

PUBLIC VERSION

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

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Protest of )  
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A3 Technology, Inc. ) Docket No. 21-ODRA-00883  
 )  
Pursuant to Solicitation No. 693KA9-20-R-00001)

**DECISION ON REQUEST FOR SUSPENSION**

This matter arises from a protest filed with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by A3 Technology Inc. (“A3T”). The protest challenges the FAA Product Team’s decision to award a small business contract to Regulus Group, LLC (“Regulus”) and not award a contract to A3T under Solicitation No. 693KA9-20-R-00001.<sup>1</sup> The FAA awarded a total of four Indefinite-Delivery Indefinite-Quantity (“IDIQ”) task order contracts under the solicitation.<sup>2</sup> The contracts provide Program Support Services (“PSS”) for the FAA’s Air Traffic Organization’s Program Management Organization (“PMO”).<sup>3</sup> The contracts will provide a wide range of technical and professional services to support FAA infrastructure programs in transforming, modernizing and sustaining the National Airspace System (“NAS”).<sup>4</sup> Three of the contracts were awarded to large businesses, and one was awarded to a small business.<sup>5</sup> The ODRA

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<sup>1</sup> *Protest* at 4-6.

<sup>2</sup> *Id.* at 19.

<sup>3</sup> *Id.* at ¶ 5.

<sup>4</sup> *PT Opposition*, Exhibit 4, *Manager/Tech Lead Declaration* at ¶ 4.

<sup>5</sup> *See ODRA Initial Status Conference Memorandum*, dated January 21, 2021.

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permitted the small business awardee, Regulus, to participate as an intervener in this protest under 14 C.F.R. § 17.3.<sup>6</sup>

A3T seeks a stay of contract award and performance only for the contract awarded to Regulus.<sup>7</sup> The Product Team filed an opposition to the A3T's request on January 19, 2021.<sup>8</sup> On January 21, 2021 and January 22, 2021, A3T and the Regulus, respectively, filed responses to the Product Team's opposition.<sup>9</sup>

For the reasons discussed below, the ODRA finds that A3T has not demonstrated compelling reasons to suspend performance of Regulus's contract. The ODRA therefore will not impose a temporary stay or recommend that the FAA Administrator order a suspension.

### I. Standard of Review

Under the FAA's Acquisition Management System ("AMS"), procurement activity and contract performance ordinarily continues during the pendency of bid protests.<sup>10</sup> Nevertheless, the ODRA Procedural Regulation permits a protester to request a suspension at the outset of a protest.<sup>11</sup> A3T recognizes that suspensions are not often granted and invites the ODRA to clarify its decisional law so that the "rebuttable presumption" against suspensions does not become a "hard-and-fast rule against suspensions."<sup>12</sup> A3T makes this argument based in large measure on

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<sup>6</sup> *Id.*

<sup>7</sup> *Protest* at 72-77.

<sup>8</sup> *PT Opposition* at 1.

<sup>9</sup> *A3T Reply*; *Regulus Reply*.

<sup>10</sup> 14 C.F.R. § 17.13(g) (2020); *Protest of Telephonics Corporation, Inc.*, 20-ODRA-00873 (Decision on Request for Suspension, May 1, 2020).

<sup>11</sup> 14 C.F.R. § 17.15(d) (2020).

<sup>12</sup> *A3T Reply* at 5-6.

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the argument that allowing Regulus to compete for task orders will result in irreparable injury to A3T.<sup>13</sup>

The ODRA accepts A3T’s invitation to reiterate in detail the standard for suspension. To begin, the FAA is statutorily exempted from the Competition in Contracting Act of 1984 (“CICA”).<sup>14</sup> Accordingly, protests of FAA acquisitions do not trigger an automatic stay of contract performance.<sup>15</sup> Under this unique statutory authority, and under the FAA’s fundamental acquisition principle to “[p]romote discretion, sound business judgment, and flexibility at the lowest levels,”<sup>16</sup> product team personnel should make the initial determination as to whether to continue or suspend performance after receiving a protest.<sup>17</sup> If the parties cannot agree on the terms for a suspension, the ODRA will consider a well-pleaded request for suspension.<sup>18</sup> The burden of proof rests on the protester.<sup>19</sup> The ODRA is vested with authority to deny the request or recommend that the Administrator sustain it.<sup>20</sup> The ODRA may also impose a temporary suspension when it recommends that the FAA Administrator impose a suspension.<sup>21</sup> Authority

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<sup>13</sup> *Protest at 73.*

<sup>14</sup> 49 U.S.C. § 40110(d)(2)(E) and (F) (exempting FAA from the Competition in Contracting Act of 1984 and the procedures set forth in 31 USC § 3553).

