

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: Contract Dispute of Susquehanna Area Regional Airport Authority
Pursuant to OTA No. HSTS04-04-A-DEP144 and
OTA No. HSTS04-05-DEP242

Docket No.: 10-TSA-047

Appearances:

For the Contractor: Neil G. Epstein, Esq. and Joshua D. Hill,
Esq. of Eckert Seamans Cherin & Mellott,
LLC; and

Daniel B. Markind, Esq. of Weir & Partners
LLP

For the TSA: Michael D. Kiffney, Esq. and
David R. Cutler, Esq.

I. INTRODUCTION

The instant Contract Dispute filed by Susquehanna Area Regional Airport Authority (“SARAA”) on November 12, 2010 (“Initial Dispute”) against the Transportation Security Administration (“TSA”) is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”).¹ It arises out of Other Transaction Agreement (“OTA”) No. HSTS04-04-A-DEP144 and OTA No. HSTS04-05-DEP242 (collectively the “OTAs”) and allegations of breach of oral contract and implied in fact contract among others. SARAA seeks \$5,503,816.39 in unpaid invoices relating

¹ It was confirmed at the initial status conference that no claim is being brought in this action against the Federal Aviation Administration (“FAA”). *Status Conference Memorandum*, dated November 24, 2010.

to improvements undertaken by SARAA at the Harrisburg International Airport (“HIA”) including installation and construction of an in-line baggage screening system, a basement facility to house the system, and related facilities, following the terrorist attacks of September 11, 2001 (the “Project”). *Initial Dispute* at 2.

In order to obtain Federal funding for the Project, SARAA filed an Application, dated September 24, 2002 for Federal Assistance (“Application”) pursuant to the FAA’s Airport Improvement Program (“AIP”). The FAA and SARAA entered into a formal Grant Agreement (“Grant”), dated September 27, 2002 pursuant to which the FAA provided grant funding totaling \$5 million for the Project. Finding of Fact (“FF”) 15. In December 2003, however, Congress limited the use of AIP funds when it enacted the Wendell H. Ford Aviation Investment and Reform Act Vision 100. Among other things, that Act prohibited the FAA from using discretionary AIP funds for reconfiguration of terminal baggage areas and installation of explosive detection systems. FF 34-36. Thereafter, the FAA ceased funding the Project under the Grant. FF 36. Subsequently, TSA and SARAA held a series of discussions with respect to reimbursing SARAA for the remaining costs of the Project in lieu of the Grant. FF 40-58.

In 2004, SARAA submitted three invoices to the TSA for reimbursement of the Project’s costs totaling \$4,077,126.00. FF 71. TSA determined that the submitted costs were allowable, FF 72, and paid SARAA under an OTA, dated July 22, 2004 (“First OTA”). FF 74. In 2005, SARAA submitted additional invoices in the amount of \$8.5 million. FF 75. TSA reviewed the invoices and raised concerns about its ability to reimburse SARAA for certain amounts claimed under the applicable Appropriations Act, *Department of Homeland Security Appropriations Act*, 2005 P.L. 108-334. FF 80-83. After a series of meetings and correspondence between SARAA and TSA, FF 84-100, TSA reimbursed SARAA through another OTA, dated May 17, 2005 (“Second OTA”) in the amount of \$3 million. FF 103.

On July 12, 2010, representatives of five airports, including SARAA on behalf of HIA, forwarded a letter to TSA Administrator John S. Pistole jointly requesting reimbursement

for \$15 million in costs incurred to install TSA equipment at the airports involved, including SARAA's claim for the HIA improvements. FF 107. In a letter dated October 14, 2010, TSA Administrator John S. Pistole responded to the Executive Director of HIA with regard to the amounts in controversy addressed in the July 12, 2010 letter. FF 108. Administrator Pistole stated that he "personally reviewed the documentation related to Harrisburg and other airport terminal projects requesting reimbursement." *Id.* With respect to HIA's claim for reimbursement, he concludes that "[a]lthough it is a difficult decision, I have concluded that reimbursement for previous work outside a formal agreement comes at the cost of advancing current or future security measures." *Id.*

In the present action before the ODRA, SARAA seeks to recover the amount of the unpaid invoices for the HIA Project, asserting: (1) breach of an oral agreement between SARAA and TSA entered into by the FAA on TSA's behalf; (2) breach of an implied-in-fact contract between SARAA and TSA; (3) "SARAA's right to recover in quantum meruit \$5,503,816.39 due for the Project;" and (4) that "TSA has been unjustly enriched by \$5,503,811.39 by not paying SARAA the balance due for the Project." Second Amended Dispute ("Second Amended Dispute") at ¶¶ 80-84. For the reasons discussed herein, the ODRA recommends that the Dispute be denied on the basis that there is no legal entitlement to the amount claimed. The ODRA further recommends that to the extent SARAA is seeking reimbursement under a grant agreement, its dispute should be dismissed as outside of the subject matter jurisdiction of the ODRA.

II. PROCEDURAL HISTORY

On November 12, 2010, SARAA filed its Initial Dispute with the ODRA. The Initial Dispute alleged breach of the First OTA and the Second OTA between SARAA and the TSA. On December 10, 2010, TSA filed a Motion for Summary Dismissal of the Initial Dispute asserting that SARAA's Initial Dispute was untimely filed, and failed to state a claim upon which relief may be granted. *TSA Motion for Summary Dismissal* ("First Motion"). In a Letter dated December 22, 2010, SARAA objected to TSA's reliance in the Motion on "unsupported 'relevant facts' not found anywhere in SARAA's Contract

Dispute.” In response, TSA filed an Amended Motion for Summary Dismissal (“Amended First Motion”), which purported to rely “only [on] the Statement of Facts set forth in SARAA’s Contract Dispute and the attachments thereto.” *Amended First Motion* at 2. The ODRA granted the Amended First Motion in part and denied it in part without prejudice, ruling that SARAA had not sufficiently pled its claim pursuant to the ODRA Procedural Rules, and that TSA had failed to satisfy its burden with respect to demonstrating lack of timeliness. *Contract Dispute of SARAA*, 10-TSA-047 (Decision on Motion for Summary Dismissal, March 23, 2011) (“March 23, 2011 Decision”). The ODRA directed SARAA to amend its Initial Dispute pursuant to the terms outlined in the Decision. *Id.*

On May 23, 2011, consistent with the March 23, 2011 Decision, SARAA filed its Amended Contract Dispute and supporting documentation (“First Amended Dispute”) with the ODRA. On June 7, 2011, the TSA filed a Motion for Summary Dismissal of SARAA’s Amended Contract Dispute (“Second Motion”) for failure to state a claim on which relief may be granted. By letter dated June 10, 2011, the ODRA deferred briefing and consideration of TSA’s Second Motion pending the completion of discovery. By letter dated November 22, 2011, Administrative Judge Marie Collins, pursuant to an alternative dispute resolution (“ADR”) effort, filed the Parties’ “joint proposal for complying with the adjudication schedule set forth” by the ODRA (“Joint Proposal”). In relevant part, the Parties agreed that: “TSA will seek to withdraw its Motion to Dismiss the Amended Complaint and instead submit a [new] Motion for Summary Judgment” and “SARAA would supplement its Amended Claim in order to identify any additional theories of recovery in support of its claim.” *Joint Proposal* at 2. By letter dated November 28, 2011, the ODRA established a revised adjudication schedule pursuant to the Joint Proposal, which included granting SARAA “leave to amend its Amended Claim.”

Pursuant to the terms of the Joint Proposal, by letter dated November 25, 2011, TSA withdrew its Second Motion. On December 8, 2011, SARAA filed its Second Amended Contract Dispute with the ODRA identifying additional theories of recovery in the instant

dispute. The Second Amended Dispute asserts: (1) breach of an oral agreement between SARAA and TSA entered into by the FAA on TSA's behalf; (2) breach of an implied-in-fact contract between SARAA and TSA; (3) "SARAA's right to recover in quantum meruit \$5,503,816.39 due for the Project;" and (4) that "TSA has been unjustly enriched by \$5,503,811.39 by not paying SARAA the balance due for the Project." *Second Amended Dispute* at ¶¶ 80-84.²

On December 15, 2011, TSA filed a Motion for Summary Dismissal of SARAA's Second Amended Dispute ("Third Motion") for lack of jurisdiction asserting that "in filing its Second Amended Dispute, SARAA has plead [sic] itself out of the ODRA's jurisdiction." *Third Motion* at 2. On January 9, 2012, TSA filed a Second Motion for Summary Dismissal of SARAA's Second Amended Dispute ("Fourth Motion") asserting, among other grounds, that SARAA has failed to state a claim for oral contract and implied-in-fact contract, and that the ODRA lacks jurisdiction over SARAA's remaining equitable claims against TSA. *Fourth Motion* at 3-4, 18, and 20.

The Parties filed Final Submissions dated July 17, 2012. On the same date, TSA and SARAA also filed a Joint Submission ("Joint Submission"). The Joint Submission includes undisputed facts of the Parties. *Joint Submission* at 18-20. Pursuant to the Joint Submission, SARAA seeks the unpaid balances from the First OTA and the Second OTA in the respective amounts of \$77,126.00 and \$157,564.60, respectively, totaling \$5,503,816.39. *Id.* at 19-20. Alternatively, SARAA seeks recovery of \$3,000,000, which is the balance due under the alleged agreement by TSA to pay \$6 million to SARAA in full payment of the alleged outstanding balance of \$8.5 million due SARAA for reimbursement of Project costs. *Id.* at 20. SARAA filed a Sur Reply to TSA Final Submission dated July 30, 2012. TSA filed its Sur Reply to the Final Submission Sur Reply on August 1, 2012.

² SARAA withdrew its claims for *quantum meruit* and unjust enrichment in its Post Hearing Brief, dated February 18, 2013.

At a conference held on October 17, 2012, the ODRA directed counsel to attempt to reach a stipulation on damages, if possible. *Pre-Hearing Conference Memorandum*, dated October 17, 2012 at 2. On December 6, 2012, the Parties filed a Joint Stipulation as to damages.

A hearing was held on December 13 and 14, 2012. Post Hearing briefs were filed on February 18, 2013 by SARAA and by TSA on February 19, 2013. Thereafter, the record closed.^{3 4}

III. FACTUAL BACKGROUND

A. The Project

1. In early 2001, SARAA planned to refurbish its terminal building by adding space to the baggage claim area, and generally upgrading its facility at an estimated cost of \$40 million. *Dispute File (“DF”)* Tab 4 at 00005-00006; *DF* Tab 9 at 00049-00053.

³ In Section III of the Parties’ Joint Submission, dated July 17, 2012, SARAA and TSA informed the ODRA that they agreed to withdraw documents admitted into the record via the Dispute File and stated that the documents “not be considered in the resolution” of the case *DF* Tabs 12, 13, 14, 16, 21, 34-40, 42-66, 102, 108, 109, and 110. These documents had been filed into the record on July 11, 2011 and neither Party filed *any* objection or motion to strike. The Parties do not state any specific grounds for excluding the evidence, and the specific grounds are not apparent from the context. *C.f.* Federal Rules of Evidence § 103(a).

