



## Federal Aviation Administration Office of Dispute Resolution for Acquisition (ODRA)

### Revised A-76 Contest Rules (November 1, 2005)

#### Part A – General

##### CR 1 Applicability.

These procedures apply to all contests against FAA procurements under OMB Circular A-76. To the extent that the Office of Dispute Resolution for Acquisition (ODRA) Procedural Regulation, 14 CFR Part 17, is applicable and consistent with these procedures, that regulation is hereby incorporated.

**CR 2 Definitions.** The following definitions supplement those set forth in 14 CFR § 17.3:

(a) **Acquisition Team**, as used in these rules, refers to the FAA organization(s) responsible for the procurement activity, without regard to funding source, and includes the Contracting Officer (CO) and assigned FAA legal counsel, when the FAA organization(s) represent(s) the FAA as a party to a contest before the Office of Dispute Resolution for Acquisition. The CO is responsible for all Acquisition Team communications with and submissions to the Office of Dispute Resolution for Acquisition through assigned FAA counsel.

(b) **Compensated Neutral** refers to an impartial third party chosen by the parties to act as a facilitator, mediator, or arbitrator functioning to resolve the contest under the auspices of the Office of Dispute Resolution for Acquisition. The parties pay equally for the services of a Compensated Neutral, unless otherwise agreed to by the parties. A Dispute Resolution Officer (DRO) or Neutral cannot be a Compensated Neutral.

(c) **Competition** refers to the FAA's acquisition, through competitive means, of services that have been determined "not inherently governmental" under the Federal Activities Inventory Reform (FAIR) Act of 1998. Competitions are conducted by the FAA pursuant to the AMS and the FAA's adaptation of Office of Management and Budget (OMB) Circular A-76.

(d) **Contest** refers to a formal challenge of any of the following agency actions taken in connection with a competition: (1) the issuance or the terms of a SIR; (2) the cancellation of a SIR; (3) a determination to exclude a tender or offer from a competition; (4) a performance decision, including, but not limited to, compliance with the costing provisions of OMB Circular A-76 and Section 647 of P.L. 108-199 (the 2004 Consolidated Appropriations Act), and other elements in an agency's evaluation of offers and tenders; or (5) a termination or cancellation of a contract or letter of obligation

if the challenge contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the performance decision. The pursuit of a contest by a directly interested party and the resolution of such contest by the FAA shall be governed by the procedures set forth in these procedures.

(e) **Contester** refers to the individual(s) or entity that files a contest.

(f) **Default Adjudicative Process** is an adjudicative process used to resolve contests. The Default Adjudicative Process is conducted by a DRO or Special Master selected by the Office of Dispute Resolution for Acquisition to serve as "adjudicative officers," as that term is used in 14 CFR Part 14.

(g) **Directly interested party**, in the context of a contest can be the agency tender official who submits an agency tender; a single individual appointed by a majority of directly affected FAA employees as their agent; a public agency or agency component that submits a "public reimbursable tender" (as contemplated by OMB Circular A-76); or a private sector offeror. A directly interested party may, at the discretion of the ODRA, be permitted to participate as an intervenor in a contest that has been initiated by another directly interested party. For pertinent caselaw, see ODRA Topical Index under "Contests."

(h) **Discovery** is the procedure where opposing parties in a contest may, either voluntarily or to the extent directed by the Office of Dispute Resolution for Acquisition, obtain testimony from, or documents and information held by, other parties or non-parties.

(i) An **intervenor** is a party other than the contester whose participation in a contest is allowed by the ODRA. Successful offerors will be permitted to timely intervene in contests of performance decisions.

(j) **Neutral** refers to an impartial third party in the ADR process chosen by the parties to act as a facilitator, mediator, arbitrator, or otherwise to resolve a contest.

(k) **Offer**, in the context of a contest, refers to a proposal submitted to the FAA by a private sector entity in connection with a competition.

(l) The **Office of Dispute Resolution for Acquisition (ODRA)**, under the direction of the Director, acts on behalf of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to the Administrator, or the Administrator's delegee, on matters concerning contests.

