**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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| NOVA DATACOM, LLC,<br><br>Plaintiff,<br><br>v.<br><br>EYAK TECHNOLOGY, LLC,<br><br>Defendant. | Civil Action No. 1:11cv1210 (TSE/JFA) |

**DEFENDANT EYAK TECHNOLOGY'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendant Eyak Technology, LLC (EyakTek), by and through its undersigned counsel, respectfully opposes the Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) (Motion) filed by Nova Datacom, LLC (NDC or Plaintiff) on November 10, 2011, and states as follows:

**PRELIMINARY STATEMENT**

NDC comes before this Court with "unclean hands" seeking extraordinary relief. NDC is asking this Court to issue a mandatory injunction requiring EyakTek to pay invoices (and future invoices) NDC acknowledges it may have improperly inflated in a brazen $20 million kickback and bribery scheme that has resulted in an indictment involving allegations against its former Chief Technology Officer (CTO). *See* Compl., ¶¶ 35-36. This Court should deny NDC's Motion for myriad reasons:

- NDC cannot satisfy the high burden for a ***mandatory injunction*** for the payment of money;

- NDC has an ***adequate remedy at law for the payment of money*** it seeks, particularly when the claimed amount represents at most roughly 5% of its $47 million 2010 revenue.

- There is ***no emergency*** justifying a TRO because NDC did not file this "emergency motion" until almost three weeks after it was informed that EyakTek was withholding payment of the invoices at issue (EyakTek is seeking guidance from the Government about how to assure the Government's interests in recovery of any overpayments);

- NDC has ***no likelihood of success on the merits*** because NDC admits that its invoices for which it seeks payment may contain improper, inflated "overhead" charges that it cannot quantify. In other words, it cannot show that it submitted proper, valid invoices to EyakTek—a prerequisite to its entitlement to any payment under the parties' subcontract;

- NDC offers ***no citation supporting its argument that this Court should issue a mandatory injunction forcing payment of money*** under an agreement, the enforcement of which involves the complicity of its CTO in a fraudulent act;

- ***Any harm alleged by NDC is of its own making***. Again, the amounts NDC seeks to have this Court order EyakTek to pay constitute only approximately 5 percent of NDC's 2010 revenues. NDC's financial woes are caused not by EyakTek's nonpayment, but rather by NDC's recognition that it must reimburse the Government "for any improper 'overhead' that was embedded in NDC's invoices" (estimated by the Government to be $20 million); by the guilty plea of its Executive Vice President for Operations for conspiracy to defraud the government; and by its suspension from receiving any new Federal Government business;

- It would be ***contrary to the public interest*** for this Court to issue a mandatory injunction requiring the payment of money based on admittedly inflated invoices;

- While NDC recognizes its obligation to reimburse the Government any inflated "overhead' amounts included in its invoices, in the next breath NDC makes clear that it intends to use any monies it receives immediately to make payroll and stay in business—leaving nothing for the Government to recover. By contrast, ***EyakTek is holding the funds in question it has received in a segregated account pending guidance on disbursement from the Government, which far better serves the public interest*** in assuring Government recovery of such funds.

For these reasons, and others, the Court should deny NDC's Motion.

At bottom, NDC's request for temporary relief is simply a demand for money to which it

acknowledges it may not be entitled. On November 4, 2011, nearly a week prior to filing its Motion, NDC filed a Complaint demanding that EyakTek pay various Purchase Order (PO) invoices it alleged were issued in connection with a Subcontract Agreement (Subcontract), attached hereto as Ex. 1, under which NDC provided goods and services in support of EyakTek's contract with the United States Army Corps of Engineers (USACE) for Technology for Infrastructure, Geospatial and Environmental Requirements (TIGER), Compl. ¶¶ 12-18. Yet, in light of the allegations in the indictment, meeting NDC's payment demands could potentially expose EyakTek to allegations that it knowingly and improperly made payments to NDC based upon inflated invoices.

