



# **Federal Aviation Administration**

## **Office of Dispute Resolution for Acquisition (ODRA)**

### **Alternative Dispute Resolution (ADR) Agreement**

**For Arbitration of [Protest/Contract Dispute] of [Protester/Contractor] Regarding  
[Screening Information Request (SIR)][Contract] No. \_\_\_\_\_  
Issued by the Federal Aviation Administration - \_\_\_\_\_ Region.**

**ODRA Docket No. \_\_\_\_\_**

#### **1. Background**

The Federal Aviation Administration (FAA) Office of Dispute Resolution for Acquisition (ODRA) is independent of those FAA organizations which are responsible for procurement actions. The ODRA has been provided broad discretion by the Administrator of the FAA to promulgate rules of procedure and to utilize a variety of Alternative Dispute Resolution (ADR) techniques to resolve both procurement protests and contract disputes. One form of ADR, binding arbitration, may be utilized by federal agencies such as the FAA, pursuant and subject to the provisions of the ADR Act of 1996, 5 U.S.C. §§575 (a), (b) and (c).

#### **2. Agreement to Arbitrate**

The parties hereto hereby agree to resolve this matter through the use of binding arbitration. In this instance, binding arbitration is a form of ADR in which the parties present their positions and supporting evidence to a Neutral Arbitrator, and are bound by the Neutral Arbitrator's decision, subject only to a contrary order by the FAA Administrator indicating non-concurrence with the Neutral Arbitrator's decision. Unless such Administrator non-concurrence order is served on the parties within seven (7) business days of the issuance of the Neutral Arbitrator's decision, the decision of the Neutral Arbitrator shall be final and binding on the parties as an arbitral award.

### 3. Designation of Neutral Arbitrator

The parties have agreed that the ODRA Director will **[designate a Dispute Resolution Officer (DRO) on its staff or, if agreed to by the parties and the Director, a non-FAA Neutral, who may be made available under an existing interagency or neutral sharing arrangement][refer the matter to \_\_\_\_\_, a Compensated Neutral selected and mutually agreed upon by the parties, whose fees the parties will share equally and]** who will serve as the Neutral Arbitrator in this **[protest][contract dispute]**.

### 4. Procedures and Groundrules for the Conduct of the Binding Arbitration.

The procedures and groundrules which the parties have agreed upon for conducting binding arbitration in this case are set forth in Appendix 1, which is attached hereto and made part of this ADR Agreement. The Neutral Arbitrator shall have broad discretion to administer those procedures in the interests of efficiency, effectiveness, and a fair resolution of the matters in controversy.

### 5. Issuance of Decision by Arbitrator; Standard of Review

Within a maximum of **[20 business days – for protests][40 business days – for contract disputes]** of the execution of this Agreement, the Neutral Arbitrator will submit a written report to the Director of the ODRA, which shall contain the Neutral Arbitrator's decision, including findings of fact and conclusions of law. The Neutral Arbitrator may also provide to the Director of the ODRA, by separate concurrent correspondence, any recommendations for future agency action that the Arbitrator may feel is appropriate. This submittal time may be extended by the Director of the ODRA, at his/her sole discretion, upon the request of the Neutral Arbitrator.

The standard of review for bid protests to be applied by the Neutral Arbitrator shall be whether the actions or decision of the FAA had a rational basis, and was neither arbitrary, capricious, nor an abuse of discretion. For contract disputes, the Neutral Arbitrator must consider the matters at issue in the context of the contract requirements, the FAA Acquisition Management System (AMS) and applicable law. Any findings of fact issued by the Neutral Arbitrator as part of the decision must be supported by substantial evidence. The Neutral Arbitrator will have broad discretion in prescribing within his/her decision **[a remedy for a successful protest, consistent with the AMS and applicable statutes] [an award, if the claim resulting from the contract dispute is held to be valid]**.

## 6. Binding Effect

Subject only to an Administrator non-concurrence order, as described in paragraph 2 above, the decision of the Neutral Arbitrator, absent fraud, shall be binding and fully enforceable in any court of competent jurisdiction, to the extent it comports with the procedures and groundrules set forth in Appendix 1 hereto.

## 7. Counterparts

This Agreement may be executed in any number of copies, each of which shall be deemed to be a counterpart original.

