

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

Protests of	)	
	)	Docket Nos. 08-ODRA-00452
Air Transport Association	)	08-ODRA-00453
Northwest Airlines, Inc.	)	08-ODRA-00454
Continental Airlines, Inc.	)	08-ODRA-00455
US Airways Group, Inc.	)	08-ODRA-00456
United Airlines, Inc.	)	08-ODRA-00457
Delta Airlines, Inc.	)	08-ODRA-00461
The Port Authority of NY & NJ	)	08-ODRA-00462
The New York Aviation Management Association	)	(CONSOLIDATED)
	)	
Pursuant to SIR Posting 6996	)	

**FINDINGS AND RECOMMENDATIONS**

**I. INTRODUCTION**

These eight consolidated bid protests (“Protests”) are pending before the Federal Aviation Administration (“FAA” or “Agency”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protests challenge the issuance by the FAA on August 7, 2008 of Screening Information Request Posting No. 6996 (the “Solicitation”) for the auction of two “slot” leases—one aircraft departure time slot and one airplane landing time slot—at Newark Liberty International Airport located in New Jersey (hereinafter “Slot Auction”). Five of the Protests were filed on August 14, 2008 by airline carriers, namely: Continental Airlines, Inc. (“Continental”); Delta Airlines, Inc. (“Delta”); Northwest Airlines, Inc. (“Northwest”); United Airlines, Inc. (“United”); and US Airways Group, Inc. (“US Air”) (referred to collectively herein as “Carrier Protests”). On the same date, a protest also was filed by the Air Transport Association (“ATA”). Two additional protests were filed by the Port Authority of New York and New Jersey (“Port Authority”) on August 28, 2008 and by the New York Aviation Management

Association (“NYAMA”) on August 29, 2008 (hereinafter the “Non-Carrier Protests”). For the reasons discussed herein, the ODRA recommends that: (1) the Non-Carrier Protests be dismissed for lack of standing; (2) the Carrier Protests be denied to the extent they assert that (a) the FAA Acquisition Management System (“AMS”) does not authorize the FAA to lease property interests, and (b) the proposed Slot Auction terms are deficient; and (3) all other grounds raised in the Carrier Protests be dismissed because they do not challenge the procedures to be used for the Slot Auction and otherwise raise constitutional and non-procurement legal issues not appropriate for adjudication in the context of a bid protest proceeding before the ODRA.

## **II. FACTUAL BACKGROUND**

The Solicitation was issued by an FAA Program Office (“Program Office”) and stems from the FAA’s effort to ease the peak hour flight congestion at three New York Metropolitan Area airports, namely: Newark Liberty International Airport in New Jersey (“Newark Airport”); and JFK International Airport and LaGuardia Airport in New York. *See Notice of Proposed Order Limiting Scheduled Operations at Newark Liberty International Airport; Request for Comments*, 73 Fed. Reg. 14552 (March 18, 2008); *Supplemental Notice of Proposed Rulemaking: Congestion Management Rule for LaGuardia Airport*, 73 Fed. Reg. 20846-01 (April 17, 2008); *Notice of Proposed Rulemaking: Congestion Management Rule for [JFK] Airport and [Newark] Airport*, 73 Fed. Reg. 29,626 (May 21, 2008) (“May Rulemaking”).

In each of the above rulemakings and Orders, the FAA has explained that its proposal to temporarily limit flight operations at the New York Metropolitan Area airports is being undertaken to relieve, in part, “the substantial inconvenience to the traveling public caused by excessive congestion-related flight delays.” *See “Request for Comments,” supra; May Rulemaking* at 29,627. Thus far, the FAA has outlined the following tentative approach for managing airport congestion at Newark. The FAA has proposed: establishing “caps” on flight operations. The FAA also has proposed limiting its assignment of “the majority” of flight landing and departure slots at Newark to the

existing Carriers currently operating at that airport. Finally, the FAA has proposed “creat[ing] a market by annually auctioning off a limited number of slots” for the first five years of the congestion management plan. *See May Rulemaking*. The Slot Auction challenged in these Protests is part of the aforementioned market approach (“Market Approach”).

Recognizing that the FAA’s assignment of the slots to current airport carriers would impact other carriers’ efforts to secure flight operations at the identified airports, the FAA has advised that under its proposed airport congestion management Market Approach, the Agency intends to permit the incumbent carriers to sub-lease or auction any number of their assigned flight departure and landing slots—which the FAA also refers to as “reservations to use navigable airspace.” *See FAA Opposition to Protesters’ Suspension Request* dated August 22, 2008 at 2. In addition, to promote opportunities for non-incumbent carriers, *e.g.*, those carriers who are not currently operating at Newark Airport, the FAA has proposed that its Market Approach—the direct auction of slots by the FAA—be opened up for competition to the entire air carrier community. *See* 73 Fed. Reg. 29550.

On Wednesday, May 21, 2008, in addition to the separate May Rulemaking, the FAA Acting Administrator issued an “*Order Limiting Scheduled Operations at Newark Liberty International Airport*” (“May Order”). *Id.* The May Order was issued following the Agency’s receipt of 78 written “Comments” on a “*Proposed Order*” that had been issued on March 18, 2008. The May Order contemplates remedying flight congestion at Newark Airport by conducting an auction of an as yet undetermined number of Newark Airport slots for lease terms ranging from five to ten years in duration. *Id.* According to the May Order, the “principal purpose” of the auction approach described therein is to “to curb the over-scheduling that passengers transiting [Newark Airport] would experience during the summer of 2008.” *Id.* at 29,551. To that end, the May Order explains that the FAA’s prior attempts to intervene and discuss voluntary reductions of peak-hour flight operations with numerous carriers to reduce the Newark Airport congestion problem had proven largely unsuccessful. *Id.* The May Order, by its express terms, became effective

on June 20, 2008, and currently is scheduled to expire on October 24, 2008—two days before the planned date that the successful Slot Auction bidder could begin to use the slots that are the subject of these Protests.<sup>1</sup> *Id.* Notably, and of relevance to these Protests, the May Order states that the FAA considers its approach to be a leasing transaction authorized by and being conducted pursuant to the FAA Administrator’s “Property Management Authority,” 49 U.S.C. § 106(l)(6), § 106(n) and the Administrator’s “Acquisition Authority,” § 10110. *Id.* at 29,553. As a result, in the May Order, the FAA has announced that further Slot Auction information and “notices to interested parties will be governed by the applicable procurement law, rather than the Administrative Procedure Act.” *Id.*

On August 6, 2008, the FAA published the Solicitation, setting forth the terms of the challenged Slot Auction on the FAA’s Contracting Opportunities website.<sup>2</sup> The Solicitation’s two slots at the Newark Airport (“Slots”), and specified a September 3, 2008 bid submission deadline—which since has been suspended pending resolution of these Protests.<sup>3</sup> *See Solicitation* at 2. According to the FAA, the Slots that are being leased became available for this Auction because the Carrier to whom they originally were assigned had declared bankruptcy. *See Opposition* at 1. The Solicitation states that the Slots “lease will be awarded to the eligible carrier who submits the highest bid.” *See Solicitation* at 2. Attached to the Solicitation is a proposed lease agreement (“PLA”) which specifies that “Lease Disputes” as well as any pre- or post-award protests involving the Slot Auction are to be filed with the ODRA and reviewed pursuant to the Procedural Regulations set forth at 14 C.F.R. Part 17. *See PLA, Article Nos. 9-11* at 4-5. On August 28, 2008, the FAA issued a Solicitation Modification purporting to clarify some of the terms of the Slot Auction. The Modification was posted on the FAA’s Contracting Opportunities website.

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<sup>1</sup> As explained by the May Order, October 26, 2008 is the start of the winter flight season.

<sup>2</sup> The FAA Contracting Opportunities website is located at: <http://faaco.faa.gov/index.cfm>.

<sup>3</sup> On August 28, 2008, the FAA Acting Administrator’s Delegee issued an Order for Suspension in this matter, staying all Slot Auction activities pending the issuance of a Final Order in these Protests.

