DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PR

29 Jun 00

MEMORANDUM FOR ALL FORSCOM Directorates of Contracting

SUBJECT: Contracting Information Letter (CIL) 00-31, Army Guidance for Protests, CICA Automatic Stay Override Guidebook

1. The primary purpose of the guide is to improve the quality of and to establish uniformity on override requests originating with in Army. It is not intended to provide boilerplate requests that, if strictly adhered to, will receive automatic approval. The guidance contained in the handbook should be tailored to each situation. Use of the guide, in conjunction with sound judgment, common sense, and a thorough and detailed analysis of the agency's rationale for overriding the automatic stay, to include a detailed explanation of why the status quo could not be preserved by extending the incumbent's contract, will better enable procurement official to prepare quality and legally sufficient override requests. Also our CIL 93-10 is still in effect.

2. For additional information, please contact Irene Hamm hammi@forscom.army.mil or 404/464-5632.

Encl
as

CHARLES J. GUTA
Colonel, AC
Chief, Contracting Division, DCSLOG
Principal Assistant Responsible
for Contracting

CICA
AUTOMATIC STAY
OVERRIDE GUIDEBOOK

AUTOMATIC STAY OVERRIDE REQUEST

TABLE OF CONTENTS

SUBJECT:	Page
Introduction	3
The Courts – An Overview	4
CICA – Automatic Stay Provision	5
Automatic Stay Exceptions	6
Urgent and Compelling Exception	7-8
Best Interests of the Government Exception	9
Determinations & Findings	10-11
Quick View - Urgent and Compelling Overrides	12
Quick View - Best Interest Overrides	13
Pre- and Post-Award Protests in Same Acquisition	14
Conclusion	15
References & Links	16
Appendix 1 – DASA(P) Approved Override Example	17-20

AUTOMATIC STAY OVERRIDE REQUEST

INTRODUCTION

This guidebook is designed to assist the practitioner in the preparation of overrides of automatic stays which may be triggered by pre- or post-award protests. The Competition in Contracting Act (CICA) requires agencies, in most instances, to stay the award of a contract, or stay the performance of an awarded contract, if timely notice of a protest is received. (See, 31 U.S.C. Sec. 3553) Interested parties can challenge the agency's override decision in either the U.S. Court of Federal Claims or the United States District Courts. Therefore, it is important for agencies to carefully prepare and document an override decision that can withstand judicial scrutiny. This guide is intended to assist the practitioner in preparing an override decision that can withstand such scrutiny. It is intended to be used in conjunction with FAR Part 33 and supplements thereto, as well as applicable MACOM bid protest guidance.

If an automatic 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 automatic stay can be overridden, but two for post-award stays. With respect to pre-award stays, the agency can base its override decision on the ground that contract performance by a particular contractor other than the incumbent is urgent and compelling. With respect to post-award stays, the agency can base its override decision on the ground that contract performance by a particular contractor other than the incumbent is either: (1) urgent and compelling, or (2) in the best interests of the Government. It is important to note that the Courts will apply different tests to determine the reasonableness of the agency's override decision, depending upon the ground on which the override decision is based. For that reason, Contracting Officers must tailor their Determination and Findings to fit the basis for the override.

Both the U.S. Court of Federal Claims and District Courts review automatic override stay requests. Thus, the 'initial' D&F to override the CICA stay must be well reasoned to withstand close judicial scrutiny.

AUTOMATIC STAY OVERRIDE REQUEST

THE COURTS: AN OVERVIEW

If the agency overrides an automatic stay, if an interested party challenges the override decision, that party will generally seek an injunction to immediately stop the the agency from proceeding with either contract award or contract performance. The courts will apply a four-part test in reviewing a 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 Courts will look at the agency's override decision to see if it was rationally based, and not unreasonable, arbitrary, or capricious. As mentioned above, the Courts apply different tests to determine the reasonableness of the agency's decision, depending upon the ground on which the override decision was based, urgent and compelling, or best interests of the Government. To reiterate, it is vital for Contracting Officers to prepare Determination and Findings that are tailored to the appropriate ground on which the override decision was based.

Key aspects the courts review are:

- **U.S. Court of Federal Claims and U.S. District Courts**
  - Standard of review -
    - Administrative Procedures Act (APA)
      - Did the HCA act within the scope of his authority in overriding the stay?
      - Was the agency's decision arbitrary, capricious or 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?

