IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIGG BRIDGE ENGINEERS, INC. & WILLIAM DENNEY PATE, Plaintiffs, v. FEDERAL HIGHWAY ADMINISTRATION and HARI KALLA, in his official capacity as the Suspension and Debarment Official, Associate Administrator for Infrastructure of the Federal Highway Administration, Defendants.	Civil Action No. 20-cv-2188

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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In further support of their Application for a Temporary Restraining Order and Preliminary Injunction, Plaintiffs Figg Bridge Engineers, Inc. ("Figg" or "the Company") and William Denney Pate ("Pate") (collectively "Plaintiffs"), state as follows:

INTRODUCTION

Plaintiffs seek a temporary restraining order and preliminary injunction lifting Defendants' decision to suspend Plaintiffs from participating in any federally-funded government program and/or contract. As set forth below, the suspensions pose a threat of catastrophic and imminent harm to Plaintiffs that cannot be reversed if the suspensions are allowed to continue during the pendency of the proposed underlying debarment process.[1] *Indeed, the harm to Plaintiffs is so imminent and great that, on Tuesday, August 11, 2020, Plaintiffs stand to lose an existing contract which provides almost half of Figg's revenue*. The FHWA suspensions violate the Administrative Procedure Act ("APA") given the Agency's failure to meet the essential element of pointing to *any*, let alone sufficient, evidence of an "immediate need" to suspend Plaintiffs. As such, the suspensions should be lifted pending resolution of this case.

On July 14, 2020, the FHWA issued a notice of suspension and proposal to debar Figg and one of its engineers, William Denney Pate, (the "Suspensions") in connection with the Florida International University pedestrian bridge project ("FIU Bridge"), which collapsed on March 15, 2018 during project construction. Tragically, six people died as a result.

Despite the undisputed facts that there were more than forty different parties involved in the construction, management and inspection of the FIU Bridge project and, as a matter of law,

[1] The debarment process, when done in accordance with federal regulations, provides Plaintiffs an opportunity for a fact-finding hearing before a neutral arbiter and likewise provides the Federal Highway Administration ("FHWA" or "the Agency") with the prescribed approach for assessing the present responsibility of an entity and/or individual.

Plaintiffs were not the party responsible for site safety, construction or inspection, Plaintiffs are the only parties that the FHWA has suspended and proposed to debar as a result of the accident. Moreover, the FHWA's proposed 10-year debarment is a significant departure from the applicable regulatory guidance, specifically, more than three times the generally-imposed debarment term. These facts, in addition to the FHWA's failure to substantiate its findings, conduct any of its own factfinding or consider the responsibility of any other party before imposing such draconian and punitive measures against Plaintiffs, reflect that the Agency is simply looking for someone to blame for the FIU Bridge collapse without fairly reviewing the substantial technical engineering evidence that Plaintiffs have offered to it.

Plaintiffs meet all the elements required for a temporary restraining order and preliminary injunction.

First, Plaintiffs are likely to succeed on the merits of their case that Defendants violated the APA in issuing the Suspensions. Significantly, the FHWA fails to make a *prima facie* case for suspension. It offers only a single conclusory sentence purporting to justify the critical requirement that there be an "immediate need" to suspend Plaintiffs. Underscoring the lack of any exigency, the FHWA did not suspend Plaintiffs until two and a half years after the March 2018 accident and nine months after the last report on which the Agency bases its conclusions. Nor does the Agency point to any specific immediate or upcoming project from which Plaintiffs should be prevented from participating, claiming instead that the immediate suspension is necessary because Plaintiffs "could" work on federally-funded projects at some unspecified point in the future. If the Agency could truly support a suspension based on the public's interest in safety, it clearly could have acted upon information available to it a long time ago.

In addition, the Suspensions are not based on the Agency's independent factfinding and fail to address in any meaningful way the competing evidence available to it on the face of the existing administrative record. Indeed, the record reflects a stubborn obstinance on the part of FHWA to even consider technical information presented by the Plaintiffs' independent expert. Instead, the Agency relies wholly on reports from other agencies released between nine and twelve months ago. The processes that resulted in those reports either excluded or severely limited Figg's participation. Figg has legitimately challenged those reports' central conclusions on the basis of sound engineering principles and has attempted, without success, to engage the FHWA in a meaningful dialogue concerning deficiencies in the reports.

The inexplicable delay in the FHWA's administrative action, the failure of the Agency to base its suspension on any "immediate need" to protect the public interest, the excessive length of the proposed debarment, and the disparate treatment of Plaintiffs from other parties with substantial involvement in the FIU Bridge project reflect that the FHWA is improperly using the suspension and debarment regime to blame this tragic construction accident on Plaintiffs and to punish Plaintiffs without any sufficient reason for doing so. This is the very type of agency action against which the APA is designed to protect.

Second, for a number of reasons, Plaintiffs have established that they will suffer imminent, irreparable harm if the suspensions are not vacated in the interim. As an initial matter, the harm to Plaintiffs is, as a matter of law, irreparable *per se* given that Plaintiffs would not be able to recover any damages against Defendants, the government. This, alone, is sufficient for Plaintiffs to make out a showing of irreparable harm. Even assuming the harm were not irreparable *per se*, the declaration of Linda Figg (CEO of Figg Engineers, Inc.) establishes that Suspensions no doubt pose a real and imminent threat to the very existence of the Company – a female-owned family

business that has been in existence for more than 40 years. Similarly, as set forth in the declaration of William D. Pate, the Suspensions end his 40-year career as an engineer, leaving him without any ability to seek a livelihood in the profession to which he has devoted his entire life. Finally, both Plaintiffs have established the substantial reputational harm that they are currently suffering on account of the improper Suspensions.

Third, the balance of harms tips overwhelmingly in Plaintiff's favor. As set forth above, if they are not vacated pending resolution of this this matter, the Suspensions present a real and imminent threat to the existence of the Company and would effectively end Mr. Pate's 40-year career. In contrast, the harm to Defendants is non-existent. As set forth above, Defendants themselves cannot point to any immediate need to suspend Plaintiffs and, in fact, only state that the Suspensions are necessary because Plaintiffs hypothetically "could" work on a federally-funded project in the future. Moreover, Defendants have a remedy available to them: the underlying proposed debarment process which is currently ongoing. Defendants' non-specific conclusory statement of an "immediate need" simply is not enough to outweigh the crippling harm Plaintiffs are suffering.

Finally, the public interest will be served by the issuance of injunctive relief. It is in the public's interest that the government's suspension and debarment process is administered in a fair manner and that an agency is required to follow the law and its own regulations. Moreover, it is in the public interest to enjoin an agency when it has so far overreached in doling out the type of catastrophic punishment the FHWA has imposed here in contravention of the intent of the government's suspension and debarment rules, based on non-existent evidence demonstrating an immediate need to suspend Plaintiffs.

FACTUAL BACKGROUND

Figg Bridge Engineers, Inc.