<sup>15</sup> *Compare* 31 U.S.C. § 3553 *with* 14 C.F.R. § 17.15(d) (2020).

<sup>16</sup> AMS Policy 3.1.3(c).

<sup>17</sup> The importance of sound business judgement cannot be over emphasized given that the ODRA has long stated that product teams bear the financial and performance costs if a protest is sustained. *Protest of ITT Information Systems / Exelis, Inc.*, 12-ODRA-00628 (Decision on Request for Suspension, December 12, 2012).

<sup>18</sup> A protester’s failure to set forth the necessary elements and facts as part of its protest may result in “summary rejection of the request for suspension.” 14 C.F.R. § 17.15(d)(3) (2020).

<sup>19</sup> *Id.* at (d)(2). Further, the Administrative Procedures Act, which governs ODRA adjudications, provides that the proponent of an order has the burden of proof. 5 U.S.C. § 556(d). The standard of proof is met by providing supporting oral or documentary evidence that is reliable, probative and substantial. *Id.*

<sup>20</sup> 14 C.F.R. § 17.17(a)(1) and (2) (2020).

<sup>21</sup> *Id.* at § 17.14(a)(2).

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to suspend the acquisition for the pendency of the entire protest rests with the Administrator.<sup>22</sup>

The ODRA renders a decision on a suspension request by using a four-factor test that the ODRA adopted in the *Protest of Crown Communication, Inc.*, 98-ODRA-00098. That four-factor test is now codified by regulations, and requires the protester to demonstrate:

- (i) The protester has alleged a substantial case;
- (ii) The lack of a suspension would be likely to cause irreparable injury;
- (iii) The relative hardships on the parties favor a suspension; and
- (iv) That a suspension is in the public interest.<sup>23</sup>

As explained in *Crown*, the ODRA turned to the standard for injunctive relief under the Administrative Procedure Act and the cases interpreting it to guide its interpretation of “compelling reasons.”<sup>24</sup> Specifically, the ODRA looked to precedent from the United States Court of Appeals for the District of Columbia Circuit. The ODRA was guided by the analysis in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, which articulated the four factors and explained:

When the second, third and fourth of the above factors strongly favor interim relief, a court in its discretion may grant a stay if the movant has made a substantial case on the merits. “The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ... may grant a stay even though its own approach may be contrary to the movant’s view of the merits. *The necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other factors.*”<sup>25</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> 14 C.F.R. § 17.15(d)(2)(i)-(iv) (2020).

<sup>24</sup> When *Crown* was decided, AMS policy provided for continuing contract performance unless the FAA determined there was a “compelling reason” to suspend all or part of procurement activities. *Protest of Crown Communication, Inc.*, 98-ODRA-00098. *Crown* was a case of first impression for the ODRA with regard to establishing a standard for imposing a temporary suspension and recommending a suspension to the Administrator.

<sup>25</sup> *Crown Communication, supra* (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (emphasis added)).

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The text emphasized in the inset quote is important in understanding the standard. It stresses that the weight or degree of the first factor varies in light of the other three factors. On this point, *Crown* quoted *Washington Metropolitan* further by including the court’s observation that “it will *ordinarily* be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.”<sup>26</sup> Over the years, this “ordinary” approach has been appropriate in many cases, leading the ODRA to state often that the first factor is “de-emphasized in favor of balancing the remaining three factors.”<sup>27</sup> But the “ordinary” is not the universal rule. Portions of *Washington Metropolitan* that *Crown* did not quote provide further insight into the relative weight of the four factors:

One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.<sup>28</sup>

This description of the analysis stresses the give-and-take embodied in the four-factor test. In particular, it means that in not-so-ordinary cases, the injury to other parties could be de-emphasized when the ODRA is presented with a truly irreparable injury to the protester coupled with probable success on the merits. In contrast, where a protest merely presents “fair ground for litigation,” the analysis focuses on the comparison between the alleged injury to the protester (even if irreparable) weighed against the injury that a suspension would cause to the other

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<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> See e.g., *Protest of Guidehouse LLP*, 19-ODRA-00857 (Decision on Suspension, dated June 28, 2019); *Protest of JL Properties Inc.*, 18-ODRA-00836 (Decision on Request for Suspension, dated May 17, 2018).

