

Manager is identified in the contract as the most senior contractor representative and is responsible for coordinating the management of all work performed under the contract. According to the contract, the Project Manager:

shall have broad and deep knowledge of the IT industry, business administration, and human resource management, and have excellent oral and written communications skills, thus ensuring that the Contractor has the capability of performing all the work.

AR at 19. Because the Project Manager is one of three key personnel, Nova was required under the old contract to submit a proposed replacement within 24 hours of a Project Manager vacancy. Nova was also required to submit the candidate's resume and any other requested information. The Contracting Officer would evaluate the candidate and submit an approval or disapproval in writing.

On July 8, 2005, less than three months before the old contract was to terminate, the FCC issued solicitation number SOL05000004, seeking bid proposals for a new IT support services contract ("ITSS contract" or the "new contract") to begin October 1, 2005. The new contract was to include all services that Nova performed under the old contract, plus additional help-desk training and support services previously performed by a third party. Nova submitted a timely proposal on July 29, 2005, but the Agency ultimately awarded the contract to Defendant-Intervenor, Zen Technology, Inc. ("Zen") on September 19.

Sometime in September, Nova's Project Manager, Mr. Brown, went on leave for approximately two weeks. During this time, Mr. Onyemaecchi, a Senior Network Engineer, performed the job of acting Project Manager. At some point, Nova learned that Mr. Brown would resign effective September 22. Mr. Onyemaecchi then served as the acting Project Manager under the contract. However, Nova did not submit a timely written request for Mr. Onyemaecchi's formal approval as the new Project Manager. Mr. Kanner, a technical officer who often acted as the Contracting Officer's Technical Representative, gave his informal approval of Mr. Onyemaecchi to serve in the capacity of Project Manager on one or perhaps two occasions in September and October.

When the FCC informed Nova of its award to Zen on September 19, Nova requested a debriefing which, for unexplained reasons, the Agency did not provide. Without knowing the reasons for its failure, on September 28, Nova filed a timely bid protest with the Government Accountability Office ("GAO"). In response to Nova's bid protest, and pursuant to the automatic stay provision of the Competition in Contracting Act of 1984 ("CICA"), 31 U.S.C. § 3553(d)(3)(A)(ii), and Federal Acquisition Regulation ("FAR") 33.104(c), 48 C.F.R. § 33.104(c), the GAO issued an automatic stay of all performance under the new contract on September 30. The stay ensured that Nova as incumbent would continue to perform under the old contract during the bid protest. To effectuate the stay, the FCC extended the transition phase of Nova's contract on a week-to-week basis, to October 23.

On October 11, the Contracting Officer requested that Nova provide Mr. Onyemaecchi's resume as required by the contract. Two days later, the Contracting Officer informed Nova that the informal approval of Mr. Onyemaecchi as Project Manager was only valid through October 16. Mr. Onyemaecchi's formal application as Project Manager was thus rejected. In response, Nova nominated Mr. Asefnia, the person proposed to be Project Manager in Nova's bid for the new contract. On October 19, the Contracting Officer also rejected Mr. Asefnia for the position.

That same day, the FCC issued an override of the automatic stay. This had the effect of terminating Nova's performance under the old contract, including transition activities, and commencing Zen's performance under the new contract. The override decision made available to Nova was a short, one-paragraph conclusory statement that performance under the new contract would be in the "best interests of the United States." This statement was based on a longer, written Determination and Findings ("D&F"), in which the Agency's Managing Director and Head of Procurement Activity set forth reasons for the decision. The D&F was not disclosed to the public or to Nova, forcing Nova to file a lawsuit in this Court in order to learn the Agency's override bases. The Agency gave no reason for keeping the D&F confidential, either at the time or at oral argument. This Court issued a Protective Order in the case on October 26, 2005. Once the Protective Order was in place, the Defendant released the D&F to Nova for the first time. At the oral argument, the Government agreed that there was no need to keep the D&F and case filings confidential. On November 10, the Court ordered all documents bearing on the override challenge released from the Protective Order.

