



# Federal Aviation Administration

## Office of Dispute Resolution for Acquisition (ODRA)

### ODRA GUIDE

*THIS GUIDE IS INTENDED TO PROVIDE THE PUBLIC WITH A CONVENIENT AND USER-FRIENDLY OVERVIEW OF THE ODRA PROCESS. PLEASE NOTE, HOWEVER, THAT IT SHOULD BE USED FOR GENERAL GUIDANCE ONLY. USERS SHOULD NOT RELY ON THIS GUIDE TO THE EXTENT ANY INFORMATION CONTAINED HEREIN CONFLICTS WITH LAW, REGULATION OR POLICY.*

#### INTRODUCTION

The Office of Dispute Resolution for Acquisition (ODRA) is the only forum authorized by law to resolve and decide bid protests and contract disputes that relate to procurement actions under the FAA's Acquisition Management System (AMS). This ODRA Guide to protest and contract dispute procedures is intended to help you to prepare for, and participate in, the ODRA dispute resolution process. The Guide is intended to inform the parties about the process and help achieve a prompt and efficient resolution or adjudication of the protest or contract dispute.

#### ORGANIZATION OF THE ODRA GUIDE

This Guide is organized into topics set forth in the [Table of Contents](#) below. Each topic represents an aspect of the ODRA dispute resolution process. These topics are described briefly below. More complete descriptions may be accessed by hyperlink.

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## ODRA BACKGROUND AND HISTORY

In 1995 Congress, through the Department of Transportation Appropriations Act, directed the FAA “to develop and implement, not later than April 1, 1996, an acquisition management system that addressed the unique needs of the agency and, at a minimum, provided for more timely and cost effective acquisitions of equipment and materials.” *See* Pub. L. 104-50, 109 Stat. 436 (November 15, 1995). In response, the FAA developed the Acquisition Management System (AMS), a system of policy guidance for the management of FAA procurement. AMS policy and guidance may be accessed via the FAA Acquisition System Toolset (FAST). Also, as a part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to facilitate the Administrator’s review of procurement protests and contract disputes. *See* 61 FR 24348, May 14, 1996. Subsequently, the FAA issued rules of procedure governing the ODRA’s dispute resolution process by publishing a final rule entitled, Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations, effective June 28, 1999. *See* 64 FR 32926, June 18, 1999.

In addition to the rules of procedures, ODRA operates pursuant to a series of delegations of authority from the Administrator. *See* ODRA Delegations. Over time, the authority delegated to the ODRA by the Administrator expanded to include the authority of the ODRA Director, among other things, “to execute and issue, on behalf of the Administrator, Orders and Final Decisions for the Administrator in all matters” under the ODRA’s jurisdiction valued at not more than \$10 Million. *See* 63 FR 49151, September 14, 1998; 65 FR 19958-01, April 13, 2000; 69 FR 17469-02, April 2, 2004.

Congress provided re-confirmation of the FAA’s dispute resolution authority in the Vision 100-Century of Aviation Reauthorization Act of 2003 (2003 Reauthorization Act), which expressly provided the ODRA with exclusive jurisdiction over bid protests and contract disputes under the AMS. *See* Pub. L. No. 108-176, § 224(b), 117 Stat. 2490, 2528 (codified as amended at 49 U.S.C. § 40110(d)(4)). Specifically, the 2003 Reauthorization Act provided at Subsection (b)(2)(4), under the title “Adjudication of Certain Bid Protests and Contract Disputes” that:

A bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator, through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition, acting pursuant to Sections 46102, 46104, 46105, 46106 and 46107 and shall be subject to judicial review under Section 46110 and Section 504 of Title 5.

On January 12, 2011, the FAA proposed to update and streamline the ODRA’s procedural rules by publishing a notice of proposed rulemaking in the Federal Register. The proposed amendment to ODRA’s Procedures for Protests and Contracts Dispute (76 FR 2035), among other things, reorganized and streamlined the rules, and harmonized them with current statutory and other authority. On September 7, 2011, the FAA adopted the proposed rule, publishing it as a final rule (76 FR 55217) in the Federal Register, with an effective date of October 7, 2011. *See* FAA Administrator’s October 12, 2011 Designation and Delegation.

## REVISED RULES GOVERNING ODRA PROCEEDINGS

The revised ODRA Procedural Rules, contained in 14 C.F.R. part 17, detail the procedural requirements for the resolution of both bid protests and contract disputes. 14 C.F.R. part 17 is organized into seven subparts. Subpart A contains key definitions of terms that you may encounter in an ODRA proceeding. It also sets forth the legal authority for the FAA's unique dispute resolution process and addresses the treatment of protected or proprietary information in the administrative record.

Subpart B and subpart C contain the specific procedural requirements for filing and adjudicating a bid protest or contract dispute. Adjudication is actively managed by the ODRA, from filing of the case to the issuance of a final order, in accordance with these procedures. Upon commencement of the adjudication process, a schedule is established, monitored and updated periodically to ensure the adjudication is completed as promptly as possible and in accordance with the ODRA Procedural Rules.

The ODRA uses Alternative Dispute Resolution (ADR) as its *primary* means of dispute resolution and the use of ADR is specified in the ODRA Procedural Rules under subpart D. This subpart also addresses the confidentiality of ADR communications in protests and contract disputes. Appendix A of the Rules describes in greater detail the various types of ADR available at the ODRA.

Subpart E addresses the procedures for seeking review or reconsideration of a final order, and subpart F addresses matters such as professional conduct and enforcement of interlocutory orders. Finally, subpart G addresses the use of the Pre-Disputes process, which is available to resolve controversies before they develop into formal protests or contract disputes.

The Equal Access to Justice Act (EAJA), which permits recovery of certain attorney fees and expenses by successful parties who qualify, is applicable to adjudications at the ODRA. The FAA Administrator has delegated final decision authority to the ODRA Director in EAJA adjudications. The procedures for applying for attorney fees and expenses under EAJA are set forth in 14 C.F.R. part 14.

