



# Federal Aviation Administration

## Office of Dispute Resolution for Acquisition (ODRA)

### FREQUENTLY ASKED QUESTIONS

*These FAQs are intended to provide the public with a convenient and concise overview of the ODRA process. Please note, however, that they should be used for general guidance only. Users should not rely on these FAQs to the extent any information contained herein conflicts with law, regulation or policy.*

#### **1. What is the ODRA?**

In 1995 the Congress exempted the FAA from federal procurement laws and regulations and directed that the FAA develop its own acquisition system. In response to that mandate, the FAA implemented its own unique and independent procurement process by developing the Acquisition Management System (AMS), which became effective on April 1, 1996. As part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to resolve procurement protests and contract disputes on behalf of the FAA Administrator. By statute, the ODRA has exclusive jurisdiction over the adjudication of bid protests and contract disputes under the AMS. ODRA adjudications are conducted under the Administrative Procedure Act and Procedural Regulations, and are subject to review by the United States Circuit Courts of Appeals (except the Federal Circuit). The ODRA is comprised of a Director and three Dispute Resolution Officers (DROs), all of whom have been designated as Administrative Judges by the FAA Administrator, as well as a Paralegal, who serves as a Special Assistant to the Director.

#### **2. What types of disputes does the ODRA resolve?**

The ODRA provides dispute resolution services and adjudicates all bid protests and contract disputes that are subject to the AMS. 49 U.S.C. § 40110 (d)(4). The ODRA also provides non-binding and binding dispute resolution services in AMS matters and non-binding dispute resolution services in non-AMS matters when requested by all parties involved. 14 C.F.R. §§17.1 and 17.3(q).

#### **3. What are the applicable procedures?**

The rules of procedure applicable to ODRA matters are found in the Code of Federal Regulations (C.F.R.) at Title 14, Parts 14 and 17.

#### **4. How do I communicate with the ODRA? How and where do I file protests and contract disputes?**

The ODRA office telephone is (202) 267-3290 and the facsimile numbers are (202) 267-3720 and (202) 493-5564. The ODRA Website contains further detailed instructions on how you may communicate with the ODRA. See Contact and Filing Information; as well as 14 C.F.R. §17.7 (filing generally); 14 C.F.R. §17.15 (protests); and 14 C.F.R. §17.27 (contract disputes).

**5. Can I speak to the ODRA DRO Administrative Judge privately regarding my protest or contract dispute?**

Private *ex parte* communications between a party and a DRO Administrative Judge regarding the substance of a particular matter are not permitted unless that DRO Administrative Judge has been assigned to the case as the ADR Neutral. *See* 14 C.F.R. §17.21 (protests) and 14 C.F.R. §17.33(q) (contract disputes). Where the DRO Administrative Judge is serving as the ADR neutral, private discussions with individual parties are encouraged, treated as confidential, and will not be made part of the adjudicative record in the case. ODRA personnel, however, may respond to general questions from parties and members of the public regarding ODRA operations and procedures.

**6. Can I ask the ODRA for legal advice?**

No. ODRA personnel must function impartially and fairly in all matters before the ODRA. As such, they are not authorized to provide legal advice to any party. However, ODRA personnel serving as ADR neutrals in a case can and frequently do provide the parties with a neutral evaluation of the strengths and weaknesses of their cases. Individuals or entities seeking legal advice should consider obtaining legal counsel.

**7. Do I need an attorney to represent me before the ODRA?**

Having an attorney represent you is not a requirement for pursuing a case before the ODRA. In fact, many cases brought before the ODRA are prosecuted on a *pro se* basis, *i.e.*, without an attorney. However, the FAA always is represented by counsel in ODRA cases. The ODRA Website can provide potential parties with information that they will need to prosecute a case without necessarily having to engage an attorney to represent them. Even so, many private parties do have legal representation in ODRA matters. Also, in cases where confidential and proprietary information requires the issuance of an ODRA Protective Order, it may be necessary to engage an independent representative in order to have access to protected materials that are critical to the prosecution of a case. *See* 14 C.F.R. §17.9 (Protective Orders).

**8. If my protest or contract dispute is successful, will I be able to recover my attorneys' fees and costs?**

The Equal Access to Justice Act (EAJA) is applicable to the ODRA's adjudicative proceedings and allows qualifying applicants to be reimbursed for some of their fees and costs, when the circumstances satisfy the prerequisites for EAJA recovery. *See EAJA Application of IBEX Group, Inc.*, 96-ODRA-00037EAJA. The rules implementing EAJA are set forth in 14 C.F.R. Part 14. Parties may not recover attorneys' fees and costs other than what might be obtained under the EAJA. *See Protest of Haworth, Incorporated*, 98-ODRA-00075.

**9. When must I file a protest?**

*See* 14 C.F.R. §17.15(a).

