

---

# Override of CICA Stays: A Guidebook



**This Guidebook is designed to assist the practitioner in preparing overrides of mandatory CICA Stays, triggered by pre-or post-award protests. It should be used in conjunction with FAR Part 33 and Agency supplements, as well as applicable MACOM bid protest guidance.**

---

---

# **Override of CICA Stays: A Guidebook**

## **The CICA Stay: An Overview**

Under strict time constraints, the Competition in Contracting Act (CICA) provides the protester a powerful right – to stop any Government procurement dead in its tracks. When an Agency is properly notified by the Government Accountability Office (GAO) of a contractor’s protest, CICA may require the contracting officer to withhold award of a contract or, if the contract has already been awarded, to suspend contract performance. (See 31 USC § 3553, implemented by FAR 33.103 and 33.104). This event is commonly referred to as a “CICA Stay.”

Importantly, CICA permits the Agency to override the CICA Stay if certain conditions are met. These conditions are generally laid out in FAR 33.103(f) for Agency protests and FAR 33.104(a) and (c) for GAO protests. (See additional guidance in AFARS §§ 5133.103 and 5133.104).

If a CICA Stay is triggered by a protest, the Agency must decide whether or not to override it. There is only one ground on which a pre-award CICA Stay can be overridden, but two for post-award Stays. With respect to pre-award Stays, the Agency must base its override decision on the ground that contract performance is urgent and compelling, and that contract award will likely occur within 30 days. With respect to post-award Stays, the Agency can base its override decision on the ground that contract performance is either: (1) urgent and compelling, or (2) in the best interests of the United States. As discussed below, case law also demonstrates that the Agency must explain why continued use of the incumbent contractor (if one exists) is not practicable. For that reason, contracting officers must tailor their Determination and Findings (D&F) to clearly establish the appropriate rationale for the override.

No matter what the justification, however, it is imperative that any decision to override the CICA Stay requirement be carefully prepared and documented in order to provide the approval authority with the basis upon which to decide, and additionally, in order to withstand intense judicial scrutiny that may follow. An interested party to a protest can challenge an Agency’s override decision in the U.S. Court of Federal Claims (COFC). (Prior to 2001, protesters challenging an override of a CICA Stay could seek a temporary injunction from various Federal District Courts. Since January 2001, jurisdiction has been exclusively vested with the COFC). [See Administrative Dispute Resolution Act of 1996].

Therefore, it is critically important for Agencies to carefully prepare and document an override decision that can withstand detailed judicial review. This Guidebook is intended to assist the practitioner in preparing an override decision that can withstand such scrutiny.

## **The Court of Federal Claims Reviews Overrides, Not the GAO**

If the Agency overrides a CICA Stay, an interested party contractor may challenge the override decision by seeking an injunction from the Court of Federal Claims. If

---

issued, the injunction will immediately stop the Agency from proceeding with either contract award or contract performance. Case law shows that the Court will apply a four-part test in reviewing a contractor's request for an injunction.

One of the elements to the four-part test is the likelihood of the plaintiff (protester) succeeding on the merits of the case. The effect is that the Court will look at the Agency's override decision to see if it was unreasonable, arbitrary, or capricious. As mentioned above, the Court determines the reasonableness of the Agency's decision, depending upon the grounds on which the override decision was based – i.e., urgent and compelling or best interests of the United States. To reiterate, it is vital for Contracting Officers to prepare a Determination and Findings document (D&F) that is tailored to the appropriate ground on which the override decision was based.

**PRACTICE TIP:** Although GAO cannot review an override decision, the Agency must immediately notify the GAO of any override action it executes.

## STANDARD OF REVIEW

The Court of Federal Claims will review an Agency override decision under the general provisions of the Administrative Procedures Act. In that context, the following questions are asked by the Court:

- Did the HCA<sup>1</sup> act within the scope of his/her authority in overriding the Stay?
- Was the Agency's decision arbitrary, capricious, an abuse of discretion, or not in accordance with the law?
- Was the decision based on all relevant facts *AT THE TIME* the override decision was made?

Recent cases from the Court of Federal Claims add an inquiry as to whether the decision was based on consideration of the relevant factors and whether there has been a "Clear Error of Judgment."

**PRACTICE TIP:** The Court of Federal Claims will generally only review the administrative record that was before the override approval authority at the time of the override decision; *NOT* documents prepared after litigation began (i.e., the contracting officer's statement, documents prepared for the purpose of protest litigation), except in very limited situations.

**PRACTICE TIP:** Filing an Agency protest does not extend the time for obtaining a stay at GAO. FAR 33.103(f)(4). Thus, if a protestor first protests to the Agency, it may be untimely for a CICA Stay if it later protests to the GAO.

---

<sup>1</sup> As explained below, within the Army, override authority is vested with the Deputy Assistant Secretary of the Army, Procurement (DASA(P)). The HCA must forward any override request to DASA(P) for approval. (Note: See AFARS 5133.104 for separate AMC approval authority).

---

The Department of Justice's Commercial Litigation Branch, Civil Division, provides a trial attorney to represent the interests of the Army, and is responsible for defending the override decision at the Court of Federal Claims.

### **The Purpose of the CICA Stay: Maintain the Status Quo**

Understanding the purpose of the CICA Stay will help practitioners in determining whether an override is appropriate in the first instance. Understanding the different grounds on which a CICA Stay may be overridden will help practitioners in ensuring that the override decision is based on adequate grounds, once the decision to override is made.