To determine the facts and interests of the parties during evidentiary hearings, the administrative judge has an affirmative duty to comprehensively develop the record and review the entire case. 2 Admin. L. & Prac. § 5:25(2) (3d ed.); *see Scott v. Astrue*, 529 F.3d 818, 824 (8th Cir. 2008) (It is well-settled that an administrative judge has a responsibility to assure a complete record independent of the party's burden.). The administrative judge has express power to rule on evidentiary documentation and considerable discretion regarding the use or incorporation of evidentiary documentation into the decision. 2 Admin. L. & Prac. § 5:53(2)(b) (3d ed.); *see Serrano v. United States*, 222 Ct. Cl. 52, 612 F.2d 525, 530 (1979). Under the Administrative Procedure Act, the Hearing Officer “rules on offer of proof and receive(s) relevant evidence.” 5 U.S.C. § 556(c). The ODRA finds that the documents at issue are reliable, probative and substantial evidence, and, thus, they remain in the administrative record.

⁴ During the Hearing, SARAA objected to the form of cross-examination questioning of Alfred Testa, Jr. by TSA counsel. Hrg. Tr. §§ 190:1-7 and 192:5-17. The objections were taken under advisement and the Parties were directed to address it in their post-hearing briefs. Hrg. Tr. §§ 191:1-5 and 193:4-9. The issue was not addressed in the post-hearing briefs and the ODRA deems the objections to be waived. Nevertheless, the ODRA does not rely in these Findings and Recommendations on the testimony in question.

2. After the terrorist attacks of September 11, 2001, SARA concluded that to comply with Aviation and Transportation Security Act, 49 U.S.C. § 40101, (“ATSA”) security requirements at HIA, it needed to construct a new terminal building at an estimated cost of \$90 million. *DF* Tab 4 at 00005; *DF* Tab 9 at 00049.
3. The Project included the installation of an in-line baggage screening system to be located in the basement of the new terminal. *DF* Tab 4 00005; *DF* Tab 9 at 00049.
4. The TSA was involved in reviewing the “New Passenger Terminal Building – Security System Design – Harrisburg International Airport,” “for compliance with the policy directives set forth by ATSA requirements for 100% screening of checked baggage with then use of explosives detection system (EDS) technology, passenger security screening checkpoint, and other security-related areas of the passenger terminal.” *DF* Tab 1 at 00001; *DF* Tab 2.
5. Mr. Charles Chase was employed as a Federal Security Director by the TSA under the Department of Homeland Security from July 2002 to January 2007. Chase Hr’g Tr. 363:5-364:3. In this position, he was responsible for security at a number of airports in Pennsylvania, including Harrisburg International Airport, Penn State University Airport, and Lancaster, Hagerstown, and Altoona Airports. Chase Hr’g Tr. 363:16-364:19.
6. According to Chase, the HIA project met every requirement of TSA, was completed on time and for substantially less than had originally been estimated. Chase Hr’g Tr. 403:12-404:2.

B. Funding Through the FAA Grant Process

7. In his Affidavit, Alfred Testa, who was the Director of HIA, states that he entered into an oral contract with the FAA. He states:

In or about April 2002, I negotiated an oral agreement with the FAA, which was acting on its own behalf and on behalf of the TSA, a new federal agency which had recently been given the responsibility of implementing greatly enhanced security measures at United States airports, pursuant to which agreement SARA was to install/construct an in-line baggage screening system as well as a basement area for the system and related facilities (“the Project”) at MDT, with SARA providing the initial funding and FAA reimbursing SARA for the costs of the Project. It was estimated that the Project cost would be \$21,500,000.

DF Tab 114 at 0856; Testa Affidavit ¶ 5.

8. Alfred Testa testified that the individuals who bound the Government to the alleged oral contract were “Kate Lang and Woodie Woodward.” Hr’g Tr. 270: 9-16.
9. Alfred Testa further states that:

Based upon my lengthy experience at the highest levels in the airport industry, I knew that oral agreements with the FAA in which payments were made as funds became available to FAA were common and a usual course of business between airports and the FAA.

DF Tab 114 at 0857; Testa Affidavit ¶ 8.

10. Alfred Testa states that “[t]he principal persons at the FAA with whom I negotiated the agreement were Catherine M. Lang . . . and Winifred Woodward” *DF Tab 114 at 0857; Testa Affidavit ¶ 9.*

11. In his hearing testimony, Alfred Testa states that Catherine Lang and Winifred Woodward allegedly bound the Government to a contract with SARAA. Testa Hr’g Tr. 270:9-271:1.
12. Alfred Testa testified that the amount for security funding allegedly agreed to by Ms. Lang and Ms. Woodward on the grant application for SARAA was \$21.5 million. Testa Hr’g Tr. 170:10-171:10.
13. Alfred Testa throughout his hearing testimony refers to the FAA grant process:
 - Alfred Testa testified that he believed that the money for the project would be given to SARAA “[t]hrough the grant process. The regular grant process.” Testa Hr’g Tr. 70:21-71:2.
 - Alfred Testa testified that grants are given in single installments, such that the first \$5 million given to SARAA was the first grant and the \$4 million next given constitutes its own grant. Testa Hr’g Tr. 71:6-11.
 - Alfred Testa testified that the FAA has “never, ever reneged on a promise to an airport for payment” and that it “has always paid for that which it has promised to pay. Even multi-year, multi-grant agreements.” Testa Hr’g Tr. 78:12-16.
 - Alfred Testa testified that under multi-year, multi-grant agreements, an application must be made every year. Testa Hr’g Tr. 78:15-20.
 - Alfred Testa testified that multi-year grants are usually awarded for pay-as-you-go projects, and the the \$21.5 million

for the security project was a pay-as-you-go project. Testa Hr'g Tr. 179:1-11.

- Alfred Testa testified that the Pennsylvania State Aviation Agency gives written grants to SARAA following the same procedure as the FAA's grant system. Testa Hr'g Tr. 213:10-214:2.
14. Tab 10 of the Dispute File consists of the first grant application filed with the FAA pursuant to the alleged agreement with Ms. Lang and Ms. Woodward. *See also* Testa Hr'g Tr. 82:18-83:6.
 15. Tab 11 of the Dispute File consists of the actual grant agreement stating that SARAA had received \$5 million from the FAA as the first year's payment, which was promptly paid to SARAA within the same month as the application's filing. *See also* Testa Hr'g Tr. 83:16-84:18.
 16. Catherine M. Lang in a Declaration dated October 7, 2011 ("Lang Declaration") states that in April 2002 she served as Director of the FAA's Office of Airport Planning and Programming, which included providing "executive-level oversight and direction for . . . Airport Improvement Program (AIP) grants. . . ." *DF* Tab 70 at 00477; *Lang Declaration* ¶¶ 2-3.
 17. In her Declaration, Catherine Lang states that:

FAA awarded Harrisburg International Airport ("MDT") a grant under the Department of Defense Act of \$203,447 and approximately \$26 million in AIP funding for terminal building improvements, taxiway, and apron projects in FY 2002. The AIP grants included a discretionary grant of \$5,000,000 for security enhancements.

DF Tab 70 at 00478; *Lang Declaration* at ¶ 8.

18. Catherine Lang also declares:

While the FAA routinely has informal discussions with airport sponsors regarding the likelihood of airport projects to compete for federal funding, we do not enter into oral agreements that obligate the agency for funding. This is because funding availability is a function of actual appropriations and authorizations.

DF Tab 70 at 00479; *Lang Declaration* ¶ 16.

C. The Grant Application with the FAA

19. SARA filed an Application for Federal Assistance (“Application”) pursuant to the Airport Improvement Program, dated September 24, 2002. The Application was signed by David G. Holdsworth, Director of Administration and Finance for SARA. *DF* Tab 10 at 00054.
20. The objective stated in the Application was:

To provide design and construction of security upgrades to accommodate EDS equipment. Work includes baggage tunnels and a conditioned basement area to provide space for baggage handling equipment, EDS machines, TSA bag check personnel, storage, offices and a break room.

DF Tab 10 at 00060.

21. The Harrisburg International Airport, New Terminal Project is described in the Application as follows:

A new Terminal is being designed for the Harrisburg International Airport and will be provided with automated BHS and EDS facilities in order to achieve maximum levels of customer service and minimum levels of

manpower cost. The Terminal is planned to commence revenue operations in 2004. . . .

DF Tab 10 at 00061.

22. Appendix 1 to the Application includes the required Assurances for AIP grants. *DF* Tab 10 at 00069-00081.

23. Alfred Testa in an email, dated July 14, 2004 to Richard Gunderson states:

[W]e applied to the FAA for funding not only the terminal project, but also extensive airside work that needed to be done. FAA, through the AIP process, supported this project wholeheartedly, for they also foresaw [sic] the possibilities of using this project as a standard.

DF Tab 4 at 00005.

24. Alfred Testa in an email to Richard Gunderson, dated July 14, 2004, further states:

We received commitments from the FAA for discretionary funding of \$54 million through direct payment and the remainder through an LOI. In addition, we had designed the in-line baggage security system in conjunction with the then TSA people in Herndon, and had come up with an estimate of \$20.5 million for the system and the construction necessary for it. FAA then promised us an additional \$20.5 million over 4 years in discretionary money for 100% of the security cost. We were to get \$5 million the first year, which we did, \$4 million the second year, then two equal payments thereafter for the balance.

DF Tab 4 at 00005.

D. The Grant Agreement with the FAA

25. The FAA and SARAA, as the recipient or sponsor for HIA, entered into a Grant Agreement, dated September 27, 2002. That Grant Agreement was stamped received by SARAA on October 11, 2002, and signed by Acting FAA Manager, Harrisburg Airports, District Office John B. Carter. *DF* Tab 11 at 00093.
26. The purpose of the Grant was for “Security Enhancements (Security Upgrades to Accommodate EDS)” and the “maximum obligation of the United States payable under this Offer” was \$5 million. *DF* Tab 11 at 00093.
27. The Grant Agreement also states that the

[O]ffer is made in accordance with and for the purpose of carrying out the provisions of Title 49, United States Code, and herein called Title 49 U.S.C. Acceptance and execution of this offer shall comprise a Grant Agreement, as provided by Title 49 U.S.C., constituting the contractual obligations and rights of the United States and the sponsor.

DF Tab 11 at 00093.

28. The Grant Agreement further states under the provision “Special Conditions” that:

It is understood and agreed that this grant is being issued with a federal funding participation rate of 100% of eligible and allowable project costs, rather than the normal 90%, in accordance with the provisions of Public Law 107-71, Aviation and Transportation Security Act (ATSA). This provision will expire on September 30, 2002 and cannot be used in Fiscal Year 2003.

DF Tab 11 at 00094.

29. The Grant Agreement was signed on behalf of SARAA by Alfred Testa.
DF Tab 11 at 00095.
30. Describing her understanding of the scope of the Grant Agreement, Catherine Lang declares that:

Based on a review of the grant history for Harrisburg International Airport, FAA awarded Harrisburg International Airport (“MDT”) a grant under the Department of Defense Act of \$203,447 and approximately \$26 million in AIP funding for terminal building improvements, taxiway, and apron projects in FY 2002. The AIP grants included a discretionary grant of \$5,000,000 for security enhancements.

DF Tab 70 at 00478; *Lang Declaration* ¶ 8.

E. The Closeout of the FAA Grant

31. Catherine Lang declares that funding for the remaining amounts under the Grant was conditioned on availability of funds. She stated:

For fiscal year 2003, FAA’s Airport Capital Improvement Plan for AIP had \$4,000,000 in discretionary grants for MDT security enhancements on FAA’s potential candidate’s list for consideration once an appropriation was received.

DF Tab 70 at 00478; *Lang Declaration* ¶ 9.

