

# BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## Flying In Friendly Skies: The Federal Aviation Administration's Unique Bid Protest Forum

By Jason A. Carey, Kayleigh Scalzo, and Carl Wiersum\*

Federal contractors usually think of two bid protest forums: the Government Accountability Office (GAO) and the U.S. Court of Federal Claims. But another protest forum often flies under the radar: the Federal Aviation Administration's Office of Dispute Resolution for Acquisition—a.k.a. the ODRA.

The ODRA has exclusive jurisdiction over bid protests of FAA procurements. ODRA protests are reviewed under the Administrative Procedure Act, adjudicated by one of the ODRA's Administrative Judges, and subject to direct appeal to a federal circuit court. Although many of the fundamental principles of bid protest practice at GAO and the Court of Federal Claims apply equally at the ODRA, there are a number of unique features. As a result, it is worth getting to know this protest forum.

This BRIEFING PAPER proceeds in five parts. Part I provides background about the ODRA, including its history, the reach of its jurisdiction, and statistics regarding its protest docket. Part II addresses the mechanics of practicing before the ODRA, including timing and deadlines; suspension of award or performance; discovery; hearings; remedies; and more. Part III discusses alternative dispute resolution (ADR), which is the primary means of resolving protests before the ODRA. Part IV addresses appeals from ODRA protest decisions. Part V concludes the PAPER with some guidelines for protests before the ODRA.<sup>1</sup>

### Part I: Background About The ODRA

#### History

The ODRA's story begins in the mid-1990s, when a series of major FAA acquisitions—which were then conducted pursuant to the Federal Acquisi-

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tion Regulation (FAR)—experienced delays and cost overruns.<sup>2</sup> As a result of these delays and unanticipated costs, Congress and the Clinton Administration became concerned “that the safety mission of the FAA might suffer from the inefficiency of the then-existing acquisition system, including its dispute resolution system.”<sup>3</sup>

Congress took action in the Fiscal Year 1996 Department of Transportation Appropriations Act.<sup>4</sup> This Act exempted the FAA from a number of the usual laws and regulations governing federal procurements, including the FAR, and directed the FAA Administrator “to develop and implement . . . an acquisition management system for the Federal Aviation Administration that addresses the unique needs of the agency and, at a minimum, provides for more timely and cost-effective acquisitions of equipment and materials.”<sup>5</sup>

To implement Congress’ mandate, the FAA created its Acquisition Management System (AMS) to govern FAA procurements,<sup>6</sup> which the FAA describes as “a system of policy guidance that maximizes the use of agency discretion in the interest of best business practice.”<sup>7</sup> The AMS governs “all aspects of lifecycle acquisition management for the Federal Aviation Administration”—in short, it is the FAA’s procurement rules.<sup>8</sup> The AMS went into effect on April 1, 1996.<sup>9</sup>

In May 1996, the FAA announced the establishment of the ODRA within the Office of the Chief Counsel to serve as a forum for resolving disputes arising out of the AMS acquisition process.<sup>10</sup> Even at this early date, the FAA indicated that “[t]he new system [was to] rely heavily on Alternative Dispute Resolution (ADR) techniques.”<sup>11</sup>

The FAA first published final rules to govern ODRA procedures in 1999.<sup>12</sup> The FAA made substantial revisions

to those rules in 2011,<sup>13</sup> and continues to make minor revisions over time. The ODRA’s procedural rules are located at 14 C.F.R. Part 17 and cover both bid protests and contract disputes. In addition, the agency maintains the ODRA Guide, available online, which 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.”<sup>14</sup>

The ODRA is led by the Director of the ODRA, who holds authority delegated from the FAA Administrator “[t]o administer and conduct proceedings in individual bid protests”; “to adjudicate all or portions of individual bid protests”; and “to prepare findings and recommendations as well as proposed final orders in such cases.”<sup>15</sup> Over time, several delegations of authority from the FAA Administrator have expanded and clarified the scope of the ODRA’s authority over matters within its jurisdiction.<sup>16</sup> For instance, the FAA Administrator has delegated to the ODRA the authority to—beyond preparing findings and recommendations—execute and issue, on behalf of the FAA Administrator, final agency decisions on all bid protests concerning acquisitions up to \$20 million and all contract disputes up to \$10 million.<sup>17</sup>

The Director is supported by three Dispute Resolution Officers (DROs), all of whom the FAA Administrator has designated as Administrative Judges.<sup>18</sup> The ODRA also may assign special masters, or non-FAA attorneys or judges, who may act as the ODRA’s finder of fact and make findings and recommendations in the adjudicative process.<sup>19</sup> Although ODRA judges are FAA employees—and thus reviewing procurement decisions made by their own agency—“[t]he ODRA is physically and organizationally distinct from the FAA’s Office of Chief Counsel’s Contracts and Commercial Law Division.”<sup>20</sup>

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## Jurisdiction

The ODRA has exclusive jurisdiction over bid protests and contract disputes arising under the FAA's AMS.<sup>21</sup> This jurisdiction was reaffirmed in 2003 with the passage of the Vision 100—Century of Aviation Reauthorization Act, in which Congress expressly vested the ODRA with jurisdiction over all AMS-covered bid protests and contract disputes.<sup>22</sup>

The ODRA's bid protest jurisdiction extends to all protests concerning FAA Screening Information Requests,<sup>23</sup> solicitations, or contract awards,<sup>24</sup> while the ODRA's contract dispute jurisdiction extends to all contract disputes arising under contracts subject to the AMS.<sup>25</sup> The ODRA's ADR services (both non-binding and binding) extend to all AMS matters.<sup>26</sup>

The AMS and ODRA procedural regulations expressly exclude a number of matters from the ODRA's protest jurisdiction, including (1) FAA purchases from or through state, local, and tribal governments and public authorities; (2) FAA purchases from or through other federal agencies; (3) grants; (4) cooperative agreements; (5) FAA transactions placed against an ordering vehicle containing a voluntary waiver of protest clause; and (6) any other transactions not subject to the AMS.<sup>27</sup>

Within this overarching framework of the ODRA's jurisdiction, there are additional nuances as well:

(1) *TSA*. Acquisitions by the Transportation Security Administration (TSA) used to be—but, with one small exception, are no longer—within the ODRA's jurisdiction. When Congress created the TSA on November 19, 2001, it made the AMS applicable to acquisitions of equipment, supplies, and materials by the TSA.<sup>28</sup> The AMS continued to apply to TSA procurements until June 22, 2008, when TSA procurements became subject to the FAR instead.<sup>29</sup> Between 2001 and 2008, however, the ODRA provided protest and dispute adjudication and resolution for TSA-related bid protests and contracts disputes subject to the AMS.<sup>30</sup> The ODRA continues to provide these services for dwindling number of TSA contracts entered into while TSA was subject to the AMS.<sup>31</sup>

(2) *FSSs and GWACs*. The ODRA has exercised jurisdiction over buys from GSA Federal Supply Schedule

(FSS) contracts where “the protest raise[d] justiciable issues regarding the Product Team’s compliance with the requirements of the AMS in making its award decision.”<sup>32</sup> The ODRA also has found jurisdiction to review purchases made under a Government-wide acquisition contract (GWAC) where the “solicitation incorporate[d] the AMS and designate[d] the ODRA as the forum for the resolution of protests and contract disputes.”<sup>33</sup>

(3) *Small business issues*. The ODRA exercises jurisdiction over protests raising issues of small business contracting opportunities under AMS procurements.<sup>34</sup>

(4) *Contract administration and responsibility determinations*. The ODRA “does not address matters of post-award contract administration in the context of bid protests, and, as a general rule, affirmative responsibility determinations are a proper subject of a bid protest, only under relatively rare circumstances.”<sup>35</sup>

(5) *Policy issues*. The ODRA's jurisdiction “does not encompass review of directives and policies issued by the [FAA] Administrator as head of the Agency,” such as the Administrator's issuance of the AMS itself.<sup>36</sup>

