assigned accounts to other valid contracts.

Because the Court has dismissed Continental's CDA claim, that other contracts should not be assigned defaulted loan accounts, the Court should not enjoin ED from assigning accounts to those contracts. The United States Supreme Court, in *Munaf v. Geren*, 553 U.S. 674 (2008), held that a district court improperly issued an injunction when, in that case, petitioners' request for habeas relief should have been promptly dismissed. *Id.* at 691. Similarly, the Court of Appeals for the Federal Circuit held in *U.S. Association of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005), that "[t]he question of jurisdiction closely affects the [plaintiff's] likelihood of success on its motion for a preliminary injunction." *Id.* at 1348. The Federal Circuit held in *U.S. Association* that the trial court's failure to consider the Government's jurisdictional challenge in granting the plaintiff's motion for a preliminary injunction was legal error. *Id.*

Here, the Court has already determined that it does not possess jurisdiction to entertain Continentals' challenge to ED's assignment of defaulted accounts to other existing contracts. Because the Court lacks jurisdiction over this claim, according to the Supreme Court in *Munaf*, the Court's injunction is improper. Therefore, the Court should lift the injunction, and allow ED to assign defaulted student loan accounts to valid, existing contracts.

III. In Addition To A Dismissal Of Its Underlying Claim, Continental Cannot Demonstrate That It Satisfies Any Of The Factors For A Preliminary Injunction

A. Standard Of Review

"A preliminary injunction is a 'drastic and extraordinary remedy that is not to be routinely granted.'" *National Steel Car., Ltd. v. Canadian Pac. Ry., Ltd.*, 357 F.3d 1319, 1324 (Fed. Cir. 2004) (quoting *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993)). Because the grant of an injunction is "extraordinary relief," the Court applies "exacting standards." *Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997).

To obtain preliminary injunctive relief, the moving party must demonstrate:

(1) A reasonable likelihood of success on the merits;

(2) an irreparable harm suffered by the movant;

(3) that the harm suffered by the movant if the temporary injunctive relief is not granted will outweigh the harm to the Government and third parties if the temporary relief is granted; and

(4) that granting the injunction serves the public interest.

Sofamor Danek Group, Inc. v. DePuy-Motech, Inc., 74 F.3d 1216, 1219 (Fed. Cir. 1996); *Kola Nut Travel, Inc. v. United States*, 68 Fed. Cl. 195, 197 (2005); *see also New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992); *T.J. Smith and Nephew Ltd.*

v. Consolidated Medical Equipment, Inc., 821 F.2d 646, 647 (Fed. Cir. 1987). Although no one factor is independently dispositive, the movant must point to clear and convincing evidence that each factor has been satisfied. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *Bean Dredging Corp. v. United States*, 22 Cl. Ct. 519, 522 (1991); *Kola Nut*, 68 Fed. Cl. at 197 (citing *Baird Corp. v. United States*, Cl. Ct. 662, 664 (1983)). Thus, Continental bears the heavy burden of proving entitlement to injunctive relief. *Id.* In contrast, the Government, as the non-movant, need only establish the absence of an adequate showing as to either likelihood of success or irreparable harm to defeat the motion for preliminary injunction. *See Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994).

B. Continental, Nor Any Party, Will Suffer Irreparable Harm Should The Court Vacate The Preliminary Injunction

Neither Continental, nor any other party to this litigation, will suffer irreparable injury should the Court lift the preliminary injunction on valid, existing contracts, because the Court cannot provide Continental the relief that it seeks. To constitute irreparable harm, the alleged injury must be "certain and great," not theoretical. *Tenacre Found. V. INS*, 78 F.3d 693, 695 (D.C. Cir. 1996); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

As we explained above, the Court has dismissed the underlying claim upon which the preliminary injunction on existing contracts was based, namely, Count VII of Continental's complaint. It follows that the Court cannot address the merits of Continental's claim. Thus, neither Continental nor any other plaintiff will suffer irreparable injury because the Court cannot provide the relief that Continental seeks.

C. Continental Cannot Succeed On The Merits Of Its Dismissed Claim

Continental cannot succeed on the merits of the claim on which the preliminary injunction is based because the Court has dismissed the claim. As we explained above, it is contrary to law for a court to enjoin an action when the underlying claim has been dismissed. Indeed, the Supreme Court held in *Munaf* that it is improper for a Court to issue an injunction when the underlying claim has been, or should have been, dismissed. Here, the underlying claim *has already* been dismissed. Because this Court has ruled that it does not possess jurisdiction to entertain Count VII of Continental's complaint, Continental cannot succeed on the merits of its claim, and the Court should lift the preliminary injunction on the existing contracts.

