# In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 04-556C
(Filed August 8, 2006)

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| **BETA ANALYTICS INTERNATIONAL, INC.,** | * |
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| Plaintiff, | * |
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| v. | * |
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| **THE UNITED STATES,** | * |
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| Defendant, | * |
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| and | * |
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| **MADEN TECH CONSULTING, INC.,** | * |
| | * |
| Intervenor. | * |
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**ORDER**

The Court has received a copy, by facsimile, of "Intervenor's Emergency Motion for Declaratory Judgment to Reinstate the Automatic Stay in Intervenor's GAO Protest, and for Leave to Amend this Court's Order o[f] March 15, 2006." In previous orders, this Court determined that the award of a contract to Maden Tech was arbitrary, *see Beta Analytics Int'l v. United States*, 67 Fed. Cl. 384 (2005), and that the appropriate remedy was a re-procurement and an injunction preventing the government from exercising any more options on intervenor's contract. *Beta Analytics Int'l v. United States*, 69 Fed. Cl. 431, 434-35 (2005) ("*Beta II*"). Since the current option year was to end on April 9, 2006, the Court ordered that the re-procurement be conducted "upon a time schedule that will allow the new contract to be awarded with a start date of April 10, 2006." *Id.*

When this schedule proved infeasible, the Court granted defendant's unopposed motion to extend the re-procurement period for an additional 120 days, so that defendant was required to "conduct the ordered re-procurement upon a time schedule that will allow the new contract to be awarded with a start date of no later than July 30, 2006." Order, March 15, 2006. According to Maden Tech a new contract was awarded to plaintiff, as a result of the re-procurement, with a

start date of July 27, 2006. Mem. in Supp. Emerg. Mot. at 3. Thus, the government has satisfied the Court's March 15, 2006 order.

Maden Tech and another unsuccessful bidder, STG, Inc., apparently filed timely protests of this new award with the Government Accountability Office. *Id.* at 3-4. The Defense Advanced Research Projects Agency ("DARPA") issued a Determination and Finding that "urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for the decision of the Comptroller General," and thus the automatic stay was overridden pursuant to 31 U.S.C. § 3553(d)(3)(c)(II). Ex. A to Emerg. Mot (Determ. & Finding at 3). Because the determination was based, in part, on DARPA's construction of the Court's previous orders to require this Court's permission "to continue the performance by Maden," *id.* (Determ. & Finding at 2, ¶ o), intervenor seeks this Court's review of the override decision or, in the alternative, an amendment or clarification concerning the government's obligations under the prior orders.

Although the re-procurement is part of the Court-ordered remedy redressing the arbitrary award of the contract to Maden Tech, this did not convert the Court into a superintendent of the process. This role was rejected, as improper, by the Court in *Beta II*, 69 Fed. Cl. at 432, even with regard to the rights of the injured party in this case -- as the Court explained that plaintiff "can enforce its rights in a *separate*, pre-award challenge." *Id.* at 434. The re-procurement process was a new matter, from which new controversies may pose the subject matter of a new case. But neither did the Court intend its orders concerning the re-procurement to interfere with or complicate any protests concerning the re-procurement. In enjoining the government from "exercising another option *year*," *id.* (emphasis added), the Court did not intend to prevent the government, if it felt it were necessary, from making any short-term extensions of the Maden Tech contract to facilitate the bid protest process. To that extent, intervenor's motion is **GRANTED**, and the prior orders are clarified.

But while the Court's prior orders should not be viewed as forbidding a short-term extension, they also should not be read to encourage one. The Court takes no position on whether the circumstances are "urgent and compelling," warranting an override of the automatic stay. After all, the automatic stay would allow Maden Tech's contract, arbitrarily awarded in the first place, to be extended during the pendency of the GAO proceedings, so that plaintiff may be prevented from performing the new contract. In other words, just because the second award *might* have been arbitrary, Maden Tech seeks to benefit further from a previous award that *was* arbitrary. Considering that Beta Analytics was the incumbent under the contract that ended with the arbitrary award to Maden Tech, from plaintiff's perspective this result would assuredly add insult to injury, if not additional injury. And as the proceedings of this case have demonstrated, the beginning of performance under a contract does not preclude the possibility that a well-founded protest may succeed. While DARPA may have had no choice but to allow Maden Tech to continue its performance while the re-procurement was proceeding, the completion of the re-procurement has identified another contractor that can displace one whose status was arbitrarily created.

But this case is not the proper vehicle for the override decision to be reviewed. The re-procurement might have been the result of the above-captioned case, but was not its subject, and the Court finds that it is without jurisdiction to rule on the DARPA override. Either Maden Tech or STG may, of course, file a new case in our Court challenging the override, to be assigned randomly to another judge of our Court. This Court's order should not be read as affecting their abilities to do so. The motion to declare the override invalid and to set it aside is, accordingly, **DENIED** without prejudice.

**IT IS SO ORDERED**.

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**VICTOR J. WOLSKI**
Judge