# Federal Aviation Administration

# Office of Dispute Resolution for Acquisition

**Matter: Findings and Recommendation of the**

**Office of Dispute Resolution for Acquisition Regarding the Equal Access to Justice Act Application of WEATHER EXPERTS, INC.**

**Pursuant to FAA Order ODR 97-25**

**Docket: 96-ODR-00013 EAJA**

In Case No. 96-ODR-00013, Weather Experts, Inc. ("Experts") protested the solicitation and award of a weather observation services contract by the FAA. The Administrator sustained the protest after consideration of the Special Master's recommendation that the protest be denied. *See* FAA Order ODR-97-25. Subsequently, Experts submitted the pending application to the Office of Dispute Resolution for Acquisition ("ODRA") for recovery of attorney's fees pursuant the Equal Access to Justice Act (5 U.S.C. § 504)("EAJA"). For the reasons set forth below, the ODRA recommends a holding that: (1) an eligible prevailing party in the adjudicative phase of the dispute resolution process before the ODRA may apply for recovery of attorney's fees under the EAJA; and (2) inasmuch as the FAA's actions related to the subject matter of the instant protest were substantially justified, Experts' EAJA application be denied.

I.

*The FAA's Internal Dispute Resolution Process Is Subject to EAJA.*

This case presents the first application to the ODRA for award of attorneys' fees under the EAJA. Although the issue of whether the EAJA applies to disputes before the ODRA under the FAA's Acquisition Management System ("AMS") has not been briefed by the parties, it is appropriate to address the matter in this decision in order to provide guidance to future interested parties. The following section discusses the jurisdictional basis for the FAA's choice of an internal dispute resolution process, and the applicability to that process of the Administrative Procedure Act, 5 U.S.C. § 551 through § 559("APA").

A. The FAA's Dispute Resolution Process

Congress directed the FAA to develop a new procurement system in the Fiscal Year 1996 Department of Transportation Appropriations Act, Pub. L. 104-50, 109 Stat. 436 (November 15, 1995)("Act"). **[1]** In Section 348(a) of the Act, Congress explicitly addressed the scope of the FAA's discretion to: (1) develop and implement an acquisition management system; (2) design a system that meets the "unique needs" of the FAA; and (3) provide "for more timely and cost-effective acquisitions." It is well established that where a statute involves a delegation of policy-making authority to an agency, and the agency's interpretation of the statute results from a permissible construction of either silent or ambiguous portions of the statute, the courts must uphold the agency's interpretation. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, *reh'g denied,* 468 U.S. 1227 (1984). The Court's analysis in *Chevron* is twofold, addressing both explicit and implicit grants of authority. *Id*. at 842-43; s*ee also Pension Benefit Guaranty Corp. v. LTV Corp*., 496 U.S. 633 (1990). The explicit statutory instruction in Section 348(a) directs the FAA to exercise wide discretion to design a system that meets the unique needs of the agency. The resulting AMS, including its dispute resolution portion, is a permissible construction of the Act.

The choice of an internal dispute resolution system also is grounded on the Administrator's grant of authority in the FAA's organic statute ("Organic Statute")(now part of Title 49, at 49 U.S.C. §§ 46101, et seq.) **[2]** to conduct investigations and hearings. The authority to hold hearings is contained in 49 U.S.C. §§ 46102(a) through (c):

> Sec. 46102. Proceedings
>
> (a) Conducting Proceedings.--*Subject to subchapter II of chapter 5 oftitle 5,* the Secretary of Transportation (or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powersdesignated to be carried out by the Administrator) *may conduct proceedings in a way conducive to justice and the proper dispatch of business*.
>
> (b) Appearance.--*A person may appear and be heard before the Secretary and the Administrator in person or by an attorney*. The Secretary may appear and participate as an interested party in a proceeding the Administrator conducts under section 40113(a) of this title.
>
> (c) Recording and Public Access.--*Official action taken by the Secretary and Administrator under this part shall be recorded*. Proceedings before the Secretary and Administrator shall be open to the public on the request of an interested party unless the Secretary or Administrator

> decides that secrecy is required because of national defense.
>
> [Emphasis added.]