Congress made changes to the bid protest system under CICA in 1984 to remedy a major loophole in the GAO protest review process. In the past, by the time the GAO reviewed a protest the contract was awarded, the awardee was engaged in performance, and the contract may have already been fully performed. This situation limited the amount of meaningful relief available to a successful protester. Consequently, Congress enacted the *CICA Stay* to maintain the "status quo," pending a thorough review of the acquisition. Thus, when possible, the Agency is generally expected to extend the incumbent's contract for the 100 days of the GAO bid protest period, rather than make contract award to or allow performance by a new contractor. ***Hence, the override decision must provide adequate justification to support contract award to, or performance by, a contractor other than the incumbent – if there is an incumbent.***

**PRACTICE TIP:** The CICA Stay is triggered at different times under different circumstances for protests. GAO protests require notification to the Agency by GAO to trigger a CICA Stay. In Agency protests, notification by the protester to the Agency triggers the Stay. See FAR Part 33 and consult your legal counsel. It is important to note that if, after an override request has been approved and the contract awarded, the same protester files a post-award protest, the post-award protest must be treated as a new action. Thus, the Agency must prepare a new D&F and consider all relevant factors necessary for an override to the most recent protest.

CICA mandates that a CICA Stay, if triggered, is effective until the protest is resolved or an override request is approved by the designated override authority. Congress recognized that there are instances where award or performance of a contract is vital to U.S. interests. Therefore, Congress created exceptions to the CICA Stay for both pre-and post-award protests.

### **When Overrides Are Authorized: Pre-Award / Post-Award**

Pursuant to CICA, the HCA has the authority to override both pre-and post-award CICA Stays. For procurement conducted by the Army, however, that authority has been withheld, and the DASA(P) is the approval authority for overrides, not the HCA. (See, AFARS Part 5133.104 concerning approval of override decisions for AMC.) ***No contract award may be made or performance begun until the override decision has been approved and GAO is notified IAW FAR 33.104(b)(2) or (c)(3).***

---

The grounds on which an override decision may properly be based are:

**Pre-Award: Override of a CICA Stay upon a written finding that:**

- Urgent and compelling circumstances which significantly affect interests of the United States that will not permit waiting for the decision of the Comptroller General. *31 U.S.C. § 3553(c)(2)(A)*.

**AND**

- The Agency is likely to award the contract within 30 days of the written override determination.

**Post-Award: Override of a CICA Stay upon written finding that:**

- Performance of the contract is in the best interests of the U.S.

**OR**

- 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 USC § 3553(d)(3)(C)(i)*.

**PRACTICE TIP:** The protest must be timely and proper notification received by the Army from GAO to trigger the CICA Stay. ***Remember, notification of a GAO protest from the contractor does not trigger the CICA Stay.***

### **Urgent and Compelling Circumstances**

In preparing the D&F, the practitioner should provide strong justification that: (1) the need for the supply or service is urgent; and (2) a compelling reason exists to award the contract to a contractor rather than extend the existing contract (or contract arrangement) with the incumbent for the 100 days of the GAO bid protest period. (As discussed previously, the D&F must state why the incumbent's contract could not be extended pending a GAO decision). Furthermore, the AFARS requires the D&F to explain the damage the United States will suffer if the award is not authorized, and damage the United States will suffer if award is made and the protest is sustained.

In the past, a decision to override on the ground of urgent and compelling circumstances was the more problematic and more likely of the two to be overturned. When they had jurisdiction, the Federal District Courts took two distinct views with respect to this ground. In the minority view, the focus was on whether the type of work or item being procured was urgently needed. The *majority* view, which was the more conservative view and the *one that should still be followed* by practitioners, focuses first on the service or supply to be provided, then shifts to whether "performance by the particular awardee" is urgent and compelling. The mere fact that the incumbent's contract has expired is not sufficient justification to make contract award to, or authorize performance by, another contractor. Now that the Court of Federal Claims is the venue for reviewing Agency override decisions, the continued

---

use of the conservative approach best insures that an override decision will be supported.

Because its jurisdiction over bid protests is relatively recent, case law within the COFC is still emerging. Although the outcome of a COFC decision is generally dependent on the specific judge hearing the challenge to the Agency override, it behooves the practitioner to ensure that the documentation and rationale supporting the Agency override can withstand intense judicial scrutiny. Provided below are recent COFC cases that provide “lessons learned” and insight regarding what is many times intense judicial scrutiny and review of Agency override determinations.

**Keeton Corrections Inc.** involved an override of a Federal Bureau of Prisons contract for a community correction center. Keeton, the incumbent, was not selected for the contract. Keeton protested and for several months after the protest continued to provide services through a series of sole-source monthly purchase orders. While the protest was pending, the Agency decided to override the CICA Stay on the basis of urgent and compelling circumstances. The Agency asserted that the monthly purchase orders resulted in additional costs. Keeton challenged the override. COFC reviewed the Agency override decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court determined that the D&F and supporting affidavits failed to establish that the Stay would cause additional cost growth. Lastly, the Court observed that the presence of another contractor able and willing to perform does not create urgent and compelling circumstances. ***A key “lesson learned” to take away from this case is the importance of assuring the accuracy of facts used to support the override determination. Loss of credibility with the Court will no doubt undermine any Agency override action.***

The case of **Chapman Law Firm** involved another post-award override. At issue was a Department of Housing and Urban Development (HUD) contract for management and marketing services. HUD asserted urgent and compelling circumstances justified continued performance by the awardee. HUD asserted that the awarded contract included several new requirements not in the incumbent contract and that continued performance by the incumbent would result in a monetary loss if the new requirements were added to the incumbent contract. Again conducting a detailed review of the Agency record, COFC found factual flaws and insufficient evidence to support HUD’s override determination. The Court also questioned the objective analysis of HUD’s actions. In light of this, the COFC held HUD’s override to be invalid, finding there was no substantial adverse financial or administrative impact attributable to the CICA Stay.