Figg has a 42-year history of excellence and specialization in the management of diverse engineering teams for major bridge projects. Compl. ¶ 19; Declaration of Linda Figg (hereinafter "Figg Decl."), attached hereto as **Exhibit A**, at ¶ 9. Figg has designed some of the most iconic bridges in the United States, and it and its related entities have received more than 420 awards, three National Endowment for the Arts Presidential Awards, and many other accolades. Compl. ¶¶ 19, 20; Figg Declaration ¶¶ 9-12. In fact, the FHWA has awarded Figg numerous awards for its design and engineering work and, as of the date of this filing, still touts several Figg-designed bridges on its website. Compl. ¶ 20.

The Florida International University Pedestrian Bridge

The Florida International University ("FIU") Board of Trustees entered into a design-build contract with prime contractor, Munilla Construction Management ("MCM"), to construct a pedestrian bridge that would cross over SW Eighth Street. Compl. ¶ 17. The funding sources for the bridge included federal, state and local agencies, as well as the FIU. Compl. ¶ 25. Among the federal contributors was the U.S. Department of Transportation's Federal Highway Administration ("FHWA"). Compl. ¶ 25.

MCM entered into a subcontract with Figg to provide design and engineering services associated with the bridge. Compl. ¶ 18. Mr. Pate, an employee of Figg, served as the designated Engineer of Record ("EOR"). Compl. ¶ 18. Figg also entered into a sub-subcontract with Louis Berger to conduct the required peer review of the design. Compl. ¶ 22. In total, there were approximately 41 parties involved in the FIU pedestrian bridge project. Compl. ¶ 112.

The FIU bridge was cast adjacent to the permanent bridge location and then moved to its final position. Compl. ¶ 27. The main span was cast above ground level and supported by

temporary falsework. Compl. ¶ 28. Importantly, under FDOT rules, EORs such as Figg are not permitted to serve as the Construction Engineering Inspector during construction of the bridge. This task was contracted to Bolton Perez and Associates, Inc. ("BPA"). Compl. ¶ 34.

The Collapse of the FIU Bridge

From February 6, 2018 to the morning of the collapse, various parties identified cracks at varying locations of the main truss. Compl ¶¶ 28, 30, 37-42. The first known indication of distress to the Member 11/12 region was documented in BPA's February 28, 2018 report. Compl. ¶ 30. While the cracks were often documented, they were not always timely reported to Figg, nor were they provided with any useful commentary, such as the size, length or growth of such cracks. Compl. ¶ 41. In fact, on March 10, 2018, after the main truss was moved into place, MCM, BPA, and Figg employees walked the bridge and did not notice a change from before the move. Compl. ¶ 31. Further, despite the cracking, the team on-site opened the road underneath the bridge to traffic and demobilized the equipment that was used to move the span. Compl. ¶ 37. Figg was not on site on March 10 and did not return to the site until the morning of March 15. Compl. ¶¶ 37, 42. Figg was not responsible for site safety or security and the decisions regarding street closure. Compl. ¶ 36.

On March 15, 2018, at approximately 1:45 PM, the main span collapsed as post-tensioning bars in the northernmost diagonal (Member 11) were being re-stressed. Compl. ¶ 44. The collapse was triggered by failure of the connection between the Members 11 and 12 and the deck. Compl. ¶ 45. As a consequence of the collapse, six people died and ten people were injured. Compl. ¶ 46.

The OSHA Investigation and Report

As a result of the collapse, several federal agencies, including the Occupational Safety and Health Administration ("OSHA") and the National Transportation Safety Board ("NTSB") launched investigations into the cause of the collapse. Compl. ¶ 47. Despite each review taking more than a year, neither agency performed testing on replicas of the key portions of the bridge. Compl. ¶ 48.

In July 2019, OSHA issued a report summarizing its investigation into the cause of the collapse. Compl. ¶ 50. Based on this review, OSHA made eleven findings, including findings that: (i) the bridge had structural design deficiencies; (ii) the cracks forming in the bridge warranted a closure of SW Eighth Street; (iii) Figg, though not onsite, failed to recognize that the bridge was in danger of collapsing; (iv) BPA, which served as the Construction Engineering Inspector and was onsite, failed to classify the cracks as structural in nature with the FDOT; (v) BPA also failed to recognize that the bridge was in danger of collapsing and did not recommend to FIU, MCM or others to close SW Eighth Street and shore the bridge; (vi) MCM was aware that the cracks were getting larger and failed to immediately inform Figg's EOR; and (vii) MCM failed to exercise its own independent judgment in implementing safety measures. Compl. ¶ 52.

The FHWA's Assessment

On October 19, 2018, the FHWA submitted a report to the NTSB. Compl. ¶ 54. In this report, the FHWA examined the cold joint between the deck concrete pour and the truss member pour, and also assessed the roughness of the interface created at the cold joint. Compl. ¶ 54. The FHWA found that the failure interface coincided with the original cold joint and that the cold joint was not intentionally roughened. Compl. ¶ 55. This was in contrast to the FDOT Standard

Specifications for Construction that were applicable to the project which required that the joint be intentionally roughened. Compl. ¶ 55.

On September 12, 2019, the FHWA submitted its assessment to NTSB. Compl. ¶ 56. In this report, among other items, the FHWA claimed that the root cause of the collapse was a deficiency in the bridge's design, including an inability of the structure to resist interface shear demands in the critical nodal region at the north end of the bridge. Compl. ¶ 57. The Agency claimed that, in the days leading up to the accident, the structure behaved in a manner that provided warning of the failure, through the development of significant and visible distress that grew over time. Compl. ¶ 57.

Figg's Independent Investigation into the Cause of the FIU Pedestrian Bridge Collapse

Figg retained Wiss, Janney, Elstner Associates, Inc. ("WJE"), a preeminent forensic structural engineering firm, to conduct an independent, forensic investigation of the accident. Compl. ¶ 61. The scope of WJE's investigation included, among other things, an evaluation of the failure pattern, a structural analysis (including an evaluation of adherence to design code), an examination of the construction of joint conditions, and physical testing of interface shear and the deck connection. Compl. ¶ 62. Among the many forensic tasks WJE performed in undertaking this independent investigation, WJE performed full-sized specimen tests. Compl. ¶ 63. In other words, WJE reconstructed aspects of the bridge, such as the concrete members, in the same manner as called for in the design plans and specifications and tested them against the same stresses. Compl. ¶ 63. Neither FHWA, OSHA nor NTSB investigations included tests or analysis of full-sized specimens. Compl. ¶ 63.