### **FILING A CASE AT THE ODRA**

The ODRA serves as the exclusive forum for the resolution and adjudication of bid protests and contract disputes under the FAA's AMS. Bidders or contractors on FAA contracts are required by law to file matters with the ODRA, rather than with the General Accounting Office (GAO), the U.S Civilian Board of Contract Appeals, or the Court of Federal Claims.

### **BID PROTESTS**

Bid protests raise issues of whether a particular decision or action taken by an FAA Product Team in connection with a Screening Information Request (SIR), solicitation or contract award is consistent with the requirements of the AMS and has a rational basis. 14 C.F.R. § 17.21(m).

### *Who may file a Bid Protest*

Only “interested parties” may file a protest with the ODRA. 14 C.F.R. § 17.15(a). An “interested party” is “one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.” See 14 C.F.R. § 17.3(m) and *Protest of Metro Monitoring, Inc.*, 98-ODRA-00047.

### *Bid Protest Filing Deadlines*

Bid protest filing deadlines are strictly applied. The procedural rules require that protests alleging defects or other improprieties in a solicitation (or solicitation amendment) be filed before the specified closing date for receipt of proposals. 14 C.F.R. § 17.15(a)(1) and (2). Protests other than those related to alleged solicitation defects or improprieties must be filed on the later of the following two dates:

- (i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or
- (ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

14 C.F.R. § 17.15(a)(3).

### *Bid Protest Filing Methods*

In order to ensure timeliness, all filings should be made by overnight delivery, hand delivery or by facsimile. 14 C.F.R. § 17.7(b). Timeliness of all filings will be measured by the time received at the ODRA offices. Filings must be received at the ODRA during its normal business hours (8 A.M. to 5 P.M. Eastern Time) on the date required. The risk of assuring timely receipt by the ODRA is borne by the filer.

The ODRA cannot extend the deadlines for the timely filing of bid protests and cannot consider a protest that was not timely filed.

### *Content of Initial Bid Protest Filing*

A bid protest **must** be submitted to the ODRA in writing, and is required to include:

- The protester’s name, address, telephone number, and fax number;
- The name, address, telephone number, and fax number of the protester’s legal representative, and who shall be duly authorized to represent the protester, to be the point of contact;
- The SIR number or, if available, the contract number and the name of the Contracting Officer;
- The basis for the protester’s status as an interested party;
- The facts supporting the timeliness of the protest; [See Filing Deadlines]

- Whether the protester requests a protective order, the material to be protected, with a redacted copy of that material attached;
- A detailed statement of both the legal and factual grounds of the protest, with one (1) copy of each relevant document attached;
- The remedy or remedies sought by the protester, as set forth in § 17.23;
- The signature of the legal representative, or another person duly authorized to represent the protester.

*See* 14 C.F.R. § 17.15(c).

At the same time as filing the bid protest with the ODRA, the protester is required to serve a copy of the protest on the Product Team's Contracting Officer and any other official designated in the SIR for receipt of protests. That copy must be served by means reasonably calculated to be received by the Contracting Officer on the same day as it is to be received by the ODRA. The protest letter must include a signed statement from the protester, certifying to the ODRA the manner of service, date, and time when a copy of the protest was served on the Contracting Officer and other designated official(s). 14 C.F.R. § 17.15(e).

#### *Requests for Suspension*

There is a strong presumption in the AMS that procurement activities and contract performance will continue during the pendency of a bid protest. If, however, the protester desires to request a suspension of such activities pending resolution of the protest, it must request a suspension in the initial protest filing, and set forth specific information, in order for the request to be considered by the ODRA. 14 C.F.R. § 17.15(d). This information consists of all facts and documents that support the protester's position and which demonstrate compelling reasons for a suspension. 14 C.F.R. § 15(d).

Where a protester requests a suspension, the Product Team will be required to submit a response to the request to the ODRA, with copies to the protester and any intervenor, by no later than the Initial Status Conference or as directed by the ODRA. 14 C.F.R. § 17.17(a).

If an initial protest filing fails to provide information or documents in support of a requested suspension, or fails to address the considerations above, the ODRA may summarily reject the request prior to scheduling a Product Team response. 14 C.F.R. § 17.15(d)(3).

During the initial status conference, the ODRA typically will confirm the deadlines for filing any additional comments regarding the suspension request. Thereafter, the ODRA, in its discretion, will make a decision as to whether to recommend that a suspension be imposed. 14 C.F.R. § 17.17(a).

The issue of whether compelling reasons exist to suspend procurement activities or contract performance is reviewed by the ODRA on a case-by-case basis by examining a combination of factors including: (1) whether the protester has alleged a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Most suspension requests can be resolved in the ADR

process. The ODRA therefore has issued suspension decisions in only a handful of cases. *See generally Protest of Crown Communications, Inc.*, 98-ODRA-00098 (Interlocutory Decision on Suspension Request); *Protest of J.A. Jones Mgmt. Servs., Inc.*, 99-ODRA-00140 (Interlocutory Decision on Suspension Request).

#### *Notification of Other Potential Interested Parties of the Bid Protest*

Only “interested parties” are allowed to participate in protest proceedings. Aside from the protester and the FAA Product Team, the ODRA’s procedures allow for other “interested parties” to intervene in a protest. In this regard, ODRA procedures require the Product Team Contracting Officer immediately to provide notification to potential “interested parties” of the Team's receipt of a protest and provides for the filing of requests for intervention within two (2) business days of receipt of the Contracting Officer’s notification. 14 C.F.R. § 17.15(f).

For protests filed prior to the date established for receipt of proposals, e.g., protests regarding the specifications, or other terms of the solicitation, the ODRA has the discretion to permit intervention by one or more other offerors who demonstrate that they qualify as “interested parties.” For *post-award* protests, however, only the awardee(s) will be permitted to participate as an intervenor. *See* 14 C.F.R. § 17.15(g); *Protests of Camber Corp. and Info. Sys. & Networks Corp.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (Interlocutory Decision on Request for Participation by Systems Research Corporation).