The case of **Reilly’s Wholesale Produce** involved the Defense Commissary Agency’s override decision based on urgent and compelling circumstances requirement for fresh produce. The Agency asserted an urgent need for fresh produce was mission critical, and without the override, the Agency’s reputation would be damaged and employees would have false hope. The Court enjoined the override observing that the Agency failed to adequately consider reasonable alternatives, or support what urgent circumstances compelled award to this particular contractor.

---

(This case sets out four factors agencies should consider in making an override decision. These factors will be discussed later in this guidebook.)

While all cases and their facts are unique, the practitioner should carefully ensure that any facts cited in the D&F for an override request are accurate and support urgent and compelling circumstances. As the above cases demonstrate, care must be taken to assure that the factual justification for an override is accurate and can withstand a rigorous judicial scrub. Once an Agency loses credibility with the Court, the Agency override will likely fail. Consequently, the practitioner must work closely with supporting legal counsel and confirm the completeness and accuracy of the Agency record supporting an override determination.

**PRACTICE TIP:** Always consider seeking senior level Government officials to establish the facts that justify “urgent and compelling interests significantly affecting the interests of the United States.” Frequently, based on their judgment and status within the Government, a high ranking official’s involvement in the override underscores the importance to the United States of the procurement action. *If an override is truly based on urgent and compelling circumstances, enlisting the support of senior level Government officials should not be difficult.*

### The Best Interests of the United States

This basis for an Agency override is applicable only in post-award situations and for reasons explained below should always be considered as a basis for the override, if at all possible. When confronted with a post-award CICA Stay, an Agency can choose to override the Stay based either on the urgent and compelling ground or on the best interests ground. When using the best interests ground, CICA requires the Agency to make a specific finding that “performance of the contract is in the best interests of the United States.”<sup>2</sup>

In recent decisions, the COFC has clearly stated that it has jurisdiction to review Agency override decisions that are based on the “best interests” rationale. Consequently, Army practitioners should prepare the D&F with an eye that the Agency’s override decision will be subject to detailed judicial review. Just as with any urgent and compelling override request, practitioners should ensure the D&F includes and accurate and thoughtful analysis of *why extending the incumbent’s contract is not in the best interests of the United States*, as well as an analysis of why continued performance is in the best interests of the United States.

---

<sup>2</sup> Some Federal District Courts opined that this ground was not subject to judicial review and deferred to the exercise of the discretion of the Agency’s decision, thereby leaving the override decision intact, unless there was evidence of Agency bad faith, fraud, or violation of law. District Courts in other jurisdictions, however, did review the Agency’s override decision. The focus of the review there was on whether the suspension of the awardee’s contract was in the best interests of the United States. This historical point is moot now since jurisdiction on Agency override decision is now vested exclusively with the COFC.

---

Again, provided below are recent COFC cases that provide “lessons learned” and insight regarding the intense judicial scrutiny and review the Court may give Agency override decisions.

In ***University Research Co.***, the Health and Humans Services Administration (HHS) issued an override involving a contract award for operation of a clearing house about substance abuse and mental health issues. University Research Co., (URC), the unsuccessful incumbent, claimed HHS failed to properly evaluate its past performance and costs, and argued that it would suffer irreparable injury from terminating its incumbent operation. HHS defended its best interests override decision, asserting that awardee’s performance was less costly and a better value than continuing with the incumbent while awaiting a GAO decision. The COFC ruled that URC was likely to win on the merits, that the incumbent would suffer irreparable injury, and that the best interests of the United States favored upholding the integrity of the procurement process. On that last point the Court observed that the public interest is not well served when contracting officials “rush” to save a few weeks and end up delaying contracts by many months. *Again highlighting the importance of Agency credibility, the Court found HHS’s override unsupported by the facts and riddled with errors.*

One decision highlighting how the COFC may vigorously review override determinations is found in **PGBA, LLC**. At issue was a contract to transform the DoD TRICARE medical services program. The TRICARE Management Activity (TMA) contended that override of this post-award protest was appropriate for both urgent and compelling reasons as well as being in the best interests of the United States. TMA asserted that without the override, the quality and quantity of medical services would be delayed throughout DoD and that millions of dollars in increased costs would accrue. Following a detailed and exhaustive scrub, the Court specifically ruled that it had jurisdiction to review both urgent and compelling and best interests findings by the Agency. Moreover, the Court noted that the “best interests” of the United States are also served by promoting competition in the contracting process. Ultimately, the Court discovered factual errors in the override determination and concluded that the override was unreasonable.

In **Advanced Systems Development Inc.**, the incumbent small business challenged the Agency’s consolidation of many IT service contracts into a single best value contract, for which it was not selected. In a best interests override, the Agency based its override decision on the assertion that the new contract would be better than the old in terms of cost and performance. The COFC held the override to be arbitrary and capricious; significantly, the court ruled that better terms for cost and performance was, by itself, an insufficient basis to support an override. The COFC concluded that allowing such a common basis to support an override decision would defeat the Congressional intent under CICA to preserve the status quo.

