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**Competition in Contracting Act**

In the absence of statutory and regulatory guidance on federal agency overrides of the CICA stay triggered by a timely bid protest, the U.S. Court of Federal Claims recently set out what the authors of this analysis say could become a bright line test to determine the validity of such overrides. The analysis discusses the antecedents and possible implications of the decision in *Reilly's Wholesale Produce v. United States*, and suggests that the time is ''more than ripe'' for regulatory guidance in the area.

## Living the Life of *Reilly's*: Recent U.S. Court of Federal Claims Decisions Highlight Need for Improved Regulatory Guidance in CICA Override Determinations

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### I. Introduction

The past year was not a good one for agencies defending their decisions to ''override'' the ''automatic stay'' of contract performance that accompanies a timely filed Government Accountability Office (''GAO'') bid protest. The Competition in Contracting Act (''CICA'')[1] contains two exceptions that permit an agency to continue with contract performance notwithstanding a pending GAO bid protest, but in the past twelve months, the United States Court of Federal Claims (''COFC'') has taken an especially aggressive approach in reviewing agency decisions to exercise this power. In fact, in 2006, the COFC sustained plaintiff challenges to agency override determinations in all four decisions in which the court claimed jurisdiction.[2]

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[1] Competition in Contracting Act, 31 U.S.C. § 3553 (2000).

[2] Only two agencies escaped the automatic stay in 2006, though neither did so on the merits of its case. In one case, the COFC declined to exercise jurisdiction over the challenge because the contract services at issue involved legitimate interests of national security. *See* Maden Tech Consulting, Inc. v. United States, No. 06-585C, slip op. at 11 (Fed. Cl. Dec. 29, 2006). In the other case, the override challenge was rendered

The most recent of these decisions, *Reilly's Wholesale Produce v. United States*,[3] is also the most significant because it presents a list of factors that an agency *must* consider for an override of an automatic stay to be valid, as well as a shorter list of factors commonly referenced by agencies for support that the court deemed to be irrelevant. Importantly, none of *Reilly's* factors are explicitly set out in the scant guidance presented on the issue in the relevant statutory provisions or in the Federal Acquisition Regulation (''FAR'') or its supplements.

The absence of meaningful guidance in either the CICA or the implementing provisions of the FAR is an issue of central concern. Since the COFC obtained jurisdiction to hear procurement-related disputes under the Administrative Dispute Resolution Act of 1996 (''ADRA''),[4] it has been compelled to develop through its decisions the contours of what is and what is not an appropriate basis for an agency to override CICA's automatic stay provision. 2006, in particular, saw the court significantly advance the law, culminating in *Reilly's* ''must consider'' factors.

The issue, therefore, is more than ripe for consideration by the Civilian Acquisition Agency Council and Defense Acquisition Regulations Council (collectively, the ''FAR Councils''). Revising the FAR to reflect the appropriate exercise of CICA's override provisions would provide procuring agencies with much needed guidance and the added protection of consistent regulatory authority. In the interim, agencies would be well advised to use *Reilly's* and its three recent predecessors as blueprints for determining how to structure a valid CICA override determination.

The first part of this article provides a history of the CICA automatic stay and override provisions, as well as the COFC's jurisdiction to review challenges to agency override determinations. The article next provides brief summaries and analyses of the four cases decided in 2006 in which the court squarely addressed the issue. Finallyl, the article concludes that, in order to help alleviate the disconnect between agencies' conduct and the COFC's expectations, the FAR Councils should consider revising the FAR to provide guidance to agencies on when and how to invoke CICA's exceptions to the automatic stay provisions.

## II. Background

Passed by Congress in 1984, CICA requires Federal agencies to conduct procurement competitions using full and open competitive procedures. As part of CICA, Congress formalized GAO's[5] jurisdiction to review bid protests and articulated certain procedures and requirements to govern such actions. Congress further prescribed what is commonly referred to as an ''automatic stay'' mechanism to maintain the status quo while a GAO bid protest is pending.