### III. THE PARTIES' POSITIONS

#### A. The Protesters' Allegations

The Protests present essentially identical legal arguments, with some minor differences. The Protests contend that the FAA lacks legal authority to conduct the Slot Auction. The Protesters disagree with the FAA Program Office's contention that the procurement authority set forth at 49 U.S.C. §106(l)(6) and § 106(n) authorizes the Slot Auction. According to the Protesters, the Slots are not actual "property," and as such, cannot be subject to a lease. According to the Protests, the Auction transaction involves not a lease, but rather the sale of a license by the FAA to a carrier to use a designated flight departure and/or flight landing time. Arguing that only a license—rather than a tangible property interest—is involved, the Protests maintain that the FAA's Property Management Authority does not permit this Auction effort. *See ATA Protest* at 4; *Northwest Protest* at 4-5; *Continental Protest* at 7-11; *US Airways Protest* at 3-5; *United Airlines Protest* at 4-6; *Delta Protest* at 3-4.

The Protests also contend that the Slot Auction is not authorized under the FAA's "Airspace Management Authority," *see* 49 U.S.C. § 40103, which is frequently cited as providing the Administrator's management authority over the United States' navigable airspace. *See, e.g., Delta Protest* at 5; *United Airlines Protest* at 5. Notably, in 2006, when the FAA was considering a "Congestion Management Rule for La Guardia Airport" that would have capped the airport's hourly operations and would have limited the number of scheduled flight arrivals and departures, *see* 71 Fed. Reg. 51360 (August 29, 2006) ("2006 Notice"), the FAA specifically advised that while the Agency had considered auctioning landing and departure slots as a congestion management tool—and even had identified "several advantages" to using such auction techniques—the FAA ultimately concluded that it lacked the necessary statutory authority to implement auctions. As explained in the 2006 Notice, the FAA determined that while the Agency "currently [did] not have full legislative authority" to employ a slot auction, it was

nevertheless actively was “seeking the legislative authority to conduct auctions . . . in the future.” *Id.* The 2006 Notice further advised that if the “Congress approve[d]” the FAA’s use of slot auctions, “a new rule-making would be necessary to implement such measures.” *Id.* Notably, in the 2006 Notice, the FAA reported that its authority for managing airport congestion derived from its “broad [statutory] authority under 49 U.S.C. § 40103 to regulate the use of the navigable air space of the United States.” *Id.* To that end, the Protests further assert that to date, there have been no changes in the law that would warrant revisiting or amending the FAA’s 2006 statement that its Airspace Management Authority does not authorize the Agency to conduct the Newark Airport or any other slot auction.

In addition, the Protests maintain that the FAA’s decision to conduct the Slot Auction violates several other federal fiscal laws: (1) the Consolidated Appropriations Act, 2008, which prohibits the FAA from collecting “new aviation user fees not specifically authorized by law after the date of the enactment” of the Act, *see* § 103, *Pub. L. No.* 110-161, H.R. 2764-1, 2764-536 *supra*;<sup>4</sup> (2) the Independent Offices Appropriations Act, which generally requires federal agencies to promulgate regulations before assessing user charges, *see* 31 U.S.C. § 9701;<sup>5</sup> and (3) the Administrative Procedures Act [“APA”], which establishes mandatory legal requirements governing an agency’s promulgation of regulations, including presenting reasonable opportunities for public notice and comment on proposed rules. *See* 5 U.S.C. § 551 *et seq.* The Protests further assert that the FAA’s non-compliance with the APA violates due process rights established under the United States Constitution.<sup>6</sup> *See United States Constitution, Amendment XIV, Section 1.*

Continental, the Port Authority and the NYAMA further allege that the terms of the Slot Auction Solicitation are defective. Continental alleges that the Solicitation violates several other fiscal laws beyond the three federal statutes identified above, and further

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<sup>4</sup> *See ATA Protest* at 6; *NWA Protest* at 4; *Continental Protest* at 8; *US Airways Protest* at 4; *United Airlines Protest* at 6; *Delta Protest* at 5.

<sup>5</sup> *See ATA Protest* at 5; *NWA Protest* at 4; *US Airways Protest* at 4; *United Airlines Protest* at 6; *Delta Protest* at 5.

<sup>6</sup> *See ATA Protest* at 6; *NWA Protest* at 5; *Continental Protest* at 11-12; *US Airways Protest* at 5; *United Airlines Protest* at 7; *Delta Protest* at 6-7.

contends that the Solicitation's PLA contains termination provisions that are ambiguous. *See Continental Protest* at 13-17. The Port Authority also contends that the termination provisions are defective; in addition, the Port Authority challenges the lack of a "use-or-lose" clause in the PLA and also challenges the five-year maximum term allocated for each auctioned slot as being "too short." *See Port Authority Protest* at 15. The NYAMA alleges that the Solicitation "improperly limits potential offerors" because "airports and communities with enormous stakes in air service to Newark" cannot submit bids in connection with the Slot Auction. *See NYAMA Protest* at 10.

### **B. The FAA Program Office's Position**

On September 4, 2008, the Program Office filed its Response to the Protests ("Program Office Response"). The Program Office argues that the Protests filed by the ATA, the Port Authority, and NYAMA should be dismissed for lack of legal standing to protest at the ODRA. *Id.* at 24. With respect to the Carrier Protests, the Program Office Response takes the position that none of their allegations have merit. *See Program Office Response* at 1-2. The Program Office further contends that: (1) the challenged alleged defects in the Solicitation have been resolved by issuance of the Solicitation Modification, *id.* at 38-40; (2) the FAA has legal authority to conduct a slot auction, *id.* at 40-60; and (3) no fiscal law is violated by awarding slot leases through a competitive auction. *Id.* at 60-67. The Program Office also contends that the slot auction does not violate any of the federal appropriation, fiscal law or constitutional provisions identified by the Protesters, *id.* at 67-72 and 74-76, and that the slot auction otherwise has a rational basis. *Id.* at 72-74.

With respect to the ODRA's jurisdiction over these Protests, the Program Office Response reasons that under the plain terms of the Administrator's Property Management and Acquisition Authorities, the ODRA has jurisdiction to review all bid protests and contract disputes involving the lease of property interests. *Program Office Response* at 15-17. Moreover, according to the Program Office, the ODRA's jurisdiction over bid protests is not limited to alleged violations of procurement statutes or regulations, but extends to any bid protest that is not resolved through alternative dispute resolution. *Id.*

at 19, citing *Protest of Crown Consulting, Inc.*, Docket No. 01-ODRA-00181 (April 26, 2001); *Protest of Maximus*, Docket No. 04-TSA-009 (September 20, 2004), *req. for reconsideration denied*, October 4, 2004.

The Program Office contends that while the Slot Auction constitutes an acquisition under the AMS, see *Program Office Response* at 21, the “proposed lease of [this] pair of slots ... however, is simply a contract” and “*not* a procurement contract.” *Id.* at 22. The Program Office further acknowledges that in contrast to most acquisitions, the “acquirer” in this case “will be an air carrier” rather than the Agency. *Id.* at 20.

The Program Office emphasizes that regardless of which type of acquisition effort the Slot Auction constitutes, these Protests “fal[l] within the ODRA’s” authority since the Slot Lease Auction involves an acquisition, and because the May 2008 Order set forth a delegation by the FAA Administrator requiring that “[a]ny interested party will have an avenue to protest the procedures” of the Slot Auction at the ODRA “up until the date of the auction, in accordance with” the Administrator’s Acquisition Authority, “49 U.S.C. § 40110(d)(4), and” the ODRA Procedural Regulations, “14 C.F.R. Part 17.” See *May 2008 Order* at 29554. See *Program Office Response* at 8.

In response to the Protesters’ allegations that the FAA Administrator lacks authority to auction the slot leases, the Program Office contends that pursuant to the Property Management Authority set forth at 49 U.S.C. §106(n)(1)(B), the Administrator is authorized to lease and assign access to navigable airspace using the FAA’s Property Management and Acquisition Authorities. See *Program Office Response* at 15-16. According to the Program Office, because the FAA has “sovereignty” to manage and oversee the United States’ navigable airspace, this function gives the Agency a property interest in each airport’s flight landing and departure slots. *Id.* at 53-60. Pursuant to the Administrator’s Property Management and Acquisition Authorities—as well as the AMS, the Program Office contends that since the slot property interest is controlled by the FAA, the Slot Auction constitutes a proper exercise of the FAA’s Property Management



and Acquisition Authorities, particularly since a Slot Auction results in the conveyance of a clear property interest from the FAA to a carrier. *Id.* at 20-21.