  - will only review administrative record that was before the agency at the time of the override decision; **NOT** documents prepared after litigation (i.e., CO statement, documents prepared for the purpose of protest litigation except in very limited situations)

  - Courts may grant any relief the court considers proper, to include declaratory and injunctive relief; monetary damages are limited to bid and proposal costs

  - DOJ attorneys or US attorneys provide trial counsel

NOTE: The Courts review only the facts before the agency at the time the decision to override was made and applies the APA standard.

The D&F cannot be remedied after the decision to override is made.

AUTOMATIC STAY OVERRIDE REQUEST

CICA: Automatic Stay Provision

Understanding the purpose of the CICA automatic stay will help practitioners in determining whether an override is appropriate in the first instance. Understanding the different grounds on which an automatic stay may be overridden will help practitioners in defending the override decision, 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 and the awardee was engaged in performance. This situation curtailed the amount of meaningful relief available to a successful protestor. Therefore, Congress enacted the *automatic stay* to maintain the 'status quo' pending a thorough review of the acquisition. Thus, generally the Agency is expected to extend the incumbent's contract rather than make contract award to, or allow performance by, a new contractor. **The override decision must provide adequate justification to support contract award to, or performance by, someone other than the incumbent.**

The automatic stay is triggered at different times under different circumstances for protests. Protests before GAO require notification to the agency by GAO to trigger the stay provision. In agency protests, notification by the protestor to the agency triggers the stay. See FAR Part 33 and your local counsel. It is important to note that if, after an override request has been approved and the contract awarded, the same protestor 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.

CICA mandates that an automatic stay, if triggered, is effective until the protest is resolved or an override request is approved by the designated Head of the Contracting Activity (HCA). 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 automatic stay for both pre- and post- award situations. Each exception is discussed in detail in the following pages.

NOTE: Automatic stays can be triggered in both Agency and GAO protest situations. If filed with the GAO, notification of the protest must come from GAO; if filed with the agency, notification by the protestor to the agency triggers the stay.

AUTOMATIC STAY OVERRIDE REQUEST

CICA Automatic Stay Exceptions

Pursuant to CICA, the HCA has the authority to override both pre- and post-award automatic stays. (AFAR Part 33.104 requires DASA(P) or AMC Command Counsel approval of override decisions. No contract award should be made or performance begun until the HCA's decision has been approved.) The grounds on which an override decision may properly be based are as follows:

PRE-AWARD, the HCA can override the stay upon a written finding that :

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

POST AWARD, the HCA can override the 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 U.S. will not permit waiting for the decision of the Comptroller General concerning the protest.

31 U.S.C. § 3553 (d)(3)(C)(i)

The protest must be timely and proper notification received by the agency from GAO to trigger the stay provision.

NOTE: Regardless of whether the protest is filed with GAO or the agency, the automatic stay is effective until the protest is resolved or an override is approved by the HCA. The agency MUST notify GAO of its intent to override.

AUTOMATIC STAY OVERRIDE REQUEST

THE URGENT AND COMPELLING EXCEPTION

URGENT & COMPELLING

A decision to override on the ground of urgent and compelling circumstances is the more problematic and more likely of the two to be overturned by a court. Over the years, the courts have taken two distinct views with respect to this ground. In the minority view, the focus is on whether the type of work or item being procured is urgently needed. The **majority** view, which is the more conservative view and the **one that should 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.

In preparing the Determination and Findings, 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 someone other than the incumbent. As discussed previously, the D&F must also include reasons why the incumbent's contract could not be extended during the pendency of the protest. Furthermore, in pre-award protest situations, the AFAR requires the D&F to explain the damage the U.S. will suffer if the award is made and the protest is sustained.

In recent years, increasing numbers of courts have ruled against the agency, and found the override decision to be unreasonable, arbitrary or capricious. In several cases, the Army was unsuccessful because its justification failed to address why performance by the new awardee was essential as opposed to extending the incumbent contractor.

Examples of such cases appear on the following page.

In the D&F, begin with whether the service/supply is essential then shift the focus to an explanation of why the incumbent contractor CANNOT be extended until the protest is resolved

AUTOMATIC STAY OVERRIDE REQUEST

THE URGENT AND COMPELLING EXCEPTION

Examples of overturned overrides based on the Urgent and Compelling:

In *DTH Management*, a contract involving housing maintenance and repair services, the agency failed to address extending the incumbent's contract and merely stated that performance by 'some entity' was urgent and compelling. The Court found that, while the need for the services was urgent, the Agency failed to adequately demonstrate why a contractor other than the incumbent was required since the tasks were janitorial in nature and did not require any special expertise.