#### *Bid Protest Initial Status Conference*

Following the protest filing, the ODRA will contact the parties to schedule an Initial Status Conference. The Initial Status Conference is conducted by telephone with the parties within five (5) business days of the ODRA's receipt and docketing of a protest. 14 C.F.R. § 17.17 (b). The purpose of the initial ODRA Status Conference is to:

- Review the ODRA’s ADR and adjudication procedures, and establish a preliminary schedule;
- Identify legal or other preliminary or potentially dispositive issues and answer the parties’ questions regarding the ODRA process;
- Deal with issues related to protected information and the issuance of any needed protective order;
- Encourage the parties to consider using ADR;
- Appoint a DRO/Administrative Judge as a potential ADR neutral to assist the parties in considering ADR options and developing an ADR agreement; and
- For any other reason deemed appropriate by the DRO/ Administrative Judge or by the ODRA.

14 C.F.R. § 17.7(c)

Following the Initial Status Conference, the parties typically schedule follow-up telephone conferences with the potential ADR neutral to discuss their positions and the possibilities of using ADR to resolve some or all of the protest issues. The Product Team and protester have five (5) business days from the date of the initial status conference to decide whether they will attempt to use an ADR process in the case. 14 C.F.R. § 17.17(c). With the agreement of the

ODRA, ADR may be used concurrently with the adjudication of a protest, but in most cases, ADR is attempted before the adjudication process begins. 14 C.F.R. § 17.35(c).

### *Protective Orders*

During the course of ODRA proceedings, a party or the ODRA may have to refer to and rely on confidential proprietary information that may be harmful to a party, if publicly released. The ODRA is authorized to issue protective orders to address the treatment of protected information where appropriate. Under ODRA procedures, any participant may request entry of a protective order. 14 C.F.R. § 17.19(a). The ODRA also may determine on its own to issue such an order.

With the ODRA's approval, the terms of the ODRA's standard protective order may be altered by the parties to suit particular circumstances. 14 C.F.R. § 17.19(b). A protective order limits the number of persons who can have access to any commercially sensitive or competition-sensitive information provided in connection with the protest, and requires that people admitted to the Order not be involved in any way in competitive decision making on behalf of potential competitors.

Individuals who participate in "competitive decision making" -- those involved in any way in preparing contract bids and proposals -- are precluded from having access to protected materials. Access to protected documents is normally limited to independent outside counsel and any of their consultants who are themselves not in "competitive decision making." In relatively rare circumstances, an in-house attorney may be permitted access to such materials. The ODRA reserves the right to deny admission under a protective order to any person whom the ODRA determines may pose a risk in terms of disclosure of protected materials. 14 C.F.R. § 17.9(c).

Violations of the terms of a protective order have resulted in the ODRA's imposition of sanctions. 14 C.F.R. § 17.19(d). The ODRA has revoked admission to a protective order for cause, where it found that counsel's publication on the Internet of documents containing retrievable protected information constituted a serious violation of the protective order. *See Contests of Agency Tender Official James H. Washington and Kate Breen, Agent for Majority of Directly Affected FAA Employees*, 05-ODRA-00342C and 05-ODRA-00343C. The ODRA also has denied admission to a protective order where the applicant maintained a close link to competitive decision makers and presented an unacceptable risk of inadvertent disclosure of protected information. *See Protests of Camber Corp. and Info. Sys. & Networks Corp., Protests of Camber Corp. and Info. Sys. & Networks Corp.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (Interlocutory Decision on Application for Admission to Protective Order).

Where there is a protective order in place and a party is not represented by counsel, it may be necessary for another party to submit sensitive information to the ODRA for inspection by the ODRA, without the need for disclosure of the information to other parties.

### CONTRACT DISPUTES

The ODRA has jurisdiction over all contract disputes arising under contracts subject to the FAA's AMS and broad discretion to recommend remedies consistent with the AMS and applicable law. 14 C.F.R. § 17.25(c). A contract dispute is defined as a written request submitted to the ODRA, for the payment of money in a sum certain, the adjustment or



interpretation of contract terms, or for other relief involving an alleged breach of an AMS contract. 14 C.F.R. § 17.3(h).

#### *Who may file a Contract Dispute*

Contract disputes may be filed with the ODRA either by contractors or by FAA Product Teams. 14 C.F.R. § 17.27(c). There is no prerequisite that such matters be the subject of a Contracting Officer's Final Decision before they can be submitted to the ODRA for resolution. 14 C.F.R. § 17.3(h). However, the parties are encouraged to attempt to resolve their differences with the Contracting Officer informally, if possible before filing with the ODRA. *See Pre-Disputes.*

#### *Contract Dispute Filing Deadlines*

The ODRA procedural rules require that contract disputes be filed with the ODRA within two (2) years of the accrual of the claim involved. 14 C.F.R. § 17.27(c). Generally, a claim will “accrue” at the point in time when all facts giving rise to the claim are known. 14 C.F.R. § 17.27(c). With the exception of Government warranty claims or claims for gross mistakes amounting to fraud or latent defects, neither the agency nor the contractor may file a contract dispute after final contract payment has been made by the agency and accepted by the contractor. 14 C.F.R. § 17.27(c). Government warranty claims must be filed within the time limitation set forth in the contract's warranty provision. 14 C.F.R. § 17.27(c). Government claims for gross mistakes amounting to fraud or latent defects must be filed within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect. 14 C.F.R. § 17.27(c).

#### *Contract Dispute Filing Methods*

A contract dispute may be filed at the ODRA by overnight delivery, hand delivery, by facsimile, or if permitted by Order of the ODRA, by electronic filing. A contract dispute is considered filed on the date it is received by the ODRA during normal business hours which are 8 a.m. to 5 p.m. Eastern Time. 14 C.F.R. § 17.7(a).