FOR THE FEDERAL AVIATION ADMINISTRATION:

\_\_\_\_\_  
[Name][Title]

Date: \_\_\_\_\_

FOR [PROTESTER/CONTRACTOR NAME]:

\_\_\_\_\_  
[Name][Title]

Date: \_\_\_\_\_

NEUTRAL ARBITRATOR

\_\_\_\_\_  
[Name][Title]

Date: \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
Anthony N. Palladino, Director  
Office of Dispute Resolution for Acquisition

Date: \_\_\_\_\_

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**FEDERAL AVIATION ADMINISTRATION**  
*Office of Dispute Resolution for Acquisition*

**Appendix 1**

to

**Alternative Dispute Resolution (ADR) Agreement**

**For Arbitration of [Protest/Contract Dispute] of [Protester/Contractor] Regarding  
[Screening Information Request (SIR)][Contract] No. \_\_\_\_\_**

**Issued by the Federal Aviation Administration - \_\_\_\_\_ Region.**

## **Procedures and Groundrules for Binding Arbitration**

1. The parties agree to engage in binding arbitration, and to present their positions to the Neutral Arbitrator for decision. The parties further agree that the decision of the Neutral Arbitrator shall be binding upon them, absent fraud, subject to any non-concurrence Order of the FAA Administrator, to the extent it is arrived at pursuant to these procedures and groundrules. Such procedures and groundrules may only be amended by the parties, by written agreement.
2. The arbitration proceeding will be held at a time and place determined by the Neutral Arbitrator, with the agreement of the parties.
3. A preliminary hearing with the parties and/or their representatives and the Neutral Arbitrator shall be scheduled by the Neutral Arbitrator to specify the issues to be resolved, to stipulate to uncontested facts, to establish a schedule for hearings to resolve the dispute, and to consider any other matters that will expedite the arbitration proceedings. At the discretion of the Neutral Arbitrator, additional conferences may be conducted as needed to review the procedures and groundrules and to ascertain the status of the arbitration proceedings and to further expedite such proceedings.
4. Consistent with the expedited nature of arbitration, the Neutral Arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called. At least two business days prior to any hearing, the parties shall exchange and provide to the Neutral Arbitrator copies of all exhibits they intend to submit at the hearing. The Neutral Arbitrator is authorized to resolve any disputes concerning the exchange of documents and information.
5. The Neutral Arbitrator shall set the date, time, and place for any hearing. The ODRA shall send a notice of hearing to the parties at least ten days in advance of the hearing date, unless otherwise agreed by the parties.
6. The parties may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the Neutral Arbitrator of the name and address of the representative at least three days prior to the date set for any hearing at which that person is first to appear. When such a representative makes a written submission on behalf of a party in connection with the arbitration to the ODRA and the Neutral Arbitrator, notice is deemed to have been given. If the parties have agreed to a protective order for the matter before the ODRA, the representative shall file a request with the ODRA for admission to that protective order, if not already admitted.

7. A party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record, unless the parties agree to share such cost. If the transcript is agreed by the parties to be, or determined by the Neutral Arbitrator to be, the official record of the proceeding, a copy shall be furnished to the Neutral Arbitrator. Any such transcript shall be considered confidential and shall be subject to any ODRA protective order in the case.

8. The Neutral Arbitrator shall maintain the privacy and confidentiality of the hearings. The Neutral Arbitrator shall have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the Neutral Arbitrator to determine the propriety of the attendance of any other person.

9. For good cause shown, the Neutral Arbitrator may postpone any hearing upon the request of a party or upon the agreement of the parties, or upon the Neutral Arbitrator's own initiative.

10. The Neutral Arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by a party, shall do so.

11. A hearing shall be opened by the Neutral Arbitrator. The [protester/contractor/FAA, if the claimant] shall then present evidence to support its position on each contested issue. The FAA [or contractor], as respondent, shall then present evidence supporting its position as to each issue. Witnesses for each party shall be subject to cross-examination by the representative of the opposing party and questions or other examination by the Neutral Arbitrator. The Neutral Arbitrator has the discretion to vary this procedure and shall afford a full and equal opportunity to all parties to be heard. Exhibits, when offered by either party, may be received in evidence by the Neutral Arbitrator. The Neutral Arbitrator shall control the proceedings with a view to expediting the resolution of the [protest/contract dispute]. In order to expedite the proceedings, the Neutral Arbitrator may control the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or evidence, and direct the parties to focus the presentation of evidence on decisive issues. The Neutral Arbitrator shall entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders. There shall be no direct communication between the parties and the Neutral Arbitrator other than at the hearing, unless the parties and the Neutral Arbitrator agree otherwise. Any other oral or written communication from the parties to the Neutral Arbitrator shall be directed to the ODRA Director for transmittal to the Neutral Arbitrator.

12. The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the Neutral Arbitrator may deem necessary to an understanding and determination of the dispute. The Neutral Arbitrator may, at the

request of a party or independently, request the ODRA Director to subpoena witnesses or documents.

13. The Neutral Arbitrator shall be the sole judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. The Neutral Arbitrator may request offers of proof, and may reject evidence deemed by the Neutral Arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved in its presentation. All evidence shall be taken in the presence of the parties, except where:

- (1) any of the parties is absent, in default, or has waived the right to be present; or
- (2) the parties and the Neutral Arbitrator agree otherwise.

