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FEATURE COMMENT: Establishing Trends In Override Case Law

The Competition in Contracting Act (CICA) establishes an automatic stay on the performance of an awarded contract if an unsuccessful offeror files a protest with the Government Accountability Office within 10 days of contract award or five days of a debriefing, whichever is later. 31 USCA § 3553(c), (d). The Government, however, may override the stay in limited circumstances. Id. § 3553(d)(3)(c)(i). The Government has been exercising the override provision with increasing regularity, and unsuccessful offerors are finding themselves before the U.S. Court of Federal Claims to overturn the override decisions while simultaneously prosecuting a bid protest at GAO. These offerors are motivated to challenge an agency override to avoid a fait accomplis that performance of the new contract is so far underway by the time of a GAO decision, even one recommending corrective action, that it would be in the best interest of the Government to continue contract performance than to follow the GAO recommendation. Other offerors may be motivated by pecuniary interests, hoping for continued performance of an incumbent contract during the pendency of a GAO protest and the benefits of continued revenue.

Regardless of the motivation to challenge an override, there is an increasing body of case law in the area of CICA overrides that is defining the landscape of what was barren soil. This FEATURE COMMENT explores some of the trends and important issues that have developed from this case law. The FEATURE COMMENT examines the question surrounding COFC jurisdiction to hear override cases, whether there are differing standards of review for the two types of overrides, the effect of supplemental determinations and findings (D&Fs) in support of an override decision, the trends in underlying bases for overriding an automatic stay and the type of relief generally granted.

The CICA Override Provisions—Although the reader may be familiar with the automatic stay and override provisions, they are worth restating here. As already noted, CICA provides that a contracting officer must direct that performance of a protested award stop if GAO notifies the procuring agency of a bid protest within 10 days of a contract award or within five days of the protestor's debriefing. 31 USCA § 3553(d)(3), (4). Congress intended the automatic stay to provide a stronger enforcement mechanism for GAO bid protests, ensure competition in contracting, and avoid faits accomplis by the Government's practice of allowing the award to continue and then determining, after GAO's decision 100 days later (or 90 days at the time) that it was in the best interest of the Government to continue the performance, now well underway, despite any GAO recommendation for corrective action. The automatic stay should prevent continued performance of "illegally" awarded contracts. *PGBA, LLC v. U.S.*, 57 Fed. Cl. 655, 657–58 (2003); 45 GC ¶ 432 (providing a full discussion of the legislative history of the CICA automatic stay and override provisions).

Nevertheless, Congress recognizes that certain circumstances require the agency to continue with performance of the newly awarded contract. Thus, CICA provides that the head of the contracting activity may authorize contract performance despite a protest after issuing a "written finding" that

> (i) performance of the contract is in the best interests of the United States; or
>
> (ii) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest.

31 USCA § 3553(d)(3)(C).

Jurisdiction or Not—In the days when federal district courts exercised *Scanwell* jurisdiction

over bid protests, they also exercised jurisdiction over challenges to Government override of CICA automatic stays under the Administrative Procedure Act. See, e.g., *Universal Shipping Co. v. U.S.*, 652 F. Supp. 668 (D.D.C. 1987). Yet offerors rarely challenged override decisions. See generally, Judith A. Sukol, The Competition In Contracting Act's Automatic Stay Provision and Judicial Review: A Trap For The Unwary, 43 Adm. L. Rev. 439 (1991). This may be due, in part, to conflicting case law from the U.S. District Court for the District of Columbia, then the most common venue for challenges to agency overrides, regarding whether the court had standing to review agency override decisions. Compare *Topgallant Group, Inc. v. U.S.*, 704 F. Supp. 265, 266–67 (D.D.C. 1988) (refusing to review overrides based on the "best interests of the Government") with *Burnside-Ott Aviation Training Ctr., Inc. v. Dep't of the Navy,* 1988 WL 179796, (D.D.C. Nov. 4, 1988) (finding jurisdiction to review an agency override) and *Universal Shipping*, supra (finding jurisdiction to review an agency override based on the "best interests of the Government" and "urgent and compelling circumstances"). Nevertheless, other district courts maintained jurisdiction. *DTH Mgmt. Group v. Kelso,* 844 F. Supp. 251, 253–54 (E.D. N.C. 1993) (exercising jurisdiction over an "urgent and compelling" override relying on *Universal Shipping*); *Dairy Maid Dairy, Inc. v. U.S.,* 837 F. Supp. 1370, 1377 and n.1 (E.D. Va. 1993) (acknowledging *Topgallant*, but assuming jurisdiction to review an agency override).