## Statistics

Due to its limited jurisdiction, the ODRA carries a much smaller caseload of protests than GAO. According to the FAA's statistics, in the first 20 years of the ODRA's existence—from 1996 through 2016—it handled 584 bid protests.<sup>37</sup> In contrast, GAO handled 2,789 protests in 2016 alone.<sup>38</sup>

The ODRA also has a higher rate of sustaining protests, averaging a 27% sustain rate.<sup>39</sup> GAO's sustain rate, in contrast, has recently ranged from 12% to 23%.<sup>40</sup> (However, GAO's effectiveness rate, which factors in voluntary corrective action by the agency, is far higher—usually about 45%).<sup>41</sup>

All told, from 1996 through 2016, there were 994 cases filed at the ODRA, which included 584 protests, 248 disputes, and 135 pre-disputes.<sup>42</sup> As discussed in more detail below in Part III of this PAPER, 66% of the ODRA's bid protests were completely resolved through the ADR process.<sup>43</sup> That is a far higher rate of ADR use than at GAO, which in 2018 used ADR for 86 out of 2,607 protests, resulting in a rate of ADR use around 3%.<sup>44</sup> And

since GAO had a 77% success rate with ADR that year, its rate of complete resolution through ADR was only around 2%.<sup>45</sup>

## Part II: Practice Before The ODRA

The protest process at the ODRA is similar to the process at GAO<sup>46</sup> in certain respects—but there are a number of important differences. Part II of this PAPER highlights some of the main features of protest practice before the ODRA—including how the ODRA’s practices are similar to and different from GAO’s. When in doubt, practitioners always should be sure to check the ODRA’s rules, regulations, and guidance—and never assume that the ODRA way is the same as the GAO way.

### Interested Party

Not just anyone can file a protest at the ODRA. Instead, like at GAO, only an “interested party” may file a protest.<sup>47</sup> The ODRA’s regulations define “interested party” in a similar fashion to GAO’s regulations: “one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.”<sup>48</sup> As a general matter, that means actual or prospective prime offerors. Like at GAO, subcontractors are not interested parties and thus cannot file protests.<sup>49</sup>

### Timing

The timing and deadlines for protests at the ODRA are set out in the ODRA’s regulations at 14 C.F.R. Part 17. The ODRA also maintains a helpful “Procedural Timeline for Protests” reference document available online.<sup>50</sup> Although this PAPER does not endeavor to catalogue all those deadlines, a few of the most salient timing considerations are noted below:

(1) *Initial Protest Filing.* Like at GAO, protests challenging a solicitation must be filed before the deadline for proposal submission.<sup>51</sup> Post-award protests, however, are filed on a different schedule than at GAO—and the filing deadline is counted in *business* days rather than *calendar* days.<sup>52</sup> Post-award protests must be filed “[n]ot later than *seven (7) business days* after the date the protester knew or should have known of the grounds for the protest; or . . . [i]f the protester has requested a post-award debriefing . . . , not later than *five (5) business days* after the date” of the debriefing—whichever is later.<sup>53</sup>

Protest submissions may be filed by overnight delivery, hand delivery, fax, or email.<sup>54</sup> Like at GAO, the protester must provide a copy of the protest to the contracting officer—but unlike at GAO, the protester must do so concurrently with filing the protest.<sup>55</sup>

Also important to note: the ODRA’s normal business hours close at 5:00 *p.m. Eastern*, not 5:30 *p.m. Eastern* like GAO’s.<sup>56</sup> In addition, the initial protest filing must include a redacted copy of the material that the protester requests be protected—unlike at GAO, where the protester has an additional day to file a redacted version of the protest.<sup>57</sup>

(2) *Intervention.* The timing for requests to intervene at the ODRA is different from at GAO. At the ODRA, a party must request to intervene within two business days of being notified of the protest.<sup>58</sup> At GAO, by contrast, there is no deadline to intervene.

In post-award protests, “only the awardee may participate as an intervenor as a matter of right.”<sup>59</sup> In pre-award protests, “the ODRA has the discretion to permit intervention by one or more other offerors who demonstrate that they qualify as ‘interested parties.’”<sup>60</sup>

(3) *Status Conference.* Also unlike GAO—but similar to the Court of Federal Claims—the ODRA holds an initial status conference “[w]ithin five (5) business days of the filing of a protest, or as soon thereafter as practicable.”<sup>61</sup> Like at the Court of Federal Claims, that initial status conference is usually telephonic. The purpose of the initial status conference is to discuss a range of preliminary matters such as ADR, adjudication procedures, setting a preliminary schedule, and issuing a protective order.<sup>62</sup>

(4) *Briefing.* Unlike at GAO, there is no fixed briefing schedule at the ODRA. Rather—as discussed in further detail below in Part III of the PAPER—the first step in an ODRA protest is typically for the parties to attempt to resolve the matter using ADR, which has a flexible schedule. Once the adjudication phase begins, however, the FAA Product Team (i.e., the agency procurement team and its counsel)<sup>63</sup> has 10 business days to file a response to the protest (like an agency report at GAO), which “shall consist of a written chronological, supported statement of proposed facts, and a written presentation of applicable legal or other defenses”—“and be accompanied



by all relevant documents.”<sup>64</sup> The protester’s and intervenor’s comments on the Product Team response are due “five (5) business days after their receipt of the response.”<sup>65</sup> But even those deadlines are flexible, and “[t]he ODRA may alter the schedule for filing of the Product Team response and the comments for good cause or to accommodate the circumstances of a particular protest.”<sup>66</sup>

### Suspension Of Award Or Performance

One of the biggest differences between the ODRA and GAO is that there is no automatic stay of award or performance at the ODRA. To the contrary, “[t]here is a strong presumption in the AMS that procurement activities and contract performance will continue during the pendency of a bid protest.”<sup>67</sup> Thus, “[p]rocurement activities, and, where applicable, contractor performance pending resolution of a protest, shall continue during the pendency of a protest, unless there is a compelling reason to suspend all or part of the procurement activities or contractor performance.”<sup>68</sup>

If, despite that presumption against suspension, “the protester wishes to request a suspension of the procurement or contract performance, in whole or in part,” it must make the request “in its initial filing[.]”<sup>69</sup> The protester’s request must “[s]et forth such compelling reason(s), supply all facts and documents supporting the protester’s position; and” demonstrate that (1) “[t]he protester has alleged a substantial case”; (2) “[t]he lack of a suspension would be likely to cause irreparable injury”; (3) “[t]he relative hardships on the parties favor a suspension”; and (4) “a suspension is in the public interest[.]”<sup>70</sup>

The FAA Product Team must file a response to the suspension request “by no later than the close of business on the date of the initial scheduling conference or on such other date as is established by the ODRA.”<sup>71</sup> The protester and intervenor may provide “additional comments on the [Product Team’s] response within two (2) business days of receiving it.”<sup>72</sup> The ODRA may resolve a suspension request informally through the ADR process or formally through a written decision.<sup>73</sup>

The ODRA’s universe of decisions addressing suspension requests confirms that the ODRA rarely grants suspensions.<sup>74</sup> The ODRA states that it applies its four-

part test in a similar fashion to the D.C. Circuit’s preliminary injunction test,<sup>75</sup> but the ODRA’s version is meaningfully different in practice. For instance, the ODRA finds the first factor—i.e., that the protester has “alleged a substantial case”—satisfied in most instances. It readily determines that the protester has demonstrated “a fair ground for litigation and thus for more deliberative investigation.”<sup>76</sup> For that factor, the ODRA appears to primarily consider whether the protester is advancing the type of arguments that are normally made in protests.<sup>77</sup>

This first factor, however, “is de-emphasized in favor of a balancing of the other three.”<sup>78</sup> And, although the ODRA facially analyzes the other three factors individually, as a practical matter, it considers them together and balances the equities—and generally finds that those factors favor the agency.<sup>79</sup>