#### *Contents of Contract Dispute Submission*

The ODRA Rules require contract disputes to be in writing and to contain the following information:

- (1) The contractor's name, address, telephone and fax numbers and the name, address, telephone and fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;
- (2) The contract number and the name of the Contracting Officer;
- (3) A detailed chronological statement of the facts and of the legal grounds for the contractor's positions regarding each element or count of the contract dispute (i.e., broken down by individual claim item), citing to relevant contract provisions and documents and attaching copies of those provisions and documents;

- (4) All information establishing that the contract dispute was timely filed;
- (5) A request for a specific remedy, and if a monetary remedy is requested, a sum certain must be specified and pertinent cost information and documentation (e.g., invoices and cancelled checks) attached, broken down by individual claim item and summarized; and
- (6) The signature of a duly authorized representative of the initiating party.

14 C.F.R. § 17.27(a).

### *Contract Dispute Initial Scheduling Conference*

Under the ODRA Rules, the parties to a contract dispute are encouraged to engage in informal discussions/communications during the first 20 business days (approximately 4 weeks) following the filing of the contract dispute with the ODRA. 14 C.F.R. § 17.29(a). During the 20 business day “informal communications” period, the ODRA will hold an Initial Scheduling Conference and make the services of a DRO/Administrative Judge available to the parties, for the purpose of attempting to reach an amicable settlement via voluntary non-adjudicative ADR (informal mediation and early neutral evaluation). 14 C.F.R. § 17.29(b).

FAA Contracting Officers are expressly authorized by the AMS to resolve disputes by means of settlement negotiations, even after matters are brought before the ODRA, and may continue their settlement efforts up until the time the Administrator issues a Final Order at the conclusion of the Default Adjudicative Process. 14 C.F.R. § 17.29(a).

### **ALTERNATIVE DISPUTE RESOLUTION (“ADR”)**

ADR can be defined as a voluntary dispute resolution approach that uses a process agreed to by the parties and under which the parties attempt to arrive at a mutually satisfactory solution to their differences without resorting to litigation. This emphasis on the use of ADR is consistent with the congressional mandate that the ODRA use consensual ADR techniques to “the maximum extent practicable.” It also is consistent with the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, which authorizes and encourages appropriate use of ADR, as well as longstanding Department of Transportation and FAA policies which reflect a continuing commitment to utilize ADR for the resolution of procurement related controversies. 14 C.F.R., Appendix A to part 17, ¶A; Alternative Dispute Resolution Pledge. The ODRA also employs ADR to avoid or resolve “pre-disputes” that have not yet ripened into formal protests or contract disputes. 14 C.F.R. subpart G.

### **THE ODRA USES VOLUNTARY ADR AS THE PRIMARY MEANS OF CASE RESOLUTION**

ADR has been effectively used to settle the majority of ODRA cases involving bid protests and contract disputes, and has proven to be a prompt and cost effective method of achieving resolution. Under ODRA procedures, adjudication is used when the parties are unable to agree on the use of ADR, or when the use of ADR does not result in a complete resolution of the issues. 14 C.F.R. § 17.35(a). Sometimes the adjudication and ADR processes are conducted simultaneously.

### *How the ADR Process Works*

The ODRA does not rely on the parties to initiate ADR discussions. Rather, the ODRA begins to discuss and encourage ADR during the initial status conference, which generally is scheduled within five (5) business days of a protest filing, or as soon as practicable in a contract dispute filing. During the conference, the Director designates a DRO/ Administrative Judge to initiate discussions with the parties regarding their ADR options, and to offer his or her services as a potential ADR neutral. 14 C.F.R. § 17.17(b)(5); 14 C.F.R. § 17.29(b) and 14 C.F.R. § 17.35(b).

The decision to pursue ADR prior to adjudication is completely voluntary. 14 C.F.R. § 17.3(f) and 14 C.F.R. § 17.35(a). The parties, however, are asked to make a good faith effort to explore the ADR possibilities. 14 C.F.R. § 17.35(b). A party always has the choice not to attempt ADR, and may withdraw from the ADR effort at any point and opt for adjudication, without prejudice to its case.

To begin the ADR effort, the parties mutually agree upon and select an ADR Neutral, who acts as a facilitator, mediator or arbitrator for the dispute. In most cases, the parties select one of the ODRA's DRO/ Administrative Judges to serve as the Neutral. The parties are free, however, to agree to use a neutral from another source at their own expense. 14 C.F.R. § 17.37(b). Once a decision to attempt ADR has been made, the ADR Neutral will assist the parties in drafting and executing an ADR agreement. The ADR agreement will specifically describe, among other things, how the ADR process will work; the applicable rules of confidentiality; and a schedule for completing the ADR effort.

### *ADR Methods*

The ODRA primarily employs three types of ADR, namely: (1) Mediation; (2) Neutral Evaluation; and (3) Binding Arbitration. 14 C.F.R., Appendix A to part 17, ¶B. In selecting an ADR process, the parties may, with the agreement of the neutral, utilize one or any combination of the above techniques, depending on the needs of the case.

In mediation, the ADR Neutral determines the needs and interests of the parties and facilitates discussions among them to attempt to reach an amicable resolution of their differences, by seeking to bridge the gaps between the parties' respective positions. The ADR Neutral can meet with the parties separately, conduct joint meetings (or telephone conferences) with the parties' representatives, or use both methods. 14 C.F.R., Appendix A to part 17, ¶B(1).

An early neutral evaluation by the ADR Neutral provides a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, in order to facilitate further discussion and resolution. An early neutral evaluation may be provided at any stage throughout the ADR process. Experience has shown that a percentage of protests filed with the ODRA are resolved successfully by this ADR method, which is employed at a very early "informal communications" stage, thereby potentially saving the parties considerable cost and time. 14 C.F.R., Appendix A to part 17, ¶B(2).