14. The Neutral Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the Neutral Arbitrator deems it entitled to after consideration of any objection made to its admission. If the parties agree or the Neutral Arbitrator directs that documents or other evidence be submitted to the Neutral Arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the Neutral Arbitrator, shall be filed with the ODRA for transmission to the Neutral Arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

15. When satisfied that the presentation of the parties is complete, the Neutral Arbitrator shall declare the hearing closed. If documents or a response are to be filed, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the Neutral Arbitrator for the receipt of documents, response, or briefs. The time limit within which the Neutral Arbitrator is required to make the decision is as specified in paragraph 5 of the ADR Agreement.

16. The hearing may be reopened on the Neutral Arbitrator's initiative, or by direction of the Neutral Arbitrator upon application of a party, at any time before the decision is made. If reopening the hearing would prevent the making of the decision within the time specified in paragraph 5 of the ADR Agreement, the matter may not be reopened unless the ODRA Director has permitted an extension of time therefor.

17. The parties may provide, by written agreement, for the waiver of oral hearings. If the parties agree to waive oral hearings after the appointment of the Neutral Arbitrator, the consent of the Neutral Arbitrator must be obtained.

18. A party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

19. The parties may modify any period of time by mutual agreement, subject to the requirements of the ODRA. The Neutral Arbitrator may for good cause extend any period of time established by or pursuant to these rules, except the time for making the decision. The Neutral Arbitrator shall notify the parties of any such extension.

20. Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party. The Neutral Arbitrator and the parties may also use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these rules. Where the parties and the Neutral Arbitrator agree, notices may be transmitted by electronic mail ("E-mail"), or other method of communication.

21. The Parties further understand and agree that the following shall apply to this **[protest/contract dispute]** arbitration:

A. The decision shall be in writing and shall be signed by the Neutral Arbitrator. The Neutral Arbitrator shall send the decision to the ODRA and shall be forwarded to the parties by the ODRA only in accordance with ODRA procedures.

B. The Neutral Arbitrator may specify any remedies or relief, including equitable relief, that the Neutral Arbitrator deems just and equitable, within the scope of the **[protest/contract dispute]**, and in accordance with the FAA Acquisition Management System and the provisions of 14 CFR Part 17.

C. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate. Neither the ODRA nor the Neutral Arbitrator in this proceeding is a necessary party in judicial proceedings relating to the arbitration. Neither the ODRA nor the Neutral Arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

D. Each party will bear its own costs arising from this proceeding. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the Neutral Arbitrator, representatives, and any witness and the cost of any proof produced at the direct request of the Neutral Arbitrator, shall be borne equally by the parties, unless they agree otherwise.

E. Each party agrees that all participants will refrain from statements that are unduly argumentative or contentious.

F. If, during a proceeding under this arbitration that is not recorded and where witnesses are not sworn, the parties agree that all participants will be expected to be forthright in their statements and to be fully open and honest in their dealings with each other.

22. Regardless of the existence or non-existence of an ODRA protective order, the parties and the Neutral Arbitrator shall consider and treat the subject matter of the arbitration process hereunder as confidential, and all information and documents created or exchanged during the course of or in connection with the arbitration process shall be considered and treated as part of confidential settlement communications pursuant to Rule 408 of the Federal Rules of Evidence and the Administrative Disputes Resolution Act of 1996, 5 U.S.C. §574. As such, they shall not disclose such information and documents to third parties, unless compelled to do so by law or court order. The Neutral Arbitrator is disqualified as a witness, consultant, or expert for either party in any matter relating to the **[protest/contract dispute]** covered by this agreement and shall not be subpoenaed by either party to testify on their behalf or to produce notes, documents or other records created or exchanged during or otherwise relating to the arbitration process hereunder. The Neutral Arbitrator may not voluntarily testify before any arbitral, administrative or judicial tribunal regarding the subject matter of the **[protest/contract dispute]**, nor may he or she voluntarily produce notes, documents or other records relating to the **[protest/contract dispute]** in connection with any proceeding before such a tribunal. Notwithstanding the foregoing, it is understood that evidence otherwise admissible or discoverable shall not be rendered inadmissible or undiscoverable because of its use in the arbitration process hereunder. It is further expressly understood, notwithstanding any of the foregoing, that this Alternative Dispute Resolution Agreement is not confidential and any decision issued by the Neutral Arbitrator shall not be considered or treated as confidential, except to the extent information in said decision may be redacted prior to its public availability, pursuant to an ODRA protective order.

23. **[For Compensated Neutrals only]** All fees and costs of the Neutral Arbitrator shall be shared equally by the parties.

24. To the extent there is any ODRA adjudication relating to the subject matter of the arbitration hereunder pursuant to the ODRA's default adjudicative process, the Neutral Arbitrator will not participate in any way in such an adjudication.

25. The Neutral Arbitrator shall interpret and apply the terms of this Alternative Dispute Resolution Agreement and these procedures and groundrules, insofar as they relate to the Neutral Arbitrator's powers and duties. All other terms, procedures and groundrules shall be subject to the interpretation of the ODRA Director.