In **CIGNA**, the agency used the best interests exception to avoid any delay in using a newer and better claims processing system and in obtaining substantial cost savings. Sustaining the challenge to the override, the Court noted the agency failed to consider the risk of GAO sustaining the protest and failed to address the important Congressional interest in competition in contracting. The Court also noted that a newer and better contract, alone, is not sufficient justification for an override decision.

---

**PRACTICE TIP – USE THE INCUMBENT:** If the existing contract still meets Agency requirements, avoid a CICA override altogether and extend the incumbent contract to bridge the protest period. If the existing contract has expired, execute a sole source, interim bridge contract with the incumbent contractor – with the same terms and conditions of the pre-existing contract. Resort to CICA overrides when the incumbent contractor is unwilling or unable to continue performance.

### **The Global War On Terror (GWOT) / National Security: The Court of Federal Claims Declines Review of Override.**

In an exceptionally important decision for the Department of Defense, the COFC declined to review an override involving the protest of procurements in direct support of the Global War on Terror.

The **Kropp Holdings** case involved a CICA Stay of a Defense Energy Support Center (DESC) contract for supplying fuel at airports and seaports. The new contract provided for the automated credit card purchase of fuel for both air and sea terminals. DESC based its override on "best interests of the United States," since performance of the new contract would be at less cost than extending the existing contract. The COFC observed that the Administrative Dispute Resolution Act of 1996 mandated that it give due regard to the interests of national defense and national security and the need for expeditious resolution of any protest action. The Court also cited to the September 2001 Joint Congressional Resolution authorizing the use of the Armed Forces against terrorism. Against this backdrop, the Court concluded when a procurement is "mission critical" or "mission essential," the interests of national defense and national security must be paramount. Consequently, the Court ruled that under such circumstances, it should defer to the Agency override decision. DESC's override was not further reviewed by the Court.

In a subsequent case, **Maden Tech Consulting Inc**, the Court actually declined to exercise jurisdiction regarding an Agency override because the D&F established that the services involved legitimate interests of national defense and national security.

**PRACTICE TIP:** If your procurement directly supports the GWOT or other vital national security interest, highlight this important fact in your D&F documentation.

### **Determination & Findings**

A careful reading of its decisions shows that the Court of Federal Claims may well limit its review of the Agency's override decision to the administrative record prepared in support of that action. The D&F, override decision, supporting documents, and Agency approval constitute the Agency record that supports the Agency's override decision. Consequently, it is critical that these documents create a written record, contemporaneous with the Agency's override decision, which contains a comprehensive, detailed, well-reasoned analysis to support the reasonableness of the Agency's decision.

---

When making the override decision, Agency officials should be mindful that a challenge to an override generally includes a request for a temporary injunction. An injunction, if successful, will prevent the Agency from proceeding with the acquisition and preserve the status quo until the Court decides the merits of the override decision. Consequently, in preparing the documentation to support the override, Agencies should include information that is relevant in the defense against a protester's request for an injunction.

The Court of Federal Claims uses a four-part test, called the "balancing hardship test" in determining whether a temporary restraining order or injunction is warranted. (See reference page for case citations) The four factors subject to judicial scrutiny are:

1. Does the Plaintiff have a substantial likelihood of prevailing on the merits?
2. Will the Plaintiff suffer irreparable harm without an injunction?
3. What harm will the Agency suffer if an injunction is issued?
4. Is injunctive relief in the public's interest?

### **The Decision To Override The Stay Must Be Supportable.**

The D&F in support of an override should focus on whether the protester has a substantial likelihood of prevailing on the merits (Factor 1) – i.e., the bases for the override decision. That factor most will be scrutinized by the Court of Federal Claims, and thus of great concern to practitioners.

Consequently, the Agency must demonstrate that its decision to override the Stay was within its authority and not arbitrary or capricious.

In other words, depending upon the ground used for the override:

- Were there urgent and compelling reasons to override the Stay?
- Was overriding the Stay in the best interests of the United States?

Practitioners should be mindful that the focus by the Court is **NOT** whether the source selection decision was reasonable. That goes to the merits of the protest of the contract award, an issue altogether separate from the override decision. Rather, the practitioner must *FOCUS ON THE OVERRIDE DECISION ITSELF*, and provide a detailed, thoughtful, and well reasoned justification to support why the override was either, or possibly both, urgent and compelling or in the best interests of the United States.

Recent COFC cases emphasize the need for the Agency to consider four factors in making the override decision, (sometimes referred to as the Reilly Factors). These four factors provide a useful blueprint for Agencies in crafting the D&F. These factors are:

1. Consideration of the significant adverse consequences that will necessarily occur if stay is not overridden.

- 
2. Consideration of all reasonable alternatives and whether each would adequately address circumstances – or not. (e.g., the use of contract extensions or bridge contract with the incumbent)
  3. Consideration of potential costs, including costs associated if protest is sustained – in comparison to the benefits associated with an override.
  4. Consideration of the impact of the override on competition, and the integrity of the procurement system.

Along with fully developing Factor 1, the D&F should also address Factors 2, 3, and 4, which may overlap with Factor 1.

- Explain why circumstances significantly affecting the Agency do not permit waiting for a GAO resolution.