Similarly, in *Dairy Maid*, though the District Court agreed that the milk products were urgently needed, the Army completely failed to consider extending the incumbent contractor. This failure to adequately justify why the incumbent's contract was not extended caused the Court to find the Agency's override decision unreasonable.

While all cases are unique and the D&F should be tailored, some factors to consider in support that the agency has urgent and compelling reasons for overriding the automatic stay may include the fact that substantial monetary savings would result by awarding to the new contractor over the incumbent, the incumbent's inability to perform new or changed services under the new contract; or, in the case of an 8(a) contractor, graduation and ineligibility under the SBA's 8(a) small business program.

In the long run, the long run, the agency will save valuable time and resources by spending the time necessary to prepare a thorough D&F. (See enclosed reference of cases and research links; Appendix 1- Sample Override)

AUTOMATIC STAY OVERRIDE REQUEST

THE BEST INTEREST OF THE UNITED STATES EXCEPTION

BEST INTERESTS OF THE UNITED STATES

This ground to support an agency override is applicable only in a post-award situations, and for reasons explained below, should always be included 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, the CICA requires the agency to make a finding that "performance of the contract is in the best interests of the United States."

Some courts have opined that this ground is not subject to judicial review at all and will defer to the agency's decision, thereby leaving the override decision intact, unless there is evidence of agency bad faith, fraud, or violation of law. The courts in some jurisdictions, however, will review the agency's override decision. The focus of the review will be on whether the suspension of the awardee's contract is in the best interests of the United States. Therefore, Army practitioners should always prepare the D&F as though the agency's decision will be subject to judicial review. The practitioner should ensure the D&F includes a 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 U.S.

Under this exception, the focus is on why suspension of the procurement is detrimental to the U.S.'s best interests. This is best illustrated in *Universal Shipping*. Here the agency for International Development (AID) sought to override the CICA stay in a procurement for food shipments for famine relief. Although the court found that the relief was undoubtedly urgent and compelling, the court found that the agency did not give a reasoned analysis as to why staying the procurement was in the "U.S's best interest." The court recognized the importance of famine relief but the D&F did not convince the court that U.S. interests were in jeopardy.

Similarly, in *Samson Tug & Barge*, the court ruled against the agency. The court stated that the agency's determination lacked a meaningful statement about the availability of continued service by the incumbent. However, in *Ingram Barge*, the court held that the agency's discretion is very broad and that it would be inappropriate to substitute its determination in lieu of the agency's. Thus, for the most part, all post award override requests should rely on the best interest standard but should include a meaningful discussion of extending the incumbent.

For Post award protests -
Most override requests should include the Best Interests Standard

AUTOMATIC STAY OVERRIDE REQUEST

DETERMINATIONS & FINDINGS

The Courts will limit their review of the agency's decision to the administrative record. The D&F, override decision, and agency approval constitute the agency record that supports the agency's override decision. It is critical that these documents create a written record, contemporaneous with the agency's override decision, that 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 of a protester's request for an injunction.

Courts use a four-part test, called the "balancing hardship test" in determining whether a temporary restraining order or injunction is warranted. (See reference page for cases): The four factors subject to judicial scrutiny are:

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

The D&F must address why the incumbent contractor CANNOT be extended
AND
why one contractor's performance over another is essential

The decision to override the stay must be supportable. 10

AUTOMATIC STAY OVERRIDE REQUEST

DETERMINATIONS & FINDINGS

The D&F should focus on Factor 1, does protestor have a substantial likelihood of prevailing on the merits. That is the factor that will be scrutinized most by the Courts.

To support Factor 1, that agency must demonstrate that its decision to override the stay was reasonable.

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 of Factor 1 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.