The D&F offers five reasons in support of the override decision. First, the FCC concluded that Nova could not adequately perform under the existing contract because it had failed to replace staff vacancies, especially the vacancy for Project Manager, the most important position of the contract. According to the D&F, Nova failed to notify the Agency immediately, as required by the contract, when its Project Manager, Mr. Brown, resigned. After the Agency learned of the vacancy, Nova attempted to promote Mr. Onyemaecchi to fill the position, but without submitting his resume or seeking the approval of the contracting officer, as required by the contract.

The FCC did not approve Mr. Onyemaecchi because it concluded that, among other things, he did not have the requisite skills and experience for the elevated position. The Agency rejected Mr. Asefnia's application in part because his management experience consisted of overseeing projects of a different size and type, and he did not react well under pressure. Because Nova failed to provide a qualified candidate, it performed the contract for nearly one month without an approved Project Manager.

Also in support of this first argument, the Agency claimed that Nova failed to fill a vacancy for Senior Technical Writer. The FCC concluded that Nova's failure to replace personnel compromised its ability to function properly and perform mission critical functions during times of increased demand due to Hurricane Katrina and other natural disasters. Furthermore, the D&F explained that failure to fill these two positions, as well

as Nova's lack of other federal contracts, indicated that Nova was unlikely to cure its eroding management structure for the relatively brief period pending the GAO decision, due on January 6, 2006.

The second reason offered to support the override decision was that Zen could perform at a significantly higher level than Nova. Third, the FCC in the D&F determined that if Nova were to continue to perform under the old contract, employees who were disgruntled at losing the new contract award would create a security risk that confidential agency information would be disclosed to the public. Fourth, the Agency found that performance under the new contract would lead to a significant cost savings. Finally, the D&F explained that performance under the old contract during the bid protest would create the appearance of an organizational conflict of interest.

Nova filed a Complaint and Motion for a Permanent Injunction in this Court on October 25, 2005, to challenge the override decision. At this point, Nova did not have access to the text of the D&F. Once Nova was served, pursuant to the Court's Protective Order, Nova filed an Amended Complaint and a revised memorandum. The Court held an oral argument in the matter on November 8. The underlying bid protest remains pending before the GAO at this writing.

Discussion

CICA

Under the Competition in Contracting Act of 1984, a disappointed bidder may file a protest of the contract award with the Government Accountability Office. 31 U.S.C. § 3553(a). Within one day of the filing of a bid protest, the Comptroller General must notify the federal agency involved. *Id.* at § 3553(b)(1). If the federal agency receives notice of the bid protest within ten days of the contract award, *id.* at § 3553(d)(4)(A), then the contracting officer must order all performance under the protested contract to halt immediately, if such performance has already begun. *Id.* at § 3553(d)(3)(A)(ii) (hereinafter, an "automatic stay"). Once in effect, the automatic stay will ordinarily last for the duration of the pending bid protest. *Id.* at § 3553(d)(3)(B).

An agency may override the stay and authorize performance under the protested contract if the head of the procuring activity for the agency makes a written finding that:

(I) performance of the contract is in the best interests of the United States;
or

(II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest[.]

Id. at § 3553(d)(3)(C)(i) (hereinafter, "best interests" and "urgent and compelling" determinations, respectively).

Similarly, if a bidder challenges the procurement process before a contract is awarded, the agency's head of the procuring activity may only continue with procurement and award the contract upon a written finding of "urgent and compelling circumstances." *Id.* at § 3553(c)(2)(A).

Jurisdiction

The Tucker Act gives the U.S. Court of Federal Claims jurisdiction to hear bid protests. 28 U.S.C. § 1491(b)(1). The Act provides in relevant part:

[T]he United States Court of Federal Claims shall have jurisdiction to render judgment on an action objecting to . . . any alleged violation of statute or regulation in connection with a procurement.