EyakTek's concerns are well-founded. Potential improprieties associated with the Subcontract came to light on October 4, 2011, when the United States Department of Justice announced the arrest and indictment of four individuals, including two USACE officials, Program Manager Kerry Khan and Program Director Michael Alexander, charged with conspiring to obtain more than $20 million in bribes and kickbacks under the USACE TIGER contract and to steer the planned follow-on $780 million Contingency Operations Readiness Engineering & Support contract to NDC. *See* Indictment ¶¶ 34-36, attached hereto as Ex. 2 (Nova Datacom is identified as Company A, and NDC's CTO is identified as "CC1").[1] The alleged fraudulent inflation of invoices by over $20 million occurred at NDC and was done by and for the personal benefit of the individuals named in the indictment. *Id.* at ¶ 35(a).

According to the indictment, individuals at NDC submitted fraudulently inflated invoices to EyakTek for the work performed on the POs issued under the parties' Subcontract. The fraudulently inflated amounts were referred to as "overhead." "The 'overhead' referred to

[1] EyakTek's former Director of Contracts was also named in the indictment. EyakTek immediately terminated him based upon the allegations against him in the indictment.

fictitious and overpriced information assurance and security equipment and services on the quotes" submitted by NDC. *Id.*; *see also* Livingston Decl., ¶ 35 ("The United States further asserts that the [NDC] CTO, with the consent and at the direction of Kerry Khan, submitted quotes to EyakTek that included, in addition to charges for legitimate products and services, inflated 'overhead' charges"). EyakTek has no visibility into the alleged "overhead" amounts referenced in the indictment. The invoices it received from NDC and those it submitted to the Government were fixed price invoices for identified products and services, based on USACE POs for those amounts. As is evident from the invoices attached as Exhibits 2 and 3 to NDC's Complaint, none of the invoices identified any amount for "overhead." Moreover, many of the POs under which NDC has asked this Court to order payment were issued to NDC's CTO and were for shipment to Kerry Khan—in other words they are the very POs that are the subject of the bribery scheme alleged in the indictment. *See* Compl., Ex. 1. The pricing for all of the invoices for which NDC seeks payment in its Complaint, including invoices it has continued to submit after the issuance of the indictment, are all tainted by the "overhead" scheme.

NDC has repeatedly admitted that it overcharged the USACE and is responsible for reimbursing the Government for the inflated overhead included in its invoices. *See* Livingston Decl., ¶ 37;[2] Compl., ¶ 38; *see also* Letter from Barbara Van Gelder, NDC Counsel, Dickstein Shapiro LLP, to Paul Khoury, EyakTek Counsel, Wiley Rein LLP (Oct. 21, 2011), attached hereto as Ex. 3 ("NDC understands that these invoices may contain 'overhead' charges that ultimately must flow back to the Government. NDC is working with the Government to identify the exact amount of the 'overcharge' on each of the invoices. Once we have identified the

[2] Of course, this assertion that NDC will reimburse the Government for inflated amounts is inconsistent with NDC's representation that it must use any payment from EyakTek to meet payroll and pay business expenses and its request, which EyakTek opposes, that the Court set the "security requirement at a nominal amount." *See* Mem. in Supp. of Mot. at 11, 14.

correct 'overcharge' amount in each invoice . . . NDC will reimburse the Government for that amount.").[3] While NDC's General Counsel may be able to claim that "[t]o [his] knowledge," NDC "satisfactorily performed the work ordered under the Purchase Orders," Livingston Decl., ¶ 12, he cannot, and does not, assert that the invoices were proper. In fact, NDC admits that these invoices were inflated, and therefore improper, and that it cannot currently quantify the amount of improper inflation associated with the invoices at issue. Compl. ¶ 39; Ex. 3. Accordingly, EyakTek has no visibility into how or what was inflated. Indeed, overall, NDC is alleged to have inflated its invoices to EyakTek by $20 million. Livingston Decl., ¶ 34. Yet EyakTek has already paid NDC over $27 million of the $29.5 million in total invoices for the POs at issue, *see* Elmquist Decl., ¶ 5, attached hereto as Ex. A—meaning any money currently outstanding likely reflects improper overcharges to USACE. As a result, and in light of the allegations against NDC in the indictment, payment to NDC could be argued to violate the law. *See, e.g.*, 31 U.S.C. § 3729(a)(1)(D), (b)(3) (defining False Claims Act violation to include retention of an overpayment).