Moreover, continuing the injunction on assigning defaulted accounts to existing contracts is contrary to the Competition in Contracting Act, 31 U.S.C. § 3553 (CICA). A stay under the CICA prohibits the protested awardee from receiving work under the protested contract, but it does *not* preclude the Government from assigning the same or similar work to other, lawful contracts. *See* 31 U.S.C. § 3553(d)(3)(A) (the contracting officer may not authorize performance of the challenged contract to begin while a protest is pending). Here, no party contests the validity of the small business contracts awarded in 2014 to perform debt collection work.

This Court has consistently held that the purpose of CICA's automatic stay provision is to preserve the *status quo* during the pendency of the protest. In this regard, this Court has encouraged and approved bridge contracts where the bridge contractor is assigned the work under the protested contract, and thus the agency is able to maintain the *status quo* during the protest. Maintaining the *status quo* allows the Government to continue to procure necessary goods and services utilizing a valid contract during a protest. *Carahsofitechnology Corp.*

v. United States, 86 Fed. Cl. 325, 347 (2009). *See also Keeton Corrections, Inc. v. United States*, 59 Fed. Cl. 753, 757-59 (2004) (agency could have continued awarding short-term, sole-source contracts to incumbent contractor during pendency of stay of protested contract, negating the need for an override); *Nortel Gov't Solutions, Inc. v. United States*, 84 Fed. Cl. 342, (2008) (because bridge contracts are a reasonable alternative, agency override decision was arbitrary and capricious); *Access Sys. Inc. v. United States*, 84 Fed. Cl. 241, 243 (2008) (award of bridge contract was not a *de facto* override because it did not disturb the *status quo*).

Here, the *status quo* is that, since April 2015, well before the solicitation under protest was issued, ED has assigned defaulted student loan accounts to the 11 small business contracts identified in Exhibit A. Decl. Wong,[2] ¶¶ 4, 5; Ex. A at 5 (identifying 11 small business contracts). These contracts were awarded under a small business set aside solicitation in 2014. Decl. Wong, ¶ 4. As Associate Administrator Wong explained, the Court's injunction has prevented ED from assigning new accounts to the small business contracts. Decl. Wong ¶ 9.

Lifting the preliminary injunction on valid existing contracts is in accordance with the CICA as well as case law. *See* 31 U.S.C. § 3553(d)(3)(A) (CICA stay requires only that work cannot be performed on the protested contract); *Keeton*, 59 Fed. Cl. at 757-59. Moreover, lifting the preliminary injunction to allow ED to assign defaulted accounts to current, valid contracts would appropriately maintain the *status quo*.

D. The Harm To The Government From A Continued Injunction Outweighs Any Harm To Plaintiffs

The harm to ED from a continued injunction on the assignment of defaulted student loans outweighs any harm to Continental. As we explained above, Continental will not suffer any

[2] Robb Wong is the Associate Administrator of the Office of Government Contracting and Business Development at the U.S. Small Business Administration.

harm should the Court lift the preliminary injunction, because the underlying claim has been dismissed.

The harm to the Government of a continued injunction, however, is severe. The Court's preliminary injunction has resulted in and will continue to cause immediate, extensive, and severe harm both to the Government as well as to ten of thousands of Federal student loan borrowers. Decl. Runcie[3] ¶ 7. The Court's injunction has, and will continue to deprive the Government of significant revenue. Because of the Court's order, ED did not assign accounts to the small businesses in April 2017. Decl. Runcie ¶ 8. ED estimates that approximately 91,000 borrower accounts, most of them newly-defaulted, would have been assigned to the small businesses at that time. The total dollar value of those accounts is approximately $2.1 billion. *Id.* For the month of May, 2017, ED would normally assign a new group of accounts on or about May 27, 2017. Decl. Runcie ¶ 9. ED estimates that approximately 143,000 additional accounts, most of them newly defaulted, will be available for assignment at that time. *Id.* The total dollar value of those accounts is approximately $2.5 billion. *Id.* Therefore, by the end of May, 2017, a total of 234,000 borrowers, holding accounts valued at approximately $4.6 billion, will have been denied loan account services if the Court's injunction is not lifted. Decl. Runcie ¶ 10.

ED estimates that, if the preliminary injunction is not lifted, the Government will have failed to collect approximately $2.4 million by the end of June 2017. Decl. Runcie ¶ 13. There are additional significant costs to ED arising from the disruption of services due to the Court's order, but they are more difficult to ascertain at this time. Decl. Runcie ¶ 14.

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[3] James Runcie is the Chief Operating Officer of Federal Student Aid at the Department of Education.