Id. The U.S. Court of Appeals for the Federal Circuit has held that this provision gives this Court jurisdiction to review an agency's decision to override a pre-award automatic stay based on an "urgent and compelling" finding under section 3553(c)(2) of CICA. *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286 (Fed. Cir. 1999). In *RAMCOR*, the Federal Circuit explained that the phrase "in connection with" is very broad, and an override decision "fits comfortably in that broad category." *Id.* at 1289. Because the pre-award override decision allowed the agency to continue with procurement and contract performance, it was "in connection with" a procurement. *Id.* *RAMCOR* did not specifically address a post-award override decision pursuant to section 3553(d)(3)(C)(i).

The Court of Federal Claims has held that it also has jurisdiction over a post-award override decision based on a "best interests" determination. *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 659 (2003); *accord Spherix, Inc. v. United States*, 62 Fed. Cl. 497, 503 (2004). In *PGBA*, the court held that *RAMCOR*'s reasoning applies as well to a "best interests" determination as it does to an "urgent and compelling" determination. *PGBA*, 57 Fed. Cl. at 659. If a "best interests" determination was not reviewable, then judicial review over an "urgent and compelling" determination would be rendered meaningless; agencies could avoid review by always issuing override decisions based on a "best interests" justification along with an "urgent and compelling" finding. *Id.* at 660.

We find *PGBA*'s reasoning persuasive, and hold that we have jurisdiction to review the FCC's "best interests" override decision. As was the case in *RAMCOR*, the "best interests" determination was "in connection with" a procurement because it allowed Zen to perform under the new contract while Nova challenged the procurement at the GAO. See *RAMCOR*, 185 F.3d at 1289.

Standard of Review

The Tucker Act imports the standard of review for bid protest actions from the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision

pursuant to the standards set forth in section 706 of title 5.”). A court can only overturn an agency’s override decision if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Under this narrow standard, the court may consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (interpreting the APA).

More specifically, an agency is arbitrary and capricious if it: 1) “relied on factors which Congress has not intended it to consider,” 2) “entirely failed to consider an important aspect of the problem,” 3) “offered an explanation for its decision that runs counter to the evidence before the agency,” or 4) the decision “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983). In short, the court must look to see whether the agency considered the relevant factors and made a rational decision. *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000).

When analyzing whether an agency’s override of an automatic stay is arbitrary and capricious, the best interests of the United States, not those of the agency, control. *PGBA*, 57 Fed. Cl. at 663. The fact that the new contract is better than the old in terms of cost or performance is not enough to justify a best interests determination. *Id.* at 662. Indeed, it will almost always be the case that the new contract will be an improvement over the old. *Id.* at 663. To allow a best interests determination to rest on such a common ground would permit the override exception to swallow the Congressionally mandated rule that stays be automatic. *Id.*; *accord Univ. Research Co. v. United States*, 65 Fed. Cl. 500, 503 (2005). The purpose of the rule is to preserve competition in contracting and ensure a fair and effective GAO process. An agency may only override the automatic stay upon a proper determination that the best interests of the United States outweigh this Congressional policy. *PGBA*, 57 Fed. Cl. at 663.

The arbitrary and capricious standard is a narrow one. It is not proper for a court to substitute its own judgment for that of the agency. *Citizens to Preserve Overton Park*, 401 U.S. at 416. If reasonable minds could differ, then the agency was not arbitrary and capricious in rendering its decision. *Baird Corp. v. United States*, 1 Cl. Ct. 662, 664 (1983); *accord CRC Marine Servs. v. United States*, 41 Fed. Cl. 66, 83 (1998). An agency’s decision should be upheld under this standard if “the agency’s path may be reasonably discerned.” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

The FCC’s Decision

In its briefing, the Defendant contends that the FCC primarily relied upon the first argument in the D&F – relating to the absence of an approved Project Manager – for its decision to issue the override. Indeed, the other reasons supporting the override were relegated to a footnote in its brief and cited as “secondary factors.” Def. Brief at 31 n.6.