The reference in Section 46102(a) to Subchapter II of Chapter 5 of Title 5 subjects the Administrator's authority to conduct hearings to the portion of the APA addressing administrative procedures. Subparagraph (a) of §46102 also states that the Administrator "may conduct proceedings in a way conducive to justice and the proper dispatch of business." Id. The grant of discretion to the FAA to shape procedures in Section 46102(a) of its Organic Statute complements the Congressional direction of § 348(a) of the Act that the FAA develop its own procurement system. While the goals in both the Act and the Organic Statute are explicit, the authority to decide how the FAA achieves these goals is delegated to the Administrator in the Act and the Organic Statute. The ODRA procedures, developed as a component of the overall AMS, are a permissible application of the procedural discretion given the FAA in Section 46102(a) of its Organic Statute. *See Chevron, supra.*.

B. The Relationship of the EAJA and the APA to the ODRA Process

The award of EAJA fees is allowed under 5 U.S.C. § 504(a)(1), when an agency conducts an "adversary adjudication." The term "adversary adjudication" is defined in the EAJA as: "(i) an adjudication under section 554 of this title [5 U.S.C. § 554] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C) in the APA, adjudication is defined in § 551(7) as: "agency process for the formulation of an order."

Section 554 of the APA addresses adjudications that are "required by statute to be determined on the record after an agency hearing." 5 U.S.C. § 554. The Supreme Court has held that §554 governs formal adjudications, but that "[the] formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1961). Determination of what § 554 procedures must be followed depends upon the statute governing the agency, and the extra-statutory due process requirements imposed by the Fifth Amendment to the Constitution. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539-542 (1984). In that regard, 49 U.S.C. § 46102 governs FAA procedure and supports the idea that the adjudicative portion of the ODRA dispute resolution procedures meets the requirements of 5 U.S.C. § 554 as determined by the Supreme Court in *Loudermill*, 470 U.S. 532. As is discussed above, the FAA has wide discretion under Section 46102(a) to "conduct proceedings in a way conducive to justice and the proper dispatch of business."

The adjudicative portion of ODRA dispute resolution procedures is based upon an administrative record, and requires two writings: the recommendation from the ODRA to the Administrator, and the order of the Administrator. These procedures satisfy the direction given in § 46102(c); and fulfill the requirement that an order of the Administrator be capable of imparting information sufficient for review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

Section 556(d) of the APA, governing the conduct of § 554 hearings, allows the Agency to adopt procedures for the submission of some or all the evidence in written form. The Supreme Court has held that an agency is free to adopt procedures that amount to less than full, formal hearings within the ambit of 5 U.S.C. § 554. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 663 (1990). The Supreme Court also has held that the submission of written materials satisfies the APA requirement of a hearing. *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). *See also CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031 (D.C. Cir. 1986), *citing Goss v, Lopez*, 419 U.S. 565, 583 (1975).

Both the case law and the statutes governing the conduct of FAA hearings allow the FAA to promulgate procedures for the ODRA adjudicative process that make the presentation of oral evidence a matter of discretion for the hearing officer. Inasmuch as the ODRA's internal dispute procedures are subject to and in compliance with § 554 of the APA, the EAJA applies to the adjudicative portion of the ODRA dispute resolution process. *See also Keyava Const. Co. v. U.S.*, 15 Cl. Ct. 135, 138 (Cl.Ct. 1988)

II.

*The Resolution of the Underlying Protest*

The procurement at issue concerned the solicitation and award of a weather observation services contract at Sea Tac and Boeing Field in Washington State by the FAA Northwest Mountain Region (FAA). The procurement was conducted under the AMS, and the proposals were solicited, evaluated and awarded on a "Best Value" basis, rather than on the basis of price alone. Award was made to Midwest Weather, Inc (Midwest). Midwest commenced its performance under the contract on October 1, 1996.