Beyond that concern, NDC has not and cannot meet the heavy burden required to merit the extraordinary remedy of a TRO or PI:

First, NDC has failed to show that any of its causes of action has any chance of success, let alone a strong likelihood of success. NDC's contract claims must fail because NDC cannot prove a breach based on EyakTek's decision not to pay the disputed invoices until it receives guidance on the improperly inflated amounts and the Government's views on how best to protect the Government's interests. The Subcontract obligated EyakTek to pay only "proper" and

[3] It is also telling, but not surprising, that NDC has failed to provide a single citation for the argument that under Virginia law EyakTek is somehow obligated to pay improper invoices because NDC has promised to reimburse the Government any amounts ultimately determined to be inflated "overhead"—i.e., fraud.

"valid" invoices. *See* Ex. 1, ¶ 10.[4] Furthermore, the existence of a valid contract between the parties—the Subcontract—negates NDC's claims for equitable relief, which are available only in the absence of a contract.

Second, NDC has failed to show that it would be irreparably harmed absent injunctive relief. NDC's primary justification for a TRO or PI boils down to an alleged cash-flow problem, including its inability to pay its employees and creditors, which NDC claims might lead to loss of its government contracts. Such financial harms, though, which can be adequately addressed through monetary damages, do not warrant injunctive relief. Moreover, EyakTek's nonpayment of the invoices is not the cause of NDC's alleged harm, which is a prerequisite in establishing entitlement to a mandatory injunctive relief. *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003). Rather, NDC is in this predicament because its CTO has allegedly been involved in a $20 million invoice inflation and bribery scheme; *see* Livingston Decl., ¶¶ 34-36; its Executive Vice President has pleaded guilty to defrauding the government; *see* Hallas Plea Agreement and Supporting Factual Statement, Case No. 1:11-cr-00299-EGS (ECF Nos. 6, 7), attached hereto as Ex. 4; NDC has received a notice of proposed debarment from federal government contracting; and NDC is currently suspended from doing any new business with the federal government.[5] NDC's other claim, that somehow a failure to receive money outstanding

[4] Contrary to Mr. Livingston's assertion that "EyakTek has unequivocally informed NDC that it will not pay" the invoices at issue, Livingston Decl., ¶ 17, EyakTek has instead, beginning directly after the unsealing of the indictment, sought guidance from the USACE as to how to handle the outstanding NDC invoices and the ongoing need for NDC's services ordered prior to October 4, 2011. Ex. A., Elmquist Decl., ¶¶ 6-7. EyakTek is awaiting guidance from USACE and in the interim is doing what it believes is necessary to best safeguard the Government's interests. *Id.* ¶ 7.

[5] *See* Mem. in Supp. of Mot. at 7-8 ("On November 2, 2011, NDC was listed on the Excluded Parties List System in conjunction with its notice of proposed debarment by the Small Business Administration. . . . In the meantime, however, although NDC may continue work under its existing government contracts, NDC is prohibited, under 48 C.F.R. § 9.405, from acquiring any

from EyakTek will impair its ability to cooperate with the Department of Justice's investigation, is utterly baseless.

Third, the balance of equities counsels against awarding a TRO or PI. Rather than preserving the *status quo*, NDC's requested relief would force EyakTek to make payment under a contract tainted by alleged fraud and potentially expose EyakTek to liability. NDC seeks this Court to "restore" the parties to their course of conduct prior to the unsealing of the indictment. *See* Memo in Supp. of Mot. at 11 n.5. In other words, NDC seeks an order allowing it to continue submitting improperly inflated invoices and forcing EyakTek to pay them (now with the knowledge that they include inflated "overhead" charges)—a situation clearly against the public interest, especially when, as NDC claims, it is teetering on extinction. If EyakTek keeps the money in question segregated, on the other hand, the funds will be preserved until EyakTek receives guidance from the Government as to the amount of the overpayment invoiced by NDC and how best to safeguard the Government's interests.