As to irreparable harm, the ODRA has expressly rejected the Court of Federal Claims’ approach in bid protest cases and thus does not find that competitive injury is sufficient to demonstrate irreparable harm.<sup>80</sup> Rather, to be irreparable, harm must be more than the usual adverse consequences that a wronged bidder—even an incumbent—would suffer in any protest.<sup>81</sup> For example, each of the following has been found insufficient to demonstrate irreparable harm: “loss of valuable employees” and “destabilized workforce”;<sup>82</sup> the fact that performance on the predecessor contract represents a large amount of revenue for the protester—or loss of revenue more generally;<sup>83</sup> loss of “user confidence” due to transition away from the existing product;<sup>84</sup> “diminished likelihood of meaningful relief”;<sup>85</sup> and “possible loss of work.”<sup>86</sup>

As to relative hardships, the ODRA generally defers to the agency if the agency asserts that delay of the procurement would harm its mission or the program or would cause the agency to incur additional costs. The ODRA construes the public interest factor in the agency’s favor for largely the same reasons and has stated that, “absent irreparable harm to the protester, the public interest lies not in delaying the acquisition process, but rather in upholding the integrity of the FAA’s Acquisition Management System.”<sup>87</sup>

Despite—or perhaps because of—the ODRA’s presumption against suspension, the ODRA generally does

not limit potential relief available to the protester based on the fact that performance will be underway at the time the protest is resolved. Instead, if the ODRA sustains a protest, it is often willing to order (1) that the awarded contract be terminated for convenience, or that no options be exercised; and (2) a recompute or directed award—all regardless of ongoing performance.<sup>88</sup> In denying requests for suspension, therefore, the ODRA often makes clear that the agency bears the risk of incurring delay and additional costs if performance continues and the protest is eventually sustained.<sup>89</sup>

### Discovery

Unlike protests at GAO or the Court of Federal Claims, the ODRA adjudicative process involves discovery.<sup>90</sup> In fact, the ODRA describes discovery as “an integral part of the ODRA dispute resolution process.”<sup>91</sup> “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.”<sup>92</sup> “The ODRA does not permit so-called ‘fishing expeditions,’ ”<sup>93</sup> however, and the regulations warn that “the FAA dispute resolution process does not contemplate extensive discovery.”<sup>94</sup>

The DRO/Administrative Judge manages discovery.<sup>95</sup> In that role, she or he “may direct the parties to exchange, in an expedited manner, relevant, non-privileged documents”; “may direct the taking of deposition testimony”; “may order that specific documents responsive to discovery requests be produced”; and “may issue subpoenas when needed.”<sup>96</sup>

“Copies of discovery materials exchanged between the parties are not to be submitted to the ODRA at the time they are produced,” but rather “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.”<sup>97</sup> At the same time, “[u]nless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record.”<sup>98</sup>

### Motions & Dispositive Motions

“Separate motions generally are discouraged in ODRA bid protests,” and “parties are encouraged to incorporate

any such motions in their respective agency responses or comments,” and also “to attempt to resolve typical motions issues through the ODRA ADR process.”<sup>99</sup>

The ODRA further “has a strong preference for deciding cases on the merits, rather than by dispositive motion”—and “[t]his is particularly true for bid protests.”<sup>100</sup> That being said, the ODRA may dismiss a protest, in whole or in part, “for lack of jurisdiction, timeliness, or standing to pursue the protest”; “if frivolous or without basis in fact or law”; “or for failure to state a claim upon which relief may be had[.]”<sup>101</sup> The ODRA also may issue a “summary decision” on a protest, in whole or in part, “if there are no material facts in dispute and a party is entitled to summary decision as a matter of law.”<sup>102</sup>

### Standard Of Review

The ODRA reviews protests to determine “whether the Product Team actions in question were consistent with the requirements of the AMS, had a rational basis, and whether the Product Team decision was arbitrary, capricious or an abuse of discretion.”<sup>103</sup> That inquiry is made under the preponderance of the evidence standard—except for “allegations that government officials acted with bias or in bad faith,” which “must be established by clear and convincing evidence.”<sup>104</sup>

The ODRA Guide states that the protester must “show that the actions in question have in some way prejudiced or resulted in harm to the Protester.”<sup>105</sup> The corresponding regulation that the ODRA cites for that statement, however, uses somewhat milder wording that would seem to allow protesters to rely on a broader, more amorphous type of prejudice than what is required at GAO: “In determining the appropriate recommendation, the ODRA *may consider*,” among other things, “the degree of prejudice *to other parties or to the integrity of the acquisition system*[.]”<sup>106</sup>

### Case Law

The ODRA publishes its decisions on its website.<sup>107</sup> It maintains a searchable database of its decisions,<sup>108</sup> as well as targeted search functions by case name,<sup>109</sup> topic,<sup>110</sup> and case summary.<sup>111</sup> ODRA decisions are also available on Westlaw and LexisNexis.

Because of the ODRA’s relatively young age—and

because relatively few cases culminate in a merits decision—the universe of ODRA case law is fairly small. As of December 31, 2016, a total of 584 protests had been filed; 577 protests had been “completed”; and only 196 protests had been “Adjudicated to Final Agency Decision.”<sup>112</sup> That means that practitioners before the ODRA may find themselves litigating issues where there is no ODRA case law on point.

In those situations, practitioners can borrow from GAO case law or Court of Federal Claims case law to fill in gaps. “Although not bound by GAO precedents, the ODRA will consider GAO decisions as persuasive when the underlying procurement regulations or policies in question are similar.”<sup>113</sup> As one example, the ODRA has looked to GAO case law in addressing organizational conflict of interest issues.<sup>114</sup> So although it is always preferable to have case law from the relevant jurisdiction on your side, that is not necessarily a limiting factor before the ODRA.

### Hearings

“Hearings are not typically held in bid protests.”<sup>115</sup> The ODRA may choose to hold a hearing, however, where either (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) “[u]pon request of any party to the protest, 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.”<sup>116</sup>

In a hearing, all witnesses are subject to cross-examination as well as questioning by the DRO/Administrative Judge.<sup>117</sup>

### Remedies

“The ODRA has broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law,” including, among other things, amending the solicitation; declining to exercise options; issuing a new solicitation; ordering a reevaluation or new

competition; terminating for convenience; making a directed award; and/or awarding bid and proposal costs.<sup>118</sup> This range of remedies is wider than what GAO typically recommends or the Court of Federal Claims typically orders when sustaining a protest.

“In determining the appropriate recommendation, the ODRA may consider the circumstances surrounding the procurement or proposed procurement.”<sup>119</sup> Such considerations may include, among other things, “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 extent of performance completed; the feasibility of any proposed remedy; the urgency of the procurement; the cost and impact of the recommended remedy; and the impact on the Agency’s mission.”<sup>120</sup>

The DRO/Administrative Judge prepares “findings and recommendations to the ODRA” that include “(1) [f]indings of fact; (2) [a]pplication 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) [i]f appropriate, suggestions for future FAA action.”<sup>121</sup> The DRO/Administrative Judge submits that recommendation to the ODRA Director or her/his designee.<sup>122</sup> The recommendation is released to the parties at the same time as the final FAA order disposing of the case.<sup>123</sup>

## Part III: Alternative Dispute Resolution

One of the unique features of the ODRA is its strong emphasis on ADR. Because the ODRA makes common use of ADR, and because it differs so greatly from practice at GAO, this PAPER devotes a separate section to it.