Specifically, for pre-award GAO bid protests, CICA instructs procuring agencies to delay awarding the contract while the bid protest is pending. Similarly, for post-award bid protests, CICA requires the agency to suspend contract performance if the protest satisfies certain timeliness requirements.[6] For these post-award protests, the automatic stay requires the contracting officer to ''direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.''[7]

CICA's automatic stay provisions play an important role in ensuring that CICA's mandate for full and open competition is upheld.[8] By requiring agencies to maintain the status quo during a pending bid protest, the automatic stay provision makes it more likely that a meaningful remedy will exist for a protester should GAO sustain its protest. According to the COFC:

> The stay provisions were designed to preserve the status quo until the Comptroller General issued his recommendation, in order to ensure that the recommendation would be considered. Under prior practice, procuring agencies had tended to exploit loopholes in earlier stay regulations; they would rush into contract awards and get performance underway so that, by the time the Comptroller General's recommendation came out, it would be too late and too costly to change contract awards, if such was the recommendation.[9]

In other words, ''the automatic stay is intended to preserve the status quo during the pendency of the protest so that any agency would not cavalierly disregard GAO's recommendations to cancel the challenged award,'' thereby ''preserv[ing] competition in contracting and ensur[ing] a fair and effective process at the GAO.''[10]

There are, however, several exceptions to CICA's automatic stay requirements that permit agencies to proceed with a procurement or contract performance in the face of a GAO bid protest. Specifically, for pre-award protests, the agency may ''override'' the stay and award the contract if the head of the procuring activity determines that ''urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General.''[11] For post-award protests, the agency may override the stay and instruct the contractor to continue with performance if the head of the procuring activity determines, in writing, that ''performance of the contract is in the best interests of the United States,'' or that ''urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General.''[12] In the case of a ''best interests'' determination, CICA specifies that if GAO subsequently sustains the bid protest, its recommended remedy is to be ''without regard to any cost or disruption from terminating, rec-

moot after the plaintiff elected to withdraw its bid protest in the GAO and refile the claim in the COFC. *See* IDEA Int'l, Inc. v. United States, No. 06-652C, slip op. at 2 (Fed. Cl. Dec. 1, 2006).

[3] Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705 (2006) (Allegra, J.).

[4] Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491 (2000).

[5] At the time, the Government Accountability Office was called the Government Accounting Office.

[6] In order to invoke the automatic stay for a post-award award protest, the protest must be filed within ten days of contract award or five day of a required debriefing, whichever is later. 31 U.S.C. § 3553(c)(4).

[7] *Id.* § 3553(d)(3)(A)(ii). Similar automatic stay requirements subsequently have been added to the FAR for agency-level bid protests. *See* FAR § 33.103(f).

[8] *See* H.R. Conf. Rep. No. 98-861, at 1435 (1984).

[9] PGBA, LLC v. United States, 57 Fed. Cl. 655, 660 n.8 (2003) (quotation omitted).

[10] Reilly's, 73 Fed. Cl. at 710 (quotation omitted).

[11] § 3553(c)(2)(A).

[12] *Id.* § 3553(d)(3)(C)(i)(I)–(II).

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ompeting or reawarding the contract.''[13] Notably, CICA and its legislative history provide scant guidance on any distinctions between the ''urgent and compelling'' and ''best interests'' determinations.

When CICA became law, the Reagan Administration viewed the automatic stay as an unconstitutional encroachment on executive branch authority and went so far as to instruct procuring agencies to ignore the related CICA provisions.[14] However, several noteworthy court decisions ultimately upheld the constitutionality of the stay provision, and the Administration abandoned the debate.[15]

**CICA and its legislative history provide scant guidance on any distinctions between the 'urgent and compelling' and 'best interests' determinations.**

Nevertheless, some U.S. district courts ruled that CICA override determinations premised on the ''best interests'' exception were essentially unreviewable. The leading case for this proposition is *Topgallant Group, Inc. v. United States*, in which the U.S. District Court for the District of Columbia refused to review the merits of a CICA override determination and granted summary judgment for the government.[16] The court's rationale was that best interests determinations represent ''agency action . . . committed to agency discretion by law'' and, thus, were essentially unreviewable pursuant to § 701(a)(2) of the Administrative Procedure Act (''APA'').[17] The COFC, however, has flatly rejected this position.[18]