Finally, the public interest weighs heavily against the TRO or PI, the enforcement of which would potentially violate federal law. Given NDC's open acknowledgment that the PO invoices issued under the Subcontract are tainted by inflated "overhead" charges, provision of those overpayments to NDC cannot possibly be in the public interest. Further, given the cash-flow problems from which NDC claims to suffer, payment to NDC in connection with its

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new government contracts as of November 2, 2011."); Nova Datacom LLC Reciprocal Exclusion, Excluded Parties List System (Nov. 2, 2011), *available at* https://www.epls.gov/epls/search.do?debar_recid=117420&status=current&vindex=0&history=true. Furthermore, while NDC "may continue work under its existing government contracts," the Government also has the discretion to decide to terminate some, or all, of NDC's existing contracts—thereby altogether excluding it from contracting with the Federal Government. *See* FAR 9.405-1(a) (describing the steps an agency should take prior to terminating contracts or subcontracts in existence at the time a company is debarred or suspended).

requested relief would limit the Government's future ability to recover funds NDC admits it improperly charged. Both the potential perpetuation of improper billing and the frustration of the Government's monetary recovery are undoubtedly against the public interest.

For the reasons set forth below, this Court should deny NDC's Motion for a TRO and PI.

## ARGUMENT

### A. NDC is Not Eligible for a Temporary Restraining Order or Preliminary Injunction Because its Invoices are Tainted by Inflated "Overhead" Charges.

As a preliminary matter, "[i]t is a fundamental principle of law that 'he who seeks equity must do equity.'" *See Morris-Griffin Corp. v. C&L Serv. Corp.*, 731 F. Supp. 2d 488, 502 (E.D. Va. 2010) (quoting *Bowen v. Hockley*, 71 F.2d 781, 783 (4th Cir. 1934)) (subcontractor who orchestrated the submission of a bid by a prime contractor in violation of small business regulations and then "racked up expenses well in excess of the amounts budgeted in the proposal" had "unclean hands" and was not entitled to injunctive relief against the prime contractor withholding payments.) The court explained, "[A] federal court should not, in an ordinary case lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law." *Id.* at 490, 502 ("The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'")

In short, NDC's actions in providing quotes inflated with improper "overhead" that formed the basis for the pricing of the POs and related invoices attached to its Complaint render NDC ineligible for injunctive relief. *See id.* at 503.

### B. NDC Has Failed to Demonstrate its Entitlement to a Temporary Restraining Order or Preliminary Injunction.

Even if NDC were eligible for injunctive relief, however, it has failed to "clear[ly] show"

its entitlement to such an "extraordinary remedy." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008)); *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 345-47 (4th Cir. 2009) *vacated on other grounds by* --- U.S. ----, 130 S. Ct. 2371 (2010), *reinstated in part by* 607 F.3d 355 (4th Cir. 2010); *Fred Hutchinson Cancer Research Ctr. v. BioPet Vet Lab*, Civ. A. No. 2:10cv616, 2011 WL 1119565, at *2 (E.D. Va. Mar. 1, 2011) ("the legal standard for issuing a TRO is the same as that for a preliminary injunction"). While injunctive relief has always been difficult to obtain, the Fourth Circuit recently adopted an even "stricter standard" for the award of such preliminary relief. *See Sherrod v. King*, No. 1:07CV28, 2010 WL 3785528, at *5 (M.D.N.C. Sept. 23, 2010) (noting that the Fourth Circuit had recently replaced the standard governing TROs with the four factor test outlined by the Supreme Court in *Winter*). Now, to obtain a TRO or PI a plaintiff "*must*" establish: 1) a likelihood of success on the merits, 2) a likelihood of irreparable harm in the absence of the injunctive relief, 3) a balance of equities that tips in its favor, and 4) the requested relief is in the public interest. *Dewhurst*, 649 F.3d at 290 (emphasis in original). Each of these factors must be demonstrated by a "clear showing." *ForceX, Inc. v. Tech. Fusion, LLC*, No. 4:11cv88, 2011 WL 2560110, at *4 (E.D. Va. June 27, 2011). Under this standard, NDC has failed to provide a clear showing of *any* of the requisite factors, let alone *all* of the factors required to establish entitlement to such extraordinary relief.

NDC faces an even higher burden because the relief it seeks—an order forcing EyakTek to pay outstanding PO invoices—constitutes a mandatory remedy. All injunctive relief is awarded "sparingly," *Via v. Wilhelm*, Civ. A. No. 7:11CV0050, 2011 WL 2516338, at *1 (W.D. Va. June 22, 2011), but the standard for obtaining mandatory, rather than prohibitory, relief is particularly exacting. *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 525. Indeed, mandatory

preliminary relief is only appropriate if it both "protect[s] against irreparable harm in a deteriorating circumstance ***created by the defendant***" and "preserve[s] the court's ability to enter ultimate relief on the merits of the same kind." *Id.* at 526 (emphasis added).[6] NDC cannot meet its burden of demonstrating the exceptional circumstances under which the relief it requests should be granted.