On September 18, 2019, WJE issued its independent report. Compl. ¶ 64. Contrary to the findings in the NTSB report, among WJE's various findings, it determined that: i) considering the

entire construction joint between Member 11/12 and the deck, the design as shown on the released for construction plans and specifications did meet the AASHTO code; and ii) if the construction joint were roughened as required by the project specifications, which Figg reconfirmed by email to MCM, the collapse would not have occurred. Compl. ¶ 64. Further, WJE found several failures in Louis Berger's peer review oversight. Compl. ¶ 65. WJE also found that twisting of the span during the move exceeded the established limits to the structure and caused high stresses in the Member 11 and 12 deck connection area. Compl. ¶ 66. Therefore, this stress may have contributed to damage in the region and ultimately to the collapse. Compl. ¶ 66. Finally, WJE also found that, contrary to Figg's instructions when implementing remedial measures to address the cracks, no party responsible for doing so closely monitored cracks in the north-end during the re-stressing of Member 11. Compl. ¶ 67. WJE's independent investigation concluded that Figg's design was to code, was not flawed, but was improperly executed, and Figg's guidance on the re-stressing of Member 11 was not followed. Compl. ¶ 68. On September 20, 2019, Figg submitted WJE's findings to the NTSB. Compl. ¶ 69.

NTSB's Investigation and Report

On May 23, 2018, the NTSB issued a Preliminary Report that outlined the investigation that it would be performing. Compl. ¶ 70. However, the NTSB did not follow its usual practices and processes for this sort of investigation and report. Compl. ¶ 71. For example, while the NTSB allowed industry to provide comments, it did not allow industry to observe or participate in the questioning of witnesses. Compl. ¶ 71. Rather, from August to November 2018, the NTSB issued a series of preliminary investigative reports providing updates on its investigation and its initial findings and conclusions. Compl. ¶ 72. In one such preliminary report, released November 15, 2018, the NTSB stated that it found design errors in load and resistance calculations pertaining to

the portion of the bridge that ultimately failed – where truss members 11 and 12 connected to the bridge deck. Compl. ¶ 73. This finding from the NTSB's Preliminary Report mirrored what was contained in the final report. Compl. ¶ 73.

Figg presented information to the NTSB and FHWA in a meeting on March 13, 2019 that demonstrated that if the Member 11 and 12 construction joint with the deck had been built in accordance with the FDOT Standard Specifications as required, the collapse would not have occurred. Compl. ¶ 74. The NTSB asked FHWA to review and provide a response to Figg's presentation and information. Compl. ¶ 74. The FHWA admittedly performed a "cursory review" of Figg's submission, but found two alleged deficiencies. Compl. ¶ 75. The FHWA concluded that Figg's presentation only added confusion to FHWA's understanding of the accident. Compl. ¶ 76.

With this information in hand, on October 22, 2019, the NTSB issued its report. Compl. ¶ 77. At the outset it stated that NTSB does not assign fault or blame for an accident or incident. Compl. ¶ 78. The NTSB stated that the probable cause of the collapse was the load and capacity calculation errors made by Figg and contributing to the collapse was the inadequate peer review by Louis Berger. Compl. ¶ 81. The NTSB explained that the severity of the outcome of the collapse was the failure of MCM, Figg, BPA, FIU and FDOT. Compl. ¶ 81. The NTSB made eleven recommendations to the FHWA, FDOT, AASHTO and Figg to implement new safety measures for future bridge projects. Compl. ¶ 81. Only two of the recommendations were for Figg and both have been acted upon. Compl. ¶ 81.

Figg's Efforts to Present the Results of WJE's Independent Investigation

On November 13, 2019, Figg and WJE met with the FHWA for the first time to present Figg's and WJE's findings. Compl. ¶ 82. In this meeting, WJE explained its conclusions that

were contrary to the NTSB report. Compl. ¶ 81. WJE also expressed its disagreement with a FHWA submission that was made to NTSB. Compl. ¶ 81. Regarding the FHWA submission, WJE found an error in FHWA's horizontal shear calculations, and the exclusion of cohesion and reinforcement that contributes to capacity. Compl. ¶ 83. When accounting for these excluded items, WJE found the calculation actually *satisfied* the AASHTO code. Compl. ¶ 84. WJE also found that the FHWA failed to reconcile, or even calculate, load and resistance at the time of collapse. Compl. ¶ 85. Instead, FHWA inappropriately labeled calculations as a root cause without considering design as reflected in the construction plans and specifications. Compl. ¶ 85. Finally, WJE pointed out that the FHWA ignored WJE's full-size specimen tests, which neither OSHA, NTSB nor the FHWA had gone through the effort to perform. Compl. ¶ 86.

In light of the disagreement between FHWA and WJE, Figg requested an opportunity to meet again with FHWA representatives to discuss these technical points of disagreement. Compl. ¶ 87. Over the next several months, despite Figg's numerous attempts, FHWA repeated that there was no data Figg had provided that would alter FHWA's view and refused to meet and deemed the matter "closed." Compl. ¶¶ 87-96. This of course did not stop Mr. Hartmann from publicly blaming Figg, as he did on June 1, 2020 during a webinar presentation at the virtual General Session for the 2020 Annual Meeting of the AASHTO Committee on Bridges and Structures. Compl. ¶ 98. Again, Mr. Hartmann and FHWA refused to provide Figg with a technical meeting to discuss their disagreement.

FHWA's Action to Suspend and Propose to Debar Figg and Mr. Pate

On July 14, 2020, two and a half years after the incident, a year after the issuance of the OSHA report, nearly a year since FHWA provided its submission to NTSB, nearly 9 months after the issuance of the NTSB report, eight months since FHWA declared the investigation of the FIU

bridge collapse "closed" by FHWA, nearly six months after Figg's last letter to FHWA seeking a technical meeting, which was ignored, and nearly two months after the FHWA's Director, Office of Bridges and Structures, publicly stated that the Agency believed Figg was the "probable cause" of the FIU pedestrian bridge collapse, the FHWA took the unprecedented step of suspending and proposing Figg and Mr. Pate for a debarment of ten (10) years. Compl. ¶ 99; *see* Notices of Suspension and Proposal to Debar Figg Bridge Engineers, Inc. and William Pate, attached hereto as **Exhibit B** and **C**, respectively. As outlined in the Memorandum of Suspension and Proposal to Debar, attached hereto as **Exhibit D**, the FHWA set forth two alleged grounds to support the suspension and proposed debarments of Plaintiffs, specifically that adequate evidence showed: (i) a willful failure to perform in accordance with the terms of one or more public agreements or transactions, as well as a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction; and (ii) a cause so serious or compelling a nature that it affects a person's present responsibility. With respect to these grounds, the FHWA relied almost exclusively on the NTSB report. Compl. ¶ 102.

To address the "immediate action" requirement of a suspension, however, FHWA simply provided that "[s]ince Figg and Mr. Pate *could work* on Government projects in the future, I find *immediate action is necessary* to protect the public interest and preserve the integrity of future Government contracts." (emphasis added). Compl. ¶ 105. In support of its bases for proposed debarment and immediate action, in its memorandum, FHWA cited to the NTSB report as supporting a conclusion that Figg acted "willfully" and in "reckless disregard for the safety of the traveling public." Compl. ¶ 106. However, the NTSB never arrived at the conclusion that Figg or Mr. Pate acted willfully or in reckless disregard. Compl. ¶ 107. In fact, the NTSB never uses the words "reckless" or "reckless disregard." Compl. ¶ 107.