(m) **Parties** include contesters, the FAA, and any intervenor(s).

(n) **Performance decision** refers to the FAA agency decision arising from a competition.

(o) **Screening Information Request (SIR)** means a solicitation or other request by the FAA for documentation, information, presentations, tenders, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA. The purpose of a SIR is for the FAA to obtain information needed for it to proceed with a performance decision.

(p) **Tender** refers to an agency management plan submitted by a grouping of FAA employees or a “public reimbursable tender” (as contemplated by OMB Circular A-76) submitted to the FAA by another public agency or agency component in response to a SIR relating to a competition.

### **CR 3 Delegation of authority.**

(a) The authority of the Administrator to conduct dispute resolution proceedings concerning contests under A-76 competitions was delegated to the Director of the Office of Dispute Resolution for Acquisition by [delegation dated March 10, 2004](#).

(b) The Director of the Office of Dispute Resolution for Acquisition may redelegate to Special Masters and DROs such authority referenced in paragraph (a) of this section as is deemed necessary by the Director for efficient resolution of a contest, including the imposition of sanctions or other disciplinary actions.

### **CR 4 Filing and computation of time.**

(a) Filing of a contest may be accomplished by mail, overnight delivery, hand delivery, or by facsimile. A contest is considered to be filed on the date it is received by the Office of Dispute Resolution for Acquisition during normal business hours. The Office of Dispute Resolution for Acquisition’s normal business hours are from 8:30 A.M. to 5:00 P.M. EST or EDT, whichever is in effect at the time of the filing. A contest received via mail, after the time period prescribed for filing, shall not be considered timely filed even though it may be postmarked within the time period prescribed for filing.

(b) Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a contest may only be accomplished by overnight delivery, hand delivery or facsimile.

(c) The time limits stated in these procedures are calculated in business days, which exclude weekends and Federal holidays. In computing time, the day of the event beginning a period of time shall not be included. If the last day of a period falls on a weekend or a Federal holiday, the first business day following the weekend or holiday shall be considered the last day of the period.

(d) The time limitations set forth in these Rules, with the exception of the time limitations for the filing of contests, may be extended by the Office of Dispute Resolution for Acquisition for good cause.

### **CR 5 Protective orders. See 14 CFR § 17.9.**

## **Part B – Contests**

**CR 6 Classification** determinations by the Agency under the FAIR Act may not be the subject of a contest before the Office of Dispute Resolution for Acquisition.

### **CR 7 Dispute resolution process for contests.**

(a) Contests concerning competitions shall be resolved pursuant to these Rules.

(b) Where possible, a directly interested party should attempt to resolve any issues concerning potential contests with the CO. The CO, in coordination with FAA legal counsel, will make reasonable efforts to answer questions promptly and completely, and, where possible, to resolve concerns or controversies.

(c) Contests shall be filed with the Office of Dispute Resolution for Acquisition in accordance with CR 8. The contest time limitations set forth in CR 8(a)(3) will not be extended by attempts to resolve a potential contest with the CO. Other than the time limitations specified in CR 8(a)(3) for the filing of contests, the Office of Dispute Resolution for Acquisition retains the discretion to modify any time imposed by these Rules in connection with contests.

(d) The Director of the Office of Dispute Resolution for Acquisition shall designate Dispute Resolution Officers (DROs) or Special Masters for the adjudication of contests.

(e) Multiple contests concerning the same SIR or performance decision may be consolidated at the discretion of the Office of Dispute Resolution for Acquisition, and assigned to a single DRO or Special Master for adjudication.

(f) Procurement activities, and, where applicable, contract performance pending resolution of a contest shall continue during the pendency of a contest, unless there is a compelling reason to suspend or delay all or part of the procurement activities or contract performance. Pursuant to CR 9(a), the Office of Dispute Resolution for Acquisition may recommend suspension of award or delay of procurement activities or performance, in whole or in part, for a compelling reason. A decision to suspend or delay procurement activities or performance is made in writing, on the recommendation of the ODRA, by the FAA Administrator or the Administrator's delegee.