1. **NDC Cannot Show That It Will Succeed On the Merits.**

The Supreme Court has mandated that a plaintiff "clear[ly] show[]" likelihood of success on the merits to obtain a TRO or PI. *Dewhurst*, 649 F.3d at 290 (quoting *Winter*, 129 S. Ct. at 376). Here, however, NDC has failed to set forth facts demonstrating that it would succeed on any of its causes of action, let alone that it would clearly succeed on the merits:

a. **NDC Fails to State a Claim for Breach of Contract, Anticipatory Breach of Contract, or a Declaratory Judgment.**

NDC's breach of contract, anticipatory breach of contract, and declaratory judgment claims all seek the same relief. And all of these claims are without merit. A successful breach of contract action requires (1) an enforceable contract, (2) a violation or breach of that contract, and (3) a consequential injury or damage to the plaintiff. *See Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 546 (1989).[7] NDC cannot prove a breach based on EyakTek's

[6] This Court also may not have the authority to grant affirmative temporary relief, because although the Complaint filed by NDC fails to disclose its existence, a clause within the Subcontract under which NDC alleges its claims arise requires NDC and EyakTek to arbitrate their disputes. Ex. 1, ¶ 6. Although the Fourth Circuit has authorized courts to issue injunctive relief that preserves the *status quo* pending arbitration, *see Merrill Lynch v. Bradley*, 756 F.2d 1048 (4th Cir. 1985), "*Bradley* does not expressly permit the entry of injunctive relief that alters, rather than preserves, the *status quo*." *See Morris-Griffin Corp. v. C & L Serv. Corp.*, 731 F. Supp. 2d 488, 504 (E.D. Va. 2010) (denying injunctive relief based on unclean hands but noting that it otherwise would have denied injunctive relief for the matters "more properly left for arbitration").

[7] Virginia law governs claims arising from the Subcontract. *See* Ex. 1, ¶ 11.

decision not to pay the disputed invoices. The Subcontract required proper invoices to be submitted before EyakTek would be under any duty to pay NDC.[8] NDC admits that it cannot demonstrate the invoices in question are free from any improper inflation. *See* Livingston Decl., ¶¶ 35-37; Compl. ¶ 36. A "proper" or "valid" invoice is not one that includes "inflated 'overhead' charges." *See, e.g., U.S. ex rel. Davis v. Prince*, 753 F. Supp. 2d 569, 587 (E.D. Va. 2011) (finding that plaintiffs had adequately pleaded fraud claim based on the defendant "inflat[ing] the amount of reimbursements for travel and other expenses" in its invoices); *cf. U.S. v. $3,000 in Cash*, 906 F. Supp. 1061, 1066-67 (E.D. Va. 1995) ("It is well settled that courts 'will not permit anyone to reap the benefits of a contract or an agreement, the carrying out of which involves his complicity in any fraudulent act, or any conduct inhibited by sound public policy.'"). Thus EyakTek's failure to pay the inflated invoices already submitted by NDC and its refusal to pay improper invoices in the future cannot form the basis for a breach of contract or anticipatory repudiation claim.

Finally, NDC's claim for declaratory judgment simply restates its breach of contract and anticipatory breach of contract causes of action. *Compare* Compl. ¶ 51 *with* Compl. ¶ 63 & Compl. ¶ 70. Because the declaratory judgment claim is duplicative, it should be dismissed on the merits. *See, e.g., Estate of Mohamed v. Monumental Life Ins. Co.*, 138 F. Supp. 2d 709, 713 (E.D. Va. 2001) (dismissing declaratory judgment claim "because it simply asked this Court to declare that [Defendant] breached its contract"). Furthermore, NDC's declaratory judgment claim fails for the same reason as do its breach and anticipatory repudiation claims—EyakTek

[8] NDC repeatedly alleges that the POs and the PO invoices at issue were issued in connection with the parties' Subcontract. Memo in Supp. of Mot. at 3 ("Under EyakTek's and NDC's subcontract arrangement, EyakTek issued purchase orders directing NDC to provide specific products and services directly to USACE."); Livingston Decl., ¶ 9 ("Under EyakTek's and NDC's subcontract arrangement in support of TIGER, EyakTek issued purchase orders directing NDC to provide specific products and services directly to USACE.").