Experts filed its protest on October 10, 1996. The FAA filed an initial response to the protest on January 2, 1997 and filed additional comments on January 10, 1997. Experts supplemented its protest with filings on December 24, 1996 and January 10, 1997. After attempts to settle the protest failed, adjudication commenced under the ODRA Default Adjudicative Process. The ODRA assigned the matter to a Special Master, Former Armed Services Board of Contract Appeals Judge Donald P. Arnavas.

In its protest, Experts contended that as the low offeror, it should have been awarded the contract and argued that the FAA acted erroneously in finding that Midwest, the second low offeror, represented the best value to the FAA even though Midwest's price over the three year life of the contract was higher than Experts' price. The FAA countered that

Experts' use of the Sole Charge Exemption to the Service Contract Act raised a serious question as to whether Experts' proposed on-site supervisors would be continuously available, and for that reason, the higher offer from Midwest represented the best value.

The Special Master concluded that the Integrated Product Team's ("IPT") award decision had a rational basis, was neither arbitrary, capricious, nor an abuse of discretion, and was supported by substantial evidence in light of the SIR's evaluation scheme. Neither the problems experienced by the IPT in its reference checks, nor the failure of the SIR to explain the Sole Charge Exemption as clearly as it could have, impacted on the manner in which Experts set forth its fundamental performance plan. For this reason, the Special Master determined that the IPT properly exercised its discretion to determine the best value to the FAA.

In FAA Order No. ODR-97-25, issued on July 18, 1997, ample evidence was found in the record to support the Special Master's findings of fact, as well as his conclusions concerning the conduct of the procurement. However, the Administrator did not accept the Special Master's ultimate conclusion concerning the overall rationality of the award decision. The Administrator decided that the Agency acted inappropriately, in failing to notify Experts that legitimate use of that exemption would be so fundamentally unacceptable. The Administrator therefore ordered the agency to reimburse the protester for its bid and proposal costs, for having been induced to compete.

III.

*EAJA Analysis*

The EAJA constitutes a waiver of sovereign immunity requiring specific statutory authority, and must be strictly construed in favor of the sovereign. *Escobar v. U.S. I. N. S.*, 935 F.2d 650 (4th Cir. 1991). Attorney's fees under the EAJA are available when a qualifying party prevails against an agency in an adjudication under Section 554 of the APA. As discussed above, the APA applies to the FAA and to the ODRA adjudication process through the FAA's Organic Statute (49 U.S.C. §§ 40101 *et seq.*)

The EAJA expressly applies to administrative adjudications held pursuant to 5 U.S.C. § 504. Under 5 U.S.C. § 504(a)(1), the threshold issues are: "(1) whether an eligible party "prevailed" over the government; (2) whether the government's position was substantially justified; (3) that no special circumstances make an award unjust; and (4) that any fee application be submitted within 30 days of the decision and be supported by an itemized statement." *I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). Here it is undisputed that the instant EAJA application was timely submitted, and was accompanied by an itemized statement of the claimed attorney's fees. Thus, only the first three issues are pertinent to this analysis.

First, we must determine whether Experts was an eligible, prevailing party. **[3]** There has been no challenge to Experts' eligibility. Although the EAJA does not define the term "prevailing party," the Supreme Court held in *Texas State Teachers Ass'n v. Garland*

*Independent School District*, that "[p]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." 489 U.S. 782, 789 (1989), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

As shown in Part II of this Order, Experts succeeded in protesting the award of a weather observation contract, and was awarded bid and proposal costs. The remedy returned Experts to the position it had been in prior to the solicitation. Because Experts would not have received its bid and proposal costs absent the filing of the protest, it was a prevailing party under the EAJA. *Public Citizen Health Research Group v. Young*, 909 F.2d 550 (D.C. Cir. 1990).

The second threshold issue concerns whether the FAA was "substantially justified in its position." Two considerations precede a determination of substantial justification. First, the burden of demonstrating substantial justification rests with the government. *Stratton v. Bowen*, 827 F.2d 1447, 1449-50 (11th Cir. 1987). Second, the legislative history of the EAJA shows that Congress did not intend that attorney fees and expenses would be awarded, simply because the Government has lost its case.