The ADRA marked another important development regarding judicial review of CICA override determinations. Prior to the enactment of the ADRA in 1996, most challenges to CICA overrides were filed in U.S. district courts. The ADRA granted the COFC and U.S. district courts concurrent bid protest jurisdiction until January 1, 2001, at which point the COFC gained exclusive authority to hear bid protests.[19] Specifically, the ADRA expanded the COFC's jurisdiction to include post-award bid protests, including ''any alleged violation of statute or regulation *in connection with* a procurement.''[20] The Court of Appeals for the Federal Circuit broadly interprets this language as a grant of jurisdiction to the COFC to review challenges to all types of CICA override determinations.[21] The ADRA, however, contains one significant limitation: when exercising its jurisdiction, the COFC is ''to give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.''[22]

The COFC reviews challenges to CICA override determinations using the standard of review set forth in § 706(2)(A) of the APA.[23] According to the APA, the court may overturn an agency's override determination only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. To make this finding, ''the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,'' and the court may not substitute its judgment for that of the agency.[24] This standard requires only that the agency's decision involves consideration of the relevant factors and is within the bounds of reasoned decision-making.[25]

## III. Summary and Analysis of 2006 COFC Case Law

Since the ADRA's enactment, disappointed bidders have had substantial success in challenging agency override determinations at the COFC. A 2005 article published in an American Bar Association publication indicated that the Government had prevailed in only

[13] *Id.* § 3554(b)(2).

[14] Robert M. Hansen, *CICA Without Enforcement: How Procurement Officials and Federal Court Decisions Are Undercutting Enforcement Provisions of the Competition in Contracting Act*, 6 Geo. Mason L. Rev. 131, 144–45 (1997).

[15] *See, e.g.*, Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1126 (9th Cir. 1988); Ameron, Inc. v. U.S. Army Corp of Eng'rs, 607 F. Supp. 962, 974–75 (D.N.J. 1985), *aff'd*, 787 F.2d 875, *modified*, 809 F.2d 979 (3d Cir. 1986).

[16] Topgallant Group, Inc. v. United States, 704 F. Supp. 265, 266–67 (D.D.C. 1988).

[17] 5 U.S.C. § 706(2)(A) (2000).

[18] *See, e.g.*, PGBA, LLC, 57 Fed. Cl. at 659–60 (''Topgallant's rationale seems less than compelling'' (quotation and citation omitted)). At least one judge on the COFC, however, recognized that the ''best interest'' justification imposed a less-demanding burden on the agency than its ''urgent and compelling'' counterpart, and suggested that a plaintiff challenging this determination faced an ''uphill battle.'' Spherix, Inc. v. United States, 62 Fed. Cl. 497, 505 (2004) (characterizing the ''best interest'' justification as an ''unremarkable determination'').

[19] Dicta in at least one COFC decision suggests that jurisdiction over challenges to override determinations now rests exclusively with the COFC. *See* OTI America, Inc. v. United States, 68 Fed. Cl. 108, 113 n.11 (2005). Moreover, although Congress included the automatic stay provision to bolster GAO's bid protest process, GAO itself has determined that it lacks jurisdiction to review agency override decisions. Mark Group Partners, Comp. Gen. B-255762, 94-1 CPD ¶ 224 (''Where an agency determines that urgent and compelling circumstances require performance notwithstanding the stay provisions [in CICA], . . . [t]here is no requirement that a protestor be allowed to rebut the agency's findings, nor do we review such a determination.'').

[20] *Id.* § 1491(b)(1) (emphasis added).

[21] RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir.1999).

