



Federal Aviation Administration

Office of Dispute Resolution for Acquisition (ODRA)

Alternative Dispute Resolution Agreement For Mediation Of the Protest of [Protester's Name] Pursuant to Solicitation DTFA[_____]] Issued by the Federal Aviation Administration [Headquarters/_____] Region] ODRA Docket No. [__-ODRA-__]

This Agreement is executed by and among the Federal Aviation Administration (FAA) [_____] Region (Region)] and [Protester's Name] hereinafter collectively referred to as the "parties," in connection with their joint efforts to resolve the above referenced protest by means of alternative dispute resolution (ADR).

1. Background Information

1.1. The FAA Office of Dispute Resolution for Acquisition ("ODRA") is independent of FAA organizations responsible for the acquisition of supplies or services. The Administrator of the FAA has granted the ODRA broad discretion to promulgate rules of procedure that include using alternative dispute resolution ("ADR") techniques like mediation to resolve both procurement protests and contract disputes See 14 C.F.R. Part 17.

1.2. The [Protester's Name] filed a protest with the ODRA on __[date]__, which has been assigned ODRA docket No. _____ (hereinafter "the protest").

2. Agreement to Mediate

The parties agree to engage in mediation in a good faith effort to resolve the protest. The parties understand that mediation is voluntary and may be terminated by any party or the mediator at any time. If the parties cannot settle the entire protest via mediation, all unsettled elements of the protest shall be resolved via the ODRA's Default Adjudicative Process.

3. Designation of Party Negotiators and Representatives

A party shall choose its own representatives for participation in the mediation proceedings. In addition to its legal counsel, each party shall be responsible for designating its principal negotiating representative. The principal negotiating representative shall have authority to enter into a settlement agreement on behalf of his/her party.

4. Designation and Role of the Mediator

- 4.1** The parties hereby agree that the ODRA's [Name] will serve as the mediator under this agreement. [His / Her] biographical statement is available on the ODRA website.¹ The parties understand that the mediator has no authority to decide the protest, and will not act as a counsel, advocate, investigator or representative for any parties. The parties acknowledge that this agreement does not create an attorney client relationship between the parties and the mediator, and that no such relationship may be created or inferred during the mediation process.
- 4.2.** The mediator shall have no financial or personal interest in the result of the mediation. A prospective mediator shall disclose to the parties and to the FAA Office of Dispute Resolution for Acquisition (ODRA), prior to accepting his or her appointment, any circumstance likely to create a conflict of interest or presumption of bias or to prevent a prompt meeting with the parties. Upon receipt of such information, the ODRA Director, at the request of either party, shall promptly designate a replacement mediator who will be a member of the ODRA staff or a replacement compensated neutral agreeable to all parties.
- 4.3.** If, during the course of mediation, any mediator shall become unwilling or unable to serve, the ODRA Director will appoint another mediator, unless the parties agree otherwise.

5. Mediation Style

The mediator may evaluate the strengths and weaknesses of positions, assess the value and cost of alternatives to settlement, or assess the barriers to settlement (collectively referred to as "evaluation") in order to facilitate the resolution of the protest. In providing the evaluation, the mediator will apply the principles of the FAA Acquisition Management System and applicable law. The mediator has broad discretion in suggesting possible settlement options and terms. The mediator may provide legal information to all parties jointly or separately.

6. Procedures

The mediation procedure is informal, and the mediator has broad discretion to conduct the mediation in the interests of providing an efficient, effective, and impartial mediation process for the resolution of the protest.

¹ See http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/contacts/

- 6.1 The Mediator shall conduct the mediation concurrently with ongoing adjudication of the protest by the ODR under its Default Adjudicative Process.
- 6.2. The mediator may request a party to produce and deliver to him (and to serve copies on the other party) further documentation, to the extent he determines such documentation has not already been provided and is reasonably needed for him to understand the issues presented and the respective positions of the parties.
- 6.3. The Mediator shall, upon consultation with the parties, fix the date, time and place of each mediation session. Mediation proceedings may be conducted via telephone conference, as needed.
- 6.4. The mediation shall include of an initial joint session wherein informal presentations of not more than ___ hours each shall be made by [CONTRACTOR] and the Region. That joint session shall be followed by series of sessions conducted by the Mediator with the parties, both individually -- *i.e.*, in "caucus" -- and in joint session, as the Mediator deems appropriate for purposes of facilitating settlement discussions.
- 6.5. If resolution is not achieved during the week of _____, the parties may agree to continue mediation efforts beyond that week, by telephone or otherwise.
- 6.6. No party shall be bound by anything said or done at the mediation unless a written settlement is reached and executed by all necessary parties. If a settlement is reached, the agreement shall be reduced to writing and, when signed and approved by the appropriate authorities for all parties, it shall be binding upon all parties to the agreement.