> The standard, however, should not be read to raise a presumption that the Government's position was not substantially justified, *simply because it lost its case*. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on *a substantial probability of prevailing*. [H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980); S. Rep. No. 96-253, 96th Cong., 1st Sess. 7 (1979)] [Emphasis added.]

Substantial justification is not a standard equal to a "rational basis." In *Pierce v. Underwood*, 487 U.S. 552, 565-556 (1988), the Court held that the substantially justified standard under the EAJA requires that there be a "reasonable basis both in law and fact" for the government's action, and that the "reasonable basis" standard is no different from "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person." The Court addressed the pertinent inquiry explicitly as follows:

> [A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable position in law and fact.

*Id.* At 566 n.1.

Thus, an agency decision that is reasonable but incorrect would be viewed as substantially justified for EAJA purposes. The Third Circuit fashioned a three-part standard to determine whether a government agency had substantial justification to pursue an enforcement action against an EAJA claimant. *See Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123 (3rd Cir. 1993). Under the three-part standard of *Hanover*, an agency must show:

1. a reasonable basis in truth for the facts alleged;

2. a reasonable basis in law for the theory propounded; and

3. a reasonable connection between the facts alleged and the legal theory advanced.

*Id*. at 128.

Most circuit courts and agencies have adopted this formulation. **[4]** There are two factors that guide this analysis. The first is that the law upon which the government relied must be the law existing at the time that the government's action was taken. The Supreme Court formulated this as "not what the law is, but what the government was substantially justified in believing it to have been." *Pierce v. Underwood*, 487 U.S. at 561 (1988). The second factor is that an agency's construction of statutes and regulations within the agency's area of expertise is entitled to deference when that construction is reasonable. *Hudson v. Secretary of Health and Human Services*, 839 F.2d 1453, 1456 (11th Cir. 1988); *see also Hill v. National Transp. Safety Bd*., 886 F.2d 1275, 1278 (10th Cir. 1989*); Reid v. Engen*, 765 F.2d 1457, 1462 (9th Cir. 1985).

The AMS is a statement of acquisition policy guiding the efforts of FAA acquisition personnel. A SIR is a public statement setting forth the terms and conditions for the proposed acquisition. The formulation of the substantial justification analysis noted above, when applied to acquisition activities under the AMS, can be formulated as follows:

(1) whether, at the time of the solicitation and award of the contract, the FAA's application of the policy guidance set forth in the AMS, adherence to the terms set forth in the SIR and compliance with applicable law was reasonable;

(2) whether, at the time the FAA reviewed the responses to the solicitation, the FAA's assessment of the facts underlying the award of the contract was reasonable; and

(3) whether the FAA acted reasonably when conducting the acquisition, considering the facts and policy guidance available to the participants when the acquisition was conducted.

At the time the SIR was issued for the instant procurement, Section 3.2.2.3.1.2.3 of the AMS provided that, "award on initial offers to other than the low cost or price offer is allowed." This policy guidance allows the FAA to weigh cost against value, and award a contract to the offeror presenting the best value to the FAA. The SIR, in clause M-001, gave the FAA the right to " . . . make award without discussion." The policy guidance available to the FAA at the time the SIR was issued and when the selection of the awardee was made did not require the FAA to note its strong aversion to use of the Sole

Charge Exemption. Although Section 3.2.2.3.1.2.2 of the AMS allows discussion with the offerors, the guidance in the SIR about communication with the offerors clearly informed the offerors that the FAA was not required to discuss their offers prior to selection.

The FAA had a reasonable basis, both under the policy guidance existing in the AMS at the time, as well as under the terms of the SIR, to support its determination that the management approach proposed by Experts failed to offer best value for the work envisioned in the SIR. Notwithstanding Section 3.2.2.3.1.2.2 of the AMS, the FAA acted within the plain terms of the solicitation when it made the award without communicating with Experts. An agency's position is substantially justified if it relied upon a credible interpretation of the law. *S&H Riggers & Erectors v. Occupational Safety and Health Review Commission*, 672 F.2d 426, 431 (5th Cir. 1982).

