

THE GOVERNMENT CONTRACTOR®



Information and Analysis on Legal Aspects of Procurement

Vol. 48, No. 29

August 9, 2006

Decisions

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Agency Fails To Justify Decision To Override Automatic Stay Pending Protest

Advanced Sys. Dev., Inc. v. U.S., 2006 WL 2130548
(Fed. Cl. July 21, 2006)

An agency's justification for overriding the automatic stay mandated by the Competition in Contracting Act "utterly failed" to demonstrate circumstances that outweigh the policy in favor of the stay, the U.S. Court of Federal Claims has ruled. The agency's justification merely cited reasons for choosing to award the new contract, which alone cannot justify overriding the automatic stay.

Prior to March 2006, the Washington Headquarters Services (WHS), a field activity of the Department of Defense, obtained information technology services from five contractors serving six contracts. When the agency determined that consolidating the contracts into one integrated system would be more efficient, it issued a solicitation for the services to be awarded on a best-value basis. An incumbent contractor, Advanced Systems Development Inc. (ASD), and four other contractors submitted proposals. On June 5, WHS awarded the contract to KENROB IT Solutions Inc.

Soon after the award, ASD protested at the Government Accountability Office. GAO notified WHS of the protest, triggering the automatic stay provisions of CICA, 31 USCA § 3553 et seq. On June 21, however, WHS instructed KENROB to continue performance of the new contract and issued a "Determination and Findings to Proceed with Contract Performance After Receipt of a Protest." In the document, WHS claimed that "[s]uspending performance of the KENROB contract during the pendency of

this bid protest is not in the public interest" because extending the previous contracts would be less efficient than using the new consolidated one and "represents a poor use of federal funds." WHS cited additional reasons that the stay "frustrated efforts to provide a smooth transition," and could result in "an unscheduled loss of service."

KENROB continued performing the contract, and ASD protested the mandatory stay override at the COFC, seeking injunctive and declaratory relief. Attached to the Government's opposition were new exhibits, including a "Supplemental Determination and Findings to Proceed with Contract Performance After Receipt of a Protest," stating additional reasons why WHS chose to override the mandatory stay, including security concerns at the Pentagon. The Government did not move the Court to admit the supplemental determination or otherwise obtain permission for its filing. ASD objected to the supplemental determination as "post-hoc rationalizations" not properly before the Court.

The Tucker Act, 28 USCA § 1491(b)(1), which gives the COFC jurisdiction over bid protests, extends to challenges to an agency's decision to override CICA's automatic stay provisions. See *RAMCOR Servs. Group, Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999). The Court gives discretion to an agency's override decision under the standards set forth in the Administrative Procedure Act, 5 USCA § 706(2)(A). In short, the Court must look to whether the agency considered relevant factors and made a rational decision based on those factors. In this instance, the Court said, the relevant factors stem from CICA and the objectives behind the automatic stay.

CICA's automatic stay is intended to preserve the status quo during the pendency of a protest, with the overarching goal of preserving competition in contracting through a fair and effective protest process. See *PGBA, LLC v. U.S.*, 57 Fed. Cl. 655 (2003). In the case of postaward protests at GAO, an agency may override the stay and authorize performance of the contract if the agency head makes a written finding that (a) performance of the contract

is in the best interest of the U.S. or (b) urgent and compelling circumstances that significantly affect interests of the U.S. will not permit waiting for the decision of the U.S. Comptroller General concerning the protest. 31 USCA § 3553(d)(3)(C).

In its initial determination to override the stay, WHS cited the best interest exception, arguing that issues including system efficiency, cost effectiveness and job security for contractor personnel justified its instruction to KENROB to continue contract performance. “In other words, the new contract is better than the old contract,” the COFC said. The Court determined that the reasons WHS cited were merely manifestations of the advantages of the new contract. But, the Court said, “[t]here must be some rationale—above and beyond the principle aim” of the new contract to justify lifting the stay. “Indeed, it will almost always be the expectation that the new contract will be an improvement over the old,” the Court reasoned. But if this alone satisfied the best-interest exception, it would “swallow the Congressionally mandated rule that stays be automatic.”