Notwithstanding the procedures in 6.1. to 6.5. above, the mediator and the parties may interact at other times and by other means in the sound discretion of the mediator.

7. Confidentiality

- 7.1. There shall be no transcription or similar record of the mediation. All notes taken by participants shall be considered dispute resolution communications subject to the terms of this agreement.
- 7.2. Except as agreed otherwise, any written or oral information exchanged during the course of and in furtherance of the mediation process hereunder are for settlement purposes only and are confidential pursuant to Rule 408 of the Federal Rules of Evidence and the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574. The parties, the mediator, the representatives, and any other participants shall not disclose to non-parties any statement made in

connection with settlement discussions or the mediation process, nor any document created or exchanged in connection therewith, unless required to do so by law or court order. Except as provided in paragraph 8.3 below or otherwise by law, order of a court, or administrative tribunal, no party or representative may use any information exchanged in this mediation for any purpose other than for the pursuit of settlement hereunder.

- 7.3. Caucus discussions provide the party and its representatives with the greatest degree of confidentiality. Consistent with the authorities cited in paragraph 7.2 above, the mediator will not disclose dispute resolution communications made during a caucus unless authorized by the party or representative in the caucus.
- 7.4. The parties further agree on behalf of themselves and their attorneys that none of them shall call upon or subpoena the mediator in any legal or administrative proceeding of any kind to testify, or to produce any notes, files or documents in any way created in connection with the mediation process. In no event will the Neutral voluntarily testify on behalf of either party or third person.
- 7.5. The disclosure of any report, document, or information in the context of settlement discussions or otherwise in furtherance of settlement during the mediation process shall not constitute a waiver of any applicable privilege. Both parties to this agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege.
- 7.6. Evidence otherwise admissible or discoverable shall not be rendered inadmissible or undiscoverable because of its use in the mediation process.
- 7.7. If a settlement is reached, any information created or exchanged in settlement discussions or during the mediation process may be used within the parties' respective organizations in order to explain and document the settlement.
- 7.8. Neither this agreement nor any settlement agreement will be confidential.
- 7.9. Mediation proceedings shall be subject to the Protective Order issued by the ODRA for the instant protest.

8. Termination of Mediation and Resort to Default Adjudication Process

- 8.1. All mediation efforts shall be terminated whenever one of the following occurs:

- 8.1.1. The execution of a settlement agreement by the parties;
- 8.1.2. The Mediator makes a written declaration to the parties and to the ODRA Director that further efforts at mediation are no longer worthwhile; or,
- 8.1.3. A party makes a written declaration to the Mediator and to the ODRA Director that the mediation proceedings are terminated.

8.2. Upon termination of the mediation efforts hereunder, the contract protest shall proceed into the ODRA's Default Adjudicative Process. In that event, the Mediator shall not take part in that process. Notwithstanding the commencement of the Default Adjudicative Process, however, the Mediator shall be authorized to continue informal ADR discussions with the parties while that process is ongoing, to seek possible resolution of the contract protest (or of individual claim items or issues) by means of settlement. The Confidentiality provisions set forth in section 7, above, shall govern any such informal discussions.

8.3. It is expressly understood that, should the matter proceed into the Default Adjudicative Process, the adjudicative record shall include, inter alia, [insert

9. Interpretation of this Agreement

The mediator shall interpret and apply the terms of this Alternative Dispute Resolution Agreement and insofar as such terms duties, responsibilities, and conduct of the mediation procedure. All other terms shall be interpreted and applied by the ODRA Director.

10. Status Reports to the ODRA Director

During the pendency of this matter before the mediator, the ODRA Director may review the progress of mediation status with the mediator, but shall not be privy to confidential communications governed by paragraph 7, above.

FEDERAL AVIATION ADMINISTRATION: [PROTESTER]
 _____ REGION

By _____
 _____, Esq., Counsel
 Date: _____

By _____
 _____, Esq., Counsel
 Date: _____

MEDIATOR APPROVED:

_____, Esq.
Dispute Resolution Officer
FAA Office of Dispute Resolution
for Acquisition
Date: _____

Anthony N. Palladino, Esq.
Director
FAA Office of Dispute Resolution
for Acquisition
Date: _____