The majority of ADR processes combine the techniques of neutral evaluation and mediation. Neutral evaluation and/or informal mediation may continue through adjudication, up until the Administrator's issuance of a final decision in the form of an FAA Order.

Binding arbitration is a form of ADR in which an arbitrator (the DRO/ Administrative Judge or other neutral selected by the parties) renders a formal binding arbitral award at the conclusion of the proceeding which may cover entitlement, quantum, or both. The decision is issued in written form. Binding arbitration is not often used in disputes involving the federal government because the Department of Justice requires that binding arbitration agreements contain an “opt-out” provision that can be exercised by the head of the Agency after the arbitration decision is released. The FAA, however, with the assistance of the United States Department of Justice, promulgated formal guidelines for using binding arbitration in accordance with the Administrative Dispute Resolution Act of 1996. *See* Binding Arbitration Guidance; 5 U.S.C. § 575(a), (b), and (c). As such, the FAA is one of the few federal agencies authorized to offer parties true binding arbitration, i.e., with no “opt-out” provision. Binding arbitration typically is used in construction disputes at the ODRA. It often is combined with mediation in what is referred to as a “med-arb” arrangement. To date, where med-arb arrangements have been used at the ODRA, the cases involved always have settled during the mediation stage. 14 C.F.R. Appendix A to part 17, ¶B(3).

#### *Confidentiality of ADR Communications*

A firewall is maintained between the ODRA’s ADR and adjudicative processes. The ADR process thus is kept confidential and separate from the adjudication process. ADR communications of a party with the neutral are not part of the administrative record in any adjudication. 14 C.F.R. § 17.39.

This level of confidentiality is based on the confidentiality provisions of the Alternative Dispute Resolution Act of 1996 (“ADRA”). 14 C.F.R. § 17.39(a). Thus, parties in ODRA ADR processes are able to discuss potential resolutions openly, and negotiate timely and meaningful resolutions, without concern that such discussions will negatively impact any adjudication that may be required. Moreover, the ADR neutral does not participate in any adjudication of a matter that is not settled in ADR. Another DRO/ Administrative Judge always is appointed to preside over the adjudication. 14 C.F.R. § 17.21(p) and 14 C.F.R. § 17.33(q).

#### *Advantages of ADR*

The use of ADR nearly always provides a certain level of benefits to the parties, even if the matter does not resolve completely. For example, it is not uncommon for the parties to forge a better working relationship through the successful resolution of a matter in ADR, or even the good faith attempt at resolution. Negotiating an agreement to attempt ADR can begin a constructive dialogue between the parties that can lead to a prompt settlement. In ADR, the Neutral often facilitates the voluntary exchange of information that can result in a resolution of the case. ADR allows the parties to have more control over the outcome of the case by negotiating an ADR settlement that meets their needs and interests and that could not have been achieved through litigation.

#### *Examples of ADR Outcomes in Protests*

In some cases, the Agency has decided to take voluntary corrective action as a result of ADR. In other cases, protesters have decided not to proceed further with their protest based on additional information received and the evaluation of the case provided by the neutral. In one case, when a protester learned that contrary to his information, the FAA actually had not extended an

incumbent's contract, the protester withdrew its challenge. In a similar case, when provided detailed written answers to questions provided in ADR, the protester withdrew as a result of the FAA's "full disclosure." In a third case, notwithstanding evidence of some errors by the program office, the protester withdrew in exchange for a promise to be directly notified of future requirements. In another case, where the protester sought a directed award, an ADR settlement was reached based on the FAA's offer to re-solicit the entire requirement.

### *Examples of ADR Outcomes in Contract Disputes*

The outcomes of ADR activities in contract dispute claims typically involve negotiated compromises regarding: claims for delay and equitable adjustments; conversions of terminations for default; and resolution of breach claims. For example, in a dispute where a contractor sought equitable adjustments pertaining to numerous wage rate increases, an ADR settlement was reached by the parties based on an alternative calculation.

### *ADR in Adjudication*

ADR and activities pursuant to adjudication are not mutually exclusive. Even when a case is not likely to be resolved entirely via ADR, the use of ADR is useful for resolving issues that arise during adjudication. 14 C.F.R. § 17.35(c). Examples of such issues include scheduling, discovery controversies, objections to protective order admissions, or dispositive motions. All of these types of issues routinely have been resolved using ADR techniques. In addition, as a result of the voluntary exchange of information through the ADR process, individual issues, grounds, or causes of action have been resolved in ADR resulting in a more streamlined adjudication of the remaining case.

### *Pre-Dispute/Dispute Avoidance ADR*

Even before a formal bid protest or contract dispute is filed, a party may seek ODRA ADR assistance. A private party or an Agency representative can request Pre-Dispute assistance from the ODRA by forwarding a letter describing the issue. 14 C.F.R. § 17.13(s). In such circumstances, the ODRA is expressly authorized by the FAA Administrator "to engage with Agency program offices and contractors in voluntary mutually agreeable ADR efforts aimed at resolving acquisition related disputes at the earliest possible stage, even before any formal protest or contract dispute is formally filed with the ODRA." The Pre-Dispute process also applies to issues in controversy that relate to non-AMS or pre-AMS contracts, i.e., contracts executed prior to the April 1, 1996 effective date of the FAA Acquisition Management System. The ODRA treats such matters in the same manner as those involving pre-dispute/dispute avoidance ADR.

The process begins when a representative of a private party or of the Agency makes a written request for pre-dispute/dispute avoidance ADR services from the ODRA. 14 C.F.R. § 17.59(a). The request must provide basic information regarding the dispute, including a statement of pertinent facts and legal grounds, and any relevant documentation. 14 C.F.R. § 17.59(a)(1)-(4). The ODRA then contacts such other parties to determine their willingness to participate in a non-binding ADR process. Participation is purely voluntary; and the ODRA only will provide pre-dispute/dispute avoidance ADR services if the other interested parties agree. 14 C.F.R. § 17.59(c). The parties are then asked to execute a simple ADR agreement, and the process begins.