Along with fully developing Factor 1, the D&F should also treat 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 contractors ability/inability to perform during a protest and why one contractor's performance over another is urgent/compelling

The D&F must be detailed and support the basis for the override,

AUTOMATIC STAY OVERRIDE REQUEST

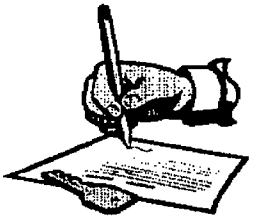
QUICK VIEW: URGENT AND COMPELLING CIRCUMSTANCES

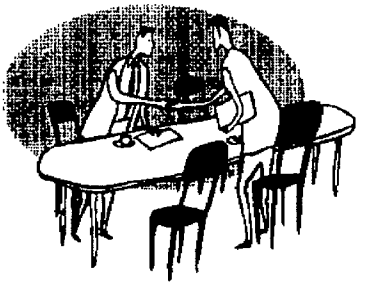
D&F MUST ADDRESS:

- Why override is urgent and compelling
  - criticality of item/service
  - necessity of continued performance
- Why "particular" contractor is essential
  - special/technical skills
  - cost considerations/savings
  - scope/nature of work/item
  - other special considerations
- Why extending incumbent is NOT in U.S's best interests
- Harm government will incur w/o override
  - why can't agency wait for a decision on the merits of the protest
- Likelihood of protestor prevailing

PROCEDURE FOR OVERRIDE REQUEST

- Contracting Officer prepares detailed D&F
  - Coordinates D&F with legal
  - Submits D&F to HCA for signature of override request
- Override request package to HQDA (ATTN: SAAL-PS) for staffing
- SAAL-PS review / action DASA(P) OR HQ AMC approval / disapproval





AUTOMATIC STAY OVERRIDE REQUEST

QUICK VIEW: BEST INTERESTS OF THE UNITED STATES

D&F MUST CONSIDER:

BEST INTERESTS

- Why is continued performance in the best interests of the U.S.
  - Urgent and compelling circumstances
  - Other reasons

- Why "particular" contractor is essential. How/why U.S. interests would be harmed if the proposed contractor were not allowed to continue performance.
  - special/technical skills
  - cost considerations/savings
  - scope/nature of work/item
  - other special considerations

- Why extending incumbent is NOT in U.S's best interests

- Harm government will incur w/o override
  - why can't agency wait for a decision on the merits of the protest
  - why U.S. interests would be harmed

- Likelihood of protestor prevailing

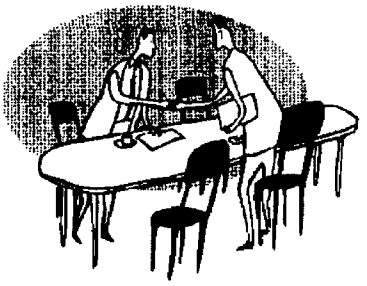
PROCEDURE FOR OVERRIDE REQUEST

- Contracting Officer prepares detailed D&F
  - Coordinates D&F with legal
  - Submits D&F to HCA for override request

- Override request package to HQDA (ATTN: SAAL-PS) for staffing

- SAAL-PS review / action

- DASA(P) or HQ AMC approval/disapproval



AUTOMATIC STAY OVERRIDE REQUEST

Pre- and Post-Award Protests In 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 automatic stay is triggered.

The contracting activity, if it desires to override the second (post-award) stay, must **prepare and process another override request.** The first override, pertaining to the pre-award protest does not overcome 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 are 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 the urgent and compelling ground.

Remember: There can be both a pre-award and a post-award protest of the same procurement, triggering two separate stays. Each stay must be overridden separately.

AUTOMATIC STAY OVERRIDE REQUEST

CONCLUSION

Procurement officials must carefully consider whether or not to pursue overriding a stay, as courts are not hesitant to stop an agency from improperly overriding one. Procurement officials may be frustrated by suspension of an acquisition. Agencies must be mindful, however, that if the stay is overridden and subsequently the protest is lost, the contract may have to be terminated for convenience, a sometimes a very expensive and disruptive proposition for the agency. Thus, if there is a reasonable risk that the protestor will prevail in its protest, the agency may be better off living with the stay and extending the incumbent's contract.

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 for the agency to create detailed, thorough, well-reasoned supporting documentation to support the override decision. While this make take considerable time and effort, it is time well spent. The failure to properly document the agency's rationale for the override decision will result in the Courts overturning the agency's decision. This can result in unnecessary expense, disruption, and embarrassment to the agency.

In preparing the supporting documentation, the agency should always consider extending the incumbent's contract before seeking an override. An override should only be sought when performance by one other than the incumbent is required either due to urgent and compelling circumstances or due to other reasons that are in the best interests of the United States. In addition to focusing on the merits of the override decision and the protester's likelihood of success on the merits in its override challenge, the the agency should address in its D&F, those other factors that a Court will consider in determining whether to grant an injunction, thereby stopping the agency from continuing with the override.