- Address the incumbent contractor's ability/inability to perform during a protest and why one contractor's performance over another is urgent and compelling.

### **Pre- and Post-Award Protests Involving the Same Acquisition**

If a pre-award protest is filed, the Stay is overridden, the contract is awarded, and immediately thereafter a post-award protest is filed, even if by the original Protester, it is important to remember that a second CICA Stay is triggered.

The contracting activity, if it desires to override the second (post-award) Stay, must *prepare and process a new override request*. The first override, pertaining to the pre-award protest does not apply to the post-award Stay!

Although the D&F and other supporting documentation will appear to be similar to that of the first override request, the post-award override packet must be prepared as an independent, stand-alone document and should not be taken lightly by the Agency.

Furthermore, since judges may be somewhat more likely to give more deference to an override based upon the best interests of the Government, this ground for override decision should always, wherever possible, be added in support of the override of post-award Stay, in addition to any urgent and compelling ground.

### **Override Decision Summary**

Procurement officials must carefully consider whether or not to override a CICA Stay, as the Court of Federal Claims is not hesitant to stop an Agency that acts without adequate factual justification or grounds. Although procurement officials may be frustrated by suspension of an acquisition, Agencies must be mindful that the overall purpose of the CICA Stay is to restrict Agencies from asserting its interests at the cost of full and open competition for the procurement process as a whole. Moreover, that if the CICA Stay is overridden and the protest is subsequently lost, the

---

contract may have to be terminated for convenience, a sometimes very expensive and disruptive proposition for the Agency. Thus, if there is a reasonable risk that the protester will prevail in its protest, the Agency may well be better off accepting the CICA Stay.

If, after careful consideration, the Agency determines that an override is necessary, either due to urgent and compelling circumstances or because it is in the best interests of the United States, it is critical that the Agency create detailed, thorough, well-reasoned supporting documentation to support the override decision. While this may take considerable time and effort, it is time well spent. The failure to properly document the Agency's rationale for the override decision may well result in the Court of Federal Claims overturning the Agency's decision. This can result in unnecessary expense, disruption, and embarrassment to the Agency.

### Summary Focus Points

- Determine whether extending the incumbent contract, or awarding an interim, bridge contract with the incumbent contractor may be accomplished in lieu of an override.
- Develop a well reasoned, accurate, and comprehensive D&F with supporting documentation justifying the override decision. Incorporate the four Reilly Factors into the D&F. Remember, the Court of Federal Claims places great weight on documents developed contemporaneous with the override decision. The Court gives little-to-no weight to *post hoc* evidence and explanations developed during the "heat of litigation." Do not be surprised if the Court declines to supplement or "correct" the Agency record after the override decision is the subject of litigation.
- Consider using the mission critical / essential justification in all situations that support National Defense / Security operations, to include procurements in direct support of the Global War on Terror.
- Ensure the GAO is immediately notified of any decision to override the CICA Stay of a GAO protest. Contract award or performance may not occur absent such notice. (See FAR 33.104 on GAO notification. Field offices should coordinate individually with KFLD on the GAO notification procedures.)

The next page presents an outline of a D&F for the practitioner to assist in organizing the Agency's override package. Following that is additional insight on preparing override documentation, sample D&F language, AFARS § 5133.104, and case citations.

---

---

## Sample Outline for an Override Determinations & Findings, D&F:

- [ ] Introduction – Agency, protest and B-number, request to proceed notwithstanding GAO protest, and protester.
- [ ] Purpose – Summarize basis for Override.
- [ ] Acquisition Background: Requiring Activity & Requirements Discussion.
- [ ] Protest Issues/Analysis: The allegations & Agency Response & Expected Resolution.
- [ ] Legal Coordination.
- [ ] Discussion of Existing Contract, if any, and selection/award process.

### **BASIS FOR THE STAY:**

- [ ] **Urgent Basis:**
  - [ ] Discuss why the override is urgent and compelling, e.g., criticality of item/service, or necessity of continued Performance. Note especially if this is a *mission critical procurement*. – Cite the Kropp Holdings Case.
  - [ ] Discuss why a “particular” contractor is essential, e.g., special/technical skills; cost considerations/savings; scope/nature of work/item; or other special considerations.
  - [ ] Also, discuss the likelihood of protester prevailing.
- [ ] **Best Interest Basis**
  - [ ] Discuss why continued performance is in the best interests of the U.S.; either based on urgent and compelling circumstances like mission essential reasons, – Cite Kropp Holdings Case; or other reasons.
  - [ ] Discuss why a “particular” contractor is essential. Relate any special/technical skills; cost considerations or significant savings; scope/nature of work/item; or other special considerations.
  - [ ] Specific findings of continuing performance in the Best Interests of US.
  - [ ] Also, discuss the likelihood of protester prevailing on the merits.
- [ ] **Discussion of HARM & DAMAGES** (Reilly Harm Factors)
  - [ ] Discuss significant adverse consequences that will necessarily occur if stay is not overridden.
  - [ ] Discuss all reasonable alternatives and whether each would adequately address circumstances – or not. (Extensions, Bridge to Incumbent, waiting for GAO, etc.)
  - [ ] Discuss potential costs, including costs associated if protest is sustained – in comparison to Benefits associated with override.
  - [ ] Discuss impact of the override on competition, and the integrity of the procurement system.
- [ ] Determination: In accordance with FAR 33.104c(2)(ii), that contract performance should continue notwithstanding this protest Stay.
- [ ] *[Attachments may include mission impact affidavits, or statements from technical representatives].*
- [ ] Proper Signatures.