The FAA assessed the policy and facts concerning the solicitation and determined that another offeror offered better value, even though Expert's offer was less expensive. The AMS allowed this choice, and indeed still does. Neither the AMS nor the SIR expressly required the FAA to ask Experts whether or not a particular management plan might prove less difficult to perform than one based upon the Sole Charge Exemption. Accordingly, the FAA acted reasonably under the policy and facts it faced at the time of the solicitation.

As a result of the instant protest, however, AMS policy guidance was supplemented. The Administrator has determined that, where a particular approach is disfavored, the SIR should make this plain to potential offerors, so that their offers can be structured appropriately. In the instant case, the SIR should have noted the Agency's strong aversion to the use of the Sole Charge Exemption. Further, the Administrator has indicated, when an offeror presents a low price, but bases an offer on an allowable approach that is not favored by the FAA unit soliciting the contract, the FAA unit should communicate with the offeror, so that an offer, otherwise advantageous to the FAA, might be available.

The novelty of a legal issue weighs in the government's favor in analyzing the reasonableness of its position under the EAJA. *Marcus v. Shalala*, 17 F.3d 1033, 1037 (7th Cir. 1994). The guidance set forth above was not available to the IPT at the time of the solicitation and award of the contract. Absent this guidance, the IPT was substantially justified in its actions. It should be noted that the findings of the Special Master, a highly respected authority in the Government contracts field, held that the FAA had a rational basis for its actions. Because the FAA was substantially justified in its actions under the AMS policy existing at the time of the solicitation and award of the instant contract, Expert's application fails to meet an essential threshold to the award of EAJA fees. *I.N.S. v. Jean*, 496 U.S. at 154.

For the reasons stated above, the ODRA recommends that Expert's application for attorney's fees and expenses pursuant to the EAJA be DENIED.

Respectfully submitted,

_____/s/_____

Wilton J. Smith
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

Dated: March 31, 1998

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Footnotes:

**[1]** Pub. L. 104-50. SEC. 348. (a) In consultation with such non-governmental experts in acquisition management systems as he may employ, and notwithstanding provisions of Federal acquisition law, the Administrator of the Federal Aviation Administration shall develop and implement, not later than January 1, 1996, an acquisition management system for the Federal Aviation Administration that addresses the unique needs of the agency and, at a minimum, provides for more timely and cost effective acquisitions of equipment and materials.

(b) The following provisions of Federal acquisition law shall not apply to the new acquisition management system developed and implemented pursuant to subsection (a):

(1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252-268);

(2) The Office of Federal Procurement Policy Act (41 U.S.C. § 401 et seq.);

(3) The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355);

(4) The Small Business Act (15 U.S.C. 631 et seq.), except that all reasonable opportunities to be awarded contracts shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(5) The Competition in Contracting Act;

(6) Subchapter V of Chapter 35 of title 31, relating to the procurement protest system;

(7) The Brooks Automatic Data Processing Act (40 U.S.C. 759); and

(8) The Federal Acquisition Regulation and any laws not listed in (a) through (e) of this section providing authority to promulgate regulations in the Federal Acquisition Regulation.

(c) This section shall take effect on April 1, 1996.

**[2]** Although the Congress directed the FAA to design a new procurement system, Pub. L. 104-50 was not a grant of original authority to procure goods, property and services. That authority already existed in the FAA organic statute based upon the Administrator's powers delegated under Title VII of 49 U.S.C., including the power to procure goods and services. *See* 49 U.S.C. §§ 40110, 40111, and 40112. Under 49 U.S.C. § 106(f)(2), the Administrator is the final authority over the FAA procurement process. The ODRA dispute resolution process results in a final order by the Administrator.

**[3]** A "party" under the EAJA is defined as an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication commenced, or a business entity with a net worth that did not exceed $7,000,000 and who did not employ more than 500 employees at the time the adversary adjudication commenced. See 5 U.S.C. § 504(b)(1)(B). Experts claimed qualification under this standard, and the FAA did not challenge its claim.

**[4]** The National Transportation Safety Board (NTSB) uses the same standard for EAJA claims arising from FAA enforcement actions. *McCrary v. Engen*, 5 NTSB 1235 (1986), citing *United States v 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984).