UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

ORDER

FAA Order Number:	**ODRA-08-466**
Matter:	**Protests of Air Transport Association, Inc. Northwest Airlines, Inc. Continental Air Lines, Inc. US Airways Group, Inc. United Air Lines, Inc. Delta Air Lines, Inc. Pursuant to SIR Posting 6996**
Docket Numbers:	**08-ODRA-00452, -453, -454, -455, -456, and -457 (Consolidated)**
Date Served:	**August 28, 2008**

ORDER FOR SUSPENSION

This matter arises from consolidated bid protests ("Protests") filed at the Federal Aviation Administration's ("FAA" or "Agency") Office of Dispute Resolution for Acquisition ("ODRA") on August 14, 2008. The Protests challenge the FAA's August 7, 2008 issuance of a solicitation ("Solicitation") for the auction ("Auction") of two "slot" leases—one aircraft departure time and one aircraft landing time—at Newark Liberty International Airport in New Jersey ("Newark").

I. BACKGROUND

The Protests allege that: (1) the FAA does not have statutory authority to conduct the Auction; and (2) the Auction violates the United States Constitution and several Federal

Laws, including: Section 103 of the 2008 Consolidated Appropriations Act, Pub. L. No. 110-161; the Anti-Deficiency Act, 31 U.S.C. § 1342; the Independent Offices Appropriations Act, 31 U.S.C. § 9701, and the Federal Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* One of the Protesters, Continental Air Lines, Inc. ("Continental") further challenges the termination provisions of the standard slot lease agreement that is part of the Solicitation documents.[1] The Protests seek, among other things, a suspension of the planned Auction during the pendency of the Protests ("Suspension Requests").

In response to the Protesters' Suspension Requests, the Agency argues, among other things, that: (1) since the Protesters do not have an "interest or rights" to the slots at issue, no irreparable harm can occur; (2) any lease that would result from the planned Auction can be terminated and the money refunded to the lessee if the Protests are sustained; (3) if it is determined that the FAA lacks authority to conduct the auction, the FAA nevertheless could allocate the slot pair at issue to the carrier who won the auction, to allow the carrier to honor any airline tickets sold on the basis of those slots, thereby avoiding the potential harm to the traveling public and its reputation; and (4) the Protesters have not presented compelling reasons to overcome the presumption that solicitation activities should continue during the pendency of a Protest. *See Agency Opposition to Protesters' Suspension Request filed August 20, 2008* ("*Agency Opposition*") at 1, 5–6.

On August 22, 2008, The Protesters jointly filed their Reply to the FAA's Opposition to the Suspension Request, and asserted that the uncontested facts, the FAA's admissions, and the public record demonstrate that they have met the ODRA's four-prong suspension test by setting forth a substantial case on the merits, establishing irreparable injury, showing that the balance of the hardships favors a stay, and advancing the public's interest in government agencies' adherence to the rule of law. *See Protesters' Reply to FAA's Opposition dated August 22, 2008* ("*Protester's Reply*") at 1 – 2.

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[1] Continental's Protest also alleges that the planned Auction violates other federal appropriation provisions. *See Continental Protest* at 13-14 (*alleging violations of* 18 U.S.C. § 209; 31 U.S.C. § 1301(a) and § 3302(b)).

II. DISCUSSION

Consistent with the FAA Acquisition Management System ("AMS"), the ODRA Procedural Regulations and case law have long established that procurement activities and, where applicable, contractor performance, shall generally continue during the pendency of a protest. *See* 14 C.F.R. § 17.13(g); *see also Protest of GLOCK, Inc.*, 03-TSA-003, *Decision on Protester's Request for Stay of Contract Performance,* October 28, 2003 *(citing Protest of J.A. Jones Management Services*, 99-ODRA-00140, *Decision on Protester's Request for Stay of Contract Performance, September 29, 1999*). Accordingly, the ODRA decides whether compelling reasons support a suspension:

> on a case-by-case basis by looking at a combination of factors including: (1) whether the Protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit and provides for a flexible analysis 'under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.'

Protest of GLOCK, Inc., supra, citing Crown Communications supra (quoting from Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d. 841, 844 (D.C. Cir. 1997)).