[22] § 1491(b)(3). The importance of this provision cannot be understated. When legitimate matters of national defense or national security are present, the COFC will give far more deference to agency determinations than is ordinarily due. At times, the court may even decline to exercise jurisdiction over the case, altogether. *See* Maden Tech Consulting, Inc. v. United States, No. 06-585C, slip op. at 11 (Fed. Cl. Dec. 29, 2006); Kropp Holdings, Inc. v. United States, 63 Fed. Cl. 537, 551–52 (2005). In fact, some scholars have even suggested that the best, if not the only, way to for an agency to prevail if its override determination is challenged is to invoke national security concerns. *See, e.g.*, Sandeep Kathuria, *Challenges to CICA Overrides in Court of Federal Claims: A Guide for Agencies, Contractors*, 41-Fall Procurement Law 3, 4–6 (2005).

[23] *Id.* § 1491(b)(4).

[24] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[25] Reilly's, 73 Fed. Cl. at 709 (2006) (citing Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)).

fifty percent of the CICA override challenges where the agency invoked the ''best interests'' exception and fared even worse where the agency invoked the ''urgent and compelling circumstances'' exception.[26] The article suggested that, despite this poor track record, agencies are well advised to allege both rationales whenever possible to ''place the greatest burden on the protesting contractor.''[27] However, as recent cases illustrate, the distinction between the two exceptions may be largely irrelevant because, in practice, courts have been applying substantially similar tests to both rationales.

In 2006, three of the four COFC decisions that directly addressed CICA override determinations involved the ''best interests'' justification; *not one* of these determinations was upheld. The lone ''urgent and compelling'' justification also failed. Far removed from the approach adopted by the district court in *Topgallant*, these recent cases show that the COFC will closely and aggressively scrutinize the findings relied upon by an agency when it decides to invoke an exception to CICA's automatic stay provision. Moreover, these cases illustrate that the COFC has continued to refine what is and is not a valid basis for an agency to override an automatic stay of contract performance.

### A. *CIGNA Government Services v. United States*

The COFC's first decision in 2006 involving a CICA override determination was *CIGNA Government Services v. United States*.[28] In *CIGNA*, the Centers for Medicare and Medicaid Services (''CMS'') invoked the ''best interests'' exception to override a stay based essentially on CMS's finding that suspending contract performance would postpone ''the implementation of a newer and better Medicare claims processing system,'' thereby preventing the government from enjoying ''the cost savings and enhanced performance'' of the new contract.[29] CIGNA filed a complaint with the COFC, challenging the override decision and requesting both injunctive and declaratory relief.

At the outset, the court denied the plaintiff's application for a temporary restraining order (''TRO'') primarily because plaintiff failed to prove that it would suffer irreparable harm in the ensuing ten days, the period covered by a TRO. Despite this finding, the court proceeded to decide the merits of the case with remarkable speed—a mere 17 days.

On the merits, the court found significant problems with CMS's override determination. First, CMS's findings regarding the impact of delayed performance were contradicted by its previous statements to Congress that it had sufficient flexibility in its procurement schedule to accommodate ''any unforeseen changes'' without impacting the new system's implementation date.[30] Second, CMS's written determination did not discuss—''not even in the most cursory fashion''—the risks to the agency if GAO ultimately sustained the plaintiff's underlying bid protest.[31] Notably, when an agency invokes the ''best interests'' exception, CICA instructs GAO upon sustaining a bid protest to make its remedy recommendation ''without regard to any cost or disruption from terminating, recompeting or reawarding the contract.''[32] Third, CMS's determination did not address the interests of competition, specifically the extent to which the awardee would gain a competitive advantage over the plaintiff by continuing with performance if GAO ultimately sustained the protest.[33] Fourth, as has become a theme in the recent override cases, the court ruled that the prospect of continuing with performance under a newer or better contract is insufficient, standing alone, to justify a CICA override determination, even under the ''best interests'' exception.[34] Accordingly, the court sustained the plaintiff's challenge.[35]

### B. *Advanced Systems Development, Inc. v. United States*

The COFC next considered a CICA override challenge in *Advanced Systems Development, Inc. v. United States*.[36] In this case, the agency made a ''best interests'' determination based primarily on three contentions: (i) the inefficiency of the current contract model; (ii) the need for a smooth transition by permitting the awardee to immediately hire incumbent personnel; and (iii) the desire to avoid a loss of IT services. The plaintiff challenged the override in the COFC, again seeking a declaratory judgment and injunctive relief.