32. Alfred Testa testified that the balance of \$5.5 million, like all agreements with the government, was conditioned upon the availability of funding. Testa Hr’g Tr. 157:12-19.

33. Alfred Testa testified that he further understood that the payment was conditioned upon the availability of funding because of his experience with multi-year grants, in which each grant agreement is for a portion of the money that a party has agreed to over the designated time period. Testa Hr'g Tr. 158:3-21.
34. In December 2003, Congress enacted the Vision 100 – Century of Aviation Reauthorization Act (P.L. 108-176, 117 Stat. 2565, December 12, 2003), codified at 49 U.S.C. § 47102(3)(B)(x) (“Vision 100 Act”).
35. The Vision 100 Act established procedures for airport sponsors to apply for the funding of such projects to the TSA. 49 U.S.C. § 44923(b). The term “airport sponsor” refers to public agencies and private owners of public-use airports that apply to TSA for financial assistance. 49 U.S.C. § 47102(24).
36. Catherine Lang further explained in her Declaration that the Vision 100 Act:

specifically prohibited FAA from approving grants for the use of discretionary AIP funds for replacement of baggage conveyor systems or reconfiguration of terminal baggage areas necessary to install bulk explosive detection systems. According to agency documents, FAA did not issue the \$4,000,000 discretionary grant to MDT.

DF Tab 70 at 00478; *Lang Declaration* ¶ 10.

37. Winifred Woodward in a Declaration dated October 11, 2011 (“Winifred Declaration”) states that in April 2002 she served as the FAA Associate Administrator for Airports and her “responsibilities included overseeing the over \$3 billion Airport Improvement Program.” *DF* Tab 71 at 00480; *Woodward Declaration* at ¶¶ 3-4.

38. Winifred Woodward declares that:

After TSA was created in 2001, my job responsibilities primarily consisted of management oversight of the AIP funding related to security requirements, including requirements for passenger and baggage screening.

DF Tab 71 at 00480; Woodward Declaration ¶ 5.

39. The Project was closed as indicated by a Memorandum, dated June 16, 2005 from Roxanne M. Wren, Program Specialist, Harrisburg Airports District Office to Natasha Severe, AEA-23.2 stating that “[t]he project . . . was recently closed. The Final Project Closeout Report indicated total costs eligible for federal funding to be equal to the grant amount.” *Amended Dispute*, Exhibit F-1.

F. The Takeover by TSA

40. Admiral Stone, as the new TSA Administrator, was present at a hearing before the House Aviation Subcommittee at which Alfred Testa testified. Testa Hr’g Tr. 92:8-9; 95:15-17. According to Mr. Testa, Admiral Stone told him that SARA had been “caught in the transition, you got caught in the middle. We’ll take care of it.” Testa Hr’g Tr. 95:16-96:2.

41. Alfred Testa stated that he met with Admiral Stone after the hearings before the House Aviation Subcommittee, at which time they exchanged contact information. Testa Hr’g Tr. 96:4-8.

42. According to Alfred Testa, Admiral Stone stated that at the same meeting, that “you’re unique in that you got caught in the middle of this transition where one agency had told you that they were going to pay for this. Another agency is now responsible, we will make you whole.” Testa Hr’g Tr. 96:10-14.

43. At an April 2004 meeting, according to Alfred Testa, Admiral Stone also stated that TSA would pay for the Project. Testa Hr'g Tr. 100:17-101:8.
44. According to Alfred Testa, at the April 2004 meeting, Admiral Stone and TSA agreed to make payment of the remaining amount claimed over a four-year period, which is "on the same schedule [they] had with the FAA." Testa Hr'g Tr. 107:13-108:3.
45. Alfred Testa stated that he then told Admiral Stone that he believed the project would be completed by August 2004, at which time TSA could take over the project and conduct security at the building. Testa Hr'g Tr. 110:10-18.
46. Alfred Testa stated that Admiral Stone informed him to contact his office with respect to a payment after the new federal fiscal year – fiscal year 2005 – and the new appropriations. Testa Hr'g Tr. 121:3-13.
47. In a letter dated April 26, 2004 from Alfred Testa to Admiral Stone, Mr. Testa states:

I want to take this opportunity to thank you for your time and help at our meeting of April 19th.

I do not envy you your job. I realize that there are 429 commercial airports all clamoring for money, which makes your job all the more difficult.

Of course, I believe that our situation is a little unique in that we got caught in the middle of transitioning from FAA to TSA for funding purposes. Your offer of four million dollars in direct money at the present time was extremely welcome and helpful overall to our situation.

DF Tab 3 at 00004.

48. Alfred Testa again met with Admiral Stone, albeit informally, at the welcome reception for the Triple AAA conference in Hawaii during January of 2005. Testa Hr'g Tr. 127:8-128:15.
49. When Alfred Testa asked at the reception in Hawaii what was going on with the payments, Admiral Stone allegedly said, "When I get back we'll take care of it." Testa Hr'g Tr. 129:6-10.
50. Alfred Testa stated that "never once did Admiral Stone ever go back on his word that he would pay for this system, nor indicate that they wouldn't pay for this system." Testa Hr'g Tr. 129:16-19.
51. A meeting was held in Washington in May of 2005 in response to another email sent to Admiral Stone regarding the failure to promptly pay the \$6 million as previously agreed. Testa Hr'g Tr. 145:12-146:2.
52. Alfred Testa stated that he believed it was reasonable to rely upon Admiral Stone's verbal promise, stating, "I mean I think it's a reasonable basis to which to expect a federal funded project, that they would be getting the benefit of, that they would be paying based upon his words to me. I don't think that's unreasonable to expect that." Testa Hr'g Tr. 212:16-213:3.
53. Alfred Testa admitted that there is no document in the record in which Admiral Stone promised to pay SARAA \$12.5 million. However, according to Mr. Testa, "there are plenty of documents and emails saying that [SARAA is] in the queue for funds." Testa Hr'g Tr. 214:15-20.
54. Alfred Testa testified that he did not write to Admiral Stone to formally request that he fulfill his alleged oral promise, because Mr. Testa believed

it had been settled due to a verbal agreement that the final \$6 million would be paid. Testa Hr'g Tr. 240:2-242:11.

55. In an email dated October 11, 2004 to Admiral Stone, Timothy Edwards of SARAA wrote:

Mr. Stone. [sic]

I just read that the US Senate has unanimously approved the conference report authorizing the FY 2005 spending bill for DHS. The bill is now on the President's desk awaiting signature and enactment into law.

As you may recall, Harrisburg International Airport recently opened a new 12 gate terminal building. The centerpiece of the new terminal is a state-of-the-art In-Line Baggage Handling System which was designed and constructed with a promise of federal participation at a cost of \$17.5M. Now that the HIA system is installed and fully operational it has become a model for in-line baggage system development throughout the country. In addition to interest from several other airports, the TSA's Scientific Advisory Panel was on-site Sept 16 and 17 to discuss in-line technology and to tour the HIA facility. The TSA was represented at the meeting by Mr. Chuck Burke.

When Mr. Testa and I visited your office in April, you generously approved a partial reimbursement in the amount of \$4M (the funds were received in August). FAA had previously granted \$5M for a total of \$9M.

At the same meeting you implied that we should contact your office upon approval of the next DHS spending bill to request reimbursement for the balance of the project (\$8.5M).

Now that 2005 funding will soon be approved, and our terminal is now open and operational, it is critical for us to receive the additional \$8.5M. As you stated to Mr. Testa at the "round table" in Washington, DC before Congressman Mica's House Committee, HIA was unfortunately "caught in the middle of the transition from FAA to TSA."

Mr. Testa has asked me to write you to remind you – even though you had asked him to do so during the summer, he wanted to wait until TSA received more funding for EDS.

Thanks for your help.

DF Tab 92.

56. In an email to Timothy Edwards, dated October 12, 2004, Admiral Stone wrote: “Timothy, Thanks for the email. Tom Blank is reviewing the matter and will stay in touch. Sincerely, Dave David M. Stone” *Id.*
57. In an email dated November 12, 2004, Alfred Testa wrote to Admiral Stone regarding the outstanding amount involved:

Admiral,

Just a note asking for some serious consideration for the rest of 12.5 mil. (or \$8.5 mil.) [sic] TSA is using this installation as a model; I spend more time escorting tours for airport personnel and TSA personnel from various areas around the country. We have achieved the highest throughput per machine in the country by far, some 530 bags/machine/hour – almost double what others have done. National press is coming through here in the next few weeks to get the story.

When we last met, I told you that the short fall, which we incurred because we were caught in the middle of the transition, and relied upon promises from the FAA (which were starting to be kept, but then were unable to be kept) was \$12.5 mil. We funded it by using funds that were scheduled to be used for terminal construction. You gave us \$4 mil, and at that time told me to contact you again after the summer about the rest (I guess because of new funding year) [sic] Well, the piper has now got to be paid. I am at the end of my construction funds, and am short some \$8.5 million, with contractors asking for their payments.

I am in a bind, and need the cash, pretty quickly. My deputy Tim Edwards has contacted the person he was supposed to, and I guess that this message to you is one hoping for help here. My neck is out there a mile.

Fred Testa

DF Tab 93.

58. By email dated November 12, 2004, Admiral Stone responded to Alfred Testa:

Fred, you are in the que [sic] for very limited FYO5 funds. It would probably be worth a trip for your rep to visit TSA and meet with Tom Blank and Chuck Burke to present your current situation. Tom Blank will email or call you to discuss. Sincerely,
Dave
David M. Stone

Id.

G. SARAA's Discussions with the TSA Contracting Officer

59. In an email dated March 9, 2005, Gregg Hawrylko (Special Assistant to Tom Blank, the Chief Support Services Officer, TSA) wrote to Mr. Testa, stating: "Now that the \$6M has been approved, we need to turn you over to the Contracting Officer. The CO is Lynn Cavendish" *DF* Tab 101.
60. Lynn McGraw Cavendish in his deposition stated that at the relevant time he was a warranted contracting officer with authority to obligate the Government. Deposition Transcript ("Cavendish Dep. Tr.") at 7:20-21.
61. The CO testified:

I was certainly mindful at the time that I did this that they wanted something that was going to guarantee them that

they'd eventually get all this money at the bottom line. And I was very clear to say, All [sic] the money I have currently is this \$4,000,000. That's all I've got. And I cannot make a representation to you that you'll get any more at a later time.

Cavendish Dep. Tr. 63:16-23.

62. The CO further testified: "I was very forceful and clear in saying this is all the money that I've got." Cavendish Dep. Tr. 65:8-9.

63. The CO testified:

It was the desire of certain parties to do whatever we could to help them out. They had spent this money pursuant to a bond that they had issued. And there were people at the TSA who thought it would be appropriate to help them out to the extent funds were available for that purpose.

Cavendish Dep. Tr. 66:14-20.

H. The Other Transaction Agreements

64. TSA executed the First OTA and the Second OTA with SARAA. *DF* Tabs 5 and 22.

65. Both the First OTA and the Second OTA state:

Except for the EDS, ETD Security Equipment owned by the TSA and separately provided for use at the Airport, the Authority shall own and have title to all personal property, improvements to real property, or other assets which are acquired under this agreement. It will be the responsibility of the Authority, acting through such agents as it may use, to operate, maintain, and if it becomes necessary, to replace, such property to support the efficient use of the Security Equipment.