“By statutory mandate, it is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA,” and “[t]he ODRA therefore uses voluntary ADR as its primary means of resolving all factual, legal, and procedural controversies.”<sup>124</sup> The ODRA’s commitment to the use of ADR is unparalleled, at least in the bid protest space. Out of the 584 protests filed with the ODRA as of December 31, 2016, 66%—or 381—were “Completely Resolved Via ADR.”<sup>125</sup>

“The ODRA does not rely on the parties to initiate

ADR discussions,” and instead “begins to discuss and encourage ADR during the initial status conference[.]”<sup>126</sup> ADR is voluntary—and a party may withdraw from ADR at any point—but “ADR has been effectively used to settle the majority of ODRA cases involving bid protests and contract disputes[.]”<sup>127</sup> The formal adjudication process begins only “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.”<sup>128</sup>

If the parties decide to pursue ADR, they must “mutually agree upon and select an ADR Neutral, who acts as a facilitator, mediator or arbitrator for the dispute.”<sup>129</sup> (“Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.”<sup>130</sup>) The neutral is usually one of the ODRA’s own Administrative Judges, but the parties may opt for a different neutral, at their cost.<sup>131</sup> After the parties have chosen a neutral, they enter into an ADR agreement, which is tailored to their case.<sup>132</sup>

The ODRA uses three main types of ADR: mediation, neutral evaluation, and binding arbitration.<sup>133</sup> Mediation involves “the ADR Neutral determin[ing] the needs and interests of the parties and facilitat[ing] discussions among them to attempt to reach an amicable resolution of their differences[.]”<sup>134</sup> Neutral evaluation involves “the ADR Neutral provid[ing] a candid assessment and opinion of the strengths and weaknesses of the parties’ positions as to the facts and law[.]”<sup>135</sup> Binding arbitration involves the neutral “render[ing] a formal binding arbitral award at the conclusion of the proceeding”—although binding mediation is not commonly used in resolving bid protests before the ODRA.<sup>136</sup>

A common approach to ADR is to combine mediation with some amount of neutral evaluation. For instance, the ADR neutral may meet individually with each party at the outset of the ADR process and share some preliminary thoughts about each party’s own position. The ADR neutral then may convene the parties to meet in person and present their respective positions to each other. The ODRA does not rush the parties, and these types of mediation presentations may span multiple days, depending on the complexity of the procurement and the number of issues in the protest. At the end of the presentations, the ADR neutral may again meet individually with each party to share thoughts about each party’s own position

and make predictions on how the case may turn out in adjudication. The ADR neutral may then attempt to facilitate a mutually agreeable settlement among all the parties.

If the parties resolve the protest, either in whole or in part, through ADR, “the neutral will assist them to memorialize the terms of their settlement in a written settlement agreement.”<sup>137</sup> And if “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.”<sup>138</sup>

The parties may be apprehensive about using ADR—or, in particular, using an ODRA Administrative Judge as a neutral—because of concerns that information shared during ADR will undermine the parties’ position if the case proceeds to adjudication. However, “[a] firewall is maintained between the ODRA’s ADR and adjudicative processes,” and “[t]he ADR process . . . is kept confidential and separate from the adjudication process.”<sup>139</sup> As a result, “ADR communications are not part of the administrative record unless otherwise agreed by the parties.”<sup>140</sup> Moreover, “the ADR neutral does not participate in any adjudication of a matter that is not settled in ADR.”<sup>141</sup> Instead, “[a]nother DRO/ Administrative Judge always is appointed to preside over the adjudication.”<sup>142</sup> And the ADR process may be subject to a protective order, just like the adjudication process.<sup>143</sup>

A protest proceeds to the formal adjudication stage “where the parties cannot achieve agreement on the use of ADR; where ADR has been employed but has not resolved all pending issues in dispute; or where the ODRA concludes that ADR will not provide an expeditious means of resolving a particular dispute.”<sup>144</sup> Even if a case proceeds to adjudication, however, that does not mean that ADR is over—or that ADR has been useless. For one thing, adjudication and ADR are sometimes “conducted simultaneously.”<sup>145</sup> For instance, ADR may be used during the adjudication stage to resolve collateral issues, such as “scheduling, discovery controversies, objections to protective order admissions, or dispositive motions.”<sup>146</sup> In addition, even if the parties are not able to fully resolve a protest through ADR, pursuing ADR still may help narrow the issues in dispute, “resulting in a more streamlined adjudication of the remaining case.”<sup>147</sup>



## Part IV: Appeals From The ODRA

Following the submission of the DRO's or Special Master's findings and recommendations, the FAA Administrator or her/his delegee issues a final FAA order in the case.<sup>148</sup> A party hoping for reconsideration within the ODRA faces a challenge—the ODRA does not “entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments.”<sup>149</sup> Rather, parties seeking reconsideration from the ODRA must show (1) “clear errors of fact or law in the underlying decision” or (2) “previously unavailable evidence that warrants reversal or modification of the decision.”<sup>150</sup> The deadline for filing requests for reconsideration with the ODRA is 10 business days from “the date of issuance of the public version of the subject decision or order.”<sup>151</sup>

Parties also may seek judicial review of the final FAA order disposing of the protest. Final FAA orders resulting from ODRA bid protests are subject to judicial review under 49 U.S.C.A. § 46110 and can be appealed by non-agency parties.<sup>152</sup> (Because the ODRA is itself part of the FAA, the agency cannot appeal its own decision.) Pursuant to that statute, parties seeking judicial review of a final FAA order skip the U.S. district courts and instead file a petition for review directly at the court of appeals level.

Parties have two options when choosing where to file a petition for review: (1) the Court of Appeals for the D.C. Circuit, or (2) the Court of Appeals for the circuit in which the party resides (or has its principal place of business).<sup>153</sup> The decision of where to file an appeal bears careful consideration. A party's “home” circuit may be perceived as more convenient for or sympathetic to the protester, but the D.C. Circuit is generally viewed as having particular subject-matter expertise in administrative litigation. How each of those considerations cuts depends on the facts and circumstances of a particular case. For instance, a protester whose argument is firmly rooted in principles of administrative law may benefit from the D.C. Circuit's expertise in that area.

The appealing party must file its petition for review within 60 days after the FAA issues its final order.<sup>154</sup> The appealing party must submit a copy of its petition for review to the ODRA and the FAA Chief Counsel on the same day it files with the court of appeals.<sup>155</sup>

Courts review FAA final orders based on the administrative record from the ODRA, which generally consists of the FAA order; the findings and recommendation on which the order is based; and the pleadings, evidence, and other parts of the proceedings before the agency.<sup>156</sup> The parties also may move to supplement the administrative record with additional material,<sup>157</sup> but courts do not readily grant such motions.<sup>158</sup>

Courts apply the Administrative Procedure Act's arbitrary and capricious standard to review final FAA orders.<sup>159</sup> Thus, the order will only be set aside if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] unsupported by substantial evidence.”<sup>160</sup> The ODRA's factual findings, if supported by substantial evidence, are conclusive.<sup>161</sup>

Under this deferential standard of review, even an ODRA decision resulting from “imperfect” and “flaw[ed]” findings and recommendations based on “evidence [that] is certainly not overwhelming one way or the other” has been upheld.<sup>162</sup> That makes appeals from ODRA protest decisions an uphill battle—and, in fact, a battle that no appealing party has ever won. According to the ODRA's statistics, from 1996 through 2016, there were 15 appeals from ODRA decisions.<sup>163</sup> Of these 15 appeals, 8 were dismissed; 7 were denied; and none were reversed, remanded, or modified.<sup>164</sup> Appealing parties have not fared any better since 2016.<sup>165</sup>

## Part V: Guidelines

These *Guidelines* are intended to assist you in understanding the FAA's unique bid protest system. They are not, however, a substitute for professional representation in any specific situation.

1. If you are considering a protest of a procurement involving the FAA, either directly or indirectly, carefully determine whether the ODRA has jurisdiction.
2. Don't assume that the ODRA way is the same as the GAO way—when in doubt, double check.
3. Don't expect a stay of award or performance during the pendency of the protest.
4. Be prepared for ADR—and that the ADR process may involve extensive, in-person discussions.