The timing of the FHWA suspension notices were curious as well, as they were issued just six days before the United States Department of Transportation's Office of Inspector General issued a letter to Congress acknowledging that, of the 41 firms involved in the FIU pedestrian bridge project, the FHWA suspended and proposed Figg and Mr. Pate for debarment. Compl. ¶ 112. Given the timing, the immediacy of the FHWA's action appeared more closely associated with congressional pressure, rather than the alleged findings of the OSHA and NTSB reports. Compl. ¶ 112. Moreover, the suspension notices were issued well after the FHWA had already awarded a contract to Figg. Compl. ¶ 113. Specifically, FWHA selected Figg for a load rating project of the Natchez Trace Parkway Arches in September of 2018. Compl. ¶ 113. This is hardly the action of an agency concerned that Figg's participation would create an imminent risk to the public interest or public health or safety. Compl. ¶ 113. In 2019, Figg was also retained on a federally-funded project for the Montana Department of Transportation to study a new highway alignment for Bad Rock Canyon. Compl. ¶ 114.

Figg and Mr. Pate's Response to the Notices of Suspension and Proposed Debarment

The undersigned counsel for Plaintiffs contacted the FHWA on July 24, 2020 to notify the agency that it represented Figg and Mr. Pate, to seek a copy of the administrative record, and to request a telephone call for a preliminary discussion regarding the matter. Compl. ¶ 114. During a July 30, 2020 video conference call, counsel for Figg and Mr. Pate, among other topics, explained its concern regarding the legality of the suspension and requested that, at a minimum, a fact-finding inquiry be conducted. Compl. ¶ 118. FHWA requested that any such concerns or requests be placed in writing for the agency's consideration. Compl. ¶ 118. Counsel for Figg explained it was clear that there was a genuine dispute over material facts and a factfinding hearing was a necessity.

Compl. ¶ 118. The FHWA counsel stated that the information was "overwhelming" and that a formal request for such an inquiry would be required. Compl. ¶ 118.

On August 4, 2020, counsel for Figg and Mr. Pate submitted a letter to FHWA, attached hereto as **Exhibit E**, explaining the concerns regarding the legality of the suspension, particularly as it related to the "immediate action" prong necessary to support a suspension. Compl. ¶ 119. The letter requested that, given the suspension's legal deficiencies and considering the harm being imposed upon Figg, the FHWA withdraw the suspension immediately or, at the latest, by Friday, August 7, 2020 close of business. Compl. ¶ 119. On August 7, 2020, Figg offered several options to FHWA to resolve the matter short of litigation, while committing to an expedited debarment process to ensure that FHWA could protect the public interest. Compl. ¶ 121. A copy of Figg's August 7, 2020 e-mail is attached hereto as **Exhibit F**. Despite counsel for Figg and Mr. Pate following up with the FHWA, aside from responding that FHWA received the notification that this filing would be made within 24 hours, no further correspondence has been received from FHWA. Compl. ¶ 122.

Notably, and notwithstanding the fact that OSHA and NTSB found fault with the actions and conduct of other involved parties, such as FDOT, MCM, BPA and Louis Berger, as of the date of this filing, FHWA has taken no suspension or debarment action against these parties. Compl. ¶ 123. In fact, when questioned on this point by counsel for Figg during its July 30, 2020 video conference, counsel for FHWA stated that no action had been taken against any other party and confirmed that the FHWA was placing the entire blame of the construction accident on Figg and Mr. Pate. Compl. ¶ 123.

ARGUMENT

I. Standard of Review

A. Temporary Restraining Order/Preliminary Injunction

In order to obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits of the party's claims, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) a balance of equities in the party's favor; and (4) that preliminary relief is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Doe v. Mattis*, 889 F.3d 745, 751 (D.C. Cir. 2018). The standard is the same for temporary restraining orders as it is for preliminary injunctions.[2] *See Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 74 (D.D.C. 2009) (quoting *Hall v. Johnson*, 599 F. Supp. 2d 1, 3 n. 2 (D.D.C. 2009)).

B. Administrative Procedure Act

The APA provides that when an administrative agency's action is "arbitrary," "capricious," or "otherwise not in accordance with law," the courts "shall" vacate the action. 5 U.S.C. § 706; *see also* 5 U.S.C. §§ 701-05. An agency's action is arbitrary and capricious when, among other things, the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency action must be upheld, if at all, using only the basis articulated by the agency itself and should not rely

[2] The only procedural difference between temporary restraining orders issued pursuant to Fed. R. Civ. P. 65(b)(1) and preliminary injunctions issued pursuant to Fed. R. Civ. P. 65(a)(1), is in the notice requirements to adverse parties. *See Sterling Commercial Credit--Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011).

on an agency's post hoc rationalization for its action. *Id*. at 50. Therefore, a reviewing court's inquiry focuses on whether the "agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*. at 43 (quoting *Burlington Truck Lines, Inc. v, United States*, 371 U.S. 156, 168 (1962)); *see Sloan v. Dep't of Housing and Urban Development*, 231 F.3d 10, 15 (D.C. Cir. 2000). In doing so, "[t]he reviewing court should not attempt itself to make up for [an agency's] deficiencies" and the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Although deference is given to agency decision making, courts are not, however, required "to countenance an agency's failure to consider relevant factors or clear errors of judgment." *Sloan*, 231 F.3d at 15 (internal citation, quotations, and alterations omitted). If an agency fails to "cogently explain why it has exercised its discretion in a given manner[,]" its action will be invalidated. *State Farm*, 463 U.S. at 48.

II. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits

The D.C. Circuit has held that "[t]o justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation . . . " *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir.1953)); *Citizens for Responsibility & Ethics in Washington v. Cheney*, 577 F. Supp. 2d 328, 335 (D.D.C. 2008).

A. Legal Standard

The Federal Highway Administration's suspension and debarment program is governed by the Office of Management and Budget's ("OMB") Guidelines to Agencies on Governmentwide

Debarment and Suspension (Nonprocurement), commonly referred to as the Common Rule, *see* 2 C.F.R. § 180 *et seq.*; 2 C.F.R. 1200.10 (adopting the Common Rule to the FHWA). However, there is a parallel regulatory scheme under the Federal Acquisition Regulation, which governs the acquisition of supplies and services by all federal agencies. 48 C.F.R. Subpart 9.4. These regulatory schemes are largely similar and work in concert with one another as a suspension and/or debarment under one regime has reciprocal effect under the other program. 2 C.F.R. § 180.10(b)(2); *see also* 48 C.F.R. § 9.401.