As bid protest jurisdiction shifted from district courts to the COFC between 1996 and 2001, when district court jurisdiction sunset and COFC jurisdiction became exclusive (Administrative Dispute Resolution Act, 28 USCA § 1491), the question of COFC jurisdiction to review agency override decisions returned. In 1999, the U.S. Court of Appeals for the Federal Circuit determined that the COFC maintains jurisdiction to review agency override decisions. *RAMCOR Servs. Group, Inc. v. U.S.*, 185 F.3d 1286, 1291 (1999); 41 GC ¶ 361. The Federal Circuit reasoned that the language in 28 USCA § 1491(b) providing the COFC with jurisdiction to decide cases involving an alleged "violation of a statute or regulation in connection with a procurement or proposed procurement," id. at 1289 (emphasis added), is very broad. The Federal Circuit specified that "[a]s long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction" and "[s]ection 3553(c)(2) fits comfortably in that broad category." *RAMCOR* at 1289. Accordingly, the COFC consistently has found jurisdiction to review override cases. See, e.g., *Advanced Sys. Dev., Inc. v. U.S.*, 72 Fed.Cl. 25, 29 (2006); 48 GC ¶ 280; *PGBA* at 659.

There is, however, one exception to this finding, including a recent decision. In *Kropp Holdings, Inc. v. U.S.*, 63 Fed. Cl. 537 (2005); 47 GC ¶ 131, the COFC held that "where legitimate 'interests of national defense and national security' are raised and established to the court's satisfaction, the circumstances under which the [COFC] should find it 'necessary' to reach the merits of an override decision should be the exception, rather than the rule." *Kropp* at 549. The COFC drew this conclusion from language in the Tucker Act that instructs the COFC to "give due regard to the interests of national defense and national security." 28 USCA § 1491(b)(3); see also *Kropp* at 548–49. Providing further guidance, the COFC held that "where the procurement involved is one that is facially 'mission critical' or 'mission essential,' the 'interests of national defense and national security' must be paramount in deciding how jurisdiction should be exercised under 28 USCA § 1491(b)(1)." *Kropp* at 538. The COFC held that a program for Aviation Into-Plane Reimbursement and Ships' Bunker Easy Acquisition cards used to refuel aircraft and vessels at commercial airports and seaports during the military operations in Afghanistan and Iraq reached such interests of national defense and security that the COFC should not entertain jurisdiction to review the agency's override decision. The COFC cautioned, however, that its holding was not that it lacked jurisdiction in all cases in which interests of national defense and security are at issue. Id. at 549. Rather, it had to balance that consideration against other constitutional concerns.

In a recent decision involving a procurement of support services for the Security and Intelligence Directorate of the Defense Advanced Research Project Agency, the COFC relied on *Kropp* to conclude that a demonstration of legitimate interests of national security superseded the Court's need to review the agency override of an automatic stay. *Maden Tech Consulting Inc. v. U.S.*, 74 Fed. Cl. 786 (Fed. Cl. 2006). The facts supporting this conclusion include (1) DARPA programs have led to innovations used in the Iraq war; (2) the contracted services are critical to DARPA's ability to perform its mission; and (3) without the services, 90 percent of DARPA's work on classified information would have to cease.

Id. The COFC, however, did not consider whether there were countervailing constitutional issues and made its determination facially, considering only the representations in the agency's D&F to override the automatic stay.

Although the COFC has issued two decisions declining to exercise jurisdiction to review agency overrides because of interests of national defense and national security based on the language in 28 USCA § 1491(b)(3), both decisions were penned by the same judge. No other judge on the COFC has drawn the same conclusion. In contrast, in *Gentex Corp. v. U.S.*, 58 Fed. Cl. 634, 655 (2003), the COFC considered the mandate in 28 USCA § 1491(b)(3) to weigh the balance of harms when assessing whether injunctive relief is appropriate, but, nevertheless, maintained jurisdiction. Also, in *Beta Analytics Int'l, Inc. v. U.S.*, 69 Fed. Cl. 431, 433 (2005), involving the same DARPA-contracted services that were the subject of the *Maden* case, the COFC identified the procurement as involving interests of national defense and specifically cited 28 USCA § 1491(b)(3), but made no further reference and rendered a decision on a bid protest.