**10. What information must I furnish in a protest?**

*See* 14 C.F.R. §17.15(c).

**11. When must I file a contract dispute?**

*See* 14 C.F.R. §17.27(c).

**12. What information must I furnish in a contract dispute?**

*See* 14 C.F.R. §17.27(a).

**13. What transmittal methods are to be used to file protests, contract disputes or other items with the ODRA? How can I make sure such items are received by filing deadlines?**

*See* 14 C.F.R. §17.7.

**14. What if my filing arrives at the ODRA after normal business hours, *i.e.*, after 5 p.m. Eastern Time?**

It will be considered as having been filed on the following business day. If a filing deadline is not complied with, the filing will be considered as untimely. *See* 14 C.F.R. §17.7(a).

**15. In terms of filing deadlines, what is the impact of weekends, federal holidays and weather emergencies that result in a Government shutdown?**

*See* 14 C.F.R. §17.7(c). Such days are excluded when calculating filing deadlines.

**16. Can a verifiable personal emergency extend a filing deadline?**

The ODRA may extend filing deadlines for cause, **except** in the case of initial protest or contract dispute filings. *See* 14 C.F.R. §17.13(c) and 14 C.F.R. §17.27(e).

**17. Are ADR services provided by the ODRA?**

The ODRA uses alternative dispute resolution (ADR) techniques as its primary means of resolving bid protests and contract disputes. *See* 14 C.F.R. Part 17, Subpart D. The use of ADR is completely voluntary and no party is required to attempt ADR.

**18. What are the various available ADR methods?**

ADR methods available at the ODRA include mediation, early neutral evaluation and binding arbitration. The parties agree upon the particular method of ADR to be used and it is specified in the parties' ADR Agreement. *See* 14 C.F.R. Part 17, Subpart D and Appendix A.

**19. What methods of ADR have been employed by the ODRA?**

In most cases, the ODRA has helped parties to settle bid protests and contract disputes through techniques such as neutral evaluation, whereby the ADR neutral provides an assessment of the legal and factual merits of a party's position, and mediation, whereby the ADR neutral ascertains the parties' needs and interests and facilitates discussions between them. On occasion, binding arbitration has been used to resolve ODRA matters. *See Binding Arbitration Guidance.*

## **20. Who decides whether to use ADR?**

The decision on whether ADR will be used is strictly that of the parties, and the ADR process is entirely voluntary. The ODRA Procedural Rules require, however, that parties consider using ADR in every case and it is the policy of the FAA to utilize voluntary ADR to the maximum extent possible. *See* 14 C.F.R. §17.17(c) and 14 C.F.R. §17.29.

## **21. Who may be used as an ADR neutral on an ODRA case and who chooses the neutral?**

ODRA DRO Administrative Judges are available to serve as neutrals in ADR proceedings, and upon request by the parties, the ODRA will assist the parties in arranging for the use of private neutral at their own expense. *See* 14 C.F.R. §17.37(a).

## **22. Why should I agree to use ADR?**

ADR is faster and less expensive than litigation and has been used to settle most of the disputes brought to the ODRA. Further, through ADR, the parties themselves retain control over the outcome of their dispute and can frequently structure the ultimate resolution in a way that satisfies all concerned. Thus, unlike litigation, ADR will often help parties maintain business relationships with each other.

## **23. Where can I find a sample ADR Agreement?**

A sample ADR Agreement and other types of commonly used ODRA documents are available on the ODRA Website. *See* ODRA Model Forms.

## **24. Can I change my mind about using ADR after I have signed an ADR agreement?**

Mediation and ENE are completely voluntary and may be terminated by either party at any time. The ADR neutral also may terminate ADR pursuant to the provisions of the parties' ADR agreement, when resolution of the protest or dispute through ADR appears unlikely. Arbitration, however involves a voluntary election before it is used, but once an arbitration agreement is signed, the parties are bound to its terms. *See* 14 C.F.R. Part 17, Subpart D and Appendix A; as well as Binding Arbitration Guidance.

## **25. How is the ODRA's impartiality maintained?**

The ODRA is physically and organizationally distinct from the FAA's Office of Chief Counsel's Contracts and Commercial Law Division. Although employed by the Agency, DRO Administrative Judges are responsible for conducting adjudicative proceedings, developing a clear and accurate record, interpreting and applying applicable legal

authority in accordance with the Administrative Procedure Act. By statute, the ODRA is charged with conducting its adjudications in a way that is conducive to “justice and the proper dispatch of business.” See 49 U.S.C. § 46102(a).

**26. How do I get information that is necessary to prove my allegations?**

Discovery – the exchange of information and documents -- is an integral part of the ODRA dispute resolution process. However, the discovery must be focused on obtaining information relevant to the issues to be resolved. The ODRA does not permit so-called “fishing expeditions.” See 14 C.F.R. §17.21(i), 14 C.F.R. §17.33(g) and (h) and 14 C.F.R. §17.53.