The Program Office disagrees with the Protester's assertion that the Slot Auction only involves a regulatory license rather than a proprietary interest, and argues that the clear terms combined with the property interests that are being conveyed establish that the challenged Slot Auction involves a lease. *Id.* at 44-45. In this regard, despite the Protesters' contention that the Slot Auction bestows a regulatory license rather than a property interest, the Program Office contends that the auctioned slots nevertheless involve a property interest within the meaning of the FAA's acquisition authority. *Id.* To that end, the Program Office cites several examples of other federal agency transactions which it believes involve property interests akin to the slot interests involved in the challenged Slot Auction. These include: the Forest Service's issuance of "special use authorizations" and "grazing permits" for National Forest System land and publicly owned forage; the Federal Communications Commission's auction of "licenses" to use "portions of the broadcast spectrum"; and the General Services Administration's issuance of "licenses and permits for the use of federally managed buildings and property." *Id.* at 48-49. The Program Office maintains that the Slot Auction, as evidenced by the PLA, is a proper execution of the FAA Administrator's property management and acquisition authority. *Id.*

### **C. The Protesters' Comments**

On September 11, 2008, ATA, Northwest, Continental, US Air, United and Delta filed consolidated Comments on the Program Office's Response ("Consolidated Comments"). The Port Authority separately filed its Comments ("Port Authority Comments"), as did NYAMA ("NYAMA Comments"). In addition to joining in the Consolidated Comments, Continental filed its own Supplemental Comments ("Continental Comments"). The various Comments filed by the Protesters largely echo and amplify the legal arguments originally asserted in the Protests. In addition, the Comments address, in

varying degrees, jurisdictional questions posed by the ODRA in a status conference with the parties.

### **1. The Consolidated Comments**

The Consolidated Comments contend that the FAA's allocation and disposal of slots is not a property management function, but rather constitutes a matter of regulator licensing. *See Consolidated Comments* at 16. According to the Protesters, since the slots involved in the Slot Auction pertain to the use of navigable airspace, the FAA's oversight arises under its sovereign capacity as a regulator of navigable airspace, as opposed to the management or leasing of a proprietary interest that would be accomplished pursuant to the Administrator's Property Management authority. *Id.* at 17-18. Concluding that the Auction constitutes a matter of regulatory airspace policy, the Protesters maintain that any challenges involving this Slot Auction are not within the purview of the ODRA's jurisdiction. *Id.* at 3. To that end, the Consolidated Comments note that the FAA has already previously admitted that the Agency lacks authority to auction slot leases. *Id.* at 6 (citing the *Congestion Management Rule for LaGuardia Airport*, 71 Fed. Reg. 51360, 51362 (August 29, 2006) wherein the FAA reported that the Agency "*does not have the statutory authority*" to use "*auctions.*")

The Consolidated Comments also continue to maintain the Protesters' original argument that the Slot Auction violates numerous federal laws: the Protesters' procedural rights under the APA; the Protester's rights guaranteed under the Due Process Clause of the United States Constitution, including avoiding the imposition of an unconstitutional tax; the 2008 Consolidated Appropriations Act; the Anti-Deficiency Act; and other federal fiscal and appropriations provisions, including the restriction on using FAA appropriations for purposes not otherwise authorized by the Congress. *Id.* 23, 28-30, 31, 34 and 37. With respect to these particular allegations involving non-procurement federal laws, the Protesters' Consolidated Comments ask that the ODRA defer its decision in this matter pending the outcome of a GAO review of the FAA's Slot Auction that was directed by the Congress. *Id.* at 32.

## 2. The Port Authority Comments

The Port Authority Comments contend that slots are not “Federal Property” that may be distributed through a public auction. *Port Authority Comments* at 19. In this regard, the Port Authority Comments argue that slots are licenses that result from the exercise of regulatory authority granting the permission to engage in conduct, and as such, they cannot be sold pursuant to the FAA’s legislative authority to dispose of property, *id.*; nor can they be created without clear statutory authority to do so. *Id.* at 21. Moreover, the Port Authority contends that if slots are Federal “property,” they belong to the United States, and not the administrator of the FAA. *Id.* at 39-40. They allege that slots were never “acquired” by the FAA and “just because the FAA decided to create a separate rulemaking docket for the attendant regulations necessary to implement its so-called ‘lease’ does not make the document attached to the SIR a ‘lease’ instead of a license.” *Id.* at 6. Moreover, as with the Consolidated Comments, the Port Authority Comments assert that the FAA has taken the position in previous rules that slots are not property but rather represent an operating privilege. *Id.* at 23 - 24, 27-33

Finally, the Port Authority argues that to the extent the FAA intends to auction slots in a commercial capacity, the FAA has failed to address possible environmental impacts of the slot lease program and thus has failed to comply with the National Environmental Policy Act of 1969 (“NEPA”), which requires, at a minimum, the preparation of an environmental assessment for any action that significantly affects the quality of the human environment. *Id.* at 43-44, *citing* 42 U.S.C. § 4332(2)(C).

As for the ODRA’s jurisdiction, the Port Authority contends that the ODRA lacks jurisdiction to do more than determine that operating authorizations or slots are not property and thus the proposed auction is not a procurement action. *Id.* at 3. The Port Authority argues that there is no acquisition-related authority for “protesting” an award of a license and that the question of whether the Administrator has exceeded his statutory authority to manage navigable airspace belongs to the federal courts. *Id.* at 7. In this regard, it asserts that, by proposing the auction of two “slots” or “operating

authorizations” the FAA Program Office “has embroiled the [ODRA] ... in a dispute that is plainly not about procurement.” The Port Authority goes on to state:

[t]he reality is that the SIR purposefully ignores an ongoing policy debate between Congress and the FAA as to whether Congress should give the FAA the authority to auction operating authorizations. That policy debate should be decided by Congress (or the federal courts), not ODRA, an office with specific and limited jurisdiction that does not extend to resolving such intra-governmental policy disputes.

*Id.* at 8. The Port Authority further argues that the ODRA Director should decline to exercise jurisdiction of this matter, as ODRA “was created as a result of Congress’s desire to streamline FAA’s legitimate acquisition activities; [and] the ODRA process has been acclaimed by industry observers for its efficiency.”<sup>7</sup> *Id.*

The Port Authority asserts that it has standing to challenge the FAA’s auction scheme, since (1) the auction, as well as any determination that the slots are “property,” will affect its direct economic interests in its capacity as a proprietor and operator of the Newark Airport, and (2) based on its unique perspective arising from day-to-day operations, financial obligations to airlines and other, environmental impacts, and as a grant recipient of Airport Improvement Program (“AIP”) funds. *Id.* at 9 – 16. The Port Authority asserts that it has standing, as a stakeholder in the implementation of market-based mechanisms, and in light of its overlapping responsibilities with the FAA. *Id.* at 18.

### **3. Supplemental Comments of Continental**

The Supplemental Comments of Continental address the alleged discriminatory impact of the proposed slot auctions on Continental. *Continental Supplemental Comments* at 4.

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<sup>7</sup> It should be noted that the ODRA Director does not have final decisional authority in these cases. Rather, the ODRA is authorized to make findings and recommendations to the FAA Acting Administrator’s Delegee, who will issue the Final Agency Order in these Protests. The FAA Acting Administrator has recused himself generally from all ODRA cases and has not participated in the adjudication of these Protests.

According to Continental, the slot auction would increase “congestion at its primary international hub as part of a proposed economic experiment to establish auction pricing” and it “would impose additional expenses on flights serving Newark on top of the extraordinary taxes, fees and charges Continental already pays for an FAA air traffic control system that is failing to meet the demand for service in the New York area.” *Id.* at 4-6. Continental further argues that such marketplace manipulation will result in worse congestion “by introducing new flights at congested peak hours through its proposed slot auction.” *Id.* Continental further asserts that the auction of licenses and permits is an abuse of the AMS system and if the FAA is permitted to auction the right to land or take off, that could lead to other actions by FAA in which services are provided to those entities who place the greatest value on the service. *Id.* at 10.<sup>8</sup>

#### **4. Comments of the NYAMA**

The NYAMA also argues that the slot auction increases congestion and therefore lacks a rational basis, as it is contrary to the provisions of the Newark Order. *NYAMA Comments* at 4. The NYAMA also argues that the proposed auction is contrary to public policy that encourages “‘entry into air transportation markets by ... existing air carriers and the continued strengthening of small air carriers’ in maintaining ‘a complete and convenient system of continuous schedule interstate air transportation for small communities and isolated areas’ and in ‘insuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled services.’” *Id.* at 4, *citing* 49 U.S.C. § 40101(a)(11), (13) and (16) (Emphasis in original). The NYAMA also contends that excluding small cities from the bidding process will not lead to efficiency, because the slots at issue are not subject to the “use or lose” requirements and the FAA has complete discretion whether to terminate the slots for lack of use. *Id.* at 5. The NYAMA claims it is an interested party because the slot auction would adversely affect the NYAMA members from an economic perspective. *Id.* at 3.