<sup>28</sup> *Washington Metropolitan* 559 F.2d at 843-44 (citing *Charlie’s Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973) (per curiam)) (emphasis added).

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parties and the public interest. This last point is particularly important for post-award protests where the interests of awardees must be considered.

In post-award protests, nearly every disappointed offeror claims that it was denied a fair opportunity to compete for the underlying contract and that continued performance by the awardee will cause lost profits, loss of employees, loss of the right to compete for task orders, and more. Were the ODRA to focus on the alleged injury to the protester to the exclusion or near exclusion of the other factors, then a hard-and-fast rule would easily develop that mirrored the automatic CICA stay of contract performance. Indeed, without considering the other factors, even the most meritless protest could result in a stay, as can occur under CICA. But that is not the statutory or regulatory standard applied to FAA protests. Rather, the standard of review that the ODRA applies, as stated in the regulation, requires the protester to show that compelling reasons favor a suspension, as analyzed by the four well-known factors.

## II. Discussion

### A. Substantial Case

When the ODRA reviews the first factor of the suspension test to determine whether the protest alleges a substantial case, it makes no final decision as to the merits of the underlying protest.<sup>29</sup> A3T asserts that it has alleged a substantial case to the extent that there is “‘a fair ground for litigation’ that justifies a ‘deliberate investigation’ by ODRA.”<sup>30</sup> The Product Team does not dispute that characterization.<sup>31</sup> But Regulus contends that A3T has not alleged a substantial case, arguing that its Protest is based on untimely and unsupported arguments, and

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<sup>29</sup> *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (Decision on Suspension, December 16, 2016).

<sup>30</sup> *Protest* at 73.

<sup>31</sup> *PT Opposition* at 2.

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does not state a claim on which relief can be granted.<sup>32</sup> Indeed, Regulus argues that “A3T’s protest grounds attacking the award to Regulus should be dismissed and do not warrant deliberate investigation.”<sup>33</sup>

The ODRA cannot say that at this stage A3T has demonstrated probable success on the merits of its protest allegations. While many issues are raised, none are immediately cognizable as probable winners, or, as the ODRA has previously stated, “demonstrated a strong likelihood of success on the merits.”<sup>34</sup> The ODRA can say—as does both A3T and the Product Team—that A3T’s Protest makes out a substantial case that provides a fair ground for litigation. The ODRA thus concludes that A3T’s Protest satisfies the first factor to that extent.

### **B. Irreparable Injury**

ODRA Procedural Regulations require a protester to establish that its injury would be “irreparable” in the absence of a suspension. 14 C.F.R. 15(d)(2). ODRA caselaw defines “irreparable injury” to be “both certain and great, actual and not theoretical.”<sup>35</sup>

A3T asserts that it will suffer substantial irreparable injury.<sup>36</sup> A3T asserts that the FAA plans to issue the vast majority of task orders for small businesses under the PSS contract during the pendency of the protest and any subsequent corrective action, if ordered.<sup>37</sup> A3T also claims it will be placed at a competitive disadvantage in the re-evaluation and new award decision, and the value of any

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<sup>32</sup> *Regulus Opposition* at 3.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Protest of Mid Eastern Builders, Inc. 05-ODRA-00330 (Order for Temporary Stay, dated January 28, 2005)*

<sup>35</sup> *Protest of Grant Thornton LLP, 19-ODRA-00858 (Decision on Request for Suspension, June 28, 2019)*(citing *Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 540 F.Supp. 2d 66, 82 (D.D.C. 2008)).

<sup>36</sup> *Protest* at 73-74.

<sup>37</sup> *Protest* at 73-74; *A3T Reply* at 1, 3 and 4.

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subsequent award would be greatly diminished because Regulus, the sole small business awardee, already would have received the vast majority of the task orders, leaving A3T with no meaningful remedy.<sup>38</sup> A3T further claims it would suffer “significant financial harm” from losing the opportunity to compete for up to \$330 million that the FAA set-aside for small business under the contract.<sup>39</sup>