---

---

## **Preparing the Agency Override:**

There are many documents that should go into an override request package – many of which are case specific. Nonetheless, the following list of documents are commonly necessary to support an override request from the field. Consult with the servicing legal office and override approval office for the documents necessary for any specific override request.

- Protest documents and GAO “B” number designation;
- Contract/solicitation sections relevant to the protest;
- The stop work order or “Stay” document showing the agency has ordered a Stay or a memo that performance has not begun;
- SSA Determination;
- Post negotiation memo;
- Supporting D&F signed by the KO and the HCA;
- Local Legal Opinion addressing the protest and the Override.

Additionally, there are several critical documents that record the Agency’s decision to override the CICA Stay. These are the essential documentation that the Court will review in any challenge to the Agency override decision. Three such documents are noted below.

First – the contracting officer’s Determination and Findings, (either signed by the HCA, or signed by the contracting officer and endorsed and adopted by the HCA), and supporting attachments. NOTE: the legal review memorandum prepared by the contracting officer’s servicing legal office, and any supporting documentation is not typically reviewed by the Court but is often included with the documents when submitted for approval.

Second - the HCA’s request for approval to proceed in the face of the CICA Stay.

## **Different Approaches to the Documentation:**

(1) One approach is to have the contracting officer prepare and sign the D&F and then have the HCA co-sign or endorse the D&F. The HCA then submits a separate request for override approval, citing or otherwise incorporating the D&F by reference.

(2) Yet another approach is for the contracting officer to prepare the D&F that the HCA will sign, with detailed supporting attachments/affidavits from the contracting officer. The HCA would still sign a request for approval.

Whichever method is used by the practitioner, it must be logically organized and sharply focused on the bases that justify and support the Agency decision. The contracting officer is generally in the best position to know the critical facts and circumstances of the contract and protest, and usually best suited to testify at any subsequent court challenge to the override decision.

---

---

**Regulatory Guidance:**

AFARS § 5133.104 states that the contracting officer shall prepare a D&F to be signed by the HCA and that such D&F shall clearly explain the damage/harm to the United States, if the award is not allowed to proceed in the face of the Stay, or in cases of a post-award override, the harm if authorized continued performance is not approved.

**I. Sample Outline of Contracting Officer's/HCA's D&F –****DETERMINATION AND FINDINGS****REQUEST FOR AUTHORITY TO PROCEED NOTWITHSTANDING PROTEST  
XXX INC, B-29xxxx**

Upon the basis of the following findings, I, [\_\_\_\_], [Contracting Officer, /HCA], [organization], have determined that performance of the contract for [-----] in support of [requiring activity or command] should be authorized to proceed in the face of a Government Accountability Office (GAO) protest (B-xxxxxx) filed by [protester].

**Purpose:** To state the basis for requesting and to request an override of the CICA Stay of performance caused by [protester's] protest against the award of Contract [contract number], which was issued by the [Army Contracting office], to awardee in support of the [requiring activity or command]

**Acquisition Background:**

a. **Originator of the Requirement:**

b. **The Requirement:**

**Protest Issues/Analysis:** The protest rests on x allegations:

a. Allegation 1: Improper price evaluation. Agency Response and Expected Resolution:

b. Allegation 2: Lack of meaningful discussions. Agency Response and Expected Resolution:

**Legal Coordination:** In making my determination, I have considered the advice of the Chief Trial Attorney, Contract & Fiscal Law Division, (KFLD) regarding the merits of the protest that triggered the CICA Stay. In his opinion, based upon his review of the Agency Report and the protest, the Army's position vis-a-vis the protester's appears to be defensible. Even if GAO were to sustain the protest, however, the interests at risk from delay are so great that they overcome the risks to the Agency of an adverse ruling by the GAO. (*Note: inclusion of this paragraph requires actual coordination KFLD*).

---

---

## **Existing Contract and Protest:**

This is a new requirement for a supply item, so there is no incumbent contractor. Extending an existing contract is not a possibility. [In cases of an incumbent discuss the issue of extending the incumbent's contract].

[Discuss the solicitation and selection/award process. Include whatever chart or table may be helpful or refer to attached supporting documents that explain Agency actions. Include noting the effective date of the Stay.]

Sample Table 1. **TECHNICAL/MANAGEMENT SUBFACTORS**

	<b>1. EXPERIENCE</b>	<b>2. INTEGRATED TECH./MGT.</b>	<b>3. DESIGN</b>	<b>4. RISK ASSESS.</b>	<b>5. KEY PERSONNEL</b>
<b>1 Bidder</b>	<b>BLUE</b>	<b>BLUE</b>	<b>YELLOW</b>	BLUE	<b>BLUE</b>
<b>2 Bidder</b>	<b>GREEN</b>	<b>GREEN</b>	GREEN	GREEN	<b>BLUE</b>

### **Basis for the Stay:** (Post-Award example)

**Urgent and Compelling circumstances that significantly affect the interests of the United States that will not permit waiting for the GAO decision on the merits of the protest.** (Note added requirement of likely award within 30 days if in a pre-award situation).

Discuss why the override is urgent and compelling, e.g., criticality of item/service, or necessity of continued Performance. Note especially if this is a mission critical procurement.