The Court agrees that the D&F's first argument is the Agency's strongest. The other four arguments do not support an override in this case. The FCC's second and fourth reasons – that Zen could perform at a significantly higher level at a considerable cost savings to the Agency – essentially state that the new contract is better than the old. Of course, the Government will almost always believe this to be the case when a stay is overruled, and this alone does not support a best interests determination. *PGBA*, 57 Fed. Cl. at 662.

The Agency's third and fifth reasons also fail to support its override decision. The D&F's third rationale – that disgruntled Nova employees are a security risk to the Agency – is completely speculative and without any support in the record. It requires one to assume that Nova employees will act in bad faith and breach their security agreements.

The D&F's fifth rationale – that performance under the new contract would create the appearance of a conflict of interest – is purely speculative, without support in the record, and fails to distinguish this from any other bid protest case. The automatic stay ensures that disappointed bidders continue to perform under their old contracts, despite any possible appearance of a conflict of interest during the bid protest.

What remains, then, is the FCC's first argument – the one primarily relied upon in the D&F and the Defendant's brief. The Defendant rests its argument on the fact that Nova performed under the old contract for approximately one month without an officially approved, qualified Project Manager. As Defendant states in its brief, the override "was based upon the threat that [the Agency] perceived to the FCC's IT contract, given the ongoing and continued vacancy at the highest position of contract management. . ." Def. Brief at 31. The Agency's best interests conclusion rests on two questions regarding the Project Manager vacancy: Was the FCC arbitrary and capricious in rejecting first Mr. Onyemaecchi and then Mr. Asefnia as candidates for the Project Manager position? If not, was the FCC arbitrary and capricious in insisting on an official Project Manager in lieu of continuing to operate with Mr. Onyemaecchi in an acting Project Manager position?

We conclude that the FCC was not arbitrary and capricious in its decision to reject Messrs. Onyemaecchi and Asefnia as replacement Project Manager. The Agency refused to approve of Mr. Onyemaecchi for at least six stated reasons. It concluded that, *inter alia*, he lacked the leadership, knowledge, and skills for the position, and in particular, that his communication skills were lacking. See Def. Brief at 18-19. The FCC rejected Mr. Asefnia for at least five stated reasons. Among those was the conclusion that he lacked the requisite experience in managing a project of the appropriate size and scope, and he could not maintain his composure under moderately stressful questioning. See Def. Brief at 20. The Plaintiff has given no indication that it can recommend any other qualified candidate to fill the position.

This Court cannot substitute its judgment for that of the Agency. *Citizens to Preserve Overton Park*, 401 U.S. at 416. The Agency examined the qualifications, experience, and interpersonal skills of Messrs. Onyemaecchi and Asefnia and came to a reasoned decision that neither of them was qualified to be Project Manager. Plaintiff argues forcefully and plausibly that Mr. Onyemaecchi had served successfully as acting Project Manager, especially in the recent post-hurricane period. It notes that the system experienced no failures during this period, and we will accept Nova's representation that it was commended for its performance. We cannot say, however, that the agency was not justified when it concluded that Mr. Onyemaecchi's leadership and other identified weaknesses outweighed his satisfactory experience in an acting capacity. Being an acceptable substitute does not necessarily translate into being qualified for a full-time position. The Agency's rejection of Mr. Asefnia was similarly not arbitrary.

Second, the agency concluded that Nova had no apparent prospects of filling the Project Manager vacancy during the period of the stay, until January 6, 2006. It further determined that it would be too risky to be dependent on an acting Project Manager for this period, and conceivably longer if the GAO required a recompetition of the new contract. This decision was not irrational.

Conclusion

In short, we conclude that the FCC was not arbitrary and capricious in requiring a full, qualified Project Manager to perform mission critical functions, pursuant to the terms in its contract with Nova.

For the foregoing reasons, the Plaintiff's Motion for a Permanent Injunction is hereby DENIED, and its Complaint is DISMISSED.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge