

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

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In re: )  
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PROTESTS REGARDING SIZE OR ) STANDING ORDER 2013-2  
ELIGIBILITY OF AWARDEE )  
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The Office of Dispute Resolution for Acquisition (“ODRA”), *sua sponte*, issues this Standing Order concerning procedures that may be employed in ODRA protests that challenge the size (“size protest”) or the “socially and economically disadvantaged business” status (“eligibility protest”) of a business selected for award of contracts under the Federal Aviation Administration’s (“FAA”) Acquisition Management System (“AMS”).

IT IS ORDERED that the following requirements shall apply, at the discretion of the ODRA Director or presiding Dispute Resolution Officer/Administrative Judge, in all designated adjudicatory proceedings and alternative dispute resolution (“ADR”) matters under 14 C.F.R. Part 17:

**I. INTRODUCTION**

**A. Purpose and Authority**

Consistent with 14 C.F.R. § 17.55 and 49 U.S.C. § 46102(a), this Standing Order is adopted to ensure that size and eligibility protests filed at the ODRA are conducted in a manner conducive to justice and the proper dispatch of business. Moreover, this Standing Order implements fundamental principles of the AMS by:

- Promot[ing] discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity;
- Provid[ing] an internal process for resolving protests and disputes in a timely, cost-effective and flexible manner; and
- Requir[ing] appropriate file documentation to support business decisions.

*AMS Policy 3.1.3 (January 2013).*

**B. Background**

The Small Business Act (15 U.S.C. Chapter 14A) and implementing regulations found in 13 C.F.R. Parts 121, 124, and 134 provide the size protest, eligibility protest, and appeal procedures, respectively, for most Federal Government acquisitions but not for acquisitions conducted under the FAA's AMS. 49 U.S.C. § 40110(d)(2)(D). Nevertheless, the FAA must provide small businesses, and small businesses owned and controlled by socially and economically disadvantaged individuals, "reasonable opportunities to be awarded contracts." *Id.* In practice, the FAA frequently adopts, incorporates by reference, or otherwise relies upon standards published by the Small Business Administration ("SBA"). See e.g., *Protest of Engineering and Information Technology, Inc.*, 06-ODRA-00386. Similarly, the FAA ODRA remains the authorized forum for all protests, including size protests and eligibility protests, arising out the AMS and the ODRA treats decisions of the SBA Office of Hearings and Appeals as persuasive authority. 49 U.S.C. § 40110(d)(4).

Most FAA Screening Information Requests ("SIRs") for small business or other set-asides require offerors to execute a "Business Declaration" or similar documents that summarize the offerors' size and eligibility for a particular set-aside procurement. See e.g., *AMS Guidance T3.6.1 A.6* (January 2013). Contracting officers may generally rely upon these self-certifications, but the "FAA reserves the right to review and verify each firm's program eligibility." *Id.* at A.6.a. Contracting officers may have little reason to question a Business Declaration until an unsuccessful offeror has filed a protest with the ODRA squarely raising issues of size or eligibility for award. See e.g., *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. In such cases, protesters may ask the ODRA to render size determinations based on evidence not provided with offers or proposals. In such cases, the ODRA historically has refrained from *de novo* review of new evidence, explaining:

The ODRA exercises its protest jurisdiction based on the familiar principle that it will not substitute its judgment for the properly exercised judgment of authorized procurement officials. [Citations omitted]. .... The legally proper and better course of action is for the ODRA to review actual determinations regarding size and affiliation rendered by contracting officers during the evaluation process.

*Protest of Arctic Elevator Company, LLC*, 12-ODRA-00629 (quoting *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490).

**C. Scope**

This Standing Order provides procedures that may be adopted on a case-by-case basis to allow initial review and verification by FAA Contracting Officials of an awardee's size and eligibility for an award in light of allegations contained in

protests filed at the ODRA. This Standing Order supplements, but does not supplant or supersede, 49 U.S.C. § 40110(d), 49 U.S.C. § 46110, and the ODRA Procedural Regulation, 14 C.F.R. part 17. The procedures set forth in this Standing Order may be invoked at the sole discretion of the Director of the ODRA or the assigned Dispute Resolution Officer/Administrative Judge in a protest, with or without the agreement of the parties. This Standing Order may be revised from time to time, if needed, and may be revised and modified by orders entered in specific proceedings/cases.

## II. INITIAL SHOWING

The ODRA Procedural Regulation requires protests to include a “detailed statement of both the legal and factual grounds of the protest, and one (1) copy of each relevant document.” 14 C.F.R. 17.15(c)(7) (2012). If the ODRA determines that a protest alleges a case for adjudication of a size protest or eligibility protest, then it may invoke the procedures of this Standing Order. Invoking the procedures in this Standing Order generally will occur in conjunction with the Initial Status Conference under 14 C.F.R. § 17.17(b) (2012), but also may occur later in the adjudication process, as necessary.