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<sup>8</sup> Similarly, the Port Authority warns of profound implications beyond this case, whereby other FAA authorizations, such as certificates, licenses, permits and exemptions could be “leased” to the public based on market rates. *Id.* at 8.

## IV. DISCUSSION

### A. The Nature and Scope of the ODRA's Bid Protest Review Authority

#### 1. The ODRA's Statutory, Regulatory and Delegated Authority

The ODRA originally was established in 1996 under the AMS as the FAA Administrator's adjudicative forum for the resolution and adjudication of bid protests related to, and disputes arising in connection with, AMS contracts. *See AMS, A: "Authority for the [FAA AMS]"*—April 01, 1996, ¶ A, "Introduction."<sup>9</sup> Initially, the ODRA's authority was established through a series of delegations from FAA Administrators, *see Delegations* dated July 29, 1998, March 27, 2000 and March 10, 2004<sup>10</sup>, and in the ODRA Procedural Regulations.<sup>11</sup> *See* 14 C.F.R. § 17.5, "Delegation of Authority." In 2003, the Vision 100—Century of Aviation Reauthorization Act, *see* Pub. L. No. 108-176 ("FAA Reauthorization Act"), expressly mandated that the Administrator, "through" the ODRA, "adjudicate all "bid protests or contract disputes which are not resolved through alternative dispute resolution." *See* 49 U.S.C. § 40110(d)(4) (*hereinafter* "Acquisition Authority").<sup>12</sup> Notably, the Acquisition Authority further provides that all bid protest and contract dispute adjudications are to be conducted "pursuant to" several provisions set forth in the "Investigations and Proceedings" chapter of the "Air Commerce and Safety" part of the Department of Transportation ("DOT") "Aviation Programs" Statute set forth at 49 U.S.C. Subtitle VII. The

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<sup>9</sup> The FAA Administrator created the AMS in response to a directive set forth in the 1996 Department of Transportation and Related Appropriations Act, Pub. L. No. 104-50, which required the FAA to develop a new acquisition management system aimed at fulfilling the FAA's unique procurement needs.

<sup>10</sup> The various FAA Administrators' *Delegations of Authority* are published on the ODRA website at <http://odra.faa.gov>.

<sup>11</sup> The ODRA Procedural Regulations took effect on June 29, 1999.

<sup>12</sup> Consistent with Congress' statutory directive to use alternative dispute resolution "to the maximum extent practicable," *see* 49 U.S.C. § 40110(d)(1)(B), the ODRA's dispute resolution process expressly favors and encourages the resolution of bid protests and contract disputes through consensual ADR. *See ODRA Procedural Regulations*, 14 C.F.R. 17.31(a).

incorporated provisions<sup>13</sup> include a “*Regulations and Orders*” authority which specifies that DOT regulations and orders “*take effect within a reasonable time*” and that an order must set forth the fact findings on which it is based and “*must be served on the parties to the proceeding and the persons affected by the order.*” See 49 U.S.C. § 46105. (Emphasis added).

As noted above, the Administrator has express authority to adjudicate all FAA bid protests and contract disputes “through” the ODRA. See 49 U.S.C. § 40110(d)(4). As a general rule, the ODRA performs its bid protest and contract dispute resolution functions pursuant to the Delegations of Authority, as well as pursuant to the terms established by the Administrator in the AMS. See AMS § 3.9.4, “*FAA Dispute Resolution System*” and § 3.9.6, “*Dispute Resolution at the ODRA.*” As prescribed by the Administrator in the AMS, the following matters may not be protested before the ODRA:

- (a) FAA purchases from or through, state, local, and tribal governments and public authorities;
- (b) FAA purchases from or through other federal agencies;
- (c) Grants;
- (d) Cooperative agreements;
- (e) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

See AMS § 3.9.8, *Matters Not Subject to Protest*. The ODRA Procedural Regulations also implement these jurisdictional limits. See 14 C.F.R. § 17.11.

## **2. The ODRA’s Review Authority for the Slot Auction**

In addition to the above authorities, the FAA Administrator specifically has authorized the ODRA to review certain issues in protests concerning the Slot Auction. In the May Order, the Administrator specified that “[a]ny interested party” would “have an avenue to

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<sup>13</sup> The other provisions incorporated into the Administrator’s adjudication function are: 49 USC § 46102, “*Proceedings*”; § 46104, “*Evidence*” and § 46107, “*Enforcement by the Attorney General.*” See 49 USC § 40110(d)(4). In addition, the Acquisition Authority further provides that the identified bid protest and contract dispute adjudications “shall be subject to judicial review” under the “*Investigations and Proceedings*” chapter identified above, see 49 U.S.C. § 46110, as well as the APA’s “*Costs and Fees of Parties*” provision set forth at 5 U.S.C. § 504. See *Acquisition Authority*, 49 U.S.C. § 40110(d)(4), “*Adjudication of Bid Protests and Contract Disputes.*”

protest the [Auction] **procedures** up until the date of auction, in accordance with 49 U.S.C. [§] 40110(d)(4) and 14 C.F.R. Part 17,” the ODRA Procedural Regulations. *See* 73 Fed. Reg. 29550, 29554 (emphasis added).

The May Order housing the first Delegation (“May Order Delegation”) fully complies with the “*Regulations and Orders*” provision set forth at 49 U.S.C. § 46105. Consistent with that provision, the May Order was properly “served” on all interested parties via its publication in the *Federal Register*, and it sets forth a detailed explanation of the facts underlying the Acting Administrator’s selected lease and auction approach for disposing of the Slots. The May Order Delegation of Authority to the ODRA to review protests challenging the Slot Auction “procedures” defines the permissible scope of the ODRA’s review in these Protests.

In addition to the May Order, Article 11 of the PLA that was issued on August 6, 2008 as an Attachment to the Solicitation specifies, in relevant part, that:

Protests concerning leases, including without limitation protests concerning proposed procedures for award of the leases, the award decision, and the proposed terms of the lease or *the authority to conduct the auction*<sup>14</sup> shall be resolved through the [FAA] dispute resolution system at the [ODRA] and shall be governed by the [ODRA] Procedural Regulations.

*See Solicitation, PLA Attachment, Article 11* at 5-6 (emphasis added).

### **3. The ODRA’s Standard of Review and the Protesters’ Burden of Proof**

The ODRA is tasked by statute, as well as the regulations and the delegations discussed above, to serve as the FAA Administrator’s adjudicative forum for all bid protests under the FAA’s Acquisition Management System. In the context of a bid protest, the ODRA

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<sup>14</sup> In the context of these Protests, the ODRA interprets the phrase “authority to conduct the auction” to mean that the ODRA can review, among other things, whether the Program Office, in the conduct of the Slot Auction, is acting within the scope of the authority granted to it by the Acting Administrator.



reviews the challenged decisions or actions of the FAA's contracting personnel.<sup>15</sup> In so doing, the ODRA interprets relevant provisions of the AMS but does not step into the shoes of the contracting personnel; nor does it review the acquisition record in a particular matter to determine how the ODRA would have proceeded had it been part of the acquisition team. Rather, when reviewing a challenged decision or action in the context of a bid protest, the ODRA will determine whether the decision or action has a rational basis, and is neither arbitrary, capricious, nor an abuse of discretion. *See Protest of Ribeiro Construction Company Inc.*, 08-TSA-031; *Protest of Diversified Solution, Inc. and Alaska Weather Operations Services, Inc.*, 08-ODRA-00440 and 00431 (Consolidated). The Protester bears the burden of proving its case with substantial evidence. *See* 14 C.F.R. § 17.37 (j).

Additionally, protesters must demonstrate they have been prejudiced by the complained of action or decision of the Agency. *See Protest of Optical Scientific Inc.*, 06-ODRA-00365. It is well established the ODRA will not recommend that a protest be sustained when a complained of action or decision has a rational basis, and is neither arbitrary, capricious nor an abuse of discretion and is supported by substantial evidence. *Protest of Ibex Group, Inc.*, 03-ODRA-00275. Finally, a protester's mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid Protest. *See Protest of En Route Computer Solutions*, 02-ODRA-0220. In that regard it is well established that a protest challenging the terms of a solicitation must do more than merely disagree with the terms of the competition selected by the Agency. *See Protest of Knowledge Connections Inc.*, 06-TSA-024, *Decision Granting Motion to Dismiss* dated May 5, 2006. To that end, the ODRA Procedural Regulations specifically contemplate summary dismissal of any factually or legally defective ground of protest. *See* 14 C.F.R. § 17.19(c).