The court criticized the agency's determination as merely asserting the agency's ''desire to embark on the newer, better contract.'' The court stated that ''it will almost always be the expectation that the new contract will be an improvement over the old. 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 be automatic.''[37] The court also found error in the agency's failure to consider the ramifications should GAO ultimately sustain the underlying bid protest.[38] Finally, the court was especially critical of the agency's attempt to supplement its written findings with documents that were created four days *after* the complaint was filed, and nearly two weeks after the initial override determination.[39] In light of these deficiencies, the court sustained the plaintiff's challenge and invalided the override decision.[40]

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[26] Kathuria, *supra* note 22, at 5–6. In some cases the agency invoked both exceptions.

[27] *Id.* at 6.

[28] CIGNA Gov't Servs., LLC v. United States, 70 Fed. Cl. 100 (2006) (Williams, J.).

[29] *Id.* at 101.

[30] *Id.* at 111.

[31] *Id.* at 111–12.

[32] 31 U.S.C. § 3554(b)(2) (2000).

[33] CIGNA, 70 Fed. Cl. at 113.

[34] *Id.*

[35] The court also addressed what has become an emerging issue in CICA override cases: whether the court should base its decision on the plaintiff's request for injunctive relief or for declaratory judgment. The *CIGNA* court opted for the latter, noting that ''[b]ecause the declaratory judgment will reinstate the stay and vacate the override, having the same effect as an injunction,'' there was no need to address the issue of injunctive relief. *Id.* at 114. As will be discussed later in this article, not every judge in COFC accepts this logic.

[36] Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25 (2006) (Baskir, J.).

[37] *Id.* at 31.

[38] *Id.* at 32.

[39] *Id.* at 33–35.

[40] In doing so, the court again addressed whether to base its decision on plaintiff's request for injunctive relief or for declaratory judgment. Citing *CIGNA*, the court stated that ''[t]here does seem to be some incongruity in forcing a plaintiff to meet the high burden necessary for obtaining extraordinary relief,'' considering that CICA does not require any evaluation of the injunctive relief factors as a prerequisite to obtain-

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Like *CIGNA*, *Advanced Systems* highlights that a mere preference for a new contract is alone insufficient to support a CICA override determination. The *Advanced Systems* court went so far as to characterize the agency's desire to ''embark on the newer, better contract'' as ''the *preferred* approach,'' which failed to show that it was the ''*necessary* approach.''[41] Although it is unclear how broadly the court intended this aspect of its holding to be construed, the potential exists for a party to argue that the court required that the agency's determination be supported by the ''necessity'' of the override, and that a somewhat lesser showing of substantial benefits flowing from the override would be insufficient.

**A mere preference for a new contract is alone insufficient to support a CICA override determination.**

*Advanced Systems* also highlights the potentially adverse consequences faced by an agency when its written determination and other documentary evidence that constitute the administrative record do not sufficiently address the relevant issues. As a general principle, the court views ''a challenged procurement decision through the prism of the administrative record,'' and this review is confined to ''the administrative record *already in existence*, not some new record made initially in the reviewing court.''[42] The court stated that:

> [T]he ''administrative record'' is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review. . . . However, 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.[43]

In taking a strict approach to the administrative record, the court rejected the agency's proffered supplemental findings and declarations as nothing more than *post hoc* rationalizations to which no deference is due, at least so far as the materials pertained to the merits of the original override determination.[44]

### C. *Automation Technologies, Inc. v. United States*

*Automation Technologies, Inc. v. United States*[45] presented yet another opportunity for an agency to succeed with a best interests determination, which it again failed to do in the face of a challenge filed with the COFC. In its written determination invoking the best interests justification, the defending agency, the U.S. Customs and Border Protection (''Customs''), relied upon its findings that the underlying GAO protest was unlikely to succeed[46] and that the Government would enjoy ''significant savings'' under the new contract.