Another way in which the Court's injunction is harming the Government, as well as borrowers, is by preventing ED from recalling accounts held by six contractors whose contracts expired on April 21, 2017.[4] Decl. Runcie ¶ 16. ED cannot recall the accounts nor transfer them to the small business contractors. Decl. Runcie ¶ 17. Accordingly, those borrowers are unable to obtain certain critical services, such as establishing a new repayment agreement. Because many of the borrowers whose accounts have not been recalled are enrolled in rehabilitation programs, they may be particularly impacted by any disruption in service and may be at risk of falling out of rehabilitation. Decl. Runcie ¶ 18. ED's Default Resolution Group can provide only limited services as the accounts are still assigned to the contractor even though the contract has expired. *Id.*

When contractors are able to service defaulted accounts, the collection on those accounts increases significantly. Decl. Runcie ¶ 12. Many borrowers enroll in loan rehabilitation programs, in which they gain access to income-based repayment options and other significant benefits. If rehabilitation is successful, the borrower is no longer in default and ED removes the record of default from the borrower's credit reports. The loan returns to regular (non-default) servicing, at which time the borrower is eligible for all benefits associated with the loan prior to default, including deferments, and is no longer subject to additional collection costs. *Id.*

By prohibiting the assignment of any defaulted student loan accounts to any valid, existing contract, such as the 11 small business contracts, the Court has seriously disrupted the Government's defaulted student loan collection program. Decl. Runcie ¶ 15.

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[4] Plaintiffs Progressive Financial Services and Van Ru claim that the accounts on their expired contracts should not be recalled. Plaintiff Collection Technology, Inc. claims that no accounts should be assigned to the small business contracts. Because these are CDA claims, or claims that have no connection to the procurement at issue in this case, they should be dismissed. We intend to file motions to dismiss these complaints.

Because Continental cannot demonstrate harm, and because the harm to the Government, as well as student loan borrowers, has been and will continue to be severe and substantial, the harm to the Government of continuing the stay far exceeds any harm to Continental or other plaintiffs.

E. Vacating The Preliminary Injunction Would Serve The Public Interest

Defendant submits that lifting the preliminary injunction on existing contracts would serve the public interest. As we explained above, the harm to the Government, or the public, in suspending all new student loan account work far outweigh any harm to Continental or any other plaintiff.

In addition to the reasons described above to vacate the injunction, the current small business contractors would be allowed to continue receiving assignments of new accounts. Should the Court continue the injunction for more than two months, past the end of May 2017, the small businesses will be forced to place loyal, skilled personnel on unpaid leave, or worse, terminate them. As one small business declarant stated, "[e]ither scenario will result in the permanent loss of our highly skilled workforce as they look for other job opportunities elsewhere given the uncertainty of the [c]ontract. Such a loss is not easily replaceable for a small business such as ourselves." Decl. Traficante-Cann ¶ 15; *see also* Decl. Yanes ¶¶ 7, 8; Decl. Smith ¶¶ 7, 8. As Associate Administrator Wong stated, "[t]he [s]mall [b]usiness [c]ontractors likely will suffer disproportionate harm from the continuation of the prohibition on assigning new accounts. In general, small business contractors lack full access to credit and capital and, as such, are less able than larger businesses to withstand shocks to cash flow and performance schedules." Decl. Wong ¶ 11. Associate Administrator Wong also explained that allowing the small business

contractors to resume their work advances the public interest by ensuring that [ED] utilizes the maximum possible capacity of its small business contractors. Decl. Wong ¶ 12.

The Court should lift the injunction because enjoining ED from placing student loan accounts with the 2014 small business contractors or any other existing contracts will result in ED having no active contracts with which to place new accounts. ED will be deprived from placing newly defaulted student loan accounts with longstanding contractors that perform this work, and the collection on those accounts will be stopped. Moreover, student borrowers will be deprived on critical information and services, including various programs that assist them in getting out of debt. These assistance programs are part of the collection services provided to ED under this work.

For these reasons, lifting the preliminary injunction would serve the public interest.

Finally, today the Court issued an order indicating that the Court "has no interest in continuing the injunction, but the Government must provide assurances that the ED will not award any of the work, subject to the proposed corrective action, to other contracting vehicles and dilute the amount of work available for potential awardees under Solicitation No. ED-FSA-16-R-0009." Order at 2. To be clear, the Government is **not** providing any such assurances. As established above, such a request for assurances is beyond the Court's authority to request because the claims not previously outside the Court's subject-matter jurisdiction are now moot, and the Court therefore lacks jurisdiction to afford any relief whatsoever.

CONCLUSION

For these reasons, we respectfully request that the Court lift the preliminary injunction and allow defaulted loan accounts to be assigned to existing contracts.

Respectfully submitted,

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