FEDERAL AVIATION ADMINISTRATION
Office of Dispute Resolution for Acquisition

GUIDANCE FOR THE USE OF BINDING ARBITRATION UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

October 2001

STATEMENT OF THE ADMINISTRATOR

As a matter of policy, the FAA is committed to the early and expeditious resolution of contract related disputes, using mediation, fact-finding, and other techniques collectively known as "alternative dispute resolution" (ADR). To further the use of ADR in our agency, this Guidance for the Use of Binding Arbitration has been issued to expand the options available to the FAA for using ADR. This Guidance, which received the concurrence of the Attorney General, specifically provides that the use of binding arbitration is entirely voluntary and is to be used only when it is in the best interest of the Government. In appropriate cases, the use of binding arbitration can provide significant benefits for the agency. For example, an arbitration agreement allows the parties to limit the issues and to tailor the arbitration process according to the unique nature of the dispute; thereby reducing costs and avoiding delays in achieving a final resolution. The use of arbitration also provides greater privacy for the decision making process, and because decision makers are involved in the process of negotiating an arbitration agreement, the parties' acceptance of and compliance with the award decision is enhanced. Binding arbitration decisions generally are final and not appealable, and may be enforced by either party in court, if necessary. In sum, this Guidance will provide the FAA with yet another ADR tool to help achieve its goal of effective, efficient and fair resolution of contract related controversies, through less formal, consensual methods.

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JANE F. GARVEY, ADMINISTRATOR

INTRODUCTION

The Office of Dispute Resolution for Acquisition ("ODRA") of the Federal Aviation Administration ("FAA"), a modal administration of the United States Department of Transportation, proposes to utilize binding arbitration among other alternative dispute resolution ("ADR") techniques for purposes of resolving bid protests and contract disputes relating to procurements and contracts under the FAA Acquisition Management System ("AMS"). The following guidance for the appropriate use of binding arbitration was prepared for review by and coordination with the United States Department of Justice, Office of Dispute Resolution (hereinafter the "Justice Department"), pursuant to the requirement of 5 U.S.C. §575(c) that such guidance be issued "in consultation with the Attorney General" prior to an agency's use of binding arbitration. On July 26, 2001, the Attorney General concurred in the proposed guidance. Notice of the proposed guidance was published for public review and comment in the Federal Register on August 27, 2001. No comments were received.

Background

The Administrative Dispute Resolution Act of 1990, Pub. L. 101-552 (November 15, 1990), as amended by Pub. L. 102-354 (August 26, 1992) (the "ADRA of 1990"), expressly authorized the use of arbitration among several alternative dispute resolution ("ADR") techniques available to federal agencies for purposes of dispute resolution, but specifically permitted agency heads to "opt out" of arbitration awards:

> (c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void.

This "opt out" feature of the ADRA of 1990 – which rendered federal agency arbitrations less than "binding" – was eliminated when Congress enacted the Administrative Dispute Resolution Act of 1996 ("ADRA of 1996"), Pub. L. 104-320 (October 19, 1996), 5 U.S.C. §§571-583. The ADRA of 1996 specifically permits federal agencies to utilize "binding arbitration" to resolve "issues in controversy." However, the ADRA of 1996 mandates as a prerequisite to agencies' use of binding arbitration that they issue agency guidance, in consultation with the Attorney General, on the appropriate use of binding arbitration. 5 U.S.C. §575(c).

After the enactment of the ADRA of 1990, but prior to the enactment of the ADRA of 1996, the Congress, under the 1996 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 104-50 (November 15, 1995), called for the Federal Aviation Administration ("FAA") to develop a new acquisition management system aimed at fulfilling the agency's unique procurement needs. Under that statute, the new FAA system was to be developed without reference to existing acquisition statutes and

regulations, including, *inter alia*, the Competition in Contracting Act ("CICA"), the Federal Acquisition Streamlining Act ("FASA"), the Office of Procurement Policy ("OFPP") Act, the Federal Acquisition Regulation ("FAR") and all statutes implemented via the FAR. In the FAA's new Acquisition Management System ("AMS"), a procurement policy document that took effect on April 1, 1996, the FAA Administrator established the Office of Dispute Resolution for Acquisition ("ODRA"), an independent office within the FAA Office of Chief Counsel, as the sole administrative forum for resolution of bid protests and contract disputes relating to procurements and contracts issued under the AMS. The ODRA has served this function since May 1996.

Pursuant to the AMS and supplemental delegations from the Administrator dated July 29, 1998 and March 27, 2000, the ODRA has employed ADR as its primary means of dispute resolution.[1] Procedures for the use of ADR are included as an integral part of the ODRA's procedural rules under Title 14 Code of Federal Regulations, Part 17. In terms of binding arbitration, the AMS had initially incorporated an "opt out" feature pursuant to the ADRA of 1990:

> If binding arbitration is agreed to, the decision of the DRO or neutral arbiter will become a final agency decision, unless the FAA Administrator indicates nonconcurrence with the decision, in writing within seven business days after the date that the decision is issued. If the FAA Administrator nonconcurs with the decision and issues a contrary determination, then that determination becomes the final agency decision concerning the merits of the protest or contract dispute.