Title to the non-security equipment such as ancillary equipment or infrastructure that was purchased or reimbursed using Federal funds, or installed by the TSA, its agents or contractors, or by the Authority or its agents or contractors will vest in the Authority upon acceptance in accordance with Article VI, below.

DF Tab 5 at 8-9 and *DF* Tab 22 at 133-134.

66. In this regard, Mr. Testa testified that “[TSA] lease[s] the room and all the stuff inside that is connected to the conveyors.” Testa Hr’g Tr. 204:16-206:3.

67. Article II – Purpose and Scope of the First OTA states:

The purpose of this Agreement is to reimburse the Susquehanna Area Regional Airport Authority for certain administrative, design, management and construction costs associated with the installation of integrated and non-integrated Explosive Detection Systems (“DS”) and Explosives Trace Detection (“ETD”), equipment as set forth in Attachment (1) hereto as MDT (the “Project”) in order to achieve compliance with the Aviation and Transportation Security Act (ATSA) Public Law 107-71, November 19, 2001.

DF Tab 5 at 00008.

68. The First OTA explicitly provides for reimbursement “not to exceed” \$4,000,000 in “actual allowable, allocable and reasonable costs of the Project. . .” *Id.* Article VII, Funding and Limitations, states:

As provided in Article III, the total cost to TSA of this Agreement shall not exceed \$4,000,000 without a separate modification to this Agreement issued by the Contracting Officer pursuant to Article XV. Funds in the amount of \$4,000,000.00 are hereby obligated and made available for payment for the performance of this Agreement.

* * * *

The TSA's liability to make payments to the Authority is limited to the amount of funds obligated and available for payment hereunder, including written modifications to this Agreement.

Id. at 00010. More specifically, Article XV – Changes and/or Modifications, states:

Changes and/or modifications to this Agreement shall be in writing and signed by a TSA Contracting Officer and the authorized representative of the Authority. The modification shall cite the subject Agreement and shall state the exact nature of the modification. ***No oral statement by any person shall be interpreted as modifying or otherwise affecting the terms of this Agreement.*** Administrative modifications may be issued unilaterally by the TSA.

DF Tab 5 at 00014 (emphasis added).

69. An untitled attachment to the First OTA stated that HIA⁵ could “seek full reimbursement.” *Id.* at 00016. A breakdown of costs is provided as “Balance of Project; not currently Funded” in the amount of \$8,500,000. *Id.*

70. The terms of the Second OTA are identical to the First OTA, except that the amount provided for is not to exceed \$3,000,000. *Compare DF* Tab 5 *with DF* Tab 22. The Second OTA also states HIA could “seek full reimbursement at a later date,” and that the balance on the Project “not currently Funded” is \$5,500,000. *DF* Tab 22 at 00143.

⁵ HIA is referred to as “MDT” in the text of the OTA. *Id.*

I. Negotiations and Payment Under the First OTA

71. In 2004, SARAA submitted three invoices to the TSA for reimbursement of Project costs totaling \$4,077,126.00.

Vendor	Invoice No.	Description of Work	Invoice Amount	DF Tab No.
Siemens Dematic	H02-100-1492 Application No. 1	Baggage Handling System	\$806,526.00	6
Siemens Dematic	H02-100-1492 Application No. 2	Baggage Handling System	\$844,200.00	7
Siemens Dematic	H02-100-1492 Application No. 3	Baggage Handling System	\$2,426,400.00	8

DF Tab 6 at 00017-00028; DF Tab 7 at 00029-00037; DF Tab 8 at 00038-00048.

72. TSA determined that the costs were allowable and agreed to reimburse SARAA \$4 million through an OTA. *DF Tab 5 at 00007-00016.*
73. In an email dated July 19, 2004 from Mr. Cavendish to Mr. Edwards, Mr. Cavendish states:

[I]nstead of your “to be funded” because no funds are currently available to me, and I can’t promise what I don’t have. The “not currently” leaves the possibility of funding in the future open. If this is agreeable, I will assemble & forward.

DF Tab 72.

74. In July 2004, TSA and SARAA executed the First OTA in the amount of \$4 million and TSA paid that amount to SARAA. *DF* Tab 5 at 00007-00016.

J. Negotiations and Payment Under the Second OTA

75. In early 2005, SARAA submitted additional invoices totaling \$8.5 million, i.e. the remaining project costs, for reimbursement. *DF* Tabs 23-33.

76. The invoices were as follows:

Vendor	Invoice No.	Description of Work	Invoice Amount	DF Tab No.
Siemens Dematic	N/A	OTA 1 Unreimbursed Remainder	\$77,126.00	N/A
Siemens Dematic	H02-100-1492 Application No.5	Baggage Handling System	\$1,578,600.00	23
Siemens Dematic	H02-100-1492 Application No. 4	Baggage Handling System	\$508,459.77	24
Vic Thompson	DBMDT0396 Application 13	New Outbound BHS w/ 100% in-Line Screening	\$69,265.96	25
Vic Thompson	DBMDT0396 Application 14	New Outbound BHS w/ 100% in-Line Screening	\$68,462.26	26
Vic Thompson	DBMDT0396 Application 16	New Outbound BHS w/ 100% in-Line Screening	\$79,529.65	27
Frey Lutz Corp.	H02-100-1550 Application No. 13	Plumbing/HVAC	\$489,587.40	28

Frey Lutz Corp.	H02-100-1540 Application No. 12	Plumbing/HVAC	\$258,105.60	29
Wickersham Construction	H02-100-0510 Application No. 6	Terminal Foundations/Structural Steel	\$1,051,524.00	30
Wickersham Construction	H02-100-0510 Application No. 7	Terminal Foundations/Structural Steel	\$1,010,826.00	31
Wickersham Construction	H02-100-0510 Application No. 9	Terminal Foundations/Structural Steel	\$837,109.00	32
Kinsley Construction	H02-120-0900 Application No. 3	New Terminal G.C. Package	\$2,475,221.40	33

77. The total value of the invoices was \$8,503,816.94. *TSA Statement of Facts* at ¶ 35.
78. The Kinsley Construction (“Kinsley”) invoice submitted to TSA by SARAA in early 2005 requested payment for certain work completed for that application pay period. *DF* Tab 33. The invoice identified the value of the work for which Kinsley was requesting payment from SARAA, as shown in Column E (title “Work Completed/This Period”) of the spreadsheets starting on *DF* page 00324. For each Item No. (identified in Column A) that included a value in Column E, Kinsley was requesting payment in that pay period. *DF* Tab 33 at 00324-334. A review of the items for which Kinsley requested payment shows that the work performed by Kinsley for which SARAA requested reimbursement from TSA in early 2005 was largely related to installation of reinforced

concrete, concrete masonry (CMU) installation, structural steel, roofing, fire proofing, curtainwall (aluminum and glass systems), and drywall work. *Id.*

79. The Wickersham Construction (“Wickersham”) invoices submitted by SARAA to TSA in early 2005 requested payment for certain work completed for that application pay period. *DF* Tabs 30, 31, 32. The invoices identified the value of the work for which Wickersham was requesting payment in Column E of each invoice’s spreadsheet, titled “Work Completed/This Period.” For each Item No. (identified in Column A) that included a value in Column E, Wickersham was requesting payment from SARAA in that pay period. *Id.* A review of the items for which Wickersham requested payment shows that the work performed by Wickersham for which SARAA requested reimbursement from TSA in early 2005 was largely related to concrete, reinforcing, structural steel, slab waterproofing, plumbing, sewer work, and basement slab construction. *DF* Tabs 30, 31, and 32.
80. TSA reviewed the invoices and raised concerns about its legal ability to reimburse SARAA for portions of them. *See DF* Tabs 12, 13, 14.
81. With respect to those concerns, TSA noted: “The funding reimbursement sought by MDT includes amounts that are beyond the scope set forth in the OTA. (Eg. [sic] ‘bricks and mortar’). The estimated amount of within-scope work is approximately at \$2.3 million.” *DF* Tab 12 at 00102.
82. The CO discussed his concerns with reimbursement of portions of the invoices, stating: “It is my understanding that only the first two items [Baggage Handling System and BHS Design] would fit into the limitations of the Appropriation Act, as it applies to the funding available for this

purpose At most, \$2.38M can be paid to the Authority, based on limitations of the Appropriation Act.” *DF* Tab 13 at 00104.

83. TSA’s Fiscal Year 2005 appropriation states that of:

\$180,000,000 for procurement of checked baggage explosive detection systems, \$45,000,000 shall be available only for installation of checked baggage explosive detection systems. The government’s share of the cost for a project under any letter of intent shall be 75 percent for any medium or large hub airport.

Department of Homeland Security Appropriations Act, 2005 P.L. 108-334.

84. In March of 2005, SARAA repeatedly requested to meet with TSA to discuss its reimbursement request. *See DF* Tab 14 at 00106 (Ross Dembling email dated March 16, 2005); *DF* Tab 15 at 00109 (Timothy Edwards email dated March 24, 2005); *DF* Tab 16 at 00111 (Ross Dembling email dated March 24, 2005); *DF* Tab 17 at 00112 (Timothy Edwards email dated March 29, 2005).

85. On March 16, 2005, Contracting Officer (“CO”) Lynn Cavendish asked TSA counsel to review the reimbursement request, noting that in his view, only \$2.38 million could be paid to SARAA based on limitations in the Appropriations Act. *DF* Tab 14.

86. Counsel for TSA identified several possible legal barriers to reimbursing amounts requested by SARAA. *DF* Tab 14 at 00106. First, it was the opinion of TSA counsel that the FY 2005 appropriations language specifically limited reimbursement of costs to BHS construction and equipment only. *Id.* Second, TSA counsel noted that only two of the submitted invoices were for installation of BHS, therefore falling within the scope of the FY 05 appropriations language. *Id.* Third, TSA counsel

noted that there was a concern as to whether FY 05 funds could be used to pay for work from earlier fiscal years. *Id.*

87. In an email dated March 22, 2005 from the CO to Timothy Edwards of SARAA, the CO indicates that he requested the assistance of TSA counsel with respect to SARAA's request for reimbursement. *DF* Tab 15 at 00109-00110. The CO raised the same questions with SARAA as he did with TSA counsel. *See DF* Tab 13; *DF* Tab 15 at 00110.
88. On March 29, 2005, the CO emailed Timothy Edwards of SARAA to instruct him that the planned meeting would have to be rescheduled because TSA counsel were "trying to make it a 'Good News' meeting if that is possible, or to have a better explanation of the fiscal limitations we face if it can not be a good news meeting." *DF* Tab 17 at 00112.
89. In an undated email (responding to one from TSA legal counsel Ross Dembling dated March 30, 2005), Elizabeth Buchanan of TSA states:

I have researched my part of the question, which was whether we can use 05 funds to increase the share of US reimbursement for the Harrisburg in-line system when we used 04 funds for the initial TSA reimbursement. I understand that FAA originally funded part of the Harrisburg system. Then TSA provided approximately \$4M last year as partial reimbursement and had budgeted for an additional \$6M in 05. The answer to that question is that if this reimbursement is essentially a grant, which it appears to be, and if we do not exceed any statutory thresholds for reimbursement, we can use 05 funds available for reimbursing airports for installing in-line systems to increase the federal share. . . .

DF Tab 102 at 0833. The Buchanon statement appears to reflect her understanding that the claims in question were pursuant to a grant.

90. On April 5, 2005, the CO emailed Edwards to advise him that “no funding has been provided to me at this time” and “the legal questions that we have discussed are, as of this date, unresolved.” *DF* Tab 18 at 00115.