Thus, agencies in the departments of Defense and Homeland Security, and possibly even the National Aeronautics and Space Administration, will be motivated to override automatic stays on the basis that interests of national defense and national security require the procurement to proceed without a decision by GAO. It remains to be seen whether other COFC judges will follow the rationale of *Kropp* and *Maden*. For now, the outcome of such agency overrides may be a matter of chance, dependent on how the clerk's office assigns cases to particular judges.

Standards of Review—Related to jurisdiction is whether the "best interest" rationale for an override is subject to a different standard of review than is the "urgent and compelling" rationale. The Government repeatedly has argued that a "best interest" override is subject to judicial review only "under an extremely deferential standard." *Alion Sci. & Tech. Corp., v. U.S.*, 69 Fed. Cl. 14, 22 (2005); 48 GC ¶ 20. The Government has relied on language in isolated COFC override cases such as *Spherix, Inc. v. U.S.*, 62 Fed.Cl. 497, 505 (2004); 46 GC ¶ 455, in which the COFC described the "best interests" exemption from the automatic stay as an "unremarkable determination" and an "easy course for an agency override" and *SDS Int'l, Inc. v. U.S.*, 55 Fed. Cl. 363, 365 (2003), in which the COFC held that "the court must defer to the agency decision."

The COFC, however, has since consistently and almost universally held that the standard of review for "best interest" and "urgent and compelling circumstances" overrides is the same. That standard, under the Administrative Procedure Act, is whether the override decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *Reilly's Wholesale Produce v. U.S.*, 73 Fed. Cl. 705 , 711 n.10 (2006); 48 GC ¶ 404 (concluding that the rationale for review of "best interest" cases applies equally to "urgent and compelling circumstances" overrides); *Advanced Sys. Dev.* at 27, 31 (disagreeing with *Spherix* that there is a difference between "best interest" and "urgent and compelling circumstances," and applying the arbitrary and capricious standard of review); *Cigna Gov't Servs., LLC v. U.S.*, 70 Fed. Cl. 100, 109-10 (2006); 48 GC ¶ 115; *Alion* at 17, 22 n.5, 22–23 (finding no distinction between "best interest" and "urgent and compelling circumstances," describing the Government's argument of a distinction as "not ... received warmly by this court" and identifying case law history applying an equal standard to "best interest cases"); *Universal Research Co., LLC v. U.S.*, 65 Fed. Cl. 500, 503 (2005); *Kropp* at 550–51. Indeed, even the *Spherix* decision recognized that the standard to review a "best interest" override "is not de minimus" and applied the arbitrary and capricious standard. *Spherix* at 507 n.8. Nevertheless, as the COFC pointed out in *Alion*, the Government likely will continue to argue that the COFC must defer to the agency under the "best interest" standard, because the Federal Circuit has not yet decided the issue. *Alion* at 22 n.5.

Sufficient Rationales—The COFC has been resoundingly clear in rejecting one asserted basis for the "best interest" exception: that the new contract is better and less expensive than the old contract. *Automation Tech. Inc. v. U.S.*, 72 Fed. Cl. 723, 730 (2006); *Advanced Sys. Dev.* at 31–32; *Cigna* at 113; *PGBA* at 662; accord *Reilly's Wholesale* at 709; *Univ. Research* at 503. The COFC explained that such a rationale is inherently inconsistent with the concept of competition in contracting.

> The allegation that the new contract is better than the old one in terms of cost or performance is not enough to justify a best interests determination. *PGBA*, 57 Fed. Cl. at 662. Indeed, it will almost always be an improvement over the old. Id. at 663. To allow a best interests determination to rest on such a common ground would permit

> the override exception to swallow the Congressionally mandated rule that stays are automatic. Id.; accord *Univ. Research Co. v. United States*, 65 Fed. Cl. 500, 503 (2005).

Advanced Sys. Dev. at 31.

An agency's D&F that a new contract is better and less expensive than the old is sufficient for the "best interest" exception defies one of the four factors of *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), which is the currently accepted standard of review for override cases. See, e.g., *Reilly's Wholesale* at 709; *Advanced Sys. Dev.* at 29. Those factors are whether the agency "relied on factors which Congress has not intended it to consider," "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 the decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.* at 43.

The *Reilly's Wholesale* decision compiles the body of override case law to distill those factors that an agency must consider so that it does not run afoul of *Motor Vehicle Mfrs*. These include:

> (i) whether significant adverse consequences will necessarily occur if the stay is not overridden ... (ii) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented ... (iii) how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare[d] to the benefits associated with the approach being considered for addressing the agency's needs ... and (iv) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.