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<sup>15</sup> Prior to the present Consolidated Protests, the ODRA had never been called upon to review a decision or action of the FAA Administrator, as opposed to a decision or action of FAA Procurement Officials or Contracting Personnel.

## **B. Standing of the ATA, Port Authority and NYAMA to Protest**

An ODRA bid protest may only be brought by an entity or person with the requisite legal standing. The FAA's AMS provides that only an "actual or prospective participant in the procurement" has the standing to protest. *See AMS, Appendix C, Definitions, "Interested Party."*<sup>16</sup> The ODRA Procedural Regulations specifically contemplate that "Offerors or prospective offerors shall file a protest" with the ODRA. *See* 14 C.F.R. § 17.13 (c). A pre-award protest must be brought "[p]rior to the close of a solicitation," which in the instant Consolidated Protests is the deadline for submitting bids to compete in the Slot Auction. The Procedural Regulations additionally require that a protester be an "interested party," *see* 14 C.F.R. § 17.15(a), which is defined as: "one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract." *See* 14 C.F.R. § 17.3(k).

The five airlines which brought the Carrier Protests, *i.e.*, Northwest, Continental, US Air, United and Delta, clearly meet the standing requirements for filing a pre-award protest. Each has confirmed that it is a qualified Carrier under the Solicitation's specified eligibility criteria and intends to compete in the Slot Auction. Each also has alleged that it is an interested party because the challenged Slot Auction will directly impact its business operations. The Program Office has not challenged legal standing in connection with the Carrier Protests. With regard to the three Non-Carrier Protests, the Program Office contends that the Protesters lack the requisite standing and that their Protests therefore should be dismissed. *See Opposition* at 24-29.

In contrast to the five Carrier Protests, the three Non-Carrier Protesters are not, by their own admission, intending to compete in the Slot Auction. Although the ATA identifies itself as a "Protester Designee" for twenty-one airline carriers,<sup>17</sup> *see ATA Protest* at 1, its interest, at best, is indirect, deriving from the possible interests of its members, five of

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<sup>16</sup> The AMS can be accessed through the ODRA's website: <http://odra.faa.gov>.

<sup>17</sup> The airlines that brought the Carrier Protests are among the twenty-one airline members of ATA. *ATA Protest* at 1.

whom have filed the Carrier Protests.<sup>18</sup> Furthermore, it is undisputed that the ATA is not and does not seek to be an offeror or proposed offeror for the Slot Auction within the meaning of 14 C.F.R. § 17.13. The ATA therefore cannot demonstrate that it, as opposed to its members, has a direct economic interest that would be affected by the outcome of the Slot Auction.

For the same reason, the NYAMA lacks standing to protest the Slot Auction. By its admission, *see NYMA Protest* at 4, it is not a prospective competitor in the Slot Auction. Nor has it articulated any direct economic harm. Instead, the NYAMA only reports that its Protest “seeks to protect” group “interests that are germane to the NYAMA’s purpose.” *See NYAMA Protest* at 4.<sup>19</sup> The interests are described as opposing the “implementation of slot [lease] auctions [as they] will disrupt the existing business model and lease arrangements.” *See Protest* at 3-4. These interests of NYAMA members, however, are insufficient to establish the interested party standing of the NYAMA itself to protest.<sup>20</sup>

For similar reasons, the Port Authority also lacks standing to protest the Slot Auction. As a preliminary matter, the Port Authority expressly admits that it is not an offeror or prospective bidder for the Slot Auction; nevertheless, the Port Authority asserts that it “has a strong and direct interest in the outcome of” these Protests “as [it is] the operator of the airports in the New York metropolitan area.” *See Port Authority Protest* at 3. The Port Authority does not dispute, however, that it is not eligible to compete under the terms of the Slot Auction since it is not a carrier airline. Additionally, the Port Authority’s allegations of economic harm are both speculative and attenuated in that they

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<sup>18</sup> ATA advises that it “expect[s] that one or more of ATA’s members have an interest in acquiring the slots at issue” and that “[v]arious ATA members currently serving [Newark] may wish to retime some of their operations into the hours covered by the slots” or are otherwise “very likely to have an interest in acquiring the slots at issue.” *See ATA Protest* at 3.

<sup>19</sup> Notwithstanding the express provisions of the ODRA Procedural Regulations, *see definition of “interested party” at 14 C.F.R. § 17.3(k)*, the NYAMA reports that “the participation of NYAMA’s individual members is not required.” *See NYAMA Protest* at 4.

<sup>20</sup> NYAMA uniquely has alleged that the Solicitation unduly restricts the slot auction competition to air carriers. While the ODRA not reach that issue because of NYAMA’s lack of legal standing, the ODRA notes that the Program Office has articulated a basis for the complained-of limitation. *See Program Office Response* at 39.

focus on the possible impacts of potential future auctions of much greater scope than the Slot Auction at issue in these Protests. *Id.* at 4.

Given that the Port Authority, as well as the ATA and the NYAMA are not prospective bidders, these Non-Carrier Protesters lack the requisite economic interest and standing to file an ODRA bid protest.<sup>21</sup> *Id.*; *Protest of Siemens Building Technologies, Inc.*, 99-ODRA000127 and 99-ODRA-00131 (Consolidated); *Protest of Metro Monitoring, Inc.*, 97-ODRA-00047. As the ODRA previously has stated:

The ODRA Procedural Rules, 14 C.F.R. Part 17, only permit offerors or prospective offerors ‘whose direct economic interest has been or would be affected by award or failure to award an FAA contract to file a protest. *See* 14 C.F.R. § 17.3(k); 14 C.F.R. § 17.13(c). In a pre-award context, any prospective offeror wishing to challenge the provisions of the solicitation may file a protest.

*Protest of Edward B. Block Consulting*, 02-ODRA-00225. As we also noted in *Block*:

The ODRA Procedural Rules are consistent with the long-standing rule at the [Government Accountability] Office that only actual or prospective bidders or offerors may file bid protests. 4 C.F.R. § 21.0(a); *see also American Federation of Government Employees, AFL-CIO v. United States*, 258 F.3d 1294 (Fed. Cir. 2001); *Baltimore Gas and Electric Company, et al. v. United States*, 2002 U.S.App. LEXIS 10501 (4<sup>th</sup> Cir. 2002).

*Id.* at 5.<sup>22</sup>

The ODRA appreciates that the overall plan to employ a Market Approach to attempt to relieve congestion at the New York Metropolitan Area airports is of great significance to

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<sup>21</sup> Neither will the ODRA permit these parties to formally intervene in the Carrier Protests. There would be no point to permitting intervention at this stage of these expedited proceedings. In any event, all three parties already have filed Comments on the Program Office Response to the Consolidated Protests, and no further briefings are scheduled to be received from any party.

<sup>22</sup> The Port Authority complains that the proposed Slot Auction “will increase the direct economic costs to air carriers operating” in the New York Metropolitan Area, including Newark, “which, in turn, will result in disincentives to (1) airline passengers through higher ticket prices and (2) airline investment in facilities.” *See Port Authority Protest* at 4.

the Port Authority, and to the member companies of the ATA and the NYAMA. The ODRA must be mindful, however, that these cases have been brought to the ODRA as bid protests, which by their very nature have a narrow focus and only may be brought by entities who either are participating or plan to participate in a competitive contracting process. None of the Non-Carrier protesters are so situated. Were the ODRA to hold that these entities nonetheless have standing, it would create a precedent that non-bidding trade associations, property owners or other similarly situated non-bidding parties could file protests of any proposed FAA contracting action that may have an indirect, adverse impact on them. Such a precedent would be inconsistent with long-standing principles of bid protest standing and would seriously undermine the Agency's ability to efficiently acquire the goods and services it needs to fulfill its mission, as well as the ODRA's ability to resolve procurement-related disputes in a timely, efficient manner.