The Common Rule's and FHWA's suspension and debarment program intends to prevent waste, fraud, and abuse in federal contracting by providing for the exclusion of those contractors whom the government deems not "presently responsible," and therefore not entitled to continue doing business with the government. *See* 2 C.F.R. § 180.125; *see also* DOT Website Suspension and Debarment. The regulations and caselaw interpreting them consistently emphasize that suspensions and debarments are "serious action[s]" that the government may take only in the interest of protecting the government and not for the purposes of punishment. *See* 2 C.F.R. §180.125(c); *see also* 48 C.F.R. § 9.407-1(b); *Sloan v. Dep't of Housing and Urban Development*, 231 F.3d 10, 14-15 (D.C. Cir. 2000); *Inchcape Shipping Servs. Holdings v. United States*, 2014 U.S. Claims LEXIS 1570, *6 (Fed. Cl. 2014) (granting temporary restraining order lifting agency's suspension because suspension was more punitive than protective). As such, suspension and debarment proceedings are forward-looking by nature – designed to ensure that the government conducts business with *presently* responsible contractors, rather than focused on doling out punishment for past transgressions (the purview of criminal law). *See Uzelmeier v. U.S. Dept. of Health and Human Services*, 541 F.Supp.2d 241, 248 (D.D.C. 2008) ("[T]he relevant question is

whether or not one could or should be entrusted with public funds… at the present time or going forward.").

Under the Common Rule, a suspending official may impose a suspension only when that official determines:

- There is:
  - an indictment for an offense listed under § 180.800(a), or,
  - adequate evidence to suspect any other cause for debarment listed under § 180.800(b) through (d); and,
- Immediate action is necessary to protect the public interest.

2 C.F.R. § 180.700; *see also Sloan*, 231 F.3d at 14-15 (D.C. Cir. 2000). In determining whether there is "adequate evidence" to support the "serious action" of suspension, the suspending official must consider "how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result" and must examine all relevant documents. 2 C.F.R. § 180.705(a). With respect to the second prong of the test, commonly referred to as "immediate need," the government must show there is a "real need for immediate action to protect the public interest," or a time-sensitive, "ongoing threat" that necessitates immediate action. *See Sloan*, 231 F.3d at 17; *Inchcape Shipping Servs*, at *6 (finding that the absence of an ongoing threat, as evidenced by significant time gap between suspension and underlying conduct, showed that there was no immediate need justifying the suspension and thus it was improperly punitive, rather than protective). As discussed in further detail below, FHWA has failed to meet the second prong of a *prima facie* case for suspension.[3]

[3] Although Plaintiffs do not believe the FHWA has met the "adequate evidence" prong to support a suspension, for purposes of this Motion, Plaintiffs focus on the more egregious inadequacy: the failure to demonstrate the need for "immediate action."

B. FHWA Fails to Demonstrate the Need for Immediate Action

As a matter of law, FHWA's Notice fails to make a *prima facie* case for suspension because it completely glosses over the "immediate action" prong of the test. While the memorandum in support of the Notice devotes several pages to copying findings from the NTSB Report (and embellishing them as though the intent of Figg was evident and supported by the record information, which it was not), it offers only a single paragraph in support of a need for "immediate action." *See* Memorandum in Support of Suspension and Proposed Debarment ("Memorandum"), at 19. The crux of the Agency's "immediate action" reasoning boils down to a single sentence at the end of the paragraph: "since FIGG and Mr. Pate *could* work on government projects in the future, I find immediate action is necessary to protect the public interest and preserve the integrity of future Government contracts." *Id.* (emphasis added).

The FHWA's overbroad reasoning essentially reads the "immediate action" prong out of the regulations. Indeed, the FHWA's reasoning would equate the second prong of a *prima facie* case for suspension with the most basic threshold jurisdictional question of whether a suspension and/or debarment action should even be considered in the first instance under the Common Rule (2 C.F.R. Part 180).[4] The Rule obviously only applies to recipients or contracting parties who work on federally-funded projects and "could" receive such awards. Thus, by equating the "immediate need" prong to the notion that the party "could" receive a federal award, the Agency is saying that there is a basis to suspend *every* party that meets the first prong (adequate evidence), since all parties considered for a suspension or debarment action, inherently "could" receive a

[4] "[A]n exclusion under this part, a Federal agency may exclude any person who has been, is, or may reasonably be expected to be a participant or principal in a covered transaction." 2 C.F.R. § 180.150; *see also* 48 C.F.R. § 9.403 ("Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract,").

federal award. In essence, FHWA says: "FIGG must be immediately suspended from receiving federally-funded awards because it might receive federally-funded awards." The flimsy justification is a thinly-veiled attempt to do precisely what the Rule aims to prevent – punish an entity for alleged past actions that have no bearing on the need for immediate action. This backward-focused analysis was roundly rejected in *Sloan* as "specious" reasoning that "ignore[d] the requirement that there must be a *real need for immediate action to protect the public interest* in order to justify a suspension." *Sloan*, 231 F.3d at 17 (emphasis added).

Other cases interpreting the "immediate action" prong of the government's case for a suspension have repeatedly held that a time gap between the underlying conduct and the sanction can be strong evidence that there is no "immediate need" and no "immediate action" is necessary to protect the government's interest, and thus the suspension is invalid. This principle comports with both the plain language of the regulations and common sense: if *immediate* action is "necessary" – i.e., is critical – to protect the public interest, then, by its very nature, such "immediate" action should have been taken as quickly as possible – very soon after the agency becomes aware of the underlying conduct. There is ample precedent for overturning suspensions where the agency's actions run counter to this common-sense principle.

For example, in *Lion Raisins*, a contractor challenged a one-year suspension that was imposed because the contractor had allegedly falsified three USDA certificates. *Lion Raisins,* 51 Fed. Cl. at 238. The agency knew of the company's conduct in May of 1999, but did not suspend the contractor until January 2001, and awarded the plaintiff five contracts in the interim. *Id.* at 247-48. The court rejected the agency's argument that this delay was necessary due to the pendency of other government investigations and held that USDA could not reasonably claim that

there was an "immediate need" to suspend the contractor when it waited so long to do so and awarded contracts to it in the interim. *Id.*

More recently, in 2014, the U.S. Court of Federal Claims followed similar reasoning to grant a contractor's temporary restraining order lifting a suspension in the case of *Inchcape Shipping Servs. Holdings v. United States*. In *Inchcape*, a contractor who provided shipping services for the U.S. Navy discovered overpayments from the government after conducting an internal financial audit in March 2008. *Inchcape*, at *2. Despite knowing of the overpayments, Inchcape did not disclose them to the government until it was ordered by the United States District Court for the District of Columbia to provide the audit report to the government in November 2012. *Id.* Approximately one year later, in November 2013, the agency suspended Inchcape. *Id.* On review, the Court held that the time delay between the government's awareness of Inchcape's actions and the suspension "casts serious doubt on the government's claim that immediate action was necessary." *Id.* at *6. After reiterating the suspension\debarment regime's focus on present responsibility and prohibition on punitive actions, the Court found:

> It is not clear that there is any evidence of an ongoing threat against which the Government needed to be protected. There is no explanation in the record as to why this matter became an emergency in November 2013. As such, even though the SDO stated that her findings affected Inchcape's present responsibility, the suspension looks much more like a punishment than a protective measure.