has not failed to timely pay proper invoices because NDC has not submitted any such invoices.

b. **There is No Basis for Plaintiff's Quantum Meruit or Unjust Enrichment Causes of Action.**

NDC's quantum meruit and unjust enrichment claims fail on the merits for many of the same reasons NDC's request for temporary relief should be denied. Both are equitable remedies, and "[t]he 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Morris-Griffin Corp.*, 731 F. Supp. 2d at 502. NDC acted in bad faith toward both EyakTek and USACE when it submitted inflated invoices in connection with a Federal Government subcontract. As a result, NDC cannot now seek equitable relief for payment under the same Subcontract.

Even absent the fact that NDC's inequitable conduct bars its recovery on equitable claims, its quantum meruit and unjust enrichment causes of action still lack merit. As NDC has acknowledged in its Complaint, specific POs and an express Subcontract govern this matter. Compl., ¶¶ 14, 17-18. "Where a contract governs the relationship of the parties, the equitable remedy of restitution grounded in quasi-contract or unjust enrichment does not lie." *WRH Mortg., Inc. v. S.A.S. Assocs.*, 214 F.3d 528, 534 (4th Cir. 2000). Further, "Virginia law provides no relief under a quantum meruit theory where a valid, express contract exists between the parties." *Centex Constr. v. Acstar Ins. Co.*, 448 F. Supp. 2d 697, 707 (E.D. Va. 2006). Thus, where two parties have a contractual relationship, a defendant cannot be held liable under unjust enrichment or quantum meruit theories of liability. *See Pilar Servs., Inc. v. NCI Info. Sys., Inc.*, 569 F. Supp. 2d 563, 569 (E.D. Va. 2008). As a result, NDC's equitable remedies cannot succeed.

2. **NDC Has Not Established That It Will Suffer Irreparable Harm.**

If NDC somehow demonstrated a chance that it could prevail on the merits, it still would be ineligible for a TRO or PI because it has failed to demonstrate that it will suffer irreparable harm absent injunctive relief. The problems cited in NDC's Complaint—its inability to pay its employees and financial creditors—do not warrant injunctive relief because they are financial in nature. Indeed, NDC seems to go to great lengths in an attempt to bolster its alleged entitlement to remuneration. *See* Livingston Decl., ¶¶ 22, 27-29 (enumerating technology, travel, and payroll expenses). Yet NDC's loss of revenue from the POs does not rise to the level of irreparable harm justifying injunctive relief. *See, e.g., Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."); *Forcex*, 2011 WL 2560110, at *7 (rejecting claim of irreparable harm, noting that "[i]n all cases where a defendant is breaching their contract or non-compete agreement, the Plaintiff faces a risk of lost revenues or clients").

Moreover, even if financial loss could constitute irreparable harm, the amount in dispute is insufficient to warrant injunctive relief. NDC alleges entitlement to roughly $2.4 million—at most roughly 5% of its $47 million 2010 revenue.[9] Courts require a far greater risk of loss to one's business before granting a TRO or PI—even the possible destruction of an entire business does not automatically guarantee entitlement to injunctive relief. *See, e.g., Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 527 (4th Cir. 1989)

[9] *See* Nova Datacom Company Profile, *available at* http://www.inc.com/inc5000/profile/nova-datacom.

(plaintiff's potential loss of nearly a fourth of its customers did not constitute irreparable harm warranting injunctive relief); *HCI Techs., Inc. v. Avaya, Inc.*, 446 F. Supp. 2d 518, 521 (E.D. Va. 2006) ("even were [the plaintiff] to be driven out of business by the [complained of conduct], it does not necessarily follow that this would constitute irreparable harm"), *aff'd*, 241 Fed. App'x 115 (4th Cir. 2007). The harm arises because NDC is responsible for reimbursement to the Government of improper "overhead" payments it has received, *see* Memo in Supp. of Mot. at 6, alleged to total $20 million. NDC also admits it was "listed in the Excluded Party List Systems (EPLS) in conjunction with its notice of proposed debarment," that its proposed debarment was based on the guilty plea of one of its executives, and that its listing on EPLS means NDC is "presently excluded from receiving new government contracts." Livingston Decl., ¶¶ 44-46. These problems are the root of NDC's current hardship. To merit mandatory injunctive relief, the harm in question must be caused by EyakTek. *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526. Here, however, the harm NDC faces is of its own making.