For the reasons discussed above, the ODRA finds that the five Carrier Protests have been brought by entities that are interested parties with legal standing to protest, but that the ATA, the NYAMA and the Port Authority do not have standing under the ODRA Procedural Regulations to file protests of the Slot Auctions. *See* 14 C.F.R. §17.3 (k), §17.13 (c) and §17.15 (a) The ODRA therefore recommends that the Non-Carrier Protests be dismissed.<sup>23</sup>

### **C. The FAA's Authority to Dispose of Property**

Each of the Carrier Protesters challenges FAA's authority to lease the Slots—and its use of an auction mechanism as part of the leasing process. *See United Protest* at 5; *US Airways Protest* at 4; *Delta Protest* at 5; *Continental Protest* at 8; *Northwest Protest* at 4. Three statutory provisions and the FAA's long-established body of procurement policy and ODRA case law are directly relevant to these protest grounds. The first statute establishes the FAA Administrator's sovereignty and oversight of the use of airspace in

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<sup>23</sup> The ODRA, in so recommending, does not intend to suggest that any of these three entities would lack standing to participate in regulatory or other non-ODRA legal proceedings related to the Slot Auction.

the United States under the Airspace Management Authority. *See* 49 U.S.C. § 40103(b)(1). The second statute establishes the Administrator’s contracts and acquisition Property Management Authority.<sup>24</sup> *See* 49 U.S.C. § 106(l) and § 106(n). The third statute vests the Administrator with general procurement Acquisition Authority over FAA procurements. *See* 49 U.S.C. § 40110. Finally, the FAA’s AMS, which as noted above, was established by the FAA at the direction of the Congress to “provide for more timely and cost-effective acquisitions,” *see AMS, Part A: Introduction*, is relevant to these particular protest grounds.

The Airspace Authority tasks the Administrator to:

develop plans and policy for the use of the navigable airspace and assign *by regulation or order* the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

*See* 49 U.S.C. § 40103(b)(1) (emphasis added).

The Administrator’s Property Management Authority is set forth in “Federal Aviation” Section of the DOT organic statute. *See* 49 U.S.C. Subtitle I, [DOT], Chapter I—*Organization*, Section 106, [FAA]. The “Contracts” provision of this Authority provides that the FAA Administrator:

*is authorized to enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary to carry out the functions of the Administrator or the Administration with any Federal agency . . . or any person, firm, association, corporation . . . on such terms and conditions as the Administrator may consider appropriate.*

*See* 49 U.S.C. § 106(l)(6) (emphasis added). The “Acquisition” clause, housed within this same Section, authorizes the Administrator to:

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<sup>24</sup> In its Response, the FAA refers to these two provisions—49 U.S.C. § 106(l) and § 106(n) as the Administrator’s “property management” authority. The ODRA adopts this identifier for purposes of this discussion.

acquire by purchase, lease . . . or otherwise: such other real or personal property (including office space and patents), *or any interest therein . . . as the Administrator considers necessary;*

[and]

*to lease to others such real and personal property.*

See 49 U.S.C. § 106(n)(1)(A) and (B) (emphasis added).

The third statute outlines the Administrator’s “Acquisition Authority,” specifying that the Administrator

*may acquire services [or] an interest in property, including an interest in airspace immediately adjacent to and needed for airports and other navigation facilities owned by the U.S. Government and operated by the Administration.*

See 49 U.S.C. § 40110(a)(1) (emphasis added). The Acquisition Authority also specifies that the Administrator “*may dispose of an interest in property for adequate compensation.*” See 49 U.S.C. § 40110 (a)(2) (emphasis added).

In vesting the Administrator with Acquisition Authority, the same Statute directed the Administrator to “*develop and implement an acquisition management system [to] address the unique needs of the agency,*” see 49 U.S.C. § 40110(1)(A) (emphasis added). Pursuant to this mandate, the Administrator created the AMS, which establishes “the policies, guiding principles, and internal procedures for FAA’s new acquisition system” that was designed to, “at a minimum, provide for more timely and cost-effective acquisitions.” See AMS, Part A, AMS Policy Introduction and Part C, “Legal Effect of this [AMS] Document.” Absent approved “waivers, deviations or tailoring on a case-by-case basis” by the Administrator, see AMS § 1.1.4, “Applicability,”<sup>25</sup> the AMS applies to “all FAA organizations, all appropriations, and all investment programs” except for the Airport Improvement Program. *Id.* With respect to the authority of the Administrator, the ODRA has previously held that “it is well established that the FAA Administrator has

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<sup>25</sup> In the AMS, the Administrator has assigned responsibility for waivers, deviations and related functions to the Agency’s Acquisition Executive. *Id.*

full and final authority over all FAA Acquisitions under the AMS.” *Protest of CNI Aviation LLC*, 07-ODRA-00448.

The express language used by Congress is the starting point of any analysis of the meaning of a statutory provision. *See Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where the statutory language is clear on its face, its plain meaning will be given effect because if the intent of the Congress is clear, “that is the end of the matter.” *See Chevron v. U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Here, there is clear language in each of the above-cited authorities to support the Administrator’s authority to enter into leases to dispose of property. As discussed above, the Property Management Authority states that the Administrator may “enter into and perform such contracts, leases, cooperative agreements, *and other transactions as may be necessary to carry out the functions* of the Administrator or the Administration” with a “non-federal entity on such terms and conditions as the Administrator may consider appropriate.” *See Property Management Authority, supra* (extra emphasis added). One of the obvious primary “functions” of the FAA Administrator and the Agency, albeit pursuant to a different statutory authority—the Airspace Management Authority—is to manage navigable airspace within the United States. *See Airspace Management Authority, supra*.<sup>26</sup> As such, conducting a lease to carry out the airspace management function is consistent with the FAA Administrator’s Property Management Authority.

To that end, the AMS also emphasizes the Administrator’s “broad authority” to use other agreement vehicles such as “cooperative agreements” and “other transactions” which do not necessarily or clearly involve *tangible* property interests. *See AMS* § 3.1.4, “*Contracting Authority*.” Notably, the AMS Guidance discussing AMS “Agreements” expressly identifies a type of “other transaction agreement” (“OTA”) that potentially

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<sup>26</sup> The Airspace Management Authority otherwise expressly authorizes the Administrator to conduct “*other transactions as may be necessary*” to execute the FAA’s airspace management goals. *See Airspace Management Authority, supra*.



involves both tangible and intangible property interests. *See AMS Procurement Guidance, T3.8.1, Agreements, ¶ 1.a(1), Applicability.* According to the Guidance, an OTA is defined as:

an agreement between the FAA and a non-Federal entity (either foreign or domestic) where the FAA's purpose is to obtain a direct benefit that advances the agency's mission while also providing assistance to the general public.

*See id., Types of Agreements, Other Transactions, § 1(c)(4)(a).* When using an OTA, the AMS Guidance further authorizes the FAA to require “reimbursement” or “receive[e] payments for benefits rendered to a non-Federal entity.” *Id.*, (b).

The ODRA concludes that the plain terms of each of the above-cited authorities authorize the leasing of FAA property interests. Moreover, the use of the competitive process of an auction to select the lessee of a property interest in order to maximize competition and promote the return of the best value to the government is not prohibited by any of the aforementioned authorities and is consistent with the preference for competition stated in the AMS. *See AMS § 3.1.1.*

As in the case of the sample OTA described in the AMS Guidance, the contemplated lease agreement will result in the FAA receiving compensation from the successful bidding Carrier for the use of the Slots. Regardless of whether the leases are found to involve tangible or intangible property interests, in the ODRA's view, they constitute an acquisition transaction authorized by the AMS. Assuming that a federal court ultimately decides that the Slot Auction is otherwise legal and constitutional, the use of a lease and a competitive bidding auction to dispose of the Slots would be consistent with the AMS and the above-cited statutory authorities. As a result, to the extent that the Carrier Protests allege that the FAA lacks authority to dispose of a property interest through a lease that is awarded based on a competitive auction, the ODRA concludes the Carrier Protests lack legal merit and recommends that they be denied. In so finding, the ODRA does not reach the question of whether the slots constitute “property”, as urged by the Program Office, or a non-proprietary license, as urged by the Protesters. That issue

involves matters of non-procurement law and policy that are not justiciable in the context of a bid protest proceeding at the ODRA. *See discussion, infra* at 31-33.

#### **D. The Terms of the Proposed Lease Agreement**

Continental was the only Protester with legal standing who raised challenges against the terms of the Slot Auction.<sup>27</sup> In pertinent part, it alleged that the Solicitation is deficient because the termination provisions are ambiguous and that the requirement to bring any bid protest or contract dispute to the ODRA is unjustified.