For example, with the permission of the interested parties, the ODRA can and has provided ADR services to subcontractors whose claims relate to an FAA prime contract. The ODRA also has facilitated: subcontracting arrangements between awardees and protesters; settlements between state airport authorities and their contractors related to FAA airport improvement grants; and claims arising under older FAA contracts subject to the Federal Acquisition Regulation. In most cases, as long as a prospective matter involves a contract or grant that impacts the FAA, and all interested parties consent, the ODRA will provide non-binding ADR services in the matter.

Typically, pre-dispute/dispute avoidance ADR is handled by the ODRA DRO/ Administrative Judge who assists the parties initially. However, as with all ADR at the ODRA, the choice of the ADR Neutral is completely up to the parties. The goal of the process is to help preserve the parties' business relationships and avoid a formal dispute, if possible. The ODRA has had significant success employing ADR techniques to resolve these types of matters.

### *The ADR Agreement*

In order to conduct a formalized mediation proceeding or any adjudicative form of ADR, the parties with the assistance of the neutral, will prepare, execute and file an ADR agreement with the ODRA. 14 C.F.R. § 17.37(b) and (c). The ADR agreement incorporates the ADR process to which the parties have agreed. The terms of the agreement typically include the name of the ADR neutral, the ADR techniques and methods to be employed, the steps to be taken towards resolution and a schedule. 14 C.F.R. § 17.37(d). A Model ADR Agreement is available on the ODRA website and may be altered by the parties to suit the needs of their particular protest or contract dispute. In order to protect the parties and ensure the confidentiality of the process, the ADR agreement must be in place before the parties commence the ADR process.

### *ADR Settlements*

If the parties reach a full or partial settlement of the dispute through ADR, the neutral will assist them to memorialize the terms of their settlement in a written settlement agreement. A Model ADR Settlement Agreement is available on the ODRA website. The terms and conditions contained in the Model ADR Settlement Agreement may be modified to suit the particular needs of the case. Once a settlement agreement resolving all issues has been executed, the pending matter either will be dismissed or placed on an inactive status pending fulfillment of the settlement terms. In the unlikely event a dispute develops over satisfaction of the settlement terms, either party may seek the ODRA's assistance to enforce compliance with the terms of the agreement.

## **ADJUDICATION**

ODRA adjudicative proceedings are governed by the regulations in 14 C.F.R. part 17 and are subject to the requirements of the Administrative Procedure Act, Subchapter II of Title 5, of the United States Code. If a matter is not fully resolved by ADR, or if no ADR is attempted, upon notice by the party who filed the action, or the ADR Neutral, the ODRA Director selects an ODRA Administrative Judge to preside over adjudicative proceedings, develop an administrative record and draft a decision for the Administrator concerning the matter in controversy. 14 C.F.R. § 17.21(b) and 14 C.F.R. § 17.33(e). The DRO/ Administrative Judge that served as the

ADR Neutral has no involvement in deciding the matter. 14 C.F.R. § 17.21(p), 14 C.F.R. § 17.33(a) and 14 C.F.R. § 17.39(c).

## PROTEST ADJUDICATION

Where ADR does not resolve all issues in a protest, the ODRA Director selects a DRO/ Administrative Judge to manage development of the Administrative Record, to prepare findings of fact, recommendations for a remedy and a Final Order. 14 C.F.R. § 17.21(b). The DRO/ Administrative Judge is authorized to manage the discovery process, including limiting its length and availability. 14 C.F.R. § 17.21(c)-(k). The DRO/ Administrative Judge also may direct the parties to exchange, in an expedited manner, relevant, non-privileged documents, and may direct the taking of deposition testimony. 14 C.F.R. § 17.21(i)(3). Upon request, the DRO/ Administrative Judge may order that discovery be limited, such as when portions of a protest are dismissed or when certain types of documents are determined not to be relevant to the issues in the case. 14 C.F.R. § 17.21(i)(2). The DRO/ Administrative Judge also may order that specific documents responsive to discovery requests be produced. 14 C.F.R. § 17.21(i)(2) and 14 C.F.R. § 17.53(b). Finally, the DRO/ Administrative Judge may issue subpoenas when needed. 14 C.F.R. § 17.53(c).

### *Required Filings in a Protest Adjudication*

In addition to the protest letter itself, other submissions that will be required in every ODRA protest adjudication will be an FAA Product Team Response and responsive protester Comments. 14 C.F.R. § 17.21(d) and (e).

### *Product Team Response*

The Product Team Response, similar to an agency report under General Accounting Office (GAO) bid protest procedures, must provide the ODRA with adequate background information regarding the procurement and must address the factual allegations and legal arguments raised by the protest. The Product Team Response will include:

- The Contracting Officer's chronological supported statement of the proposed facts, with citations to relevant documents;
- A memorandum of law;
- A chronologically arranged index and tabbed copies of all relevant documents, which may include:
  - the solicitation, including the specifications or portions relevant to the protest, an abstract of bids or offers or relevant portions; and
  - the bid or proposal submitted by the protester;
  - the bid or proposal submitted by the firm being considered for the award, or whose bid or proposal is being protested;
  - evaluation plans, memoranda, scoring sheets and other evaluation -related documents;

- correspondence between the FAA Product Team and prospective offerors relating to the procurement;
- the protest; and
- any other relevant documents.

14 C.F.R. § 17.21(d).

The Product Team Response is due within ten (10) business days of the ODRA Status Conference, or as scheduled by the ODRA. 14 C.F.R. § 17.21(d).

#### *Comments*

The protester (and any intervenor) will be required to submit comments with respect to the Product Team Response within five (5) business days of its filing with the ODRA or within five (5) business days of receiving the Product Team Response, whichever is later, unless the ODRA orders a different schedule to meet the needs of the case. 14 C.F.R. § 17.21(e). Copies of the Comments must be provided at the same time to the other parties. The Comments should include any additional information and documentation not included in the Product Team Response that is believed to be relevant to the issues raised by the protest. If yet additional information or documentation is deemed necessary by the DRO/ Administrative Judge in order to complete the administrative record, the parties will be asked to provide such information and documentation. 14 C.F.R. § 17.21(i). Filing times (other than the deadlines established for filing the protest) may be extended by the ODRA for good cause. 14 C.F.R. § 17.21(f).