### **CR 8 Filing a contest.**

(a) Only a directly interested party may file a contest, and shall initiate a contest by filing the contest in writing with the Office of Dispute Resolution for Acquisition within the times set forth below, or the contest shall be dismissed as untimely:

(1) Contests based upon alleged improprieties in a SIR that are apparent prior to the time set for receipt of initial offers or tenders, shall be filed prior to the time set for the receipt of initial offers or tenders.

(2) In competitions where offers or tenders are requested, alleged improprieties that do not exist in the initial SIR, but which are subsequently incorporated into the SIR, must be challenged by the filing of a contest not later than the next closing time for receipt of offers or tenders following the subject incorporation;

(3) For contests other than those related to alleged SIR improprieties, the contest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the contesteer knew or should have known of the grounds for the contest; or

(ii) If the contesteer has requested a post-performance decision debriefing from the FAA Acquisition Team, not later than five (5) business days after the date on which the debriefing is held.

(b) Contests shall be filed at:

Office of Dispute Resolution for Acquisition, AGC-70,  
Federal Aviation Administration  
800 Independence Avenue, S.W., Room 323  
Washington, DC 20591  
Telephone: (202) 267-3290, Facsimile: (202) 267-3720; or

(c) A contest shall be in writing, and set forth:

(1) The contesteer's identity, address, telephone number, and facsimile (FAX) number;

(2) The name, address, telephone number, and FAX number of a person designated and authorized by the contesteer (Contestee Designee), to be the point of contact;

(3) The SIR number or, if available, the competition number and the name of the CO;

(4) The basis for the contesteer's status as a directly interested party;

(5) The facts supporting the timeliness of the contest;

(6) Whether the contesteer requests a protective order, the material to be protected, and attach a redacted copy of that material;

(7) A detailed statement of both the legal and factual grounds of the contest, and attach one (1) copy of each relevant document;

(8) The remedy or remedies sought by the contesteer, as set forth in CR 11;

(9) The signature of the Contester Designee, or another person duly authorized to represent the contesteer.

(d) At the same time as filing the contest with the Office of Dispute Resolution for Acquisition, the contesteer shall serve a copy of the contest on the CO and any other official designated in the SIR for receipt of contests, by means reasonably calculated to be received by the CO on the same day as it is to be received by the Office of Dispute Resolution for Acquisition. The contest shall include a signed statement from the contesteer, certifying to the Office of Dispute Resolution for Acquisition the manner of service, date, and time when a copy of the contest was served on the CO and other designated official(s).

(e) Upon receipt of the contest, the CO shall inform the Office of Dispute Resolution for Acquisition of the names, addresses, and telephone and facsimile numbers of any other interested parties, if known, and shall, in such notice, designate a person as the point of contact for the Office of Dispute Resolution for Acquisition. Such notice may be submitted to the Office of Dispute Resolution for Acquisition by facsimile. The CO shall also notify the interested parties in writing of the existence of the contest the same day as the CO provides the foregoing information to the Office of Dispute Resolution for Acquisition. Interested parties shall notify the ODRA in writing, of their interest in participating in the contest as intervenors within two (2) business days of receipt of the CO's notification, and shall, in such notice, designate a person as the point of contact for the ODRA. Such notice may be submitted to the ODRA by facsimile.

(f) The Office of Dispute Resolution for Acquisition retains discretion to designate the parties who shall participate in the contest as intervenors.

### **CR 9 Initial contest procedures.**

(a) If, in connection with a contest, a directly interested party wishes to request a suspension or delay of procurement activities or (in the case of a contest relating to a post-performance decision) performance, in whole or in part, and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement or contract performance because of the contested action, the requester shall:

(1) Set forth each such compelling reason, supply all facts supporting the requester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.

(2) Clearly identify any adverse consequences to the requester, the FAA, or any directly interested party, should the FAA not suspend or delay procurement activities or performance.