91. In an email dated April 27, 2005 from Mr. Chuck Burke of TSA to TSA Counsel Ross Dembling, Burke states:

As you can imagine with MDT things are heating up considerably. The Admiral wants to bring them in next week to discuss where we are and listen to them as to why they feel they should be getting all of the \$6M they requested. I know the issues and as you and I discussed on Monday there was some FY 04 funding carried over. However, that money was applied to large airports and the discretionary funding line item. If we move any money form [sic] that line item there will be several airports that we will not be able to complete scheduled work.

DF Tab 19 at 00128.

92. On May 2, 2005, in preparation for a meeting with MDT officials for May 10, 2005, TSA officials prepared a summary of the situation surrounding SARAA’s request for reimbursement of \$8.5 million. *DF* Tab 21 at 00130. In that email, TSA officials noted the purpose described in OTA No. 1, issued in July 2004, and the limits of TSA’s reimbursement in that OTA (“[a]ll allowable, allocable, and reasonable costs of the Project . . . not to exceed a total reimbursement of \$4,000,000.00. . .”). *Id.* TSA officials went on to state that “[t]he funding reimbursement sought by MTD [in 2005] include amounts that are beyond the scope set forth in the OTA (Eg. [sic] “bricks and mortar”). The estimated amounts that are within the scope of the OTA stands at \$2.3 million.” *Id.*

93. On May 10, 2005, officials from TSA, SARAA and others – including Pennsylvania Congressional delegation staffers – met at TSA headquarters

in Arlington, Virginia to discuss SARAA’s request for reimbursement of an additional \$8.5 million. *DF* Tab 34 at 00345-47. The meeting was chaired by TSA’s Chief Technology Officer Clifford Wilke. *Id.* Also present at the meeting were HIA Director Alfred Testa, HIA Deputy Director of Aviation Timothy Edwards, TSA CO Lynn Cavendish, TSA counsel Ross Dembling, and Christian Jordan from the TSA Program Office. *Id.*

- 94. At the meeting, TSA counsel identified legal barriers to reimbursing the amounts at issue in total. *See DF* Tabs 34, 47, and 49.
- 95. TSA counsel explained to SARAA and MDT officials that the FY 2005 appropriations language limited TSA to reimbursing only for the costs directly associated with building the BHS, not for costs “outside the scope of approved items, which were incurred during calendar years 2003 and 2004.” *DF* Tab 40 at 00362.
- 96. At the meeting, TSA identified those invoices it could reimburse and those it could not. TSA agreed to reimburse SARAA for the work done by Siemens Dematic (\$2,164,186.00 for BHS construction), Vic Thompson (\$217,257.22 for BHS design), and Frey Lutz (\$747,693.00 for plumbing and heating and cooling work to protect TSA’s EDS equipment). *DF* Tab 40.
- 97. The invoices TSA concluded were allowable are as follows:

Vendor	Invoice No.	Description of Work	Invoice Amount	DF Tab No.
Siemens	N/A	OTA 1 Unreimbursed	\$77,126.00	N/A

Dematic		Remainder		
Siemens Dematic	H02-100-1492 Application No. 5	Baggage Handling System	\$1,578,600.00	23
Siemens Dematic	H02-100-1492 Application No. 4	Baggage Handling System	\$508,459.77	24
Vic Thompson	DBMDT0396 Application 13	New Outbound BHS w/ 100% in-Line Screening	\$69,265.96	25
Vic Thompson	DBMDT0396 Application 14	New Outbound BHS w/ 100% in-Line Screening	\$68,462.26	26
Vic Thompson	DBMDT0396 Application 16	New Outbound BHS w/ 100% in-Line Screening	\$79,529.65	27
Frey Lutz Corp.	H02-100-1550 Application No. 13	Plumbing/HVAC	\$489,587.40	28
Frey Lutz Corp.	H02-100-1540 Application No. 12	Plumbing/HVAC	\$258,105.60	29

98. TSA informed SARAA that it could not reimburse the invoices of Kinsley Construction (\$2,475,221.40 for “Terminal general Construction” not directly related to the BHS), and Wickersham Construction (\$2,899,459.00 for general construction – specifically Terminal Foundation and Structural Steel” not directly related to the BHS). *See DF Tab 40; DF Tab 47 at 00376-77; DF Tab 55 at 00403; DF Tab 56 at 00407-09.*

99. More specifically, TSA indicated that it could not reimburse the following invoices:

Vendor	Invoice No.	Description of Work	Invoice Amount	DF Tab No.
Wickersham Construction	H02-100-0510 Application No. 6	Terminal Foundations/Structural Steel	\$1,051,524.00	30
Wickersham Construction	H02-100-0510 Application No. 7	Terminal Foundations/Structural Steel	\$1,010,826.00	31
Wickersham Construction	H02-100-0510 Application No. 9	Terminal Foundations/Structural Steel	\$837,109.00	32
Kinsley Construction	H02-120-0900 Application No. 3	New Terminal G.C. Package	\$2,475,221.40	33

See DF Tab 40; DF Tab 47 at 00376-77; DF Tab 55 at 00403; DF Tab 56 at 00407-09.

100. TSA agreed to reimburse SARAA for a total of \$3 million. *See DF Tab 34 at 00345-46; DF Tab 40.*
101. In an email dated June 16, 2005 from the Contracting Officer, Lyn Cavendish, to Ross Dembling, the CO states:

With regard to the \$129 excess of invoices over funding, it was our intent that Harrisburg would eat it. Their total invoices are in excess of the \$6M that they think they have been promised.

DF Tab 37 at 00352.

102. The CO sent a letter to Testa, dated June 20, 2005, summarizing the events of the May 10, 2005 meeting, and attached an Amendment to OTA No. 2.⁶ *See DF* Tab 40. The letter states:

During that meeting, we advised you of those items related to the new inline baggage system for which we could and could not provide funding. As a result of our discussion, we agreed to reimburse \$3 Million to cover the following:

- Frey Lutz (\$747,693)
- Siemens Dematic (\$2,164,186)
- Vic Thompson (\$217,258)

DF Tab 40 at 00362.

103. TSA and SARAA executed the Second OTA on May 17 and May 18, 2005. *DF* Tab 22.

K. Additional Discussions and Correspondence

104. On June 20, 2005, the Contracting Officer sent a letter and attached modification of the Second OTA to Alfred Testa. The letter states the reason for the unilateral modification as:

After the meeting, a smaller group of representatives from both Harrisburg and TSA met to write into an amended

⁶ TSA notes in its Statement of Facts that it does not have a signed copy of the June 20, 2005 letter or OTA No. 2 modification. *TSA Statement of Facts* ¶65. However, the letter and modification were fully executed by the CO and sent to SARAA for its files. *See infra* FF 126-129.

Agreement the approved invoices. At this drafting session, your representative identified those invoices that the parties had stipulated as not available for reimbursement. As a consequence, the written Agreement did not accurately incorporate the intent or agreement of both the parties. An amendment to the Agreement is attached.

DF Tab 40 at 00362.

105. The CO stated that “[w]hat the parties agreed to at our meeting remains unchanged. . .” *Id.*
106. In an email dated November 9, 2005 from Ross Dembling to Chuck Burke at TSA, Dembling states:

Attached is proposed remedial language for Harrisburg that is going to Senate Approps. The plan, as you may recall, is to have this in the DOT/FAA appropriation or conference report that is now moving forward. I spoke to Tim Edwards at SARAA yesterday to get the grant identifying information and explained in very broad terms that we were drafting some proposed language for a legislative fix. I didn’t want him to raise his level of expectation, and I didn’t want him to think we have backed off from our position. The one thing I did emphasize was that the legislative fix would provide the legal authority we currently do not have.

DF Tab 58 at 00419.

107. On July 12, 2010, representatives of five airports, including HIA, sent a letter to TSA Administrator John S. Pistole requesting reimbursement for \$15 million in costs incurred to install TSA equipment. *DF* Tab 68.
108. In a letter dated October 14, 2010⁷, TSA Administrator John S. Pistole responded to the Executive Director of HIA with regard to the amounts in

⁷ The letter also has a date stamp stating that it was received on October 18, 2010.

controversy addressed in the July 12, 2010 letter. Administrator Pistole states that he “personally reviewed the documentation related to Harrisburg and other airport terminal projects requesting reimbursement.” With respect to HIA’s claim for reimbursement, he concludes that “[a]lthough it is a difficult decision, I have concluded that reimbursement for previous work outside a formal agreement comes at the cost of advancing current or future security measures.” *DF* Tab 69.

IV. MOTIONS FOR SUMMARY JUDGMENT

The ODRA’s Procedural Rules at 14 C.F.R. § 17.29 (2011)⁸ provide for summary decisions in contract disputes.⁹ TSA filed four Motions for Summary Dismissal. The First Amended Motion was decided by the ODRA, the Second Motion was withdrawn by the TSA on November 25, 2011, and the two remaining assert as follows:

(1) Lack of jurisdiction asserting that “in filing its Second Amended Dispute, SARAA has plead [sic] itself out of the ODRA’s jurisdiction.” TSA Motion for Summary Dismissal of SARAA’s Second Amended Dispute, dated December 15, 2011 (“*Third Motion*”) at 2.

(2) Among other grounds, that SARAA has failed to state a claim for oral contract and implied-in-fact contract, and that the ODRA lacks jurisdiction over SARAA’s remaining equitable claims against TSA. *TSA Second Motion for Summary Dismissal of SARAA’s Second Amended Dispute*, dated January 9, 2012 (“*Fourth*

⁸ This Contract Dispute was filed prior to October 7, 2011 (FF 34), and therefore is subject to the ODRA’s prior Procedural Regulation found in 14 C.F.R. pt. 17 (2011). Under that regulation, the ODRA “applies the principles of the AMS and other law or authority applicable to the findings of fact[.]” 14 C.F.R. § 17.39 (2011). The ODRA is mindful that within the TSA’s former statutory authority to use the FAA’s AMS, Congress granted the TSA Administrator the authority to “make such modifications to the acquisition management system” he or she “considers appropriate.” *Contract Dispute of Morpho Detection, Inc.*, 08-TSA-039. Neither party has asserted or shown that the TSA used that authority to issue material modifications to the FAA’s AMS. Accordingly, unless otherwise stated, the ODRA relies in these Findings and Recommendations upon the FAA AMS in effect during the relevant timeframes.

⁹ Summary decisions before the ODRA are governed by 14 C.F.R. § 17.29 (2011) rather than the Federal Rules of Civil Procedure. The ODRA may consider the Federal Rules of Civil Procedure and related decisions as persuasive authority and useful guidance. *Protest of Systems Atlanta*, 10-ODRA-00530.

Motion”) at 3-4, 18, and 20.

The ODRA stated that all fully briefed Motions would be held in abeyance. *Status Conference Memorandum* dated May 2, 2012 at 2. Based on the ODRA’s Findings and Recommendations herein, the ODRA need not address the Motions.

V. BURDEN AND STANDARD OF PROOF

The burden lies with SARAA to prove by a preponderance of the evidence, demonstrating liability, causation, and injury, that the TSA, through its actions and inactions, is liable for the stipulated unpaid amounts allegedly owed SARAA for the terminal construction at HIA. *Contract Dispute of Carmon Construction, Inc./GAVTEC, Inc.*, 07-ODRA-00425.