On August 27, 2008, the FAA Program Office issued “FAA Responses to Comments on the Auction” (“Program Office Comments”) and Amendment 001 to the Solicitation (“Solicitation Amendment”), which contained a revised PLA. The Program Office Comments explain the revised PLA terms. With respect to PLA Article 13, “*Termination for Convenience*,” the Program Office explained that the Agency’s right to terminate under this provision relates to issues of national security or the discharge of sovereign responsibilities, as well as to the use or failure to use the Slots by the awardee. The Program Office further stated “[a]s the examples concerning possible termination [contained in Article 6, Conditions of the PLA] appear to have created unanticipated confusion, the Proposed Lease Agreement is being modified to delete all reference to revocation and loss of lease except those contained in Article 13 (Termination for Convenience) and Article 14 (Default).” *See Solicitation Amendment No. 0001, “FAA Responses to Comments on Auction* dated August 27, 2008.<sup>28</sup>

In the Solicitation Amendment, the Program Office also responded to allegations that the PLA denies potential bidders the right to protest in forums other than the ODRA. The Program Office indicated that it had removed, as unnecessary, the provision in the PLA that offerors agree to bring protests at the ODRA. The Program Office explained that the provision was not needed since the ODRA maintains exclusive jurisdiction to adjudicate

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<sup>27</sup> Although NYAMA alleges that the FAA should allow entities other than air carriers to bid, as discussed above, NYAMA lacks standing to protest.

<sup>28</sup> This Amendment was also posted on the FAA Contracting Opportunities website.

bid protests pursuant to the Administrator's Acquisition Authority set forth at 49 U.S.C. § 40110(d)(4).

As for the alleged ambiguity of what constitutes a Default under Article 14, the Program Office stated that the term "has the same meaning and interpretation as similar language used in government contracts for over 50 years .... Failure to comply with the lease terms would constitute a default. Examples ... include: the lessee fails to pay the bid amount as required or sells the slots to an entity that is not allowed to operate them as a certificated or exempt air carrier." *Id.* With respect to concerns about the proposed duration of the PLA of less than five years for the Newark Order, as compared to ten years in the JFK and Newark NPRM, the Program Office responded that it had decided to retain the proposed five year lease term, even though there has been no final decision for the duration of slots *Id.* at 2. The Program Office also stated "it is highly probable that there will be a regulation establishing slots for duration of at least five years, but if the final rule is for a lesser duration, the FAA will terminate the lease ...." *Id.* at 1.

Notwithstanding the Program Office's position and the revisions to the PLA, as set forth in Solicitation Amendment, the Consolidated Comments continue to assert that the PLA contains multiple ambiguities that preclude a competition on a fair and equal basis. The Consolidated Comments contend that the termination for convenience provision renders the lease illusory and that no limits exist on the FAA's discretion to terminate. Because the termination provision caps the FAA's termination liability at the "total Lease price, they argue that if the "FAA terminates the lease, the awardee may seek its bid price, but the ceiling creates significant financial risk and exposure for additional investments beyond the bid price." *Consolidated Comments* at 44. Moreover, in these Comments, the Carrier Protests argue that the effect of deleting the language pertaining to considerations of "use or lose" does not eliminate the question of under what circumstances the FAA would terminate the lease for convenience if it is not used by the winning bidder and compromises the ability of competing bidders to value the lease. *Id.* at 44-45. The Consolidated Comments also contend that the PLA is ambiguous with respect to the five year duration and that the FAA may terminate the lease before the expiration of the five

year term; thereby presenting greater risk for the awardee, who will have made substantial investments in making the use of the slots. *Id.* at 45.

Notwithstanding these contentions, the record shows that the PLA expressly references some specific situations that may give rise to a termination prior to the expiration of the lease term. For example, the Article 7 payment provision states that failure to provide the required deposit or balance by the time specified may result in termination for default. Also, “[i]f prior to the expiration of the Lease, limits on slots are no longer in force at Newark Liberty International Airport, the lessee shall be entitled to a refund prorated for the remaining term of the lease ....” *See Solicitation, Amendment No. 001, PLA* at 3. Additionally, Article 7 states “in the event of termination or expiration of this Lease prior to the five years, other than a termination for default of the lessee, the lessee shall be entitled to a refund pro rated for the remaining term of the lease.” *Id.*

In addition, consistent with longstanding case law, Article 13 of the PLA provides that “[t]he Government may terminate this lease in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government’s interest.” *Id.*, *Article 13, Termination for Convenience of the Government*, ¶ a at 13. Article 13 further provides that, in the event of a termination for convenience, the lessee and the Contracting Officer “may agree upon the whole or any part of the amount to be paid” and that “amount may include a reasonable allowance for a prorated share of the lease term paid for, but unused,” but this amount “may not exceed the total Lease price.” *Id.* at ¶ e at 8.<sup>29</sup> Article 14 of the PLA provides that the FAA may terminate the arrangement in whole or in part if the Lessee “fails to perform any provisions of” the agreement. *Id.*, *Article 14, Default*, ¶ a at 8. This Article also specifies that if the PLA is terminated in whole or in part, the FAA may retire or auction the slots remaining under the lease and the Lessee will receive no compensation. *Id.*, ¶ c at 9. Article 14 further provides that “[i]f after termination, it is determined that the Lessee [sic] was not in default, or that the

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<sup>29</sup> There appears to be a typographical error in Article 13, paragraph (e) which contains language that refers to a non-existent subparagraph (f)(3).

default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.” *Id.*, ¶ d at 9.

As for the challenge to the duration of the PLA, the record shows that it clearly provides for use of one departure slot and one landing slot per day at a specified time beginning on October 26, 2008 for a period not to exceed five years or “until earlier terminated by the parties as provided herein.” *See Solicitation, Amendment No. 0001, PLA, Article 3, Effective Date* at 1 and *Article 7, Payment* at 3. It is well established that the determination of a contracting agency’s needs and the best method of accommodating them are matters within the agency’s soundly exercised discretion, which the ODRA will question only if the agency’s judgment is shown to lack a rational basis or constitute an abuse of discretion. *Protest of Raytheon Technical Services Company*, 02-ODRA-00210; *See also Parcel 47C LLC*, B-286324, B-286324.2, 2001 CPD ¶ 44, 2000 WL 33231411 (Comp.Gen.), *citing Tucson Mobilephone, Inc.*, B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2, *aff’d*, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. Additionally, mere disagreement with the agency’s judgment concerning the agency’s needs, and how to accommodate them, does not show that the agency’s judgment is irrational, arbitrary or capricious.

In reviewing an allegation that a requirement exceeds an agency’s needs, the ODRA will not substitute its judgment for that of the Program Office. *Id.* Moreover, as is the case in all public contract competitions, offerors who choose to compete for the Slot Auction lease are expected to use their professional expertise and business judgment in anticipating risks and preparing their offers. *See AshBritt Inc.*, B- 297889, B- 297889.2, 2006 CPD ¶ 48, 2006 WL 707305 (Comp.Gen.), *citing AT & T Corp.*, B-270841 *et al.*, May 1, 1996, 96-1 CPD ¶ 237 at 8. This Slot Auction offers the same competitive opportunity and risk to all offerors. Here, the risk imposed on the offerors under this Slot Auction process appears to affect all offerors equally.

The ODRA finds the language of the PLA above to be clear and unambiguous with respect to the FAA’s rights to terminate the arrangement and the duration of the leasing arrangement. Moreover, the terms set forth in the termination for convenience and

default clauses are consistent with those contained in standard AMS and Federal Acquisition Regulation clauses, as well as long established legal precedent. The termination for convenience clause has been used in Government contracts for many years and reflects the Government's unique authority to terminate its contractual obligations "because of the unique requirement that the government act in the interest of the society it serves" and as such "retains a special power to terminate its contract obligations when such action serves the public interest. *Southwest Laboratory of Oklahoma, Inc.*, B-251778, 93-1 CPD ¶ 368, citing *United Steam Engine Co.*, 91 U.S. 321 (1876); *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982). Similarly, the Government's right to terminate for default has been litigated extensively and is the subject of well developed case law, which essentially provides that the right to terminate the arrangement for default arises when there is an uncured failure by the Lessee to perform its material obligations. See *Restatement (Second) of Contracts* § 237 (1981); see also *A-Greater New Jersey Movers, Inc.*, 06-1 BCA ¶ 33179, citing *Precision Products*, ASBCA No. 25280, 82-2 BCA ¶ 15,981; *Kwok*, 90-1 BCA ¶ 2229.

The ODRA concludes that the Solicitation is consistent with the requirements of the AMS and cannot be said to lack a rational basis or reflect conduct that is arbitrary or capricious or an abuse of discretion. The ODRA therefore recommends that the protest ground challenging the terms of the PLA be denied as lacking legal merit.