#### *Protest Discovery*

In addition to the submission of documents as part of the Product Team Response and responsive Comments, the parties will be permitted to engage in focused limited discovery in the form of further document exchanges and possible depositions. 14 C.F.R. § 17.21(i). Discovery may be done on a voluntary basis or pursuant to direction by the ODRA, where the DRO/ Administrative Judge finds, in his or her sole discretion, that it will be helpful to the development of the factual record in the case and will not unduly delay its resolution. 14 C.F.R. § 17.21(i)(1). Copies of discovery materials exchanged between the parties are not to be submitted to the ODRA at the time they are produced. Such materials should only be submitted and will only be considered as part of the administrative record, if they are specifically incorporated into a party's evidentiary submission. 14 C.F.R. § 17.21(i)(6).

#### *Dispositive Motions in Protests*

The ODRA's process has a strong preference for deciding cases on the merits, rather than by dispositive motion. This is particularly true for bid protests. However, the ODRA may issue a summary decision with respect to the protest or any portion thereof, if it is supported by undisputed material facts. 14 C.F.R. § 17.19(a)(3). Any decision on a dispositive motion may only be rendered after the non-moving party has had an opportunity to respond. 14 C.F.R. § 17.19(e). A matter also may be dismissed if it is frivolous, without basis in fact or law, fails to



state a claim upon which relief may be granted or is otherwise untimely. 14 C.F.R. § 17.19(a)(1)-(2).

The ODRA has dismissed matters over which it does not have subject matter jurisdiction, or where the protester lacks standing. See *Protest of Siemens Bldg. Tech., Inc.*, 99-ODRA-00127 and 99-ODRA-00128 (Consolidated); *Protest of Int'l Servs., Inc.* 02-ODRA-00224; *Protest of Edward B. Block Consulting*, 02-ODRA-00228. The ODRA also has dismissed protests of matters which expressly are excluded from the ODRA's jurisdictional authority, such as the execution of cooperative agreements. *Protest of Oerlikon Contraves S.p.A.*, 04-ODRA-00320. The ODRA, however, has ruled that it has jurisdiction over buys from the GSA Federal Supply Schedule, where the protest raises justiciable issues regarding compliance with the requirements of the AMS in making the award decision. *Protest of Crown Communications, Inc.*, 98-ODRA-00098 (Interlocutory Decision on Suspension Request). The ODRA also has exercised jurisdiction over purchases made pursuant to a Government Wide Acquisition Contract ("GWAC"), where the purchase involved a solicitation that incorporated AMS requirements and designated the ODRA as the forum for the resolution of protests and contract disputes. *Protest of Maximus, Inc.*, 04-TSA-009. Moreover, the ODRA maintains jurisdiction over procurement issues related to implementation of AMS policy with respect to small business contracting opportunities. *Protest of Four Winds Services, Inc.*, 02-ODRA-00219. For example, the ODRA has considered other protests that challenged the use of SBA guidance in connection with FAA small business set-asides, as well as issues of eligibility for award under a particular NAIC code, including those that raise questions of affiliation. *Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated). The ODRA has refused to take jurisdiction, however, over protests that raise questions concerning licensing and corporate status that challenge an affirmative determination of bidder responsibility. *Protest of Universal Sys. & Tech., Inc.*, 01-ODRA-00179. Such matters are not ordinarily reviewed by the ODRA in the context of a bid protest.

#### *Hearings in Protests*

Evidentiary hearings usually are not conducted in ODRA protests. However, they are held where: (1) the DRO/ Administrative Judge determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or (2) upon request of any party to the protest, unless the DRO/ Administrative Judge finds specifically that a hearing is unnecessary and no party will be prejudiced as a result of not holding the hearing. 14 C.F.R. § 17.21(j). All witnesses at ODRA hearings in protests are subject to cross examination by the opposing party and to questioning by the DRO/ Administrative Judge. 14 C.F.R. § 17.21(j).

Where hearings are conducted, the fact-finder will decide: (1) the nature and type of hearing that is conducted; (2) whether or not there will be post-hearing written submissions which summarize the parties' respective positions in light of facts developed during the hearings; and (3) the content and any page limitations on any such submissions. 14 C.F.R. § 17.21(j).

#### *Protest Standard of Review*

In the bid protests, the ODRA test to decide examines whether the complained of Agency actions have a rational basis, are arbitrary, capricious, or an abuse of discretion, and are supported by substantial evidence. 14 C.F.R. § 17.21(m). The protester has the burden of proving its case and must also show that the actions in question have in some way prejudiced or resulted in harm to the Protester. *See* 14 C.F.R. § 17.23(b). When a protest is sustained, the ODRA, in making its remedy recommendation, considers all of the circumstances of the case, including the impact on the integrity of the FAA's procurement system, along with the impact on the Agency's mission of the recommended remedy. 14 C.F.R. § 17.23(b).

The ODRA DRO/ Administrative Judge has broad discretion to recommend protest remedies, as long as they are consistent with the AMS and applicable statutes and case law. 14 C.F.R. § 17.21(n) and 14 C.F.R. § 17.23(a). The ODRA Rules provide that remedies may include amending the solicitation, refraining from exercising options, issuing a new solicitation, conducting a re-competition, terminating an existing contract for the FAA's convenience, directing an award, awarding bid and proposal costs, or any combination appropriate under the circumstances. 14 C.F.R. § 17.23(a).