VI. DISCUSSION

The ODRA has jurisdiction over contract disputes involving TSA and its contractors arising out of contracts issued under the TSA Acquisition Management System (“TSA AMS”). *Memorandum of Agreement between the TSA and the FAA*, dated April 23, 2004.¹⁰ The ODRA, however, does not have jurisdiction over grants, either made by the FAA or the TSA. 14 C.F.R. § 17.11(c). As discussed below, the ODRA finds that to the extent SARAA asserts a grant-based claim, it is not subject to the ODRA’s jurisdiction. The ODRA further finds that the TSA fulfilled all of its obligations under the First OTA and the Second OTA and that no valid express or implied contract exists that obligates TSA to reimburse SARAA for the amounts claimed in this action. Therefore, the ODRA

¹⁰ From its inception in November, 2001 until June 22, 2008, the TSA was authorized to use the FAA AMS as its acquisition system and to tailor it according to its needs. Aviation Transportation and Security Act (“ATSA”), Pub. L. No. 107-71 § 101(a), 115 Stat. 597, 601 (2001). The ODRA had and continues to have jurisdiction over TSA AMS bid protests and contract disputes arising from TSA’s use of the AMS. See *Memorandum of Agreement between the TSA and the FAA* (“MOA”), dated April 23, 2004. Under the MOA, the TSA Administrator issues final decisions based on the ODRA’s Findings and Recommendations. *TSA Delegation of Authority*, dated December 23, 2003 at ¶ k.

finds that SARAA's not entitled to any recovery under the contractual grounds of recovery.

The alleged grounds of recovery are tied to the creation of the TSA as an agency separate and apart from the FAA. Specifically, the events leading to the present matter occurred during a time of transition when the Congress created the TSA from administrative elements formerly housed in the Federal Aviation Administration. Driven by the terrorist attacks of September 11, 2001, the emergence of the TSA from the FAA required the Congress to authorize and appropriate new funds for the TSA and to establish the statutory mechanisms to deal with security improvements to airports like HIA. A preliminary review of these statutory changes is appropriate and necessary to give context to the specific issues presented in this matter.

A. FAA's Statutory Authority

(i) Acquisitions and Contracts

The ODRA has exclusive authority to conduct adjudications of bid protests and contract disputes for acquisitions conducted under the FAA Acquisition Management System ("AMS"). 49 U.S.C. §§ 40110(d)(2) and (4). The ODRA's jurisdiction is derived from 49 U.S.C. § 40110(d)(4), which provides that "[a] bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition."

(ii) Grants

In addition to and separate from the FAA's unique acquisition authority under the AMS, the Airport and Airway Improvement Act of 1982 provides the FAA with authority to allocate and disburse grant funds from the Airport and Airway Trust Fund to finance the operation and improvement of airports. 49 U.S.C. §§ 47101-131. Grant funds are

provided to an airport owner or proprietor after an application for a grant is submitted and approved by the FAA Airport Improvement Program (“AIP”). 49 U.S.C. § 47107(a)(1). Courts have held that grant awards are not contracts, but “part of a procedure mandated by Congress to assure federal grants are disbursed in accordance with Congress’ will.” *City and County of San Francisco v. Federal Aviation Administration*, 942 F.2d 1391 (9th Cir. 1991). Courts look to the statutory provisions, regulations, and other agency guidelines at the time the grant was made when interpreting the terms of a grant. *Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 670 (1985). In the case of FAA grants, 14 CFR Part 16 contains the rules for filing complaints and adjudicating compliance matters involving Federally-assisted airports. The section below discusses the TSA’s grant and contractual authority, which has a long statutory history arising out of the events of September 11th.

B. TSA’s Statutory Authority

After the September 11, 2001 attacks, Congress enacted the 2001 Aviation and Transportation Security Act (“ATSA”) to protect and enhance airline security. 49 U.S.C. § 44901. Recognizing the need for a “fundamental change in the way [the nation] approaches the task of ensuring the safety and security of the civil air transportation system,” the ATSA created the Transportation Security Administration (“TSA”) and directed the agency to ensure airports screened all material carried onto passenger aircraft for explosives. 49 U.S.C. § 44901(a), (d); H.R. Rep. No. 107-296, at 53 (2001) (Conf. Rep.) (RL Ex. 1) (A___). ATSA required TSA to implement explosive detection systems (“EDS”)¹¹ to screen all checked passenger baggage.¹² 49 U.S.C. § 44901. ATSA,

¹¹ EDS technology uses “computer-aided tomography X-rays adapted from the medical field to automatically recognize the characteristic signatures of threat explosives.” U.S. General Accounting Office, Aviation Security: Better Planning Needed to Optimize Deployment of Checked Baggage Screening Systems, GAO-05-896T, at “Highlights” page & 5 (2005) (RL Ex. 6) (A___).

¹² The Intelligence Reform and Terrorism Prevention Act of 2004 sought to expedite TSA’s installation of in-line baggage screening equipment, including EDS:

IN-LINE BAGGAGE SCREENING EQUIPMENT.—The Assistant Secretary of Homeland Security (Transportation Security Administration) shall take such action as may be necessary to expedite the installation and use of in-line baggage screening equipment at airports at which screening is required by section 44901 of title 49, United States Code.

however, did not address the problem of funding for security systems, or grant TSA authority to issue grants for such projects. *See generally* 49 U.S.C. § 44901.

The newly created TSA ultimately became part of the Department of Homeland Security (“DHS”), but required some special treatment given the work-in-place that had been started through the FAA grants process. First, TSA retained the acquisition authority vested in the FAA. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2185 (2002). This means that it used AMS contracting principles and the FAA’s “other transaction authority” as opposed to the Federal Acquisition Regulations (“FAR”).¹³ Second, TSA obtained the authority and obligation to ensure baggage screening occurred. ATSA, § 106(a), Pub. L. 107-71, 115 Stat. 597, 608 (2001) (amending 49 U.S.C. § 44903(h)(4)(A)). Third, Congress gave TSA the authority to

SCHEDULE.—Not later than 180 days after the date of enactment of this Act, the Assistant Secretary shall submit to the appropriate congressional committees a schedule to expedite the installation and use of in-line baggage screening equipment at such airports, with an estimate of the impact that such equipment, facility modification, and baggage conveyor placement will have on staffing needs and levels related to aviation security.

2004 Act § 4019(a)-(c), 118 Stat. 3721-22, codified as amended at 49 U.S.C. § 44901 note. The 2004 Act further required the TSA to develop a formula to share the costs of in-line baggage screening projects between the government and private parties, stating the agency must develop:

- (1) a proposed formula for cost-sharing among the Federal Government, State and local governments, and the private sector for projects to install in-line baggage screening equipment that reflects the benefits that each of such entities derive from such projects, including national security benefits and labor and other cost savings;
- (2) recommendations, including recommended legislation, for an equitable, feasible, and expeditious system for defraying the costs of the in-line baggage screening equipment authorized by this title; and
- (3) the results of a review of innovative financing approaches and possible cost savings associated with the installation of in-line baggage screening equipment at airports.

2004 Act § 4019(d), 118 Stat. 3721-22, codified as amended at 49 U.S.C. § 44901 note.

¹³ According to the Congressional Research Service,

The source of TSA’s OT authority is Section 101(a) of P.L. 107-71, Aviation and Transportation Security Act, which states that the head of TSA “shall have the same authority as is provided to the Administrator of the Federal Aviation Administration under subsection (l) and (m) of section 106 [of Title 49 of the *U.S. Code*].” 49 U.S.C. §106(l)(6) authorizes the FAA Administrator “to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administration and the Administration.”

“Other Transaction (OT) Authority,” L.E. Halchin, Congressional Research Service, July 15, 2011, at 14.

issue grants to airports. Vision 100 – Century of Aviation Reauthorization Act (“Vision 100”), Pub. L. No. 108-176, 117 Stat. 2490, 2566 (2003) (amending 49 U.S.C. § 44923). Fourth, Congress regulated the implementation by statute enacted in 2007.

In 2003, the Vision 100 shifted the authority to make airport security grants from the FAA to TSA. 49 U.S.C. § 44923. The statute stated that the TSA “may make grants to airport sponsors” for projects that “improve security at an airport or improve the efficiency of the airport without lessening security.” *Id.*¹⁴ Airports had to apply for TSA grants, and, if approved, received a “letter of intent” which committed TSA to use future budgetary authority to assist in funding the project. 49 U.S.C. § 44923(b)-(d).

In 2007, Congress amended Vision 100 with the Implementing Recommendations of the 9/11 Commission Act of 2007 (“2007 Act”).¹⁵ Pub. L. No. 110–53, 121 Stat. 266, 480; 49 U.S.C. § 44923(a) (amending 49 U.S.C. § 44923(a)). The 2007 Act addressed the problem of airports and airport sponsors, like SARAA, that received grants from the FAA but did not receive payments because of the enactment of the Vision 100 Act. The Act

¹⁴ The TSA’s grant authority applied to:

- (1) projects to replace baggage conveyer systems related to aviation security;
- (2) projects to reconfigure terminal baggage areas as needed to install explosive detection systems;
- (3) projects to enable the Under Secretary to deploy explosive detection systems behind the ticket counter, in the baggage sorting area, or in line with the baggage handling system; and
- (4) other airport security capital improvement projects.

49 U.S.C. § 44923(a).

¹⁵ The amendments changed the words of Vision 100’s “may make” to “shall make” under TSA’s grant authority. The Act provides:

GRANT AUTHORITY.—Subject to the requirements of this section, the Under Secretary for Border and Transportation Security of the Department of Homeland Security *shall make* grants to airport sponsors—

- (1) for projects to replace baggage conveyer systems related to aviation security;
- (2) for projects to reconfigure terminal baggage areas as needed to install explosive detection systems;
- (3) for projects to enable the Under Secretary to deploy explosive detection systems behind the ticket counter, in the baggage sorting area, or in line with the baggage handling system; and
- (4) for other airport security capital improvement projects.

49 U.S.C. § 44923(a) (emphasis added).

requires the TSA Administrator to “establish a prioritization schedule for airport security improvement projects . . . based on risk and other relevant factors, to be funded under that section.” 49 U.S.C. § 44923 note. The 2007 Act further mandated that the TSA include in its prioritization schedule certain airports “that have incurred eligible costs associated with development of partial or completed in-line baggage systems before the date of enactment of this Act in reasonable anticipation of receiving a grant . . . in reimbursement of those costs but that have not received such a grant.” 2007 Act § 1604(b)(2), 49 U.S.C. § 44923 note.¹⁶

C. The Transactions with SARAAs Originated as FAA Airport Improvement Grants.

The context of the instant contract dispute is discussed herein. After the September 11th attacks, SARAAs commenced construction of a new terminal building at HIA, which included the installation of an in-line baggage screening system in the basement of the new building. FF 1-3. To obtain Federal funds, SARAAs filed an Application for Federal Assistance (“Application”) pursuant to the FAA’s Airport Improvement Program, dated September 24, 2002. FF 19. Appendix 1 to the Application includes the required Assurances for Airport Improvement Program (“AIP”) grants. FF 22.

The administrative record also includes a signed Grant Agreement between the FAA and SARAAs dated September 27, 2002. FF 25. The Grant Agreement states that the

¹⁶ Prior to creation of the TSA, the AMS policy and AMS contractual provisions vested the ODRA with jurisdiction to hear protests and contract disputes. In 2007, the Vision 100 Act reinforced the ODRA’s jurisdiction by stating:

(4) Adjudication of certain *bid protests and contract disputes*.— A *bid protest or contract dispute* that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition, acting pursuant to sections 46102, 46104, 46105, 46106 and 46107 and shall be subject to judicial review under section 46110 and to section 504 of title 5.