Discuss why a "particular" contractor is essential, e.g., special/technical skills; cost considerations/savings; scope/nature of work/item; or other special considerations

Discuss why extending incumbent is NOT in the best interests of the United States, and the harm Government will incur w/o the Override.

Discuss why the Agency cannot wait 100 days for a decision on the merits of the protest, and the likelihood of protester prevailing.

### **Basis for the Stay:** (Post-Award example)

**Continued performance is in the Best Interests of the United States.**

---

---

Discuss why continued performance is in the best interests of the U.S.; either based on urgent and compelling circumstances like mission essential reasons, or other reasons.

Discuss why a “particular” contractor is essential. How/why U.S. interests would be harmed if the proposed contractor were not allowed to continue performance. Relate any special/technical skills; cost considerations or significant savings; scope/nature of work/item; or other special considerations. Note especially if this is a mission critical procurement.

Discuss why extending incumbent is NOT in the best interests of the United States.

Discuss the harm Government will incur w/o override, e.g., why the Agency cannot wait 100 days for a decision on the merits of the protest, and why U.S. interests would be harmed.

Also, discuss the likelihood of protester prevailing on the merits.

### **Sample language for Mission Critical or Mission Essential Procurements:**

The below sample language is taken from previous override requests. Because of its Agency-wide significance, both the D&F and the HCA’s request should recognize this justification when it applies.

Congress has declared its will in a Joint Resolution of 14 September 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), that all branches of Government take into account the existing, unusual, extraordinary, and continuing threat to national security and foreign policy. This acquisition falls within the scope of that declaration as directly supporting the effort of forces in the stability of the Iraqi Government. *See also Kropp Holdings v. United States*, 63 Fed. Cl. 537 (2005). An override is an extraordinary remedy, but is required here by extraordinary circumstances.

### **HARM – DAMAGES**

If the Stay of performance continues, the adverse effect could be catastrophic. [Etc... discuss the costs and damages associated with the override. Include discussion of the four Reilly Factors – if not previously addressed]

Discuss significant adverse consequences that will necessarily occur if stay is not overridden.

Discuss all reasonable alternatives and whether each would adequately address circumstances – or not. (Extensions, Bridge to Incumbent, waiting for GAO, etc.)

Discuss potential costs, including costs associated if protest is sustained – in comparison to Benefits associated with override.

Discuss impact of the override on competition, and the integrity of the procurement system.

I have therefore determined, in accordance with FAR 33.104c(2)(ii), that contract performance should continue notwithstanding this protest Stay.

---

[Attachments may include mission impact affidavits, or statements from technical representatives].

[Signature of Contracting Officer]. / [Signature/Endorsement of HCA].

## II. Legal Memorandum Document

The servicing legal office should provide its legal assessment of the protest and the basis for the override decision. IT SHOULD BE CLEARLY MARKED AS ATTORNEY CLIENT WORK PRODUCT. Ideally, it should address the following points:

- Procurement background
- Protest Merits/litigation risks
- Potential harm to the US
- Standard of Review –
- Cite to the Kropp case in situations of mission critical procurements.

NOTE: This document is prepared for the decision maker and is not released to the Court or parties bringing an action in COFC challenging the Override.

## III. HCA Request for Approval Memorandum & Supporting Documentation

sample> Request as a separate document from any D&F signed by the HCA

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(POLICY AND PROCUREMENT), ATTN: SAAL-ZP, 103 ARMY PENTAGON, WASHINGTON,  
DC 20310

SUBJECT: Request for Authority to Proceed in Face of Government Accountability  
Office (GAO) Protest.

I request approval of authority to proceed and continue performance of [contract number] while protest [B-number], filed by [protester] is resolved by the Government Accountability Office (GAO). My request is based upon a finding of urgent and compelling circumstances that significantly affect the interest of the United States, will not permit awaiting the decision of the GAO /or/ the Best Interests of the United States, /or both/.

A discussion of the protest and supporting rationale for the subject request to proceed is provided in the attached Determination and Findings at enclosure x. I fully adopt and endorse the contracting officer's determinations and findings as my own. [Also list or reference any supporting documents]. A copy of the GAO protest is also provided at enclosure x.

[Address legal coordination and any points of significant importance concerning the protest and the override basis. Give emphasis to significant harm to interests of

the United States if the approval is not granted. If applicable, recognize impact to National Security / Defense (see *Kropp Holdings* statement above).]

The point of contact for this action is ... etc.

[Signature of the HCA]

#### IV. Sample GAO Notice:



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
UNITED STATES ARMY LEGAL SERVICES AGENCY  
901 NORTH STUART STREET  
ARLINGTON, VA 22203-1837  
(703) 696-2801 DSN 426; Fax ext. 1535

August 5, 2005

Contract Appeals Division

Procurement Law Group  
Office of the General Counsel  
U.S. General Accounting Office  
441 G. Street, NW  
Washington, D.C. 20548

Subject: Protest of [REDACTED]

Dear Sir or Miss:

This letter is to inform you that in accordance with 31 U.S.C. § 3553(d)(3)(C) and FAR 33.104(c)(3), the Deputy Assistant Secretary of the Army (Policy and Procurement) determined that based on both the urgent and compelling circumstances that significantly affect the interests of the United States, and the best interests of the United States, the Government will not permit waiting for the decision of the Comptroller General and has authorized the Contracting Officer to continue performance under Contract No. [REDACTED]

If you have any questions regarding this matter, please contact [REDACTED]

Sincerely,

[REDACTED SIGNATURE]  
Jayanth Jayaram  
Major, U.S. Army  
Trial Attorney

Copies Furnished:

Protester:  
[REDACTED]

---

---

**AFARS Provision:****5133.104 -- Protests to GAO.**

(a) *General procedures.* The contracting officer must take the action required of the "agency" in FAR 33.104.