## III. PROCEDURES

### A. Awardee’s Size or Eligibility Response

1. Size Protests. In cases where the awardee has intervened in the Protest and the ODRA has invoked the procedures under this Standing Order, the Awardee shall, within five (5) business days, or such other timeframe as is established by the ODRA in the case, provide to the Program Office through its counsel an Awardee’s Size Response, consisting of a completed SBA Form 355, supporting documentation, and any statement in response to size issues contained in the protest. These materials do not need to be provided to the Protester and are not to be filed with the ODRA at this stage. Moreover, issues raised in the protest that do not relate directly to the determination of the awardee’s size should not be addressed. In cases where the awardee has not intervened, the Program Office shall make all reasonable efforts to obtain the above from the awardee within the timeframe specified.
2. Eligibility Protests.
  - a. *Consultation.* In cases where the awardee has intervened in the Protest and the ODRA has invoked the procedures under this Standing Order, a representative of the Program Office and the Awardee shall, within five (5) business days, or such other timeframe as is established by the ODRA in the case, consult as to

what materials the Contracting Officer requires in order to render an eligibility determination. Appendix A to this Standing Order contains a non-exclusive list of the types of materials that may be appropriate, depending on the nature of the allegations in question. In cases where the awardee has not intervened, the Program Office shall make all reasonable efforts to obtain the above from the awardee within the timeframe specified.

- b. *Response.* In cases where the awardee has intervened in the Protest and the ODRA has invoked the procedures under this Standing Order, the Awardee shall provide to the Contracting Officer, within five (5) business days, or such other timeframe as is established by the ODRA in the case, an Awardee's Eligibility Response, which shall consist of specified forms, supporting documentation, and any statement in response to issues contained in the eligibility protest. These materials do not need to be provided to the Protester and are not to be filed with the ODRA at this stage. Moreover, issues raised in the protest that do not relate directly to the determination of the awardee's eligibility should not be addressed. In cases where the awardee has not intervened, the Program Office shall make all reasonable efforts to obtain the above from the awardee within the timeframe specified.

**B. Program Office Determination**

The Program Office, through its contracting officer shall, within the timeframe specified by the ODRA in the particular case, render a determination as to whether an awardee meets the size or eligibility standard(s) stated in the applicable SIR. In rendering the determination, the Program Office is encouraged to seek the assistance of the FAA Small Business Utilization Office, the Office of the Chief Counsel, and subject matter experts within the Government deemed necessary to render an informed sized determination supported by a rational basis.

1. At a minimum, the determination shall:
  - a. Be in writing;
  - b. Address each size or eligibility allegation in the protest;
  - c. Support each material factual conclusion with citations to source materials, unless a conclusion adverse to the awardee is based on the awardee's refusal to provide specific information ordinarily expected to be in its possession.
  - d. State the determination results and the rational basis relied upon.
2. The determination shall be filed with the ODRA and the Awardee. A copy of the determination shall also be provided simultaneously to all

protester-representatives admitted to an applicable ODRA protective order issued in the protest.

**C. Relationship to Alternative Dispute Resolution Processes**

The ODRA encourages the use of ADR, and procedures established in this Standing Order may be used in conjunction with ADR procedures voluntarily established by the parties. Any of the timeframes established by, or in connection with, this Order may be modified to accommodate ADR efforts of the parties.

**D. Alternative Procedures**

Consistent with 14 C.F.R. § 17.21(f), the ODRA may adjust the timeframes set for this in this Standing Order to accommodate the circumstances of the protest.

This Order shall become effective on the date executed below.

Dated this 3rd day of May, 2013.



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

**APPENDIX A –  
MATERIALS THAT MAY BE SPECIFIED FOR INCLUSION IN  
THE AWARDEE’S SIZE OR STATUS RESPONSE**

The ODRA, on its own initiative or at the request of a party, may direct the Awardee to provide any of the following information and documentation to the Contracting Officer, completed so as to show the circumstances existing on the date of self-representation:

- SBA Form 355, “Application for Small Business Size Determination;”
- SBA Form 1010A, “Statement of Personal Eligibility” for each individual claiming disadvantaged status;
- SBA Form 1010B, “Statement of Business Eligibility;”
- SBA Form 413, “Personal Financial Statement,” for each individual claiming disadvantaged status;
- Information as to whether the protested concern, or any of its owners, officers or directors, have applied for admission to or participated in the SBA's 8(a) BD program and if so, the name of the company which applied or participated and the date of the application or entry into the program;
- Business tax returns for the last two completed fiscal years prior to the date of self-representation;
- Personal tax returns for the last two years prior to the date of self-representation for all individuals claiming disadvantaged status, all officers, all directors and for any individual owning at least 10% of the business entity;
- Annual business financial statements for the last two completed fiscal years prior to the date of self-representation;
- A current monthly or quarterly business financial statement no older than 90 days;
- Articles of incorporation;
- Corporate by-laws;
- Partnership agreements;
- Limited liability company articles of organization; and
- Any other relevant information as to whether the protested concern is disadvantaged.