### CONTRACT DISPUTE ADJUDICATION

Adjudication of a contract dispute occurs if the parties have declined to attempt ADR or have been unable to fully settle the matter via ADR. In the contract dispute context, the ODRA reviews and decides the case based on the material facts, the terms of the contract and applicable law and precedent. 14 C.F.R. § 17.33(l). The claiming party normally has the burden of proving its case by a preponderance of the evidence. 14 C.F.R. § 17.33(m). If the dispute is a challenge to a default termination of a contract, the initial burden is on the Agency party to demonstrate that the termination was justified.

The adjudication begins when the ODRA receives written notification by any party, or the Neutral, that ADR will not be used, or that ADR is not likely to resolve all the issues in controversy. 14 C.F.R. § 17.33(a).

Following the commencement of the adjudication, the ODRA Director will designate a DRO/ Administrative Judge to develop the Administrative Record and make findings of fact and a recommendation for a final decision on behalf of the FAA Administrator in the case. *See* 14 C.F.R. § 17.33(e). The DRO/ Administrative Judge will contact the parties and will schedule and convene a Status Conference (normally by telephone) in order to define the issues to be decided and to establish a schedule for discovery and to schedule any hearings and further briefing requirements needed to conclude the fact-finding process. 14 C.F.R. § 17.33(f)-(g).

#### *Dispute File and Supplement; Other Written Submissions*

Within twenty (20) business days of the commencement of the adjudication, the opposing party will be required to compile and provide to the ODRA and to the party that filed the dispute a substantive response and a chronologically arranged and indexed Dispute File, containing *tabbed* documents relevant to the issues in dispute. 14 C.F.R. § 17.33(b)-(c). The party that filed the dispute will then be permitted, within a timeframe established by the fact-finder, to supplement the Dispute File with other documents believed to be pertinent. 14 C.F.R. § 17.33(b)-(c). The DRO/ Administrative Judge may call for additional written submissions from the parties as he/she deems necessary to complete the administrative record. 14 C.F.R. § 17.33(k).

### *Discovery in Contract Disputes*

In addition to the submission of documents as part of the Dispute File, the parties will be permitted to engage in discovery in the form of further document exchanges and possible depositions. The opposing party must file responses to written discovery within 30 business days from the date discovery materials are received. 14 C.F.R. § 17.33(h). Discovery may be done on a voluntary basis or pursuant to direction by the ODRA. *See* 14 C.F.R. § 17.33(d). Copies of discovery materials exchanged between the parties are not to be submitted to the ODRA at the time they are produced. 14 C.F.R. § 17.33(d). Such materials should only be submitted and will only be considered as part of the administrative record, if they are specifically incorporated into a party's evidentiary submission. 14 C.F.R. § 17.33(d).

### *Hearings in Contract Disputes*

The DRO/ Administrative Judge may decide the case on the written record, or may call for a hearing. A hearing will ordinarily be required (1) where there are complex factual issues in dispute that cannot adequately be developed solely by means of written presentations; and/or (2) where the resolution of the dispute is dependent on the fact-finder's assessment of the credibility of witnesses with first-hand knowledge of the facts. The DRO/ Administrative Judge will determine the structure and sequence of the hearing or other oral presentation. 14 C.F.R. § 17.33(k). Also, whenever a hearing is requested by a party, one will be conducted, unless the DRO/ Administrative Judge finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. 14 C.F.R. § 17.33(k)(2).

### *Final Written Submissions*

Before a decision is rendered, the parties will be required to file final written submissions with the DRO/ Administrative Judge (with copies served on the other party) containing:

- a statement of the issues
- a proposed statement of undisputed facts related to each issue together with citations to the administrative record or other supporting materials
- separate statements of disputed facts relating to each issue, with citations to documents in the Dispute File, the transcripts of any depositions or hearings, and to any affidavits or exhibits which a party may wish to submit with its statement.
- separate legal analyses in support of the parties' respective positions on issues in dispute.

14 C.F.R. § 17.33(i).

### **DISMISSAL FOR FAILURE TO PROSECUTE**

When a protester or contractor repeatedly fails to meet established filing deadlines or fails to participate in scheduled ODRA conferences, the ODRA may recommend that the protest or

contract dispute be dismissed for failure to prosecute. 14 C.F.R. § 17.49. The ODRA likewise may recommend the exclusion of an intervenor in a protest or the imposition of appropriate sanctions against the FAA Product Team for such failures on the Team's part in connection with protests or contract disputes. 14 C.F.R. § 17.49. It is strongly suggested that parties first contact one another reasonably in advance of scheduled deadlines or conferences, to seek agreement on proposed schedule adjustments, whenever it appears likely that they will be unable to meet such deadlines or to participate in such scheduled conferences. The DRO/ Administrative Judge should also be notified in advance of scheduled dates regarding any proposed schedule adjustments, as to the parties' availability for alternative dates for rescheduling of conferences, and as to whether they are in agreement on requests for filing deadline extensions.

#### FINAL ORDERS IN PROTESTS AND CONTRACT DISPUTES

Based on the proceedings and the record that has been developed in a protest or contract dispute, the DRO/ Administrative Judge will issue findings and recommendations, which are submitted to the Director of the ODRA. 14 C.F.R. § 17.33(l) and (o). The Director reviews the findings and recommendations, and if he determines them to be in accord with the policy stated in the FAA Acquisition Management System (AMS) and applicable law (including prior ODRA precedent), he will endorse them and submit them to the Administrator of the FAA as the basis for a final Order. *See* 14 C.F.R. § 17.33(o).

All final agency Orders in ODRA matters, along with the underlying ODRA findings and recommendations, are published on the ODRA website for ready access, and are summarized and indexed by both case name and topic. *See* <http://odra.faa.gov>. The decisions also are published on Lexis/Nexis.

#### APPEALS FROM FINAL DECISIONS IN ODRA CASES

Appeals from final agency Orders resulting from ODRA adjudications may be appealed by non-Agency parties, in accordance with 49 U.S.C. § 46110, with either the United States Court of Appeals for the District of Columbia Circuit or the Court of Appeals where the appellant resides.