The Court evaluated each of the reasons offered by WHS to justify the override decision and concluded that the agency did not adequately explain why it could not obtain the IT services to be performed under the KENROB contract from other sources during the period of delay, including extending the incumbent contracts. The justification failed to consider the possibility that ASD’s protest may have merit and “apparently read out of CICA any significance to the stay requirement.” Thus, the Court said, “We conclude that this shortsighted approach is both arbitrary and capricious, and contrary to the objectives of CICA’s stay provisions.”

The COFC also refused to consider the supplemental determination because it was not part of the administrative record. “The documents were not accompanied by any motion, nor, inexplicably, did the Government address in its brief the anomalies they presented,” the Court said. The Government argued that an agency may supplement the administrative record under *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), which allows the use of “extra-record evidence” in instances such as “when the agency failed to consider factors which are relevant to its final decision.” The Court, however, reasoned that the Government’s position implicitly concedes the agency’s original failure to consider relevant factors, and thus concedes the merits of the controversy at

hand. “We have been supplied no authority for the proposition that the override determination can be an evolving document,” the Court said.

A final issue for the Court concerned ASD’s request for declaratory and injunctive relief. The Court concluded that its declaratory judgment that the override was improper necessarily effected a return of the automatic stay and precluded the need for injunctive relief, which carries a heightened burden for the movant. For these reasons, the COFC ruled in favor of ASD, holding that the WSH failed to justify its override of the mandatory stay and restoring the automatic stay pending ASD’s protest at GAO.

♦ **Practitioner’s Comment**—We believe that this case will have broad ramifications for CICA overrides. The Court issued a thorough and thoughtful decision that seeks to resolve and solidify the scant case law in this area. For example, the Court, emphasizing the CICA stay provision’s legislative history and following the rationale set forth in the *PGBA* decision, rejected the Government’s arguments that “best interest” overrides are due substantial deference or that a lesser showing is needed to support such an override. The Court also confirmed the now settled principle that the prospect that a new contract is better or cheaper than the old contract is not sufficient justification to support an override decision.

The Court also addressed the standard for reviewing override decisions and the scope of the administrative record, ruling that “in the narrow context of statutory compliance with the automatic stay provisions of CICA, it is unnecessary to search beyond the four corners of the override decision—the agency either complied with the requirements of Section 3553(d)(3) of CICA, or it did not.” Faced with the “extraordinary” circumstance of the Government issuing supplemental findings weeks after the agency issued the initial override and the protester challenged the override at the COFC, the Court found that the determination and findings cannot be an “evolving document” that is ultimately “perfected” some time after the initial override. The Court stated, “The text of the statute does not support a reading that the override can precede the statutory justification.” Finally, the Court addressed whether injunctive or declaratory relief was more appropriate upon a determination that the override was unlawful. Following in the footsteps of the *Chapman* and *CIGNA* decisions, the Court held that declaratory relief was more appropriate. It noted

that “some incongruity” exists in forcing a plaintiff to meet the high burden necessary for obtaining extraordinary relief, when the CICA statute, by its very existence, “gives presumptive weight to the otherwise required showings of irreparable harm and public interest.”

The case is instructive for the Government and contractors. For the Government, this decision clarifies what grounds remain insufficient as a matter of law to accomplish a successful override. For contractors, it provides a solid basis to attack unlawful overrides. Congress intended CICA stay overrides to be

the exception rather than the rule. Although there is a place for overrides, decisions like this prevent agencies from converting the exception into the rule.



This PRACTITIONER’S COMMENT was written for THE GOVERNMENT CONTRACTOR by Paul E. Pompeo and Kara L. Daniels, who served as counsel for ASD. Mr. Pompeo is a partner and Ms. Daniels is an associate in the Government Contracts Practice Group of Holland & Knight LLP, Washington, D.C.