(3) Any other party may submit to the Office of Dispute Resolution for Acquisition a written response to the request in accordance with a schedule established by the ODRA. Copies of the response shall be furnished to the other parties. The requester shall have the opportunity of providing additional comments on the response. Based on its review of such submissions, the Office of Dispute Resolution for Acquisition, in its discretion, may recommend such suspension or delay to the Administrator or the Administrator's designee.

(b) Within five (5) business days of the filing of a contest, or as soon thereafter as practicable, the Office of Dispute Resolution for Acquisition shall convene a status conference to --

(1) Review procedures;

(2) Identify and develop issues related to summary dismissal and suspension recommendations;

(3) Handle issues related to protected information and the issuance of any needed protective order;

(4) Encourage the parties to use ADR, as appropriate, during the contest process; and

(5) For any other reason deemed appropriate by the DRO or by the Office of Dispute Resolution for Acquisition.

(c) Within ten (10) business days following the status conference, the Acquisition Team shall file with the Office of Dispute Resolution for Acquisition an Acquisition Team Response to the contest. The Office of Dispute Resolution for Acquisition may alter the schedule for filing of the Acquisition Team Response to accommodate the requirements of a particular contest.

(d) The Acquisition Team Response shall consist of a written chronological statement of pertinent facts, and a written presentation of applicable legal or other defenses. The Acquisition Team Response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed and tabbed. A copy of the Acquisition Team Response shall be furnished so as to be received by the contestee and any intervenor(s) on the same date it is filed with the Office of Dispute Resolution for Acquisition, if practicable, but in no event later than one (1) business day after the date it is filed with the Office of Dispute Resolution for Acquisition. In all cases, the Acquisition Team shall indicate the method of service used.

### **CR 10 Dismissal or summary decision of contests.**

(a) At any time during the contest, any party may request, by motion to the Office of Dispute Resolution for Acquisition, that --

(1) The contest, or any count or portion of a contest, be dismissed for lack of jurisdiction, if the contestee fails to establish that the contest is timely, or that the contestee has no standing to pursue the contest;

(2) The contest, or any count or portion of a contest, be dismissed, if frivolous or without basis in fact or law, or for failure to state a claim upon which relief may be had;

(3) A summary decision be issued with respect to the contest, or any count or portion of a contest, if:

(i) The undisputed material facts demonstrate a rational basis for the action or inaction in question, and there are no other material facts in dispute that would overcome a finding of such a rational basis; or

(ii) The undisputed material facts demonstrate that no rational basis exists for the action or inaction in question, and there are no material facts in dispute that would overcome a finding of the lack of such a rational basis.

(b) In connection with any request for dismissal or summary decision, the Office of Dispute Resolution for Acquisition shall consider any material facts in dispute, in a light most favorable to the party against whom the request is made.

(c) Either upon motion by a party or on its own initiative, the Office of Dispute Resolution for Acquisition may, at any time, exercise its discretion to:

(1) Recommend to the Administrator dismissal or the issuance of a summary decision with respect to the entire contest;

(2) Dismiss the entire contest or issue a summary decision with respect to the entire contest, if delegated that authority by the Administrator; or

(3) Dismiss or issue a summary decision with respect to any count or portion of a contest.

(d) A dismissal or summary decision regarding the entire contest by either the Administrator, or the Administrator's delegee, shall be construed as a final Agency order. A dismissal or summary decision that does not resolve all counts or portions of a contest shall not constitute a final agency order, unless and until such dismissal or decision is incorporated or otherwise adopted in a decision by the Administrator (or the Administrator's delegee) regarding the entire contest.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.



## **CR 11 Contest remedies.**

(a) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies in a contest consistent with the AMS and applicable law and Agency policy. Such remedies may include, but are not limited to one or more, or a combination of, the following -

- (1) Amend the SIR;
- (2) Issue a new SIR;
- (3) Require re-evaluation or re-competition;
- (4) Terminate an existing contract or other agreement;
- (5) Retract a letter of obligation;
- (6) Direct an award or the issuance of a letter of obligation to the contestee;
- (7) Award bid and proposal costs; or

(8) Any combination of the above remedies, or any other action consistent with the AMS that is appropriate under the circumstances.