The evidence in the record shows the solicitation contemplates the award of multiple indefinite delivery/indefinite quantity contracts, under which task orders “may be issued at any time” during a 7-year performance period, consisting of a three-year base plus two, two-year options.<sup>40</sup> Section B.6 of the solicitation provides for a guaranteed minimum of work in the amount of only \$10,000.00.<sup>41</sup> The solicitation also allows contract managers “the flexibility to adjust the level of effort between line items and the base and option periods, as the need arises.”<sup>42</sup> Pursuant to section G.10 of the solicitation, task orders will be awarded based not only on small business participation considerations, but also on a variety of other considerations, such as the technical nature of the requirement, “best fit,” organizational conflicts of interest, ongoing activities/work distribution among contract holders, performance evaluations, and the like.<sup>43</sup> Section G.10 further provides for making task order awards to 2 or more contractors, if determined to be in the best interests of the FAA.<sup>44</sup>

The record additionally shows that the FAA issued the solicitation for unrestricted competition, but anticipated at least one award would be made to small business, while also reserving the right to award no contracts if in the best interest

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<sup>38</sup> *Id.*

<sup>39</sup> *Protest* at 73-74; *A3T Reply* at 3.

<sup>40</sup> *PT Opposition*, Exhibit 4, *Manager/Tech Lead Declaration* at ¶ 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at ¶ 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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of the FAA.<sup>45</sup> In no way does the solicitation promise to award \$330 million or more to one small business awardee, but rather it only provides that the FAA “intends to set aside 33% of the total combined contract value for small business.”<sup>46</sup>

In view of these facts, the ODRA finds A3T’s alleged loss of the opportunity to compete for vast number of task orders to be neither actual, certain, nor great. The contract expressly provides for flexibility in the distribution of work among contract holders depending on the circumstances and FAA requirements. Thus, work awarded to one contractor could be re-assessed and transferred to another at a later date. In addition, the amount set aside for small business is not a promise or a ceiling on the amount of work available to a small business, but only represents the FAA’s goal for small business participation, a goal which could be exceeded. Moreover, there is no evidence that suggests that the FAA intends to meet its set-aside goal during the first months of the contract. Given the 7-year duration and the IDIQ multiple award nature of the contract, the ODRA simply does not find A3T’s alleged losses to be irreparable, if its protest is successful.

Any disappointed bidder competing for a large multiple award task and delivery order contract could make arguments similar to those of A3T. The economic harms alleged by A3T are theoretical and speculative, given the express terms of the solicitation, and the fact the alleged harms depend on “the future actions of procurement officials.”<sup>47</sup> It is well established that general economic loss does not provide a sufficient basis to stay performance of a contract.<sup>48</sup>

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<sup>45</sup> *PT Opposition*, Exhibit 1, Solicitation § M.1.b.

<sup>46</sup> *Id.*

<sup>47</sup> *Protest of 36th Ave. Co-Tenancy, International Office Building, JL Office Tower, LLC and SJ/JL Calais Office II*, 17-ODRA-00798, -00799, -00800 and -00801 (Decision on Suspension Request dated September 8, 2017 at 2).

<sup>48</sup> *See, e.g., Protest of CACI, Inc. Federal*, 15-ODRA-00733 (Decision on Request for Suspension, dated July 1, 2015); *see also Protest of Crown Communications, Inc.*, 98-ODRA-00098 (Decision on Suspension dated October 9, 1998) (“Only economic loss that threatens the survival of the movant’s business constitutes irreparable harm.”).

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Moreover, A3T cannot meet its burden of proving irreparable injury solely by relying on argument of counsel, which is not evidence.<sup>49</sup> A3T's arguments regarding irreparable harm lack evidentiary support, such as declarations, affidavits or other materials.<sup>50</sup>

As for allegations that A3T will be deprived of an adequate remedy if its protest is meritorious, it is well established that the ODRA has broad authority to recommend relief "that is appropriate under the circumstances."<sup>51</sup> Moreover, by opposing the suspension request, the Product Team assumes the risk of any additional costs and/or delay resulting from its decision to continue contract performance, in the event the Protest is sustained.<sup>52</sup> In fact, in its opposition, the Product Team expressly acknowledges the risk of continued contract performance, accepting, "on behalf of the FAA ... the risks associated with a successful protest."<sup>53</sup>

The ODRA therefore concludes that A3T has not satisfied the second factor of the four-part test, inasmuch as it fails to demonstrate injury that meets the definition of irreparable.