Id. at *6-7. *See also Sloan*, 231 F.3d at 17 (emphasizing that the regulations require a "*real need for immediate action to protect the public interest* in order to justify a suspension" and holding that where plaintiff's improper disposal of debris under a HUD contract had ceased years prior, before the issuance of the suspension, the agency's suspension improperly relied on past actions without any colorable assertion of immediacy) (emphasis in original).

In this case, FHWA's Notice suffers from the same fatal immediacy-related flaws as the suspensions that were overturned in *Inchcape*, *Lion Raisins*, and *Sloan*. Most significantly, the key dates in this matter demonstrate that there is no need for "immediate action" to protect the government interest, notwithstanding FHWA's conclusory assertions to the contrary. These key dates here are as follows:

- March 15, 2018 – The incident underlying this matter – the FIU pedestrian bridge accident – occurs;
- November 15, 2018 – A preliminary investigative update issued by NTSB alleges essentially the same design flaws as were ultimately highlighted by the final report, thus putting FHWA on notice of these alleged issues as early as 22 months ago;[5]
- July 2019 – OSHA issues its report regarding the incident;[6]
- September 12, 2019 – FHWA submits its view to the NTSB on the FIU pedestrian bridge construction accident;[7]
- October 22, 2019 – The NTSB issues its report regarding the incident;[8]
- October 2019 through January 2020 – FIGG repeatedly (to no avail) requests an opportunity to meet with FHWA to discuss its submission to NTSB and alleged findings;
- June 1, 2020 – FHWA presents at the 2020 Annual Meeting of the AASHTO Committee on Bridges and Structures, claiming FIGG was the probable cause of the action; and
- July 14, 2020 – Nearly nine months after the NTSB report and 20 months after the alleged findings were known to FHWA, it issues its Notice to Figg and Mr. Pate.

As this brief timeline shows, a substantial gap exists between FHWA becoming aware of the essential facts and its decision to suspend Figg. The incident giving rise to this matter occurred

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[5] National Transportation Safety Board, Investigation Update – Collapse of Pedestrian Bridge Under Construction Miami, FL (Nov. 15, 2018), available at https://www.ntsb.gov/investigations/AccidentReports/Reports/HWY18MH009-investigative-update2.pdf.

[6] OSHA's report was created without the review and input of the parties involved in the FIU pedestrian bridge project and is disputed by the facts and sound engineering evidence. Additionally, Figg has not agreed to the fines and other parties have also contested OSHA's findings along with Figg.

[7] The FHWA submission to NTSB did not follow the traditional transparency protocol employed by NTSB, was not subject to input from industry, and is also disputed. In fact, after numerous requests, FHWA has continually refused to discuss its submission and alleged findings with FIGG.

[8] The forensic analysis performed by outside engineering firm WJE refutes the NTSB Report's conclusions.

approximately two and a half years ago. If the government truly believed that allowing any of the parties involved with this project to continue working on other federally-funded infrastructure projects posed an imminent threat to the federal interest or public safety, it could have and should have taken action "immediately" after the incident or after the alleged support for the instant suspension came to light. Even if the government was waiting to take action until the OSHA and NTSB investigations were complete, the appropriate time to impose a suspension would have been late summer of 2019 (if relying on the OSHA report), or, at the latest, shortly thereafter when the NTSB report was released (October 2019). The delay is particularly egregious given that publicly-released investigation updates from NTSB indicated initial determinations of negligence and responsibility approximately a year before the report was finalized, and thus 20 months before FHWA issued its Notice. Finally, nearly two months prior to the suspension, FHWA was claiming during presentation that Figg was to blame, yet, still no action taken. As in *Inchcape*, the timing of FHWA's action "casts serious doubt on the government's claim that immediate action was necessary." *See Inchcape*, at *6. As a matter of common sense, it is difficult to credibly claim that one must take "immediate" action when the action was not, in fact, taken immediately.

Moreover, in the intervening years between the incident and the instant letter, FWHA indicated its belief in Figg's present responsibility by selecting its team for a project to perform a load rating of the Natchez Trace Parkway Arches, a signature bridge that Figg designed for FHWA approximately 25 years ago. This contract was awarded in September of 2018 to Figg's team (after the March 15, 2018 incident), which included Short Elliot Hendrickson as the prime consultant and FIGG as the subconsultant to perform a load rating of the bridge.[9] In 2019, Figg was also retained on a federally-funded project for the Montana Department of Transportation to

[9] *See* Natchez Trace Parkway Project, Contract Number DTFH71-15-D-00004.

study a new highway alignment for Bad Rock Canyon. On the Bad Rock Canyon project, Figg's team includes Kadrmas, Lee and Jackson the primary engineer, with Figg providing the conceptual bridge design for the study.[10] These are hardly the actions of an agency concerned that Figg's participation would create an imminent risk to the federal interest or public health or safety. Courts have held that suspensions are arbitrary when projects are awarded to contractors in the intervening time period between the time when the underlying conduct arose and the imposition of the suspension. *See Lion Raisins* 51 Fed. Cl. at 247-49 (holding that the agency acted arbitrarily when it found the contractor both responsible [via the award of new contracts] and not responsible based on the same evidence).

Ultimately, if this matter was the type of public safety emergency that FHWA now conveniently claims, FHWA would have issued the Notice as soon as soon as it knew of the reports' conclusions, which, based on record evidence was many months and even a year or more prior. That FHWA took so long to impose this suspension suggests that this action is less about Figg's present responsibility or "ongoing threats" to the public interest – the appropriate focus of suspensions and debarments, *see Inchcape* – and more about punishing Figg for standing up for its hard-earned and unblemished reputation by disagreeing with findings that were made without due process and which asserted forensically-disproven conclusions.

In comments to the media following its July 14 Notice, FHWA stated that the Suspensions were based on "the interest of protecting public safety." See https://www.enr.com/articles/49821-us-dot-proposes-10-year-ban-of-contract-awards-to-design-firm-figg. Yet, the Agency's memorandum explaining its rationale lacks any justification of "immediate need" based on safety. If safety were the actual basis of the decision, most assuredly, the FHWA would have

[10] *See* Bad Rock Canyon Study, MDT Contract Number 110616.

suspended Plaintiffs *immediately* after receiving the NTSB report. They did not. In addition, the Agency maintains a strict and justified policy that if officials determine that a bridge is unsafe, they close it to traffic immediately. If FHWA believed that Figg bridge designs were inherently unsafe, they could have shut down all those facilities across the interstate system and beyond. They could have ordered immediate mass inspections of all bridges designed by Figg. The FHWA did none of those things. In this case, FHWA appears to be truly upset that Figg did not "accept responsibility" for the accident and instead stood up for its work and reputation following the NTSB report. Why else would a simple advertisement for Figg's bridges be viewed as an "aggravating circumstance" supporting the draconian 10-year proposed debarment? Safety is the number one priority for the entire transportation industry. But it is most definitely not the basis for the challenged Agency action before the court. Alternatively, or in conjunction, given the fact that the United States Department of Transportation's Office of Inspector General issued a letter to Congress, just days after the imposition of the suspension and proposed debarment, raises serious suspicion that the agency was tagging Figg and Mr. Pate as political "scapegoats" for this tragic accident.[11]

C. Additional Circumstances Surrounding FHWA's Actions Suggest a Punitive Motive.

In addition to the legally insufficient basis for the suspension, Figg further notes other aspects of this matter that suggest that FHWA improperly used the suspension and debarment program as a vehicle for punishment rather than a means of protecting the Government's interest.