5. If appropriate in your case, take advantage of the opportunity to pursue discovery.

6. Borrow case law from GAO and the Court of Federal Claims where there is no ODRA case law on point.

7. Remember that the ODRA may draw from a wider array of remedies than either GAO or the Court of Federal Claims.

8. Be prepared for a more flexible timeline than at GAO.

9. Don't expect to win on appeal.

## ENDNOTES:

<sup>1</sup>This BRIEFING PAPER is adapted from an Inside Government Contracts blog post by the same name, available at <https://www.insidegovernmentcontracts.com/2019/05/flying-in-friendly-skies-the-federal-aviation-administrations-unique-bid-protest-forum/>. This article is made available by Covington & Burling LLP for educational purposes only and to provide a general understanding of the law, not for specific legal advice. By reading this article, you understand that there is no attorney-client relationship between you and Covington & Burling LLP. This article should not be used as a substitute for competent legal advice from a licensed professional attorney in your state.

<sup>2</sup>Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Regulations, 64 Fed. Reg. 32,926, 32,926 (June 18, 1999).

<sup>3</sup>Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Regulations, 64 Fed. Reg. 32,926, 32,926 (June 18, 1999).

<sup>4</sup>Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 1996, Pub. L. No. 104–50, § 348, 109 Stat. 436, 460 (1995) (codified in relevant part at 49 U.S.C.A. § 40110(d)).

<sup>5</sup>Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 1996, Pub. L. No. 104–50, § 348, 109 Stat. 436, 460 (1995) (codified in relevant part at 49 U.S.C.A. § 40110(d)); Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Guide, at 2, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/odra\\_process/media/ODRA\\_Guide.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/media/ODRA_Guide.pdf) [hereinafter “ODRA Guide”]; Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Frequently Asked Questions, at 1, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/odra\\_process/media/FAQs.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/media/FAQs.pdf) [hereinafter “ODRA FAQs”].

<sup>6</sup>ODRA Guide at 2; see <https://fast.faa.gov/>.

<sup>7</sup>Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Regulations, 64 Fed. Reg. 32,926, 32,926 (June 18, 1999).

<sup>8</sup>AMS § 1.1.1.

<sup>9</sup>Federal Aviation Administration Life Cycle Acquisition Management System, 61 Fed. Reg. 15,155, 15,155 (Apr. 4, 1996).

<sup>10</sup>Establishment of the Office of Dispute Resolution for Acquisition (ODR), 61 Fed. Reg. 24,348, 24,348 (May 14, 1996); ODRA Guide at 2–3.

<sup>11</sup>Establishment of the Office of Dispute Resolution for Acquisition (ODR), 61 Fed. Reg. 24,348, 24,348 (May 14, 1996).

<sup>12</sup>Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Regulations, 64 Fed. Reg. 32,926 (June 18, 1999).

<sup>13</sup>Procedures for Protests and Contracts Dispute, 76 Fed. Reg. 55,217 (Sept. 7, 2011).

<sup>14</sup>ODRA Guide at 1.

<sup>15</sup>See Designation of Administrative Judges and Delegation of Authority, 76 Fed. Reg. 70,529 (Nov. 14, 2011); Memorandum from Administrator, Fed. Aviation Admin. to Director, Office of Dispute Resolution for Acquisition (Oct. 12, 2011), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/FAA2011Delegation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/FAA2011Delegation.pdf).

<sup>16</sup>See Organizations, Functions, and Authority Delegations: The Chief Counsel and Associate Chief Counsel/Director of the Office of Dispute Resolution for Acquisition, 63 Fed. Reg. 49,151 (Sept. 14, 1998); Delegation of Authority, 65 Fed. Reg. 19,958 (Apr. 13, 2000); Delegation of Authority, 69 Fed. Reg. 17,469 (Apr. 2, 2004); Designation of Administrative Judges and Delegation of Authority, 76 Fed. Reg. 70,529 (Nov. 14, 2011); Delegation of Authority, 79 Fed. Reg. 21,832 (Apr. 17, 2014); see also Memorandum from Administrator, Fed. Aviation Admin. to Director, Office of Dispute Resolution for Acquisition (Oct. 12, 2011), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/FAA2011Delegation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/FAA2011Delegation.pdf); Memorandum from Administrator, Fed. Aviation Admin. to Director and Administrative Judge, Office of Dispute Resolution for Acquisition (Mar. 19, 2014), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/FAA2014Delegation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/FAA2014Delegation.pdf).

<sup>17</sup>See Delegation of Authority, 79 Fed. Reg. 21,832 (Apr. 17, 2014); Memorandum from Administrator, Fed. Aviation Admin. to Director and Administrative Judge, Office of Dispute Resolution for Acquisition (Mar. 19, 2014), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/FAA2014Delegation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/FAA2014Delegation.pdf).

<sup>18</sup>14 C.F.R. § 17.3(I); ODRA FAQs at 1. “The term

DRO can include the Director of the ODRA.” 14 C.F.R. § 17.3(l). The ODRA also has a paralegal “who serves as a Special Assistant to the Director.” ODRA FAQs at 1.

<sup>19</sup>14 C.F.R. § 17.3(v).

<sup>20</sup>ODRA FAQs at 5.

<sup>21</sup>49 U.S.C.A. § 40110(d)(4); ODRA Guide at 4.

<sup>22</sup>Pub. L. No. 108-176, § 224(b), 117 Stat. 2490, 2528 (2003) (codified in relevant part at 49 U.S.C.A. § 40110(d)(4)); ODRA Guide at 3.

<sup>23</sup>An FAA Screening Information Request is an FAA request for “documentation, information, presentations, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA.” 14 C.F.R. § 17.3(u).

<sup>24</sup>14 C.F.R. § 17.13(a).

<sup>25</sup>14 C.F.R. § 17.25(a).

<sup>26</sup>14 C.F.R. §§ 17.1, 17.3(q); ODRA FAQs at 1.

<sup>27</sup>14 C.F.R. § 17.11; AMS § 3.9.8; see also Protest of Oerlikon Contraves S.p.A., ODRA Docket No. 04-ODRA-00320, at 6–7 (Nov. 5, 2004) (dismissing protest of cooperative agreement).

<sup>28</sup>Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 601 (2001).

<sup>29</sup>Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 568, 121 Stat. 1844, 2092 (2007) (eliminating previous 49 U.S.C.A. § 114(o)); see also Office of the Chief Procurement Officer; Revision of Department of Homeland Security Acquisition Regulation; Technical Amendments (HSAR Case 2008-001), 73 Fed. Reg. 30,317, 30,318 (May 27, 2008).

<sup>30</sup>See Memorandum from Associate Under Secretary for Finance and Administration, Transp. Sec. Admin., to Director, Fed. Aviation Admin., Office of Dispute Resolution for Acquisition (Sept. 16, 2002), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/TSA2002Delegation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/TSA2002Delegation.pdf); Memorandum from Elaine Duke, Transp. Sec. Admin., to Director, Fed. Aviation Admin., Office of Dispute Resolution for Acquisition (Dec. 23, 2003), [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/delegations/media/TSA2003Delegation.pdf](http://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/delegations/media/TSA2003Delegation.pdf).

<sup>31</sup>Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Transportation Security Administration, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/odra\\_process/media/tsa.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/media/tsa.pdf).

<sup>32</sup>Protest of Crown Consulting, Inc., ODRA Docket No. 01-ODRA-00181, at 2 (Apr. 26, 2001).

<sup>33</sup>Protest of Maximus, Inc., ODRA Docket No. 04-TSA-009, at 3 (Sept. 20, 2004).

<sup>34</sup>See Protest of Four Winds Servs., Inc., ODRA Docket No. 02-ODRA-00219, at 14–15 (June 6, 2002);

Protests of Hi-Tec Sys., Inc., ODRA Dockets No. 08-ODRA-00459 and 08-ODRA-461 (Consolidated), at 30 (Jan. 30, 2009).

<sup>35</sup>Protest of Washington Consulting Grp., Inc., ODRA Docket No. 97-ODRA-00059, at 5 n.2 (Feb. 18, 1998); Protest of Int’l Servs., Inc., ODRA Docket No. 02-ODRA-00224, at 2 n.1 (July 29, 2002) (“[T]he questions presented in this protest concerning licensing and corporate status involve an affirmative determination of bidder responsibility, a matter ordinarily not reviewed by the ODRA in the context of a bid protest.”).