### C. The Relative Hardships

The injury that A3T alleges it will experience in absence of a suspension is very similar to the harms that Regulus asserts it will experience if a stay is issued.<sup>54</sup> While the record is not clear as to whether any task orders have been

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<sup>49</sup> *Protests of 36<sup>th</sup> Avenue Co-Tenancy, International Office Building, JL Office Tower, LLC, and SJ/JL Calais Office II, supra.*

<sup>50</sup> *Protest of BAE Systems Technology Solutions & Services, Inc.* 10-ODRA-00542 (Decision and Order on Consultant's Admission to Protective Order, dated September 22, 2010).

<sup>51</sup> 14 C.F.R. § 17.23(a)(8) (2020); *Protest of Patriot Taxiway*, 18-ODRA-00832 (Decision on Suspension, May 7, 2018).

<sup>52</sup> *Protest of Whitestone Group, Inc., supra.*

<sup>53</sup> *PT Opposition*, Exhibit 4, *Manager/Tech Lead Declaration at ¶ 12.*

<sup>54</sup> *Regulus Opposition* at 8-9. "To the extent that the ODRA finds that A3T's alleged harms are not speculative, the very harms that Protester alleges it will endure as a small business contractor in the absence of a stay would impact Regulus in a very similar manner if its performance is suspended."

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awarded to Regulus,<sup>55</sup> the theoretical harms certainly are similar in that suspending Regulus's performance would prevent it competing for task orders that could be awarded to its large business competitors.

The harm to the FAA is less theoretical. A managerial declaration provided by the Product Team explains that the contracts will support four separate FAA directorates working on several, safety-related and time-critical projects.<sup>56</sup> A suspension of Regulus will certainly reduce the number of contractors available for task orders, which in turn reduces the available workforce and Product Team's ability to find the "best fit for technical requirements" in the task orders.<sup>57</sup>

Ultimately, the burden rests on A3T to show that the balance of hardships tips sharply in its favor.<sup>58</sup> The ODRA finds that at most the potential injury to A3T is comparable to the potential injury to Regulus. Adding to the scale the effect that a suspension would have on the Product Team tips the balance in favor of denying the request for suspension.<sup>59</sup>

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<sup>55</sup> Counsel for Regulus claims that "Regulus has received an award, incurred the costs necessary to begin performance, and actually began performing on December 31, 2020." *Id.* at 9. This statement, however, is not supported by an exhibit or declaration. The Agency's Opposition, although much more detailed and supported by a declaration, does not confirm or contradict the assertion. The declaration represents, however, that transition to these contracts has a "projected completion date of 30 January 2021." *Agency Opposition*, Exhibit 4, *Manager/Tech Lead Declaration* at ¶ 8.

<sup>56</sup> *Agency Opposition*, Exhibit 4, *Manager/Tech Lead Declaration* at ¶ 11.

<sup>57</sup> *See Regulus Opposition*, Ex. 1 at 33 (solicitation amendment 006, at § G.10 (permitting competition of task orders)).

<sup>58</sup> *See supra* Part I.

<sup>59</sup> Unlike the Court of Federal Claims, the ODRA Regulation does not require or authorize a protester to file a bond to mitigate the damages suffered by a party who is found to have been wrongfully enjoined. *See* Rule 65(c) of the Rules of the Court of Federal Claims ("RCFC") and RCFC Appendix C, Rule V.15 (f); *see also Hospital Klean of Texas, Inc. v. United States*, 65 Fed. Cl. 618, 625 (Fed. Cl. 205).

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**D. The Public Interest**

With respect to the fourth factor, A3T argues the public has an interest in “upholding the integrity of the FAA’s AMS System.”<sup>60</sup> Given the absence of proof that A3T would suffer irreparable harm without a suspension, and that the balance of the parties’ injuries do not tip in A3T’s favor, the ODRA finds the interest of the public lies in continuing performance of the awarded contracts and promptly adjudicating the protest pursuant to 14 C.F.R. § 17.21(m) (2020). The public interest also lies in compliance with FAA statutory authority, the ODRA Regulation and AMS policy, which do not contemplate automatic stays of contract performance when a disappointed bidder files a protest.

**III. CONCLUSION**

The ODRA concludes that A3T has alleged a substantial case that provides fair grounds for litigation, but it has not demonstrated that it is likely to suffer irreparable injury in the absence of a suspension. Further, neither the relative hardships nor the public interest favor a suspension in this case. The ODRA, accordingly, declines to order a temporary stay and declines to recommend that the FAA Administrator issue a permanent suspension.

*- Signed -*

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Marie A. Collins  
Dispute Resolution Officer and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

February 4, 2021

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<sup>60</sup> *A3T Reply* at 9.