Although the court conceded that cost savings alone may support an agency override ''in the proper case,'' it bluntly concluded that ''this is not that case.''[47] Instead, the court found that Customs had failed to consider several relevant factors, including ''the ramifications of an agency loss in the GAO protest, . . . the impact of an override on the competition in contracting and bid protest processes,'' and the availability of alternatives to an override.[48] The agency also erred in not considering the potential costs to the Government from carrying out relief measures as might be recommended by GAO if the protest were subsequently sustained. The court further held that Customs had neglected to consider all reasonable alternatives to an override, including extension of the current contract to provide the needed services while the GAO protest was pending.[49] Finally, the COFC reiterated that a new contract being better than an old contract is, standing alone, an insufficient basis to support a CICA override determination.[50]

### D. *Reilly's Wholesale Produce v. United States*

The prior decisions culminated in *Reilly's Wholesale Produce v. United States*, which may prove to be the most influential COFC decision involving a challenge to a CICA override. The most significant aspect of *Reilly's* is the list of factors, gleaned from existing case law, that the court declared an agency *must* consider in making a CICA override determination. These factors are:

> (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 to the benefits associated with the approach being considered for addressing the agency's needs; and

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ing a stay of contract performance. Thus, the court ruled that ''despite the fact that Plaintiff requests an injunction, we find that a declaratory judgment achieves the same effect.'' Notably, the court construed its ruling as precluding the agency from basing ''some hypothetical future override on the reasons articulated in this litigation,'' a point that counsel for the United States apparently conceded during oral argument. *Id.* at 36–37.

[41] *Id.*

[42] *Id.* at 33 (quotations removed) (emphasis added).

[43] *Id.* (quotations and internal citation omitted).

[44] *Cf.* Maden Tech Consulting, Inc. v. United States, No. 06-585C, slip op. at 3 (Fed. Cl. Dec. 29, 2006) (accepting into the record supplemental findings issued one week before the complaint was filed); *id.* at 5 (allowing supplementation of the record with explanations of the agency's national security activities that were first articulated two days after the court granted a TRO and reinstated the automatic stay); IDEA Int'l, Inc. v. United States, No. 06-652C, slip op. at 8 (Fed. Cl..Dec. 1, 2006) (permitting an agency to take corrective action after the initial override determination was deemed inadequate).

[45] Automation Tech., Inc. v. United States, 72 Fed. Cl. 723 (2006) (Horn, J.).

[46] The agency ultimately proved correct in this account: GAO issued a decision dismissing the plaintiff's bid protest a mere six days after the COFC issued its bench ruling on the override challenge. *Id.* at 725 n.3.

[47] *Id.* at 730.

[48] *Id.*

[49] *Id.* at 729. The court was not concerned that such action apparently would benefit the plaintiff to the detriment of the awardee, given that the plaintiff was the incumbent contractor.

[50] Persuaded by *CIGNA* and *Advanced Systems*, the court once again decided to grant declaratory relief and declined to address the plaintiff's request for an injunction. *Id.* at 730–31.

(iv) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.[51]

These factors are somewhat similar to those described in older Supreme Court rulings that elaborate upon what constitutes ''arbitrary and capricious'' action under the APA in other contexts,[52] and, as the court noted, they can be distilled from relevant COFC case law. However, *not one* of them appears in the scant guidance contained in the applicable CICA provisions or in the FAR's implementing regulations.

The requirement that the agency consider ''reasonable alternatives'' to an override is a key aspect of *Reilly's* factors. It is worth emphasizing that this obligation pertains only to *reasonable* alternatives, and the existence of a reasonable alternative alone is not necessarily fatal to the agency's override decision if the agency adequately considered that alternative but reasonably opted for another course.[53] The degree to which an agency may submit and the court will consider supplemental materials to demonstrate that an alternative proffered by the plaintiff is not reasonable is a complicated question, and one that surely will be the subject of debate in future cases.