49 USC 40110(d)(4) (emphasis added). This language affirmatively conveys jurisdiction over protests or contract disputes. It does not reference grants. Indeed, grant review is conducted under part 16, and the AMS draws a distinction between OTAs and contracts. See AMS 3.9.8(c). In similar fashion, the TSA uses the ODRA for protests and contract disputes, as described in a delegation letter issued in 2003. The delegation from TSA does not extend to grant disputes.

[O]ffer is made in accordance with and for the purpose of carrying out the provisions of Title 49, United States Code, and herein called Title 49 U.S.C. Acceptance and execution of this offer shall comprise a Grant Agreement, as provided by Title 49 U.S.C., constituting the contractual obligations and rights of the United States and the sponsor.

FF 27. Alfred Testa signed the Grant Agreement on behalf of SARAA on September 27, 2002. FF 29. It is undisputed that the transaction in question began as a grant from the FAA to SARAA.

In her declaration, Catherine Lang, the Director of the FAA's Office of Airport Planning and Programming described FAA's grant history with SARAA as follows:

Based on a review of the grant history for Harrisburg International Airport, FAA awarded Harrisburg International Airport ("MDT") a grant under the Department of Defense Act of \$203,447 and approximately \$26 million in AIP funding for terminal building improvements, taxiway, and apron projects in FY 2002. The AIP grants included a discretionary grant of \$5,000,000 for security enhancements.

FF 30. The FAA paid SARAA the \$5 million under the Grant Agreement. FF 15. Lang further stated that "[f]or fiscal year 2003, FAA's Airport Capital Improvement Plan for AIP had \$4,000,000 in discretionary grants for MDT security enhancements on FAA's potential candidate's list for consideration once an appropriation was received." FF 31.

Alfred Testa's hearing testimony confirms that the underlying agreement between SARAA and the FAA was a grant. FF 13. Alfred Testa testified that the money for the project would be given to SARAA "[t]hrough the *grant* process. The regular *grant* process." FF 13 (emphasis added). Testa further testified that the FAA has "never, ever reneged on a promise to an airport for payment" and that it "has always paid for that which it has promised to pay. Even multi-year, multi-*grant agreements*." FF 13 (emphasis added). The ODRA finds that the underlying transaction at issue in this case began as an FAA AIP grant.

In December 2003, however, Congress enacted the Vision 100 Act. 49 U.S.C. § 44923. As previously discussed, this Act explicitly prohibited FAA from approving further grants that use discretionary AIP funds for replacement of baggage conveyor systems or reconfiguration of terminal baggage areas necessary to install bulk explosive detection systems. FF 34-36. As a result, the FAA did not issue the additional \$4,000,000 discretionary grant to SARAA. FF 36. The FAA closed the HIA Project grant, as indicated by a Memorandum, dated June 16, 2005 from Roxanne M. Wren, Program Specialist, Harrisburg Airports District Office. FF 39. The Memorandum states that “[t]he project . . . was [] closed.” FF 39. The Final Project Closeout Report indicated total costs eligible for federal funding to be equal to the grant amount.” FF 39.

D. The TSA used OTAs to Allocate and Obligate further TSA funds but not to the Extent Claimed by SARAA

SARAA asserts that Admiral David Stone, the then-TSA Administrator, promised to pay it \$12.5 million for the remaining costs of the Project. FF 53. The record reflects that TSA paid SARAA \$4 million through the First OTA. FF 68. The OTA included limitations of funds language and a statement that SARAA could “seek full reimbursement” at a later time. FF 68-69. The TSA then paid SARAA another \$3 million through the Second OTA 2, which contained identical language limiting funding and provided that SARAA could “seek full reimbursement at a later date.” The Second OTA stated that the remaining unfunded balance on the Project was \$5,500,000. FF 70. The amount in controversy in this case is the remaining \$5.5 million for the construction of the new terminal building.

Admiral David Stone, the Administrator of TSA at the time, met Alfred Testa at a hearing before the House Aviation Subcommittee in which the two exchanged contact information. FF 40-41. Mr. Testa testified that Admiral Stone said that “you’re unique in that you got caught in the middle of this transition where one agency had told you that they were going to pay for this. Another agency is now responsible, we will make you whole.” FF 42. The statement by Testa constitutes hearsay evidence, which is permitted

in an administrative adjudication.¹⁷ *Protest of Antenna Products Corporation*, 11-ODRA-00580. However, as further discussed below, the hearsay statements that Alfred Testa attributes to Admiral Stone are not consistent with the record. FF 56, 58. Subsequent to Mr. Testa's introduction to Admiral Stone, SARAA and TSA held a series of meetings and correspondence discussing reimbursements to SARAA for some of the funds remaining on the Project. FF 43-52. In 2004, SARAA submitted three invoices to the TSA for reimbursement of the Project's costs totaling \$4,077,126.00. FF 71. TSA determined that the \$4 million in costs were allowable, FF 72, and paid SARAA under the First OTA. FF 74.

In 2005, SARAA submitted invoices in the amount of \$8.5 million. FF 75-79. TSA reviewed the invoices and raised concerns about its ability to reimburse SARAA for certain costs under the applicable Appropriations Act, *Department of Homeland Security Appropriations Act*, 2005 P.L. 108-334. FF 80-83. The Contracting Officer believed that "[a]t most, \$2.38M can be paid to the Authority, based on limitations of the Appropriation Act." FF 85. The record shows that counsel for TSA identified several possible legal barriers to reimbursing the full amount requested by SARAA: (1) FY 2005 appropriations language specifically limited reimbursement of costs to [Baggage Handling Systems ("BHS")] construction and equipment only; (2) only two of the invoices submitted by SARAA were for installation of BHS; and (3) whether FY 05 funds could be used to pay for work from earlier fiscal years. FF 86.¹⁸

¹⁷ While not binding, the ODR looks to the Federal Rules of Evidence for guidance in determining the admissibility of evidence into the administrative record. *Protest of Systems Atlanta*, 10-ODRA-00462. As with the Boards of Contract Appeals and adjudicatory tribunals operating under the authority of the Administrative Procedure Act, 5 U.S.C. §§ 511-599, the ODR may find hearsay admissible in administrative proceedings if it is relevant and material, and otherwise reliable and probative. 5 U.S.C. § 556(d). The ultimate test is whether the evidence is substantial and has probative value, or in other words is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Appeals of Western Filter Company, Inc.*, ASBCA No. 16880, ASBCA No. 16728, 1974 WL 1996 (A.S.B.C.A.) 72-2 BCA ¶ 9662 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)).

¹⁸ The record also shows that TSA made an unsuccessful effort to obtain a legislative solution to reimbursing SARAA for the remaining funds. FF 106. In an email dated November 9, 2005 from TSA counsel Ross Dembling to Chuck Burke of TSA, Dembling states:

Attached is proposed remedial language for Harrisburg that is going to Senate Approps. The plan, as you may recall, is to have this in the DOT/FAA appropriation or conference report that is now moving forward. I spoke to Tim Edwards at SARAA yesterday to get the grant identifying information and explained in very broad terms that we were drafting some proposed language for a legislative fix. I didn't want him to raise his level of

There were a series of meetings and correspondence between SARAA and TSA with respect to these costs. FF 87-99. After finding a little over \$3 million was within scope, FF 96-97, 101-102, TSA ultimately paid SARAA in the Second OTA, \$3 million. FF 100, 102, 103.

The ODRA concludes that TSA, through the First OTA and Second OTA reimbursed a portion of the remaining Project costs and thus fulfilled its obligations under the OTAs. Based on the express terms of the First OTA and the Second OTA, SARAA is not entitled to the additional compensation claimed. *Contract Dispute of Dynamic Security Concepts, Inc.*, 05-ODRA-00346 citing *Park Vill. Apartments v. United States*, 25 Cl. Ct. 729, 733 (1992) (unambiguous terms of the contract, not the unilateral beliefs of one of the parties, define the parties' respective obligations).

The ODRA finds that the referenced discussions with TSA officials, including Admiral Stone, which referred to the FAA AIP grant, did not as a matter of law create a contractual obligation of TSA to compensate SARAA for the remaining cost of the Project. *See infra section E, F.*

E. SARAA's Contractual Theories of Recovery

The elements required to establish an implied-in-fact contract are identical to those establishing an express contract with the Government: (1) mutuality of intent to be bound; (2) unambiguous offer and acceptance; (3) consideration; and (4) the cognizant government official acting has actual authority to bind the Government. *See, e.g., Yachts Am., Inc. v. United States*, 779 F.2d 656, 661 (Fed. Cir. 1985), cert. denied, 479 U.S. 832 (1986). The elements for a binding oral contract with the Government are identical to those of an implied in fact contract. *See, e.g., Edwards v. United States*, 22 Cl. Ct. 411,

expectation, and I didn't want him to think we have backed off from our position. The one thing I did emphasize was that the legislative fix would provide the legal authority we currently do not have.

FF 106.

420 (1991). The elements are inferred from the parties' conduct in light of the surrounding circumstances. *See, e.g., Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

SARAA asserts multiple theories of recovery under contract law:

- (1) By not paying it the remaining balance of \$5,503,816.39 for the Project, TSA is in breach of an oral contract entered into between SARAA and the FAA for the benefit of TSA. *Second Amended Dispute* at ¶¶ 4 and 80.
- (2) “The facts and circumstances in this matter establish an implied-in-fact agreement between TSA and SARAA, pursuant to which TSA agreed to reimburse SARAA for the balance of the Project not previously reimbursed by the FAA.” *Second Amended Dispute* at ¶ 81.
- (3) In or about March 2005, TSA and SARAA entered into an Agreement where TSA agreed to pay \$6 million. *SARAA Post Hearing Brief* at 59. “[B]y reason of TSA’s breach of its 2005 agreement to promptly pay SARAA \$6 million in full payment of SARAA’s claim for the then outstanding balance of \$8.5 million for reimbursement of Project costs.” *Id.* TSA “agreed to pay SARAA \$6 million promptly in full satisfaction of SARAA’s claim for the then unpaid balance of \$8.5 million of Project costs and that Admiral Stone, the Administrator of TSA, arranged and approved this settlement.” *Id.* at 62.

For the reasons discussed below, the ODRA finds that none of the requirements of a contract, oral, implied in fact or otherwise, are present in the instant case. Accordingly, the ODRA recommends that SARAA’s claims arising under breach of contract be denied.

F. The Elements of a Contract Are Not Present

(i) Intent to be Bound and Unambiguous Offer and Acceptance

The first two elements of a binding contract with the Government are (1) mutuality of intent to be bound and (2) an unambiguous offer and acceptance. *See, e.g., Yachts Am., Inc. v. United States, supra.* SARAA asserts that “TSA was a critical participant in the design, construction and approval of the Project. . . . At all times, the Project was a TSA project, even when the initial funding was provided by the FAA.” *SARAA Post Hearing Brief* at 36. SARAA further asserts that “[t]he facts establish SARAA’s acceptance of a definite offer . . . [by] actual authority of the TSA official, Admiral Stone, to enter into the agreement with SARAA on behalf of TSA.” *Id.*

As discussed further in Section F (iii), TSA Administrator Admiral David Stone did not bind TSA to a contract with SARAA or provide SARAA with an unambiguous offer. The ODRA gives the hearsay testimony of Alfred Testa little weight, as the contemporaneous emails from Admiral Stone show no intent to bind TSA to a contract. FF 56, 58. Rather, the record shows that TSA reimbursed SARAA using its other transaction authority through the First OTA and the Second OTA. FF 71-103, 106.