#### **E. The Remaining Protest Grounds**

As noted above, the ODRA's protest jurisdiction is limited to reviewing pre-award protests challenging the terms of a Solicitation and post-award protests challenging evaluation and selection decisions. In the context of any protest, the ODRA's review focuses on determining whether the decisions and actions of the Agency's procurement personnel are consistent with the AMS, rationally based and not otherwise arbitrary, capricious or an abuse of discretion. See *Protest of DMS Technologies*, 04-ODRA-00306. With one exception, discussed in Section D above, none of the Carrier Protests has challenged the slot auction procedures. Rather, they have focused on policy and

regulatory issues, as well as legal challenges based on the United States Constitution and several non-procurement statutes. As is discussed below, the ODRA's authority and responsibility as the FAA Administrator's bid protest forum under the FAA's Acquisition Management System and the May Order does not extend to consideration of such issues.

### **1. The ODRA's Authority to Review the Slot Auction**

The Program Office asserts that the ODRA has jurisdiction to review most of the issues raised by the Protesters in this matter. *Program Office Response* at 1. The Consolidated Comments agree with the Program Office position that "the ODRA can consider the merits of the parties' arguments at least to the extent necessary to determine whether the FAA's proposal for allocating slots amounts to property management (as the Program Office contends) or whether it constitutes the regulatory function of licensing (as the Protesters contend)." The Consolidated Comments also agree with the Program Office position "that ODRA can order the Program Office not to conduct the planned auction if it finds (i) that the auction would be inconsistent with the final Newark Operating Limitations Order ..., (ii) that the auction and resulting lease would violate some other law ..., or (iii) that conducting the auction would violate the Protesters' procedural rights under the APA and Due Process Clause of the U.S. Constitution ...." *Consolidated Comments* at 48.

Notwithstanding these assertions by the Protesters and the Program Office, the ODRA has not been granted, either by statute or by delegation, authority to review the final orders of the FAA Administrator. See *Electronic Data Systems Federal Corp. v. General Services Administration, Board of Contract Appeals*, 792 F.2d 1569 (Fed.Cir.1986). As was discussed above, the powers to manage navigable airspace and property, as well as conduct FAA acquisitions, are solely vested in and committed entirely to the Administrator's discretion. Thus, reviewing the current directive of the Acting Administrator—as expressed in the May Order—to conduct the Slot Auction effort is beyond the scope of the ODRA's protest and contract dispute review function.

Nor does the language of Article 11 of the Solicitation's attached PLA provide such authority. As was noted above, the ODRA interprets the phrase "authority to conduct the auction" contained in Article 11 to mean that the ODRA may review whether, in conducting the Slot Auction, the Program Office is acting consistent with the authority granted it by the Acting Administrator in the May 2008 Order, which expressly authorizes and directs the Program Office to conduct the Slot Auction and permits the filing of protests at the ODRA of the Slot Auction's "procedures." *See May Order, supra*. As was discussed in Sections C and D above, the ODRA has concluded that the Slot Auction procedures are consistent with the requirements of the AMS, and are not arbitrary, capricious or an abuse of discretion. The Program Office's actions have been consistent with the May Order and thus cannot be said to be *ultra vires*.

## **2. The Alleged Violations of the Constitution and Non-Procurement Law**

The remaining grounds of the Carrier Protests do not allege violations of procurement principles or policies; nor do they challenge the Slot Auction procedures. Instead, the remaining protest grounds maintain that the Slot Auction violates several non-procurement laws such as: the Consolidated Appropriations Act, 2008, *supra*; the Independent Office Act, *supra*, the APA, *supra*, as well as the Due Process Clause of the United States Constitution, *supra*, and several other federal fiscal laws.<sup>30</sup>

Determining whether the Slot Auction runs afoul of the above-referenced non-procurement laws or the United States Constitution goes far beyond the ODRA bid protest-related functions of interpreting the AMS and reviewing decisions or actions of the involved contracting personnel regarding Slot Auction procedures and the propriety of the Slot Auction Solicitation's requirements. None of the cited federal laws which the Slot Auction allegedly violates involve procurement provisions, and none are incorporated as a term of the Slot Auction. In addition, none of the cited non-

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<sup>30</sup> In addition to the above-referenced statutory violations, Continental alleges that the Slot Auction violates the following federal appropriations provisions: 31 U.S.C. § 1301(a); 31 U.S.C. § 3302(b); 18 U.S.C. § 209 and the General Accountability Office's *Principles of Appropriations Law, Vol. II* at 6-163 (3d ed. 2006). Continental also contends that directing auction participants to file any protests against the Solicitation or Auction at the ODRA violates the Tucker Act. *See* 28 U.S.C. § 1491.



procurement laws are relevant to interpreting the Slot Auction's terms. *See Contract Dispute of DCT Incorporated*, 05-ODRA-00354, *Motion to Dismiss* dated November 4, 2005; *Tri-State Motor Transit Co.*, GSBCA No. 142255-RATE (March 5, 1998).

It is well established that administrative tribunals such as federal agency boards of contract appeals generally lack the jurisdiction to decide issues of constitutional law. *See United Technologies Corp., Pratt & Whitney Group, Government Engines and Space Propulsion*, ASBCA No. 46880 *et al.*, 95-BCA 27,456; *Protest of Stanford University*, B-241125, 90-2 CPD ¶ 246. The construction and application of the Constitution and the above-referenced non-procurement federal laws and their impact on the legality of the Slot Auction are within the purview of the federal courts, as the final authorities and arbiters on such matters of statutory interpretation and construction. *See Simons v. United States*, 25 Cl.Ct. 85 (1992) (“[a]lthough the plaintiffs assert contract rights arising from an express contract with a federal agency, the case is actually one for judicial review.”). While the findings of the ODRA and other administrative tribunals such as the various boards of contract appeals and the Government Accountability Office are generally accorded deference, it is the nevertheless the federal courts—rather than these tribunals—that are vested with the final word over controversies involving an agency head's actions and interpretations of law. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980), *cert. denied*, 449 U.S. 975 (*although agency's interpretation of statute to be given deference, courts have final word on statutory interpretation*); *see Matter of Stephen V. Yates*, GSBCA No. 16236-RELO, 04-1 BCA ¶ 32,542.<sup>31</sup>

The ODRA's adjudicated bid protest findings and recommendations constitute final Agency action only when the Administrator or the Administrator's delegee adopts those findings and recommendations and issues a final Agency order.<sup>32</sup> If the ODRA were to proceed with issuing findings and recommendations on the remaining issues raised in the Carrier Protests, this forum, which acts as the Administrator's delegee in conducting

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<sup>31</sup>Several of the Protesters have advised the ODRA that they recently filed challenges against the Auction and its lawfulness in federal court. *See States Roofing Corp. v. United States*, 70 Fed. Cl. 299 (Fed. Cir. 2006).

<sup>32</sup>The Administrator has delegated final decisional authority to the ODRA over acquisitions valued at \$5 Million or less. *See Delegation of Procurement Authority* dated March 10, 2004.

adjudications, would be reviewing the Acting Administrator's final decision in the May 2008 Order to conduct the Slot Auction. Essentially, the Acting Administrator would, through the ODRA, be reviewing his own Order. Such a result would be both legally inappropriate and would turn the ODRA adjudication process on its head. *See Protest of HyperNet Solutions, Inc.*, 07-ODRA-00416, *Decision Denying CNI Aviation LLC Request for Reconsideration* dated January 25, 2008; *ODRA Procedural Regulations* at 14 C.F.R. Part 17.

To the extent these Protests seek to have the ODRA determine whether, in issuing the May Order the Acting Administrator acted in consonance with all applicable non-procurement law and the requirements of the United States Constitution, the ODRA declines to consider such questions in the context of these Protests. *See Tri-State Motor Transit Co.*, GSBICA No. 14241-RATE, 97-2 BCA ¶ 29,306 (the GSBICA refused to review requests for enforcement or sanctions of the GSA Administrator's actions.) The ODRA therefore recommends that the remaining grounds of the Protests be dismissed.

## **V. CONCLUSION**

For the reasons discussed above, the ODRA recommends that:

- (1) the Protests of the ATA, the Port Authority and the NYAMA be dismissed for lack of standing;
- (2) the Carrier Protests be denied to the extent they assert that: (a) the leasing of property interests is not authorized; and (b) that the proposed lease terms are deficient; and
- (3) all other grounds of the Carrier Protests be dismissed as they do not challenge the procedures to be employed in conducting the Slot Auction and raise constitutional and non-procurement legal issues not appropriate for adjudication in the context of a bid protest proceeding before the ODRA.

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