Under the Administrator's *Delegation of Protest and Contract Dispute Resolution Authority*, dated July 29, 1998, the ODRA Director is authorized to suspend award or performance of a contract for not more than ten business days. Only the Administrator or the Administrator's delegee may issue a longer suspension on recommendation of the

ODRA.[2] *See Protest of Mid Eastern Builders,* 05-ODRA-00330, *Order For Temporary Stay,* dated January 28, 2005.

As noted above, several purely legal issues have been raised in the Protests, and issues related to them have not yet been briefed to the ODRA by the parties. The ODRA has concluded that within the meaning of the articulated suspension test, the Protesters' have alleged a "substantial case," *i.e.*, one that provides a basis for "deliberate investigation." *See Protest of All Weather, Inc.*, 04-ODRA-00294 at 4. The substantial case prong, however, is de-emphasized in the suspension analysis in favor of balancing of the remaining three elements. *Id.*

With respect to irreparable injury, the FAA states that there can be none in the absence of a suspension because "whenever the ODRA reaches a decision on the merits, that decision, if unfavorable to the FAA can be implemented." *See Agency Opposition* at 4. The Agency's position in this regard fails to recognize that permitting the bid opening to proceed as currently scheduled on September 3rd, *i.e.,* prior to the date that a Final Agency Decision on the Protests could be issued, would effectively undermine any remedy that involves a re-bidding process. Once the bids are opened, the winning bid amount will be set forth in the lease agreement which, as a matter of law, will be a publicly available document as it will be a contract between the Agency and the winning bidder.

Moreover, the imposition of a suspension of the bidding deadline would not, on this record, cause irreparable injury to the Agency. As the Agency acknowledges, "by its own terms, the lease (Art[icle] 3) does not allow for use of the slots prior to October 26, 2008, long after the [Protests are] likely to be decided." *Agency Opposition* at 12. Finally, given the small number of slots involved in this auction "two out of over 1,200 slots a day at Newark," *id.* at 13, a minor delay in the commencement of the Auction to

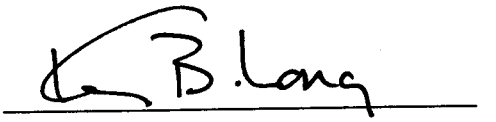
[2] The above-referenced Delegation of Authority are published on the ODRA's website at http://odra.faa.gov.

permit completion of the administrative adjudication of the Protests at the ODRA cannot be said to adversely impact the congestion issues at Newark in any significant way. The same analysis applies with respect to the relative hardships prong. A suspension would not, on this record, cause significant injury to the Agency or its mission; however, going forward with the Auction, before the substantial issues raised can be considered by the ODRA, could impact the challenged Auction.

Finally, with respect to the public interest, the Agency contends that it is best served by "a simple run through of procedures [by conducting a very limited competition in Newark] so that both the FAA and potential bidders can gain experience," before a larger slot auction. *Id.* at 15. In the ODRA's view, the more significant public interest lies in completing the adjudication of the issues raised in these Protests prior to the commencement of the Auction process. Moreover, there is nothing in the record to suggest that the public interest identified in the *Agency Opposition* would be harmed by the suspension imposed by this Order.

Based on the record developed to date in this case and the analysis of the potential for irreparable injury, the relative hardships on the parties, and the public interest, I find that the Protesters have demonstrated compelling reasons to maintain the *status quo* pending the issuance of a Final Agency Decision in these Protests. I therefore suspend the Auction, including without limitation the September 3, 2008 bid deadline, until issuance of the Agency Order at the conclusion of these Protests. I further direct that the Agency inform interested parties of the suspension. In the event the Agency already has received bids in response to the Solicitation, it is directed to take all necessary steps to secure such bids from public disclosure. Adjudication of this matter will proceed on an expedited basis.

Issued this 28th day of August, 2008
Pursuant to a Delegation of Authority
From the FAA Acting Administrator[3]



Kerry B. Long
Chief Counsel

[3] By Delegation dated September 20, 2007, the FAA Acting Administrator delegated final decisional authority to the FAA Chief Counsel for all ODRA matters.