<sup>36</sup>Protests of Hi-Tec Sys., Inc., ODRA Dockets No. 08-ODRA-00459 and 08-ODRA-461 (Consolidated), at 9 (Dec. 1, 2008).

<sup>37</sup>Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Cumulative Case Management Statistics as of December 31, 2016, at 1, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/media/CaseMgtStats.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/media/CaseMgtStats.pdf) [hereinafter “ODRA 2016 Statistics”].

<sup>38</sup>U.S. Government Accountability Office, GAO-17-314SP, GAO Bid Protest Annual Report to Congress for Fiscal Year 2016, at 4 (Dec. 15, 2016), <https://www.gao.gov/assets/690/681662.pdf>.

<sup>39</sup>ODRA 2016 Statistics at 1.

<sup>40</sup>U.S. Government Accountability Office, GAO-19-248SP, GAO Bid Protest Annual Report to Congress for Fiscal Year 2018, at 4 (Nov. 27, 2018), <https://www.gao.gov/assets/700/695707.pdf> [hereinafter “GAO 2018 Bid Protest Report”] (reporting, for fiscal years 2014 through 2018, sustain rates of 13%, 12%, 23%, 17%, and 15%, respectively).

<sup>41</sup>GAO 2018 Bid Protest Report at 4.

<sup>42</sup>ODRA 2016 Statistics at 1.

<sup>43</sup>ODRA 2016 Statistics at 1.

<sup>44</sup>GAO 2018 Bid Protest Report at 4.

<sup>45</sup>GAO 2018 Bid Protest Report at 4.

<sup>46</sup>The GAO Bid Protest Regulations are codified at 4 C.F.R. pt. 21.

<sup>47</sup>See 14 C.F.R. § 17.15(a).

<sup>48</sup>14 C.F.R. § 17.3(m).

<sup>49</sup>See 14 C.F.R. § 17.3(m).

<sup>50</sup>Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Procedural Timeline for Protests, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/odra\\_process/media/Procedural%20Timeline%20for%20Protests.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/media/Procedural%20Timeline%20for%20Protests.pdf).

<sup>51</sup>See 14 C.F.R. § 17.15(a)(1), (2).

<sup>52</sup>For more on computation of time at the ODRA, see 14 C.F.R. § 17.7.

<sup>53</sup>See 14 C.F.R. § 17.15(a)(3) (emphasis added); see



also 14 C.F.R. § 17.13(c) (“Other than the time limitations specified in § 17.15 for the filing of protests, the ODRA retains the discretion to modify any timeframes established herein in connection with protests.”).

“The CO must conduct debriefings with all offerors that request them.” AMS § 3.2.2.2; see also AMS § 3.2.2.3.1.4 (addressing debriefings for “Complex and Noncommercial Source Selection”).

<sup>54</sup>See 14 C.F.R. § 17.7(a) (“Filing of a protest. . . may be accomplished by overnight delivery, by hand delivery, by Fax, or, if permitted by Order of the ODRA, by electronic filing.”); Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Contact and Filing Information, [https://www.faa.gov/about/office\\_or\\_g/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/contact\\_filing\\_info/](https://www.faa.gov/about/office_or_g/headquarters_offices/agc/practice_areas/adjudication/agc70/contact_filing_info/) (“Initial filings of protests. . . may be filed by regular mail, overnight delivery, hand delivery, facsimile, or electronic filing[.]”) [hereinafter “ODRA Contact and Filing Information”]; In re: Program for Electronic Filing In Adversarial Proceedings and Alternate Dispute Resolution Matters, ODRA Standing Order 2013-3, [https://www.faa.gov/about/office\\_or\\_g/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/media/Standing%20Order%202013%20-%20Filing%20by%20Email.pdf](https://www.faa.gov/about/office_or_g/headquarters_offices/agc/practice_areas/adjudication/agc70/media/Standing%20Order%202013%20-%20Filing%20by%20Email.pdf) (“This Standing Order permits parties to electronically file initial bid protests . . . by email.”); Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), E-Filing Instructions, [https://www.faa.gov/about/office\\_or\\_g/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/media/efiling%20Instructions.pdf](https://www.faa.gov/about/office_or_g/headquarters_offices/agc/practice_areas/adjudication/agc70/media/efiling%20Instructions.pdf).

Some ODRA guidance says that filing by regular mail is also permitted, but discouraged due to the unpredictable timing. See, e.g., ODRA Contact and Filing Information.

<sup>55</sup>See 14 C.F.R. § 17.15(e).

<sup>56</sup>See 14 C.F.R. § 17.7(a); ODRA Contact and Filing Information; see also ODRA FAQs at 3 (“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.”).

<sup>57</sup>See 14 C.F.R. § 17.15(c)(6).

<sup>58</sup>See 14 C.F.R. § 17.15(f).

<sup>59</sup>14 C.F.R. § 17.15(g); see also 14 C.F.R. § 17.3(n) (“For a post-award protest, the awardee of the contract that is the subject of the protest will be allowed, upon timely request, to participate as an intervenor in the protest. In such a protest, no other interested parties will be allowed to participate as intervenors.”).

<sup>60</sup>ODRA Guide at 6–7.

<sup>61</sup>14 C.F.R. § 17.17(b); see also 14 C.F.R. § 17.13(d).

<sup>62</sup>See 14 C.F.R. § 17.17(b); see also ODRA Guide at 7. For more on protective orders at the ODRA, see 14

C.F.R. § 17.9 and ODRA Guide at 7–8.

<sup>63</sup>See 14 C.F.R. § 17.3(t).

<sup>64</sup>14 C.F.R. § 17.21(d); see also ODRA Guide at 15.

<sup>65</sup>14 C.F.R. § 17.21(e).

<sup>66</sup>14 C.F.R. § 17.21(f).

<sup>67</sup>ODRA Guide at 6; see also ODRA FAQs at 6 (“Contract award and performance will continue during pendency of a protest unless there are compelling reasons for suspension. 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.” (citation omitted)).

<sup>68</sup>14 C.F.R. § 17.13(g).

<sup>69</sup>14 C.F.R. § 17.15(d).

<sup>70</sup>14 C.F.R. § 17.15(d)(1)–(2).

<sup>71</sup>14 C.F.R. § 17.17(a).

<sup>72</sup>14 C.F.R. § 17.17(a).

<sup>73</sup>See ODRA Guide at 6.

<sup>74</sup>See, e.g., Protest of Mid Eastern Builders, Inc., FAA Order No. ODRA-05-328, at 2 (Jan. 28, 2005) (staying contract performance for 10 business days pending decision on permanent stay).

<sup>75</sup>See Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497, at 6 (Sept. 15, 2009).

<sup>76</sup>Protest of Crown Commc’n, Inc., ODRA Docket No. 98-ODRA-00098, at 5 (Oct. 9, 1998) (citation omitted); see also Protest of Data Transformation Corp., ODRA Docket No. 15-ODRA-00731, at 2–3 (July 9, 2015).

<sup>77</sup>See, e.g., Protest of ITT Info. Sys./Exelis, Inc., ODRA Docket No. 12-ODRA-00628, at 2–4 (Dec. 12, 2012).

<sup>78</sup>Protest of Data Transformation Corp., ODRA Docket No. 15-ODRA-00731, at 2 (July 9, 2015); see also Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497, at 6 (Sept. 15, 2009) (similar).

<sup>79</sup>See, e.g., Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497 (Sept. 15, 2009).

<sup>80</sup>See Protest of Data Transformation Corp., ODRA Docket No. 15-ODRA-00731, at 4 n.3 (July 9, 2015) (finding “inapposite” Court of Federal Claims decisions setting out “the proposition that the loss of a contract may constitute irreparable harm,” given FAA’s “strong presumption in favor of continuing contract performance”); Protest of Northrop Grumman Sys. Corp., ODRA Docket No. 06-ODRA-00384, at 7 (Sept. 14, 2006) (“A potential competitive disadvantage, by itself, does not demonstrate hardship.”).