A carefully documented and thorough D&F will speed the approval process time at the ensure its ability to withstand close judicial scrutiny.

Carefully consider the decision to override; consider the supply/service urgency then focus on performance by one contractor over another in the D&F - the D&F cannot be remedied after the decision to override

AUTOMATIC STAY OVERRIDE REQUEST

References & Links

Majority View Cases - (that performance by a particular contractor is urgent and compelling)

- *DTH Management Group v. Kelso*, 844 F.Supp. 1993
http://ogc.doc.gov/websonar/WebSonar.acgi$GoToDocCommand

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

- Superior Services, Inc., v. Dalton, 851 F.Supp. 381 (S.D.Cal, Apr 21, 1994)(No. 94-49CH)

- Commercial Energies Inc., v. Cheney, 745 F. Supp. 647 (D. Colo. 1990)

- Superior Services Inc., v. Dalton, 851 F. Supp 381 (S.D. Cal. 1994)

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)

- Universal Shipping Co., v. United States, 652 F. Supp. 668 (D.D.C. 1987)]

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,335 U.S. App. D.C. 105; 169 F.3d 21 (March 1999); Matthews v. United States, 526 F. Supp. 993, 1981 U.S. Dist.;

GAO Rules
http://www.gao.gov/decisions/bidpro/new.reg/regulation.htm

GAO Bid Protest Cases - Search mode
http://www.gao.gov/decisions/bidpro

AUTOMATIC STAY OVERRIDE REQUEST

Example of Override Request

APPENDIX I – EXAMPLE OVERRIDE ANALYSIS

BASIS FOR OVERRIDE DECISION

Upon the basis of the following findings, I [contracting officer], have determined that contract [contract no] for operation and maintenance in support of [organization] for the US Military Training mission in [location] should be authorized to proceed in the face of a General Accounting Office (GAO) protest [protest docket no.] filed by the incumbent contractor [name of contractor].

I find that the contract performance by [contractor x] will be in the best interest of the United States and that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision on the protest. The U.S. Army's basis for the override decision is presented in enclosure 1. As discussed in encl. 1, the impact to performance and costs on critical programs will be severe if performance by [contractor x] is not permitted.

The potential damage to the government if performance by [contractor x] is not permitted has been analyzed and is considered to be of significantly less risk to the [army organization] than would be realized upon extension of the incumbent's contract. The extension of the incumbent's contract does not allow for performance of the critical functions of the Facilities Control Officer (FAO) nor does it provide for Tower maintenance. Both of these functions have been incorporated into [contractor x's] contract.

In the event that the protest is sustained, we would move to continue the contract with [contractor x] while another round of BAFO's is considered. This would allow the Army to maintain the critical FCO and tower maintenance functions. Since [contractor x's] price is half that of the incumbent's actual costs to the Army during any such extension with [contractor x] would be less than the cost of an extension of the incumbent's contract (which would be necessary if this override is not approved.)

Our evaluation team is in place and minimal time will be required for them to reacquaint themselves with the details of the solicitation if it becomes necessary to evaluate another round of BAFO's. government labor cost, therefore, would be approximately the same regardless of whether the override is approved or not.

I find that the issues of the protest are without merit and unlikely to be upheld by the GAO. The issues of the protest are discussed in encl. 2.

BASIS FOR OVERRIDE DECISION

1. Purpose: To provide the basis for and to request override of the stay of performance imposed by protest against an award of a contract issued by [command] for the [command, unit, location].

2. Background: this requirement is for operation and maintenance of components of the [unit/area/etc] as follows: the facilities control office, technical control facilities, patch and test facility, outside cable plant, and the communications tower and associated antennas.

> The FCO provides management and control of all communication facilities for the [unit]. The FCO is required to be manned and operated 24 hours a day.
>
> There are 2 TCDs located in [area] and one patch and test facility located in [area] that makes up the backbone of the [area] defense information infrastructure. Together the TCFs and PTF are the conduit for the command, control and communications, computers (C4I) for the [area] of operations.
>
> The microwave antenna tower and associated antennas are located in [area]. Routine maintenance is performed every four months and include inspection, painting, removal of rust, tightening of bolts, alignment of antenna, etc. [Location] is on the gulf and thus highly susceptible to corrosion, rust, high winds, and dust storms. Failure of any of these systems can cause extreme communications degradation or failure.