Reilly's Wholesale at 711 (citations omitted). The *Reilly's Wholesale* decision also notes two factors that Congress specifically does not intend agencies to consider: the aforementioned newer and better contract, and that continuation of the contract simply is preferable to the agency. Id.

Perils of Supplemental D&Fs—In proving these factors, the Government must be wary to issue a complete D&F addressing the approved factors and avoiding the others. In *Advanced Sys. Dev.*, two weeks after issuing its initial D&F and five days after submitting the agency record to the COFC, the agency issued a supplemental D&F that included new material not in the record and further explained the agency's rationale. The COFC held that it had

> been supplied no authority for the proposition that the override determination can be an evolving document. In effect, the Government has executed the override two weeks before it issued its "perfected" Determination and Findings. The text of the statute does not support a reading that the override can precede the statutory justification.

Advanced Sys. Dev. at 34. Accordingly, the COFC rejected the supplemental D&F. Similarly, in *Maden*, the agency submitted a supplemental D&F three days after the initial one, but before the institution of litigation. The COFC did not comment on the propriety of the supplemental D&F in the written decision, but, in any event, found them both ineffective support for an "urgent and compelling" determination to override the automatic stay.

What's the Remedy?—A final aspect of the trends in override case law to consider is the form of remedy. Plaintiffs who challenge an automatic stay override generally seek both declaratory and injunctive relief, with the expectation that a preliminary or permanent injunction would wholly set aside the override during the GAO protest period. In a series of five nearly consecutive cases, the COFC granted declaratory relief as the appropriate remedy. *Maden*, supra; *Automation Tech.* at 730–31; *Advanced Sys. Dev.* at 36–37; *Cigna* at 114; *Chapman Law Firm Co. v. U.S.*, 65 Fed. Cl. 422, 424 (2005). The theory behind these decisions is that declaratory relief renders the override invalid, thus reinstating the automatic stay as a matter of law. *Advanced Sys. Dev.*, supra at 36–37. Moreover, demonstration of the elements necessary for injunctive relief is an unnecessary burden on a party seeking to challenge an override, given the statutory scheme. Id. With declaratory relief, however, the Government could immediately issue a new D&F, as long as the rationale does not parrot that of the original that was found invalid. Id. at 37.

Indeed, this was the consequence of *Maden*. In that case, the COFC granted declaratory relief, determining that the initial and supplemental D&Fs were invalid, and, thus, reinstating the automatic stay as a matter of law. *Maden*, supra. On the same day of the COFC's order, the agency issued a new D&F again based on urgent and compelling circumstances. The COFC upheld the last D&F. Thus, from Maden's perspective, it received no relief whatsoever and the

agency received a second bite at the apple to overcome the automatic stay.

The COFC in *Reilly's Wholesale* foresaw the consequence of declaratory relief. In rejecting the line of cases extolling declaratory relief, the COFC held that

> this court doubts whether, as several of these cases have stated, a declaration, that could immediately be superceded by a new override decision, is the equivalent of an injunction. Accordingly, at least in the circumstances presented, the court believes that injunctive relief is the more appropriate remedy.

Reilly's Wholesale at 708 n.7.

Conclusion—The Government faces a challenge of a nearly immediate response to an automatic stay when it has a legitimate concern to continue a new contract. Nevertheless, the Government must work within the confines of competition in contracting and produce a thorough, well-reasoned D&F that not only considers the appropriate factors but specifically avoids inappropriate factors. Moreover, the Government must accomplish that effort in one D&F, not through a series. The decision in *Reilly's Wholesale* goes a long way toward developing precise guidance on a proper rationale. See also *Maden*, supra (admonishing DARPA's counsel and director to read a certain law review article on the subject of overrides before issuing another one). Asserting issues of national defense and national security alone may not carry the day.

Plaintiffs also have the *Reilly's Wholesale* decision to help them evaluate whether they can succeed on the merits in demonstrating that a D&F is arbitrary and capricious. If an unsuccessful offeror files a GAO bid protest and challenges an automatic stay override, it should be sure to argue for both declaratory and injunctive relief. The ultimate relief may depend on the judge assigned to hear the case; however, a plaintiff awarded declaratory relief might find itself able to win a battle but not the war while concurrently prosecuting a bid protest.

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