In addition to the four factors an agency must consider, the court identified two factors it believed to be *irrelevant* to an analysis of a CICA override determination:

(i) whether the new contract would be better than the old one; and

(ii) whether the override and continuation of the contract is otherwise simply preferable to the agency.[54]

If the court's statements are interpreted broadly and inflexibly, these two ''non-factors'' could become quite controversial. One can fairly easily envision circumstances where a comparison of new and old contracts warrants at least some weight. For example, where the incumbent contractor is performing very poorly and the circumstances are such that a CICA override would not provide the awardee a meaningful competitive advantage vis-à-vis the plaintiff incumbent contractor should GAO sustain the plaintiff's bid protest, a direct comparison of contracts would seem to be a relevant factor in the agency's override determination.

Although past COFC decisions have discussed one and often more of the factors above as bases for sustaining override challenges, *Reilly's* marks the first time that a court consolidated them and articulated what amounts to a bright line test to determine the validity of an agency's CICA override determination. Notably, despite having announced this ''test'' in the context of a challenge to an ''urgent and compelling circumstances'' determination, the court referenced several ''best interests'' cases—including *CIGNA*, *Advanced Systems*, and *Automation Technologies*—for support, and it gave no indication that the analysis would be different depending on which of the two automatic stay exceptions is at issue.[55] Therefore, if the *Reilly's* test is eventually embraced throughout the COFC, it could have the practical effect of eliminating the distinction between the ''best interest'' and ''urgent and compelling circumstances'' justifications.

Turning to the case before it, the *Reilly's* court departed from the three previous COFC decisions concerning override challenges by reviewing the agency's determination in the framework of a request for preliminary injunctive relief, notwithstanding the plaintiff's argument that a narrower ruling granting declaratory judgment would suffice.[56] Consequently, the court was obligated to address the four factors relevant to requests for injunctive relief: (i) whether the plaintiff is likely to succeed on the merits; (ii) whether the harm to plaintiff outweighs the harm to the defendant; (iii) whether the public interest is served by enjoining defendant; and (iv) whether the plaintiff will suffer irreparable injury if the defendant is not enjoined.

Considering the plaintiff's ''likelihood of success on the merits,'' the court found that evidence in the administrative record contradicted many of the facts relied upon by the agency in its written determination.[57] For example, the Government claimed that the agency lacked the staffing to continue the support function under the existing framework owing to a planned reduction in force (''RIF''). However, based partly on the statements of a former government official with knowledge of the RIF, the court found this explanation unpersuasive because the reductions had not yet occurred. Moreover, because this step of the injunctive relief analysis subsumes the four ''must consider'' factors, the court diligently applied its new test to the override determination and ultimately found that the agency failed to consider at least two of the required factors.[58] Having decided that the plaintiff was likely to succeed on the merits of its challenge, the court had little trouble settling the next three prongs of the injunctive relief analysis in a similar manner. It then concluded that the prerequisites for injunctive relief had been satisfied and subsequently granted the plaintiff's request for preliminarily injunction.[59]

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[51] *Id.* at 711.

[52] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (identifying four grounds upon which a holding of arbitrary and capricious agency action could be based).

[53] *Id.* at 710. ''By its very definition, this standard recognizes the possibility that there exists a zone of acceptable results in a particular case and requires only that the final decision reached by an agency be the result of a process 'which consider[s] the relevant factors' and is 'within the bounds of reasoned decisionmaking.' '' *Id.* (quoting Balt. Gas & Elec. Co., 462 U.S. at 105).

[54] *Id.* at 711.

[55] *See* Reilly's, 73 Fed. Cl. at 711.

[56] In doing so, the court distinguished the recent COFC decisions that chose to issue declaratory relief in part on the basis that those decisions involved the choice of *permanent* injunctive relief, whereas *Reilly's* requested only *preliminary* injunctive relief. *Id.* at 709 n.7. More importantly, though, the court expressed ''doubts [as to] whether . . . a declaration, that could immediately be superseded by a new override decision, is the equivalent of an injunction.'' *Id.* This aspect of the court's ruling appears to be somewhat at odds with *Advanced Systems*, where the court stated that ''the agency may not base some hypothetical future override on the reasons articulated in this litigation.'' Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25, 37 (2006). Presumably, the court's statements in *Advanced Systems* pertained to the doctrine of *collateral estoppel*, which precludes the re-litigation of factual findings that were necessary to the court's holding in the prior litigation.