(b) In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the competition including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the cost of any proposed remedy to the FAA; and the impact of the recommendation on the FAA.

## **Part C - Alternative Dispute Resolution**

### **CR 12 Use of alternative dispute resolution**

The Office of Dispute Resolution for Acquisition shall encourage the parties to utilize consensual alternative dispute resolution (ADR) techniques to resolve contests to the maximum extent practicable. Such ADR techniques include mediation, neutral evaluation, or arbitration, or variations of these techniques as agreed by the parties and approved by the Office of Dispute Resolution for Acquisition.

### **CR 13 Election of alternative dispute resolution process**

(a) The Office of Dispute Resolution for Acquisition will make its personnel available to serve as Neutrals in ADR efforts and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually acceptable Compensated Neutral.

(b) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.

#### **CR 14 Selection of neutrals for the alternative dispute resolution process.**

See 14 CFR § 17.35.

### **Part D - Default Adjudicative Process**

#### **CR 15 Default adjudicative process for contests**

(a) Other than for the resolution of preliminary or dispositive matters, the Default Adjudicative Process for contests will commence upon the submission of the Acquisition Team Response to the Office of Dispute Resolution for Acquisition, pursuant to CR 9(e).

(b) The Director of the Office of Dispute Resolution for Acquisition shall select a DRO or a Special Master to conduct fact-finding proceedings and to provide findings and recommendations concerning some or all of the matters in controversy.

(c) The DRO or Special Master may issue procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties. As a minimum, the contestee and any intervenor(s) must submit to the Office of Dispute Resolution for Acquisition written comments with respect to the Acquisition Team Response within five (5) business days of the Response having been filed with the Office of Dispute Resolution for Acquisition or within five (5) business days of their receipt of the Response, whichever is later. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the Office of Dispute Resolution for Acquisition.

(d) The DRO or Special Master may convene the parties and/or their representatives, as needed, to pursue the Default Adjudicative Process.

(e) If, in the sole judgment of the DRO or Special Master, the parties have presented written material sufficient to allow the contest to be decided on the record presented, the DRO or Special Master shall have the discretion to decide the contest on that basis.

(f) The parties may engage in voluntary discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the contest. The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents. Where justified, the DRO or Special Master may direct the taking of deposition testimony; however, the FAA dispute resolution process does not contemplate extensive discovery. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and

shall establish schedules and deadlines for discovery, which are consistent with time frames established in these procedures and with the FAA policy of providing fair and expeditious dispute resolution.

(g) Where requested, or on his or her initiative, the DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted: (1) where the DRO or Special Master 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 contest, unless the DRO or Special Master 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. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(h) The Director of the Office of Dispute Resolution for Acquisition may review the status of any contest in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.

(i) Within thirty (30) business days of the closing of the administrative record in the contest or at the discretion of the Office of Dispute Resolution for Acquisition, the DRO or Special Master will submit findings and recommendations to the Office of Dispute Resolution for Acquisition that shall contain the following:

(1) Findings of fact;

(2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;

(3) A recommendation for a final FAA order; and

(4) If appropriate, suggestions for future FAA action.

(j) In arriving at findings and recommendations relating to contests, the DRO or Special Master shall consider whether or not the action(s) in question had a rational basis, and whether or not the performance decision under question was arbitrary, capricious or an abuse of discretion. Findings of fact underlying the recommendations must be supported by substantial evidence.

(k) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with CR 11.

(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, only upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the contest, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only

persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

## **Part E - Finality and Review**

### **CR 16 Final orders**

All final FAA orders regarding contests under these procedures are to be issued by the FAA Administrator or by a delegee of the Administrator.

### **CR 17 Judicial review**

(a) A contester or any intervenor may seek review of a final FAA order, pursuant to 49 U.S.C. §46110, only after the administrative remedies of these procedures have been exhausted.

(b) A copy of the petition for review shall be filed with the Office of Dispute Resolution for Acquisition and the FAA Chief Counsel on the date that the petition for review is filed with the appropriate circuit court of appeals.