<sup>81</sup>In a number of decisions, the ODRA has remarked that if it were to find irreparable harm in that instance, it would have to do so in every case, and thus the harm cannot justify a suspension. See, e.g., Protest of Data Trans-



formation Corp., ODRA Docket No. 15-ODRA-00731, at 4 (July 9, 2015) (“If the ODRA were to recommend a suspension on that basis, the FAA would be required to impose a suspension in virtually every case where an incumbent loses a competition. Such an approach would undermine the presumption against suspensions.”); Protest of ITT Info. Sys./Exelis, Inc., ODRA Docket No. 12-ODRA-00628, at 5 (Dec. 12, 2012) (“Moving forward with contract performance. . . is the presumed norm under the AMS; it is not an injury.”); Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497, at 7 (Sept. 15, 2009) (“[The protester’s] situation is not different than that faced by any incumbent who loses a competition and thus loses a source of revenue. To issue a suspension on that basis would severely undermine the AMS presumption against suspensions and require the ODRA to impose a suspension in virtually every case where an incumbent loses a subsequent competition for the work involved.”).

<sup>82</sup>Protest of Crown Commc’n, Inc., ODRA Docket No. 98-ODRA-00098, at 5 (Oct. 9, 1998); see also Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497, at 8 (Sept. 15, 2009) (finding that “employee loss . . . does not constitute irreparable injury”).

<sup>83</sup>See Protest of CGH Techs., Inc., ODRA Docket No. 16-ODRA-00767, at 3 (July 11, 2016); Protest of Data Transformation Corp., ODRA Docket No. 15-ODRA-00731, at 3–4 (July 9, 2015).

<sup>84</sup>See Protest of Data Transformation Corp., ODRA Docket No. 15-ODRA-00731, at 3–5 (July 9, 2015).

<sup>85</sup>Protest of Sec. Support Servs., LLC, ODRA Docket No. 12-ODRA-00595, at 5 (Mar. 22, 2012).

<sup>86</sup>Protest of Sec. Support Servs., LLC, ODRA Docket No. 12-ODRA-00595, at 5 (Mar. 22, 2012).

<sup>87</sup>Protest of CACI, Inc.—Federal, ODRA Docket No. 15-ODRA-00733, at 4 (July 1, 2015).

<sup>88</sup>See Protest of J.A. Jones Mgmt. Servs., ODRA Docket No. 99-ODRA-00140, at 4 (Sept. 29, 1999) (“Although [the protester] claims that in the absence of a stay, effective relief will not be available to it, the ODRA does not accept this argument. If [the protester] is successful in this Protest, a broad range of possible remedies would be available. Such remedies might include, for example: (1) an ordered termination of the Contract for the convenience of the FAA, coupled with a direction to award the Contract to [the protester] or to recompetit it; or (2) a direction that the Center not exercise an option at the end of the initial period of the Contract, coupled with a direction to award the Contract to [the protester] or to recompetit it.”).

<sup>89</sup>See Protest of SENTEL Corp., ODRA Docket No. 09-ODRA-00497, at 9 (Sept. 15, 2009) (observing “that the Program Office, by choosing to continue with the Contract work notwithstanding the Protest allegations, assumes the risk and responsibility for additional costs and delay that may result if the Protest is sustained and a

contract ultimately is awarded to [the protester]”); see also Protest of CACI, Inc.—Federal, ODRA Docket No. 15-ODRA-00733, at 3 n.1 (July 1, 2015); Protest of Sec. Support Servs., LLC, ODRA Docket No. 12-ODRA-00595, at 5 (Mar. 22, 2012); Protest of Northrop Grumman Sys. Corp., ODRA Docket No. 06-ODRA-00384, at 7–8 (Sept. 14, 2006).

<sup>90</sup>See 14 C.F.R. § 17.21(i) (“The parties may engage in limited, focused discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest.”); ODRA Guide at 14; ODRA Guide at 16 (“[T]he parties will be permitted to engage in focused limited discovery in the form of further document exchanges and possible depositions.”).

<sup>91</sup>ODRA FAQs at 5.

<sup>92</sup>ODRA Guide at 16.

<sup>93</sup>ODRA FAQs at 5.

<sup>94</sup>14 C.F.R. § 17.21(i)(3); see also 14 C.F.R. § 17.21(i)(4) (“The use of interrogatories and requests for admission is not permitted in ODRA bid protests.”).

<sup>95</sup>See 14 C.F.R. § 17.21(i)(1) (“The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery[.]”); ODRA Guide at 14.

<sup>96</sup>ODRA Guide at 14; see also 14 C.F.R. § 17.21(i)(2), (3), (5). For more on orders and subpoenas for testimony and document production, see 14 C.F.R. § 17.53.

<sup>97</sup>ODRA Guide at 16; see also 14 C.F.R. § 17.21(i)(6) (“Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing.”).

<sup>98</sup>14 C.F.R. § 17.21(i)(7).

<sup>99</sup>14 C.F.R. § 17.19(a).

<sup>100</sup>ODRA Guide at 16.

<sup>101</sup>14 C.F.R. § 17.19(a)(1)–(2).

<sup>102</sup>14 C.F.R. § 17.19(a)(3).

<sup>103</sup>14 C.F.R. § 17.21(m).

<sup>104</sup>14 C.F.R. § 17.21(m).

<sup>105</sup>ODRA Guide at 17.

<sup>106</sup>14 C.F.R. § 17.23(b) (emphasis added).

<sup>107</sup>See Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Recent ODRA Cases, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/Casefiles/RecentCases/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/Casefiles/RecentCases/).

<sup>108</sup>See Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Case Search, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/Casefiles/CaseSearch/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/Casefiles/CaseSearch/).

<sup>109</sup>See Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Cases by Name,

[https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/Casefiles/CaseSByName/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/Casefiles/CaseSByName/).

<sup>110</sup>See Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Cases by Topic, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/Casefiles/CaseSByTopic/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/Casefiles/CaseSByTopic/).

<sup>111</sup>See Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), ODRA Case Summaries, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/Casefiles/CaseSummary/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/Casefiles/CaseSummary/).

<sup>112</sup>ODRA 2016 Statistics at 1.

<sup>113</sup>Protest of Apptis, Inc., ODRA Docket No. 10-ODRA-00535, at 61 n.6 (Mar. 25, 2011).

<sup>114</sup>See, e.g., Protest of Sentel Corp., ODRA Docket No. 09-ODRA-00512, at 43 (Apr. 7, 2010); Protest of Washington Consulting Grp., ODRA Docket No. 97-ODR-00059, at \*3 (Feb. 18, 1998).

<sup>115</sup>14 C.F.R. § 17.21(j).

<sup>116</sup>14 C.F.R. § 17.21(j)(1)–(2).

<sup>117</sup>14 C.F.R. § 17.21(j)(2).

<sup>118</sup>14 C.F.R. § 17.23(a); see also 14 C.F.R. § 17.21(n) (“The DRO or Special Master has broad discretion to recommend a remedy that is consistent with § 17.23.”).

<sup>119</sup>14 C.F.R. § 17.23(b).

<sup>120</sup>14 C.F.R. § 17.23(b).

<sup>121</sup>14 C.F.R. § 17.21(l).

<sup>122</sup>14 C.F.R. § 17.21(o).

<sup>123</sup>14 C.F.R. § 17.21(o).