In addition, because the requisite harm must be imminent rather than "remote []or speculative," *Via*, 2011 WL 2516338, at *1, NDC's claim that it will face irreparable harm as a result of its inability to "fulfill its obligations and commitments to the Department of Justice in a timely manner," Compl., ¶ 55, is without merit.[10] These problems, if they materialize, are connected to the Government's investigation into NDC for fraud and its subsequent suspension from contracting with the Federal Government—not EyakTek's payments on the contract.[11]

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[10] Notably, no one in the Government has requested or directed EyakTek to pay the invoices at issue since the indictment. *See* Elmquist Decl. ¶ 7.

[11] NDC's delay in filing its request for temporary relief also undercuts its assertion of irreparable harm. *See, e.g., Equity in Athletics, Inc. v. U.S. Dept. of Educ.*, No. 07-1914, 291 F. App'x 517, 521-22 (4th Cir. Aug. 20, 2008) (district court gave significant weight to the fact that plaintiff waited to file its request for a preliminary injunction until "a mere fifteen days prior to the date the cuts were scheduled to go into effect"); *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp.

### 3. The Balance of Equities Counsels Against a Temporary Restraining Order or Preliminary Injunction.

Similarly, NDC cannot point to the balance of equities to support the preliminary relief it seeks. When balancing equities in connection with a decision on injunctive relief, "the court should consider: (1) the relative importance of the rights asserted and the act sought to be enjoined; (2) the preservation of the status quo; and (3) the balancing of damage and convenience generally." *Warren v. Rodriguez-Hernandez*, Civ. A. No. 5:10CV25, 2010 WL 3668063, at *5 (N.D. W.Va. Sept. 15, 2010) (citing *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932)). Here, none of these factors supports NDC's requested TRO—quite the opposite, the clear balance of equities supports its denial.

To start, NDC's request for mandatory injunctive relief "should be treated with caution" because it alters the *status quo* by requiring EyakTek to "perform a positive act." *Calvary Christian Ctr. v. City of Fredericksburg*, No. 3:11-CV-342-JAG, 2011 WL 2899184, at *13 (E.D. Va. July 18, 2011) (considering mandatory injunction in balance of equities analysis). NDC has failed to offer any evidence supporting its entitlement to such an extraordinary measure.

Indeed, neither the rights alleged by NDC nor the balance of damage and convenience supports NDC's requested TRO or PI. NDC has already acknowledged that it does not have a right to, at a minimum, at least part of the money in question because it improperly added "overhead" charges to the invoices. NDC has also acknowledged that the Government is entitled

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2d 410, 420-21 (E.D.N.C. 2006) (determining that a plaintiff's delay indicated a lack of imminent and irreparable harm where the plaintiff waited at least six weeks after it knew of defendant's hostile activities before seeking injunctive relief). Here, NDC's Complaint alleges that it first learned of its alleged harm over a month ago. *See* Compl., ¶¶ 28-29. Indeed, NDC's Counsel wrote EyakTek counsel a letter seeking payment on October 21, 2011. *See* Ex. 3. Further, while NDC filed its Complaint on November 4, 2011, it waited until November 10, 2011 to seek emergency relief. This delay suggests harm is not truly imminent.

to reimbursement for NDC's overcharges, which allegedly total $20 million. Given NDC's alleged cash-flow problems, however, it is essentially admitting it will be using the money for purposes other than reimbursing the Government. *See, e.g., Farkas v. Nat'l Union Fire Ins. Co.*, No. 1:11CV529 (LMB/IDD), 2011 WL 2838167, at *3 (E.D. Va. July 14, 2011) (considering plaintiff's likely inability to repay money to rightful owner when balancing equities). If kept segregated, on the other hand, as EyakTek is currently doing, the money would be preserved for USACE's future collection.