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[11] *See also* Letter from USDOT Office of Inspector General to U.S. House of Representatives, Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies (Jul. 20, 2020) at 3, available at: https://www.oig.dot.gov/sites/default/files/DOT%20OIG%20Correspondence%20-%20Firms%20Involved%20with%20the%20FIU%20Pedestrian%20Bridge%5E07-20-2020.pdf (last visited on August 9, 2020).

First, the ten-year length of the proposed debarment in a fact-based situation (i.e., without a conviction or plea) – more than 3 times the standard period for a debarment – shows that the Agency has no interest in understanding the present responsibility of Figg and Mr. Pate but rather intends to put Figg out of business and put an end to Mr. Pate's career. *See* 2 C.F.R. 180.865 ("Generally, debarment should not exceed 3 years."). Second, in spite of findings in the NTSB report that many parties involved in the FIU bridge project other than Figg and Mr. Pate may have contributed to the bridge construction accident, none of these parties have been suspended or proposed for debarment.[12] Clearly these contractors, like Figg, *could* receive federal-funded government contracts in the future as well. By FHWA's logic – relying solely on the NTSB report's findings for factual basis and equating immediate need with the possibility of working on future projects – those contractors should have been suspended as well. This disparate treatment, considered in conjunction with the excessive length of debarment, strongly suggests that FHWA is "making an example" of Figg and Mr. Pate, which, again, is not the purpose of the suspension and debarment program.

III. Plaintiffs Will Suffer Irreparable Harm If An Injunction Is Not Issued

To demonstrate irreparable harm, a party must show that the harm is "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters of the U.S.*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) *abrogation on other grounds recognized by Seeger v. U.S. Dept. of Defense*, No. 17–639,

[12] During a July 30, 2020 video conference between counsel for FIGG and FHWA, the agency confirmed that no other parties involved in the FIU bridge collapse had been suspended or proposed for debarment.

2018WL 1568883, at *8 (D.D.C. Mar. 30, 2018)). Here, Plaintiffs have established three, independent reasons they meet the irreparable harm element required for an injunction.

A. Plaintiffs' Harm is Irreparable *Per Se*

The harm Plaintiffs suffer on account of the Suspensions is irreparable *per se* because the government cannot be made to pay damages to redress Plaintiffs. *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *see also Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010). Typically, the repayment or "payment of money is not considered irreparable, . . . because money can usually be recovered from the person to whom it is paid." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). "If, [however,] expenditures cannot be recouped, the resulting loss may be irreparable." *Id*; *see, e.g., World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000) (court found that plaintiff's lost sales which may not be recouped amounted to irreparable harm).

Although monetary loss, in and of itself, generally does not constitute irreparable harm, *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985), here the damage caused to Plaintiffs is irreparable *because it cannot be recovered* from the government Defendants. That Plaintiffs stand to suffer harm that irreparable *per se* is, on its own, sufficient to meet the irreparable harm standard.

B. Plaintiffs' Harm Is Irreparable Because their Business Will Cease To Exist and They are Deprived of the Ability to Compete on Contracts

It is also well-settled in this Circuit that "economic harm rises to the level of irreparable harm where it threatens the 'very existence of [a] business[.]'" *Patriot, Inc. v. United States HUD*, 963 F. Supp. 1, 5 (D.D.C. 1997) (quoting *Wisconsin Gas*,758 F.2d at 674)). Moreover, the Court of Federal Claims has held that a lost opportunity to compete on contracts constitutes irreparable harm. *See Inchcape*, 2014 U.S. Claims LEXIS 1570 at *7-8; *Cardinal Maint. Serv., Inc. v. United*

States, 63 Fed. Cl. 98, 110 (2004) ("It is well settled that a party suffers irreparable injury when it loses the opportunity to compete on a level playing field with other bidders."); *CW Gov't Travel,Inc. v. United States*, 110 Fed. Cl. 462, 494 (2013) ("The Court of Federal Claims has repeatedly held that a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract.").

As set forth in detail in the attached declarations of Linda Figg, CEO of Figg, and William Pate, Plaintiffs have shown how the Suspensions cause a certain threat to the very existence of the business (Figg) and the destruction of an individual's 40-year career (Pate). Moreover, as reflected in Ms. Figg's declaration, the inability of Figg to compete fairly for upcoming contracts will no doubt cause additional irreparable harm to the Company.

Ms. Figg explains that the Suspension and associated publicity have "severely damaged FIGG's business with tangible and wide-ranging impacts on the company's bottom line." (Figg Decl. ¶ 16). Since Figg relies heavily on projects that receive federal funding, FHWA's action banning Figg from working on such projects "threatens the very existence of [the] company." (Figg Decl. ¶ 32). Absent an injunction, the Company fears that it will not survive. Since the Suspension was imposed, Figg has lost existing contracts from state partners, suffered reputational harm, and cannot pursue the many new contract opportunities it was planning to submit bids for in the near and longer-term future.

Termination of Existing Contracts. Figg has been told that previously-approved contract services are being put on hold, or that it is likely to lose existing contracts as a result of the Suspension. (Figg Decl. ¶ 17).

- On July 14, 2020, the same day as FHWA's Suspension was posted to the SAM system, the Maine Department of Transportation notified Figg that, because of the Suspension, it

was putting its contract with Figg on hold. (Figg Decl. ¶ 18). Projected revenue for the project was approximately $800,000. *Id.*

- Since July 15, 2020, Ms. Figg has been in communication with officials from the Harris County Toll Road Authority (HCTRA) regarding the effect of the Suspension on Figg's ongoing contract with HCTRA for on-site field services and design support that, as of July 12, 2020, has a remaining value of approximately $3,821,000. (Figg Decl. ¶ 19). The HCTRA has concerns about supporting Figg's services because of FHWA's challenge to Figg's "honesty and integrity" as described in the federal SAM posting. (Figg Decl. ¶ 20). At a meeting on Tuesday, August 11, 2020, the Harris County Commissioners Court will discuss a recommendation to terminate Figg's contract with HCTRA. (Figg Decl. ¶ 22). Currently, the HCTRA contract is worth approximately $520,000 per month – approximately 42% of Figg's total revenue. (Figg Decl. ¶ 23).
- On July 29, 2020, the South Dakota Department of Transportation notified Figg that it was suspending an existing agreement with Figg for professional services because of the FHWA Suspension. (Figg Decl. ¶ 24).