<sup>124</sup>14 C.F.R. § 17.35(a); see also 14 C.F.R. § 17.3(f) (defining ADR as “the primary means of voluntary dispute resolution that is employed by the ODRA”); 14 C.F.R. § 17.13(d) (“It is the Agency’s policy to use voluntary ADR to the maximum extent practicable.”); 14 C.F.R. pt. 17, App. A, § A (“The FAA dispute resolution procedures encourage the parties to protests and contract disputes to use ADR as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996, Public Law 104-320, 5 U.S.C.A. 570–579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the ODRA encourages parties to consider ADR techniques such as case evaluation, mediation, or arbitration.”); AMS § 3.9.2 (“The FAA is committed to the early and expeditious resolution of controversy using voluntary mediation, fact-finding, arbitration and other techniques collectively known as ‘alternative dispute resolution’ (ADR). The FAA has pledged to utilize ADR techniques to the maximum extent practicable when such voluntary techniques will produce a fair and expeditious

disposition of a controversy.”); ODRA FAQs at 3 (“The ODRA uses alternative dispute resolution (ADR) techniques as its primary means of resolving bid protests and contract disputes.”); ODRA FAQs at 4 (“[I]t is the policy of the FAA to utilize voluntary ADR to the maximum extent possible[.]”); ODRA Guide at 4 (“The ODRA uses Alternative Dispute Resolution (ADR) as its primary means of dispute resolution[.]”).

<sup>125</sup>ODRA 2016 Statistics at 1.

<sup>126</sup>ODRA Guide at 10.

<sup>127</sup>ODRA Guide at 10; see also 14 C.F.R. § 17.35(b) (“The parties are encouraged to make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case.”); 14 C.F.R. § 17.37(e) (“An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Adjudicative Process, upon the election of any party.”); ODRA FAQs at 4 (“The use of ADR is completely voluntary and no party is required to attempt 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[.]”).

<sup>128</sup>ODRA Guide at 10; see also 14 C.F.R. § 17.17(e) (“If the Product Team or protester indicate that ADR proceedings will not be used, or if ADR is not successful in resolving the entire protest, the ODRA Director upon being informed of the situation, will schedule an adjudication of the protest.”).

<sup>129</sup>ODRA Guide at 11; see also 14 C.F.R. § 17.17(d) (“If the Product Team and protester elect to use ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an ODRA DRO or a compensated neutral of their own choosing) pursuant to § 17.37, and shall execute and file with the ODRA a written ADR agreement.”); 14 C.F.R. § 17.37(b) (“The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the ODRA pursuant to § 17.17(c).”).

<sup>130</sup>14 C.F.R. § 17.17(d).

<sup>131</sup>ODRA Guide at 11; see also 14 C.F.R. § 17.37(a); AMS § 3.9.6; ODRA FAQs at 4.

<sup>132</sup>ODRA Guide at 11; see also 14 C.F.R. § 17.37(b), (d), (e). For more on ADR agreements, see ODRA Guide at 13–14.

<sup>133</sup>See 14 C.F.R. § 17.35(b); see also 14 C.F.R. § 17.37(e); 14 C.F.R. pt. 17, App. A, § B; ODRA FAQs at 4.

<sup>134</sup>ODRA Guide at 11.

<sup>135</sup>ODRA Guide at 11.

<sup>136</sup>ODRA Guide at 11; see also 14 C.F.R. § 17.37(f). “[T]he FAA is one of the few federal agencies authorized to offer parties true binding arbitration, i.e., with no ‘opt-

out’ provision.” ODR Guide at 11. For more on the use of binding arbitration before the ODR, see Fed. Aviation Admin. Office of Dispute Resolution for Acquisition (ODRA), Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996 (Oct. 2001), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/odra\\_process/media/Binding%20Arbitration.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/media/Binding%20Arbitration.pdf).

The ODR also offers voluntary “Pre-Dispute/Dispute Avoidance ADR,” which is intended to provide assistance “[e]ven before a formal bid protest or contract dispute is filed[.]” ODR Guide at 13.

<sup>137</sup>ODR Guide at 14.

<sup>138</sup>ODR Guide at 14.

<sup>139</sup>ODR Guide at 12; see also AMS § 3.9.9.

<sup>140</sup>14 C.F.R. § 17.39(c); see also ODR Guide at 12 (“ADR communications of a party with the neutral are not part of the administrative record in any adjudication.”); ODR FAQs at 2 (“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.”).

<sup>141</sup>ODR Guide at 12; see also 14 C.F.R. § 17.13(e) (“A person serving as a neutral in an ADR effort in a matter, shall not serve as an adjudicating DRO or Special Master for that matter.”).

<sup>142</sup>ODR Guide at 12.

<sup>143</sup>14 C.F.R. § 17.37(g).

<sup>144</sup>14 C.F.R. § 17.35(c); see also AMS § 3.9.6.

<sup>145</sup>ODR Guide at 10; see also 14 C.F.R. § 17.13(d) (“Informal ADR techniques may be utilized simultaneously with ongoing adjudication.”); 14 C.F.R. § 17.17(c) (“With the agreement of the ODR, ADR may be used concurrently with the adjudication of a protest.”); 14 C.F.R. § 17.35(c) (“Even where the Adjudicative Process is to be used, the ODR, with the parties’ consent, may employ informal ADR techniques concurrently with the adjudication.”); 14 C.F.R. § 17.37(e) (“Notwithstanding such termination [of ADR proceedings], the parties may still engage with the ODR in ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication.”); ODR Guide at 7 (“With the agreement of the ODR, ADR may be used concurrently with the

adjudication of a protest, but in most cases, ADR is attempted before the adjudication process begins.”).

<sup>146</sup>ODR Guide at 13.

<sup>147</sup>ODR Guide at 13.

<sup>148</sup>14 C.F.R. § 17.21(o); 14 C.F.R. § 17.47.

<sup>149</sup>14 C.F.R. § 17.47.

<sup>150</sup>14 C.F.R. § 17.47.

<sup>151</sup>14 C.F.R. § 17.47.

<sup>152</sup>49 U.S.C.A. § 40110(d)(4); ODR Guide at 20.

<sup>153</sup>49 U.S.C.A. § 46110(a).

<sup>154</sup>49 U.S.C.A. § 46110(a). Petitions may only be filed beyond the 60-day deadline if the court finds “reasonable grounds for not filing by the 60th day.” 49 U.S.C.A. § 46110(a). In addition, any administrative remedies available to the party under 14 C.F.R. Part 17 must be exhausted. 14 C.F.R. § 17.43(a)

<sup>155</sup>14 C.F.R. § 17.43(b).

<sup>156</sup>Fed. R. App. P. 16(a); *Leader Commc’n, Inc. v. Fed. Aviation Admin.*, 757 F. App’x 763, 768 (10th Cir. 2018).

<sup>157</sup>Fed. R. App. P. 16(b).

<sup>158</sup>See *Leader Commc’n, Inc. v. Fed. Aviation Admin.*, 757 F. App’x at 769; *Multimax, Inc. v. Fed. Aviation Admin.*, 231 F.3d 882, 887–88 (D.C. Cir. 2000).

<sup>159</sup>See, e.g., *Leader Commc’n, Inc. v. Fed. Aviation Admin.*, 757 F. App’x at 769; *Dynamic Sec. Concepts, Inc. v. Fed. Aviation Admin.*, 408 F. App’x 624, 629 (3d Cir. 2010); *Multimax, Inc.*, 231 F.3d at 886–87; *J.A. Jones Mgmt. Servs. v. Fed. Aviation Admin.*, 225 F.3d 761, 764 (D.C. Cir. 2000).

<sup>160</sup>5 U.S.C.A. § 706(2); *Dynamic Sec. Concepts*, 408 F. App’x at 629; see also 49 U.S.C.A. § 46110(c) (“Findings of fact . . . if supported by substantial evidence, are conclusive.”).

<sup>161</sup>49 U.S.C.A. § 46110(c); *Leader Commc’n, Inc.*, 757 F. App’x at 769.

<sup>162</sup>*Dynamic Sec. Concepts*, 408 F. App’x at 629, 630 & n.6.

<sup>163</sup>ODR 2016 Statistics at 2.

<sup>164</sup>ODR 2016 Statistics at 2.

<sup>165</sup>See *Leader Commc’n*, 757 F. App’x at 771.

# BRIEFING PAPERS