[57] *Id.* at 712–14.

[58] *Id.* at 714–15.

[59] *Id.* at 717.

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**The *Reilly's* test could have the practical effect of eliminating the distinction between the 'best interest' and 'urgent and compelling circumstances' justifications.**

Only time will tell the extent to which *Reilly's* factors will be adopted by the other judges on the court as a bright-line test for determining whether an agency override determination has sufficiently addressed the relevant factors. In the interim, however, an agency that is unaware of *Reilly's* mandate runs a significant risk that its CICA override determination will be judged inadequate for failing to address the relevant factors.

## IV. Conclusion

The CICA provisions that permit procuring agencies to ''override'' an automatic stay provide very little guidance on the factors that are relevant to an override determination and the extent to which the determination is intended to be subject to demanding standards. For post-award challenges the statute requires merely that the head of the procuring activity make ''a written finding'' that ''performance of the contract is in the best interests of the United States,'' 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.''[60] The implementing regulations set out in the FAR and the agency supplements provide very little additional insight on the requirements.[61]

Initially, some courts interpreted the ''best interests'' and ''urgent and compelling circumstances'' provisions as affording agencies much more latitude than is evident in the more recent cases. Indeed, some district courts held that the lack of standards associated with CICA's best interests determination indicated that such determinations essentially were beyond the scope of judicial review.[62] More recent decisions, however, reveal that the COFC will closely scrutinize CICA override determinations and will not hesitate to invalidate those that it finds are incomplete or ill-supported.

The COFC's decisions setting the standards for what must be addressed in a valid override determination are partly the result of the dearth of meaningful guidance in CICA's implementing regulations. In the absence of clear statutory or regulatory standards to guide its decisionmaking, the COFC has turned to the legislative history of the law, which it has interpreted as showing Congress's intent to add ''teeth'' to GAO's bid protest process through the implementation of the automatic stay provisions.[63] As a result, the COFC's decisions have filled gaps in the legal framework consistent with its interpretation of Congressional intent and Supreme Court precedent on what constitutes arbitrary and capricious agency action under the APA standard of review. The test announced in *Reilly's* may be the culmination of this process.

The recent string of COFC decisions also suggests that procuring agencies and the court do not share the same understanding of what factors the agency must address in its written determination to override an automatic stay. As illustrated by the four cases discussed above, even if a procuring agency has a logical basis for exercising its override authority, that determination runs a significant risk of being held invalid if the factors identified by the COFC are not adequately addressed, especially if the court takes a narrow view of the extent to which the agency may supplement the administrative record.

Consequently, the FAR Councils should consider revising the FAR provisions that deal with CICA overrides. As previously indicated, the existing FAR provisions are inadequate in providing meaningful guidance on CICA overrides. More comprehensive regulations will: (i) improve agencies' actual notice of the type of judicial scrutiny to expect; (ii) provide a stable source of legal authority on which agencies, contractors, and courts alike can rely; and (iii) minimize the disconnect between an agency's findings and the COFC's expectations.[64] And, more important, including the necessary guidance as part of CICA's implementation in regulation will help ensure that court decisions addressing CICA overrides apply a uniform set of standards, at least insofar as the regulations are deemed to be consistent with the overarching statutory provisions. However, until the FAR Councils act, agencies are well advised to use *Reilly's* and its three recent predecessors as blueprints for determining when and how to make a valid CICA override determination.

[60] 31 U.S.C. § 3553(d) (2000).
[61] *See* FAR § 33.103 (2006).
[62] *See, e.g.*, Topgallant Group, Inc., 704 F. Supp. at 266–67.
[63] *See* H.R. Conf. Rep. No. 98-861, at 1435 (1984).
[64] Although some agencies address CICA override determinations in internal guidance, the authors' experience has been that such guidance is not up to date and does not encompass all of the *Reilly's* factors.