The deposition testimony of the Contracting Officer who executed the OTAs under which payment was made to SARAA, demonstrates that he expressly did not bind the government beyond the amounts stated in the OTAs. FF 60-63. The TSA Contracting Officer states in his deposition that, despite the guarantees for the full amount sought by SARAA, he told them that “[a]ll [sic] the money I have currently is this \$4,000,000. That’s all I’ve got. And I cannot make a representation to you that you’ll get any more at a later time.” FF 61. Further, in an email dated July 19, 2004 from Lynn Cavendish to Timothy Edwards from SARAA, Mr. Cavendish clarifies the language in the OTAs that SARAA could only “seek full reimbursement,” not a promise to pay. The Contracting Officer states:

[I]nstead of your ‘to be funded’ because no funds are currently available to me, and I can’t promise what I don’t have. The ‘not currently’ leave[s] the possibility of funding in the future open. If this is agreeable, I will assemble & forward.

FF 73. Thus, the ODR finds that there was no mutual intent to be bound beyond the amounts expressly provided by the First OTA and the Second OTA; and further there was no contrary, definite offer on the part of a TSA official with actual authority to bind the Government.

(ii) Consideration

The next element is that the parties receive consideration. *See, e.g., Yachts Am., Inc. v. United States, supra.* SARAA asserts that “[a]ny contention by TSA that it did not receive consideration is specious, in light of the undisputable fact that TSA received the use and possession of a state of the art in-line baggage screening system, as well as a screening room, offices and classroom and break room in the basement area of MDT.” *SARAA Post Hearing Brief* at 32. However, SARAA concedes that “[t]he Project, as defined by the FAA Grant Agreement and the First and Second OTAs, expressly included these facilities.” *SARAA Post Hearing Brief* at 44.

Both the First OTA and the Second OTA state:

Except for the EDS, ETD Security Equipment owned by the TSA and separately provided for use at the Airport, the Authority shall own and have title to all personal property, improvements to real property, or other assets which are acquired under this agreement. It will be the responsibility of the Authority, acting through such agents as it may use, to operate, maintain, and if it becomes necessary, to replace, such property to support the efficient use of the Security Equipment.

Title to the non-security equipment such as ancillary equipment or infrastructure that was purchased or reimbursed using Federal funds, or installed by the TSA, its agents or contractors, or by the Authority or its agents or contractors will vest in the Authority upon acceptance in accordance with Article VI, below.

FF 65. Inasmuch as SARAA relies on the use of break room and other space used by TSA at HIA, *SARAA Post Hearing Brief* at 32, Testa testified that “[TSA] lease[s] the room and all the stuff inside that is connected to the conveyors.” FF 66.

Furthermore, SARAA cannot rely upon Admiral Stone’s alleged promises that the TSA would pay SARAA \$12.5 million as constituting consideration. The Restatement 2d Contracts, § 86(1), Promise For Benefit Received, states that a “promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.”¹⁹ In the instant case, the ODRA finds that Admiral Stone’s alleged promise to pay SARAA for work already completed at HIA constitutes past consideration. The ODRA further finds that there is no injustice in this case because SARAA owns all personal property, improvements to real property, or other assets which it acquired under the OTAs, title to the non-security equipment such as ancillary equipment or infrastructure, and TSA leases the break room and other space at HIA. Accordingly, the ODRA finds that TSA did not receive any present consideration from SARAA.

(iii) Actual Authority

The final element necessary for a valid contract with the Government is that the cognizant government official acting on behalf of the Government had actual authority to bind the Government. *See, e.g., Yachts Am., Inc. v. United States, supra.* The ODRA first looks at SARAA’s assertions that FAA officials bound the Government to an oral

¹⁹ Comment *a* of section 86 further states with respect to “past consideration” or “moral obligation” that:

Enforcement of promises to pay for benefit received has sometimes been said to rest on “past consideration” or on the “moral obligation” of the promisor, and there are statutes in such terms in a few states. Those terms are not used here: “past consideration” is inconsistent with the meaning of consideration stated in § 71, and there seems to be no consensus as to what constitutes a “moral obligation.” The mere fact of promise has been thought to create a moral obligation, but it is clear that not all promises are enforced. Nor are moral obligations based solely on gratitude or sentiment sufficient of themselves to support a subsequent promise.

Restatement 2d Contracts, § 86(a).

contract with SARAA, and then whether TSA officials bound that entity to an implied in fact contract with SARAA.

AMS § 3.1.4 requires that “Contracting authority must be delegated to the Contracting Officers or other qualified persons with a written warrant or other certificate of appointment. . . . Absent specific authority in the delegation, that authority does not exist. . . .” SARAA does not point to any part of the record to show that an official at the FAA or the TSA with authority delegated from the FAA Administrator through the Acquisition Executive and the Chief of the Contracting Office entered into the oral agreement with SARAA.

Alfred Testa further testified that “[t]he principal persons at the FAA with whom I negotiated the agreement were Catherine M. Lang . . . and Winifred Woodward” from the FAA. FF 10. In his hearing testimony, Testa also states that Catherine Lang and Winifred Woodward allegedly bound the Government to a contract with SARAA. FF 11. There is nothing in the record, however, demonstrating that either Lang or Woodward were duly warranted contracting officers at the time. SARAA concedes that “[n]either Ms. Lang nor Ms. Woodward states in her Declaration submitted in this Dispute whether she had actual authority to bind the government in contract.” *SARAA Post Hearing Brief* at 12. It is unambiguous in this record that Lang, who in April 2002 served as Director of the FAA’s Office of Airport Planning and Programming, and Woodward, who in April 2002 she served as the FAA Associate Administrator for Airports, were cognizant officials at the FAA for the AIP and negotiated a grant to SARAA rather than an AMS procurement contract. FF 16, 37. Lang also declares that:

FAA awarded Harrisburg International Airport (“MDT”) a grant under the Department of Defense Act of \$203,447 and approximately \$26 million in AIP funding for terminal building improvements, taxiway, and apron projects in FY 2002. The AIP grants included a discretionary grant of \$5,000,000 for security enhancements.

FF 17. Thus, the ODRA finds that no cognizant official at the FAA with authority to bind the Government entered into a contract with SARAA, but rather the officials involved negotiated the terms of a grant and that the grant was issued to SARAA.

SARAA also asserts that “[the] officer whose conduct is relied upon had the actual authority to bind the [TSA] in contract [was] Admiral Stone, who was the Administrator of TSA at the time.” *SARAA Post Hearing Brief* at 32. At the hearing, Alfred Testa testified that Admiral Stone entered into a moral contract with SARAA on behalf of the TSA. FF 43-46. As discussed previously, the ODRA finds that the testimony of Alfred Testa with respect to his discussions with Admiral Stone constitutes hearsay evidence and gives it little weight on this point in light of other evidence in the record. *See supra*, at section VI.D.

Alfred Testa’s hearsay testimony also contradicts contemporaneous evidence in the form of correspondence between Admiral David Stone and representatives of SARAA. In an email dated November 12, 2004 from David M. Stone to Fred Testa, Admiral Stone states:

Fred, you are in the que [sic] for very limited FY05 funds. It would probably be worth a trip for your rep to visit TSA and meet with Tom Blank and Chuck Burke to present your current situation. Tom Blank will email or call you to discuss. Sincerely, Dave
David M. Stone

FF 58. The ODRA finds that Admiral Stone’s contemporaneous emails do not constitute a promise to reimburse SARAA for the remaining funds. FF 56, 58. Thus, the ODRA finds that Admiral Stone did not bind TSA to an implied in fact contract with SARAA.

SARAA, however, asserts that it does not need to have someone with contracting authority to bind the Government stating that “even assuming neither had such authority, there was institutional ratification of the Agreement by the FAA.” *SARAA Post Hearing Brief* at 42-45. Notwithstanding this assertion, institutional ratification still requires contracting authority. *P&K Contracting, Inc. v. United States*, 108 Fed. Cl. 380, 391

(2012). Accordingly, the ODRA finds that the record demonstrates that no one with contracting authority bound TSA to a contract with SARAA. The ODRA further finds that none of the elements of a contract with the Government are present in this case, and therefore recommends that SARAA's claims arising under breach of contract be denied.

G. Grant-based Theory of Recovery

To the extent SARAA has a grant-related claim against the TSA, it is the TSA Administrator and not the ODRA, who has the authority, under the 2007 Act discussed previously, to create a "prioritization schedule for airport security improvement projects," which "shall include airports that have incurred eligible costs associated with development of partial or completed in-line baggage systems before the date of enactment of this Act in reasonable anticipation of receiving a grant." 49 U.S.C. § 44923 note. The ODRA has not been delegated the authority by the TSA Administrator to adjudicate such disputes. See Delegation of Authority dated September 16, 2002.

Moreover, the TSA Administrator already has decided the issue of additional reimbursement for SARAA. On July 12, 2010, representatives of five airports, including HIA, sent a letter to TSA Administrator John S. Pistole requesting reimbursement for \$15 million in costs incurred to install TSA equipment. FF 107. In a letter dated October 14, 2010, TSA Administrator John S. Pistole responded to the Executive Director of HIA with regard to the amounts in controversy addressed in the July 12, 2010 letter. Administrator Pistole stated that he "personally reviewed the documentation related to Harrisburg and other airport terminal projects requesting reimbursement." With respect to HIA's claim for reimbursement, he concluded that "[a]lthough it is a difficult decision, I have concluded that reimbursement for previous work outside a formal agreement comes at the cost of advancing current or future security measures." FF 108.

As we have held previously in a different context, "the ODRA has not been granted, either by statute or by delegation, authority to review the final orders of the FAA Administrator.... Thus, reviewing the current directive of the Acting Administrator... is

beyond the scope of the ODRA's protest and contract dispute review function.” *See Protests of Air Transport Assoc., et. al*, 08-ODRA-00452 through -00457; 00461, -00462, at 59, 60 . The same principle applies to the ODRA’s review in TSA matters.

Accordingly, the ODRA recommends that to the extent SARAA’s claims are grounded on TSA grant authority, they should be dismissed as outside the review authority of the ODRA and because the TSA Administrator already has decided not to further reimburse SARAA.

VII. CONCLUSION

The ODRA finds that: (1) the underlying arrangement between TSA and SARAA originated as an FAA AIP grant; (2) neither SARAA’s discussions with the TSA Administrator and other officials, nor the First OTA or the Second OTA created a contractual obligation on the part of TSA to reimburse SARAA for the full remaining amounts claimed in this action; (3) no other express or implied contractual relationship was created between TSA and SARAA; and (4) all obligations of the TSA under the First OTA and the Second OTA with SARAA were fulfilled.

For the reasons stated above, the ODRA recommends the Dispute be denied on the basis that SARAA has not demonstrated any contract-based legal entitlement to the amount claimed. Finally, the ODRA recommends that to the extent SARAA’s claims are based

on TSA grant authority, they should be dismissed as outside the subject matter jurisdiction of the ODRA.

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C. Scott Maravilla
Dispute Resolution Officer
and Administrative Judge
Office of Dispute Resolution for Acquisition

APPROVED:

-S-

Anthony N. Palladino
Director and Administrative Judge
Office of Dispute Resolution for Acquisition