Elimination of Opportunities for Future Federally-Funded Contracts. In addition to losing existing contracts, Figg cannot pursue new federally-funded opportunities while the Suspension is in place. Several bidding teams of which Figg was a part have already been dissolved because of the Suspension. (Figg Decl. ¶ 26). Figg will also be unable to pursue and develop a proposing team, or continue discussions with existing partners for numerous projects with RFQ and RFP submission deadlines in the next 120 days. (Figg Decl. ¶ 26). These projects are collectively worth almost $100 million in total contract value. (Figg Decl. Exhibit A, at 1-2). In addition to these immediately-jeopardized projects, Figg is also effectively eliminated from consideration for

many longer-term projects on which it was intending to bid. (Figg Decl. ¶¶ 27, 28). Figg will also have difficulty securing contracts even further in the future, because it will have always to answer in the affirmative when the sponsoring agency asks – as it typically does (and is often required to do) in the bidding process – whether a bidding party has ever been suspended or proposed for debarment. (Figg Decl. ¶ 28).

In sum, the wide-ranging consequences of FHWA's action have threatened the very existence of the company. (Figg Decl. ¶ 32). Without the current revenue from existing clients who have put on hold or terminated work, and without the prospect of being able to participate in submissions for future work, Figg will not be able to meet basic financial obligations such as employee payroll, health benefits, rental payments, property taxes and other day-to-day expenses. (Figg Decl. ¶ 34). The consequences of FHWA's Suspension will be particularly hard to bear during the COVID-19 pandemic, which has damaged state revenue, and thus made federal funding even more important. (Figg Decl. ¶ 33). Beginning this month, Figg will be forced to begin laying off some of the talented men and women who work for the company. (Figg Decl. ¶ 34).

The immediate financial and reputational harm caused by the Suspensions poses a real and imminent threat to the very existence of the Company. (Figg Decl. ¶ 35). In fact, Figg Bridge Engineers, Inc. will likely not survive if the Suspension is not lifted in the very short term. *Id.*

The consequences from FHWA's Suspension will be just as devastating for Mr. Pate. As detailed in his declaration, attached hereto as **Exhibit G**, Mr. Pate has spent his entire career with Figg-family companies and has worked almost exclusively on bridge projects during his tenure with Figg. (Pate Decl. ¶¶ 4, 5). As a result, he has heavily specialized in bridge engineering – it is his "only source of work experience" and he has done "essentially nothing else in [his] 40-year career." (Pate Decl. ¶ 14). All bridge engineering firms like Figg rely heavily on projects that

use federal funding. (Pate Decl. ¶ 11). If the Suspension were kept in place, Mr. Pate would thus be ineligible to work on projects which comprise the bulk of all work in his highly-specialized field. Even if Mr. Pate left Figg, he fears that no other engineering firm could afford to hire him while he remains suspended or proposed for debarment because it is unlikely that there would be enough non-federal funding to cover his salary. (Pate Decl. ¶ 12). In short, a suspension would "completely end" his engineering career. (Pate Decl. ¶ 13).

C. Plaintiffs Have Suffered Reputational Harm From FHWA's Suspension

Finally, Plaintiffs continue to be irreparably harmed from FHWA's actions due to the negative impact on their business reputations. *See Beacon Assocs., Inc. v. Apprio, Inc.*, 308 F. Supp. 3d 277, 288 (D.D.C. 2018) (finding plaintiff made a strong showing of likely irreparable harm due to its "reputational injuries"); *Patriot*, 963 F. Supp. at 5 (noting that the "plaintiffs have demonstrated irreparable harm in damage to their business reputation"); *see, e.g., Alf v. Donley*, 666 F. Supp. 2d 60, 70 (D.D.C. 2009), *vacated on other grounds* (Dec. 13, 2010) (holding that CEO's declaration regarding damage to business reputation and negative stigma associated with his debarment provided proof of irreparable harm);

In addition to the harm outlined above, since the date of the suspension, Figg has received substantial negative publicity for FHWA's action that has harmed Figg's reputation. (Figg Decl. ¶ 29). This has been particularly true in the engineering and construction trade press – for example, negative articles have been published in "Road & Bridges," "Engineering News Record," and "Constructive Drive." (Figg Decl. ¶¶ 29, 30). Negative publicity in these publications is especially damaging to Figg because they are widely read within the industry. (Figg Decl. ¶ 29). As a result of the negative attention Figg has received since FHWA's suspension, Figg has been prevented from creating and\or participating in teams for any future federally-funded projects, making it virtually impossible for the company to obtain any work. (Figg Decl. ¶ 31).

In short, the harm from the Suspensions is not theoretical or harm from which Plaintiffs could recover. It is real, it is great, and it is imminent.

IV. The Balance of the Equities Weighs in Plaintiffs' Favor

In determining whether to allow injunctive relief, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)).

This is not a close case. The balance of harms and equities weighs heavily in favor of granting an injunction. As set forth above and in Plaintiffs' declarations, absent an injunction, Plaintiffs stand to suffer irreparable catastrophic harm to Figg's business and Pate's career. Neither the financial nor reputational harm Plaintiffs suffer is reversible.

In contrast, the FHWA faces little, if any, harm if an injunction is issued. Specifically, the FHWA's only stated basis for an immediate need of a suspension is that Plaintiffs *could* be awarded contracts in the future. FHWA does not point to any *specific* harm that it will suffer or a specific contract about which it is concerned. Indeed, the alleged harm to the Agency is nowhere near the crippling harm Plaintiffs are facing if an injunction is not issued. *See Inchcape Shipping Servs. Holdings Ltd. v. United States*, No. 13-953 C, 2014 WL 12838793, at *3 (Fed. Cl. Jan. 2, 2014) (granting preliminary injunction and holding that "the government risks only a short delay in suspending [Plaintiff]"). Given that the government can point to no harm, if any injury, during the course of a fact-finding inquiry, whereas Plaintiffs will face the ongoing substantial and irreparable harm, the balance of equities tips in Plaintiffs' favor.

V. Granting Plaintiffs Preliminary Relief is in the Public Interest

An injunction in this case is also in the public interest for a number of reasons. As an initial matter, "[t]he public interest is served when administrative agencies comply with their obligations

under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). Indeed, one of those obligations is ensuring "that the government's suspension and debarment process is administered in a fair manner." *Inchcape*, No. 13-953 C, 2014 WL 12838793, at *3. Moreover, the public interest would be served in issuing an injunction lifting Plaintiffs' suspension because this would ensure that the government only issues suspensions when there is adequate evidence to do so, there is an immediate need to protect the public interest, and that the sanction is not being imposed as a punitive measure opposed to its lawful origin as a protective measure. Issuing Plaintiffs' injunctive relief request would not only serve the public interest in the fair administration of the suspension process, but it would help deter the government from further APA violations.

Thus, the public interest weighs in favor of granting Plaintiffs the injunctive relief they seek.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion.

Dated: August 11, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2020, a copy of the foregoing was served on counsel for Defendants as follows:

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