(4)(iii)

(1) Contracting offices must use the following reporting procedures, except that the PARC may require the report to be sent through the PARC's office:

(i) Contracting offices reporting to AMC must send the report directly to the addressee in 5101.290(b)(12).

(ii) Contracting offices reporting directly to the U.S. Army Corps of Engineers (USACE) must send the report directly to the following address: US Army Corps of Engineers, Attn: CECC-C, 441 G St., N.W., Washington, DC 20314-1000. [AFARS Revision #004, dated Jul 26, 2002]

(iii) All other Army contracting offices must send the report via courier or express mail service to the Office of The Chief Trial Attorney, Attn: DAJA-CA, 901 N. Stuart Street, Suite 500, Arlington, VA 22203-1837.

(iv) The report must be sent not later than 20 days after the GAO notifies the agency by telephone that a protest has been filed. If the GAO decides to use the express option and the contracting officer concludes that the report cannot be furnished in time, he/she must notify the appropriate office in (i)-(iii) at once so that it may request an extension from GAO.

(2) Before forwarding the report to the GAO Comptroller General, the addressees in (1)(i)-(iii) must review the report and recommend any changes required to ensure that the report is accurate, complete, and legally sufficient.

(b) *Protests before award.*

(1)

(A) When it is necessary to request authorization to award a contract notwithstanding a protest, the contracting officer must prepare a D&F to be signed by the HCA. The D&F must clearly explain the damage the United States will suffer if award is not authorized and the damages the United States will suffer if the award is made and the protest is sustained.. However, no award can be made or selection announced prior to approval by the DASA(P), except for contracting offices reporting to AMC, when the

---

approval may be granted by the Command Counsel, AMC. The contracting officer must also prepare a request for approval that identifies all protest issues and addresses the merits and expected resolution of the protest. Include details of any Congressional interest in the protest. After legal review, forward the request with the D&F to the HCA.

(B) Within three days after the contracting office is notified of the protest, the HCA will endorse the request for approval and electronically transmit the request and the D&F to the appropriate office in (a)(4)(i)(1)(i)-(iii). That office shall immediately distribute the request and the D&F to the addressee in 5101.290(b)(1) and to Department of the Army, Attn: SAGC, General Counsel, 104 Army Pentagon, Washington DC 20310-0104.

(c) *Protests after award.*

(2) Process the finding as required at (b), Protests before award. The D&F must explain the damage the United States will suffer if continuing performance is not authorized and the damages the United States will suffer if continuing performance is authorized and the protest is sustained. Continuing performance cannot be authorized prior to approval by the DASA(P), except for contracting offices reporting to AMC, when the approval may be granted by the Command Counsel, AMC. Process the request for approval as required in (b).

(g) *Notice to GAO.* Send the report to the addressee in 5101.290(b)(1) not later than 45 days after receipt of the recommendations.

## Case References & Links

### COFC Cases

*Advanced Systems Development Inc v. United States*, 72 Fed. Cl. 25 (2006)

*CIGNA Gov't Servs LLC v. United States*, 70 Fed. Cl. 100 (2006)

*Maden Tech Consulting Inc v. United States*, 74 Fed. Cl. 786 (2006)

*Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705 (2006)

*University Research Co. v. United States*, 65 Fed. Cl. 500 (2005)

*Kropp Holdings Inc. v. United States*, 63 Fed. Cl. 537 (2005)

*Keeton Corrections Inc., v. United States*, 59 Fed. Cl. 753 (2004)

*Chapman Law Firm v. United States*, 62 Fed. Cl. 464 (2004)

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-17, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).

*Altos Federal Group v. United States*, 60 Fed. Cl. 832 (2004)

*Spherix Inc., v. United States*, 62 Fed. Cl. 497 (2004)

*PGBA LLC v. United States*, 57 Fed. Cl. 658 (2003)

*Sierra Military Health Services v. United States*, 58 Fed. Cl. 573 (2003)

### COFC Review of Military Question

*Filtration Development Co. v. United States*, 59 Fed. Cl. 658 (2004), 63 Fed. Cl. (2005)

### Older Federal District Court Decisions:

**Majority View Cases -- Urgent and Compelling:**

- *DTH Management Group v. Kelso*, 844 F. Supp. (1993)

- *Dairy Maid v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993)

### Best Interest Cases:

- *Ingram Barge v. United States*, 34 Cont. Cas. Fed. (CCH 75,486 (D.D.C. 1988)

- *Samson Tug & Barge Co. v. United States*, 695 F. Supp. 25 (D.D.C. 1988)

### Other Cases:

- *Camps v. Pitts*, 411 U.S. 138, 142 (1973) (most important document in administrative record is the Determination and Findings)

### Balancing Hardship Cases –

• *DSE, Inc. v. United States*, 169 F. 3d 21 (1999);

• *Matthews v. United States*, 526 F. Supp. 993 (1981)

### GAO

#### GAO Rules

<http://www.gao.gov/decisions/bidpro/new.reg/regulation.htm>

#### GAO Bid Protest Cases -- Search

<http://www.gao.gov/decisions/bidpro>