**27. Can contract awardees participate in a protest?**

Yes. Upon receipt of a protest, the FAA Contracting Officer (CO) involved is required to provide notice of a protest to the awardee of a challenged contract. The ODRA Procedural Rule permits awardees to intervene as interested parties in an ODRA protest as a matter of right, provided they advise the ODRA of their desire to do so within two business days of the Contracting Officer’s notification to them of the protest. For post-award protests, the awardee is the only interested party permitted to participate as an intervenor. See 14 C.F.R. §17.15(f) and (g).

**28. Will my proprietary and competition-sensitive information be protected?**

Yes. The ODRA can issue a Protective Order at the request of a party, or upon its own initiative, to protect the release of information, which could result in a competitive advantage to one or more parties. After a Protective Order is issued, only a party’s counsel, or consultants retained by counsel, may be allowed access to the protected information. Access to protected information is granted only if such individuals can establish they are not involved in competitive decision making for any firm that could gain a competitive advantage from access to the protected information. See 14 C.F.R. §17.9.

**29. Can there be a suspension of award or of contract performance during the pendency of a bid protest?**

Contract award and performance will continue during pendency of a protest unless there are compelling reasons for suspension. See 17 C.F.R. 17.15(d). This policy is consistent with Congressional intent that the automatic procurement stay provision of the Competition in Contracting Act (CICA) not apply to bid protests under the AMS. See Pub. L. No. 104-50, 109 Stat. 436.

**30. Do I have to provide copies of documents filed with the ODRA to the other party?**

Yes. A copy of a protest must be served on the Contracting Officer and any other official designated in the SIR for receipt of protests by means reasonably calculated to be received by the Contracting Officer on the same day as it is to be received by the ODRA. See 14 C.F.R. §17.7(a) and 14 C.F.R. §17.15(e). Copies of contract disputes similarly must be provided to the other party, i.e., to the FAA Contracting Officer, if the contract

dispute is filed by the contractor, or the contractor, if the contract dispute is filed by the FAA Product Team. *See* 14 C.F.R. §17.27.

### **31. What kind of relief can I get from the ODRA's Default Adjudicative Process?**

The ODRA has broad discretion to recommend and impose remedies for successful protests and contract disputes that are consistent with the AMS and applicable statutes. *See* 14 C.F.R. §17.23 and 14 C.F.R. §17.25(c).

### **32. When are hearings conducted for bid protests?**

Hearings are not typically held in bid protests, although the DRO Administrative Judge may conduct a hearing where he or she determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations or that their resolution is dependent on an assessment of witness credibility. *See* 14 C.F.R. §17.21(j).

### **33. When are hearings conducted for contract disputes?**

Evidentiary hearings on the record are conducted where the DRO Administrative Judge where he or she determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations or that their resolution is dependent on an assessment of witness credibility. A party also may request a hearing in a contract dispute, however, if the DRO Administrative Judge specifically finds that a hearing is unnecessary and that no party will be prejudiced by limiting the adjudicative record to the parties' written submissions, the hearing request can be denied. *See* 14 C.F.R. §17.33(k).

### **34. Who makes the final decision in an ODRA adjudication?**

The final decision of the FAA is made by Order of the FAA Administrator or the Administrator's delegate, based on a review of the ODRA's findings and recommendations. *See* 14 C.F.R. §17.41. The ODRA Director, among other things, has been delegated the authority "to execute and issue, on behalf of the Administrator, Orders and Final Decisions ... in all matters" under the ODRA's jurisdiction valued at not more than \$10 Million. *See* Designation and Delegation of Authority, dated October 7, 2011.

### **35. What is contained in the ODRA's findings and recommendations?**

Findings and recommendations contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, a recommendation for a final FAA order, and if appropriate, suggestions for future FAA actions. *See* 14 C.F.R. §17.21(l) and 14 C.F.R. §17.33(l).

### **36. How can I find a previously decided ODRA case?**

All ODRA case decisions resulting from the adjudicative process are published on the ODRA Website and can be searched by case name or key terms. *See* ODRA Case Search.

ODRA Decisions also are available online to Lexis account holders. *See* <https://law.lexisnexis.com>. The following path will take you to the ODRA database: Legal → Area of Law → By Topic → Administrative Law → Specific Agency Decisions & Materials → Transportation → Office of Dispute Resolution for Acquisition.

### **37. How do I appeal an Administrator's Order?**

Final Orders in ODRA cases can be appealed to any U.S. Court of Appeals, with the exception of the Federal Circuit Court of Appeals. *See* 14 C.F.R. §17.43.