

GAO OVERRIDE PROCEDURES IN THE PRE AND POST-AWARD ENVIRONMENTS

One of the major concerns that a Program Manager (PM) has at the conclusion of a source selection is the immediate commencement of contract performance. A protest to the General Accounting Office (GAO) received within ten days after contract award or five days after a required debriefing (or the date on which such a required debriefing is offered) shall result in the immediate suspension of contract performance (see FAR 33.104(c)). In legal terminology, this is called an automatic stay. The statutory basis for this requirement is the Competition in Contracting Act (CICA) of 1984, as amended by the Federal Acquisition Streamlining Act (FASA) of 1994.

An override is an exception to the automatic stay of performance requirement. It permits the Agency, under limited circumstances, to award the contract or to continue contract performance in the face of a protest notwithstanding the above-referenced statutory and regulatory provisions. FAR 33.104(c)(2) sets forth two bases for the override exception:

“(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO’s decision.”

In analyzing the applicability of the two bases for the override request, keep in mind the usual time frame for the GAO to reach its decision, since in an override, the agency contends that it cannot wait for such a decision. 4 CFR 21.9 establishes the GAO due date for a decision as 100 calendar days.

The analysis of whether an override would be appropriate will consider such items as: stock on hand, production lead time, consumption rate, where the items are used, who would be injured by the items’ unavailability and any other relevant facts.

There are two general questions that an override analysis must address:

- (1) How urgently is the item or service to be provided by the awardee needed and why?
- (2) What is the likelihood of losing the protest?

The analysis of the override request will consider the probability of winning the protest weighed against the need for the award and the immediate commencement or continuation of contract performance, as applicable.

If a determination is made that an override would be appropriate, the next question is: Who prepares the override request?

The Contracting Officer, working with the PM and the Legal Office, must prepare and forward the override request in the form of a Determination and Findings (D&F) to the Head of the Contracting Activity (HCA) for signature. The HCA must *personally* sign the document. Since the FAR states that the approval authority is nondelegable, a person acting in an HCA capacity will not suffice. Accordingly, if the HCA position will not be filled for a protracted period of time, prior coordination with AMC and DA on the Acting HCA's authority in such situations as override requests is recommended.

The next question is: When and where must this request be forwarded? AFARS 5133.104(b)(1)(B) states that the override request must be forwarded to AMC within three days after the contracting office has received notification of the protest. The three day timeframe applies to both protests before and after award.

In 1997, the AMC Office of Command Counsel prepared a Handbook entitled "AMC Bid Protest Handbook - Tactical Operations in the Face of GAO Protests." Appendix B of the Handbook lists seven requirements for the D&F:

1. Describe the requirement, the Request for Proposals (RFP), the dollar value and any unique aspects which are relevant to the override decision.
2. Address each of the protest issues to include their merits and the expected results.
3. If the protested acquisition is a continuation of a prior contract, such as a new year of services, address why the incumbent contractor cannot continue the services during the protest decision period.
4. Address damages, including dollar amounts, the Army would suffer if award or performance is not permitted.
5. Address mission impact if award or performance is not permitted.
6. Address any political, Congressional or state interest if this is known.
7. Address potential damage to the Army.

These statements must be factually based; conclusionary statements will not be persuasive. Additionally, in a pre-award protest, the D&F must clearly explain the damages the United States will suffer (a) if the award is not made and (b) if the award is made and the protest is sustained. In a post-award protest, the D&F must clearly explain the damages the United States will suffer (a) if continued performance is not authorized and (b) if continued performance is authorized and the protest is sustained.

Override requests must provide a thorough explanation for the request and contain a complete file with all of the relevant documentation supporting such a request. If a protestor learns of the override request and believes it will be irreparably harmed by the commencement/continuation of performance, it may go to Federal Court and seek an injunction. The Courts will use the override D&F file as the basis for their review. If a favorable decision has been obtained on the override, the Courts will review that decision and the contemporaneous evidence (D&F with supporting file) on which it was made. Consequently, the override package must be complete in the event of judicial scrutiny.

The last question is: Who makes the final decision regarding the override request? AFARS 5133.104(b)(1)(A) and 5133.104(c) state that in protests before and after award, respectively, the AMC Command Counsel is the approval authority.

In conclusion, the override request is a much discussed but infrequently used procedure. In fact, during the past eight years, CECOM has not submitted, and AMC has not approved, one such request. There are various reasons for this situation. One is that the GAO has been consistently shortening its decision time. In 1996, the GAO was required to decide a case in 125 *business* days; a decision is now required in only 100 *calendar* days. Furthermore, other tools are available now such as the accelerated AMC Agency Protest Procedure which have tended to reduce the number of override requests. The override procedure does, however, still exist and is available for use in the appropriate circumstances.

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