In addition, EyakTek could risk liability if it were to pay NDC the funds demanded. NDC seems to recognize this risk in its Complaint, claiming that "EyakTek's obligation to pay NDC under the Purchase Orders and invoices continues notwithstanding EyakTek's own potential liabilities to the United States on account of any irregularities in connection with the TIGER Contract." Compl. ¶ 54. Then NDC all but ignores this risk in its request for a TRO or PI. *See* Mem. in Supp. of Mot. at 12 (describing this risk as "speculative liability EyakTek may incur to the Government by paying the 'overhead' amounts to NDC"). EyakTek has a responsibility as a federal government contractor to pay only proper and valid invoices. *See* FAR 3.1002 ("Government contractors must conduct themselves with the highest degree of integrity and honesty."); *see also* FAR 3.1003(3).

4. **A Temporary Restraining Order or Preliminary Injunction in This Case Would Be Against Public Interest.**

Finally, the public consequence of preliminary injunctive relief is an important consideration for a court. *Yates v. Norwood*, No. 3:11CV258-HEH, 2011 WL 1675382, at *6 (E.D. Va. Apr. 28, 2011). Here, a grant of NDC's requested TRO or PI would effectuate harm on the public, and should be denied, because it could encourage submitting invoices containing inflated and improper charges. *Cf. Warren*, 2010 WL 3668063, at *6 (rejecting preliminary

injunction in part because it would "burden public interests in combating fraud"). This Court has a significant interest in deterring such improper charges. Forcing payment to an entity after such improper charges were uncovered would run counter to those interests. Moreover, as mentioned above, if EyakTek is forced to pay NDC's outstanding invoices, given NDC's current financial woes, the USACE may be unable to recoup the money to which it is rightfully entitled. NDC has already essentially asserted that every penny of the money it seeks from EyakTek will be used to pay its bills—leaving nothing for the Government to recover. *See* Livingston Decl., ¶¶ 28-29. Accordingly, the public would be better served by allowing the Government to reclaim money NDC admits is owed to the federal treasury, rather than allowing an entity implicated in alleged fraudulent activity to pay off its numerous debts. *Cf. United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989) (recognizing that courts had granted preliminary injunctions to preserve assets in danger of dissipation or depletion).

Of course, NDC claims without support that "the public interest would be best served by granting the requested injunctive relief." Compl. ¶ 57. Yet there is no public interest in granting one private party preliminary monetary relief over the other arising from a contract dispute, especially in the face of the powerful competing public interests to prevent the payment of invoices containing inflated charges to Federal Government contractors and to ensure the integrity of the procurement system. *See Jacobs Tech. Inc. v. United States*, Nos. 11-180C and11-190C, 2011 WL 3555595, at *15 (Fed. Cl. July 29, 2011) (noting that "the public interest is clearly served by maintaining the integrity of the procurement system"). In short, there is no public interest in providing NDC's requested relief.

### C. If The Court Grants NDC's Motion It Should Be Required To Pay A Significant Bond.

Rule 65(c) states that "[t]he court may issue a preliminary injunction or a temporary

restraining order ***only if*** the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." (emphasis added). NDC without any basis states that "EyakTek is not likely to sustain significant costs or damages as a result of the relief sought herein" and then asks "the Court [to] exercise its discretion to set the security at a nominal amount." Memo. in Supp. of Mot. at 14. Under this Circuit's precedent, given that the potential harm the extraordinary remedy NDC seeks would potentially impose on EyakTek, the Court should deny NDC's request:

> In fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order. ***The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party.***

*Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir.1999) (emphasis added). Here, NDC seeks a TRO and PI requiring EyakTek to pay all allegedly outstanding invoices along with all invoices NDC issues on a going-forward basis. Given that all of the NDC invoices currently issued and all future invoices under the tainted Purchase Orders may include as yet unquantified, inflated "overhead" charges, such an order could potentially expose EyakTek to substantial liability if it were found that the injunction was "improvidently issued." Accordingly, if the Court were to grant NDC's Motion, NDC's request for a "nominal" bond requirement should be denied and NDC should be required to pay a significant bond, determined based upon the scope of the injunctive relief granted by the Court.

## CONCLUSION

For the foregoing reasons, EyakTek respectfully requests that the Court deny Plaintiff's

Motion for a Temporary Restraining Order and Preliminary Injunction, and grant such further relief as this Court deems proper.

EYAK TECHNOLOGY, LLC
By counsel

Dated: November 15, 2011

By: /s/ Attison L. Barnes, III

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