AMS §3.9.3.2.3.1 (April 1996). This same language was carried over into the most current version of the AMS. *See* AMS §3.9.6 (September 1999). Pending the issuance of Justice Department guidance for the use of binding arbitration pursuant to the ADRA of 1996, the FAA ODRA has only authorized binding arbitration using the "opt out" procedure contemplated by the ADRA of 1990. The ODRA procedural rules, which took effect on June 28, 1999, were worded so as to accommodate both the existing procedure and anticipated Justice Department guidance on use of binding arbitration. The pertinent section of the procedural rules provides:

> (f) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.

[1]As of September 5, 2000, the ODRA had completed 116 bid protests. Of those, 63 protests (54%) were resolved by means of ADR techniques. Of the 41contract disputes completed as of July 1, 2000, 34 (83%) were resolved by means of ADR techniques.

14 C.F.R. §17.33(f). The American Bar Association ("ABA") took issue with this language as part of its comments on an earlier ODRA Notice of Proposed Rulemaking

("NPRM"). The ODRA addressed the ABA's comments in the following manner:

Binding Arbitration

> The ABA takes issue with the language of §17.33(f), which permits the FAA Administrator a limited amount of time within which to "opt-out" of an arbitrator's decision in binding arbitration, arguing that such a provision conflicts with the policies enunciated in the Administrative Dispute Resolution Act of 1996. Accordingly, the ABA recommends deletion of such language.
>
> FAA Response: The FAA disagrees. Under 5 U.S.C. 575(c), any binding arbitration undertaken by a Federal agency must be in accordance with guidance issued by the head of the agency in consultation with the Attorney General, *i.e.*, the Department of Justice (DoJ). As of this time, DoJ has advised that federal agencies, including the FAA, may not engage in any form of binding arbitration without the kind of "opt-out" provision described in proposed §17.33(f). The language with which the ABA takes issue does not mandate this form of binding arbitration, but merely makes it a permissible form. Since any form of ADR will require the concurrence of both parties, the FAA does not see any necessity for eliminating this alternative and has not done so in the final rule. The language of the first sentence of §17.33(f) would allow for binding arbitration without such an "opt out" provision, pursuant to 5 U.S.C. 575(a), (b), and (c), so long as the arbitration process is consistent with current DoJ guidance and "applicable law." Thus, if DoJ modifies its guidance to the agencies so as to allow such binding arbitration, the FAA would not need to revise §17.33 in order to pursue such a dispute resolution option.

Subsequent to the issuance of the ODRA procedural rules, the Federal ADR Council under the leadership of the Attorney General approved and endorsed a publication entitled "Developing Guidance for Binding Arbitration: *A Handbook for Federal Agencies*," prepared by Phyllis Hanfling, Esq., Department of Energy, and Martha McClellan, Federal Deposit Insurance Corporation (hereinafter the "Handbook"), as a "blueprint" for the development of agency guidance for use of binding arbitration, as contemplated by the ADRA of 1996. The following proposed ODRA guidance for binding arbitration has been developed along the lines suggested by the Handbook, and in accordance with the recommendations set forth in Section IV of the Handbook, is being transmitted to the Justice Department's Office of Dispute Resolution for review and comment. It is the intent of the FAA, once Justice Department concurrence is obtained, to publish the proposed guidance (with whatever modifications may be suggested by the Justice Department and adopted by the FAA) in the Federal Register. The FAA is also contemplating the future issuance of guidance for the use of binding arbitration in

connection with non-acquisition related disputes. In this regard, the proposed ODRA guidance is considered a first step toward establishing overall guidance for the FAA for use of binding arbitration.

Overview

The following guidance is aimed at satisfying the requirements regarding binding arbitration specified within the ADRA of 1996 and at identifying and addressing critical issues relating to binding arbitration in a manner that is consistent with the FAA dispute resolution process, as set forth under the ODRA's procedural rules, Title 14 C.F.R. Part 17.

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I. Statutory Requirements

A. Considerations for Not Using Arbitration

The ADRA of 1996 calls for agencies to consider not using any form of ADR, including binding arbitration, in a number of specified circumstances. Accordingly, unless it can be established to the satisfaction of the ODRA Director that the use of binding arbitration for the resolution of a bid protest or contract dispute will be in the best interests of the Government, such an ADR technique will not be utilized whenever:

> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
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> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
>
> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
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> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
>
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or
>
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of

> changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

See 5 U.S.C. §572(b).

B. Other Statutory Requirements

In accordance with the ADRA of 1996, the following shall apply to all arbitrations conducted for the resolution of bid protests and contract disputes under the auspices of the ODRA:

1. The decision to arbitrate must be voluntary on the part of all parties to the arbitration. (*See* 5 U.S.C. §575(a)(1)).

2. A party may limit the issues it agrees to submit to arbitration. (*See* 5 U.S.C. §575(a)(1)(A)).

3. A party may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. (*See* 5 U.S.C. §575(a)(1)(B)). (Note: This provision does not contradict the requirement (set out in 4 below) that the parties agree on a maximum amount that the arbitrator can award).

4. An agreement to arbitrate must be in writing. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or "cap" that may be granted by the arbitrator. (*See* 5 U.S.C. §575(a)(2)).

5. The FAA shall not require anyone to consent to arbitration as a condition of entering into a contract or obtaining any other benefit. (*See* 5 U.S.C. §575(a)(3)).

6. An officer or employee of the FAA who offers to use arbitration must otherwise have the authority to enter into a settlement concerning the matter or must be specifically authorized to consent to the use of arbitration. (*See* 5 U.S.C. §§575(b)(1) and (2)).

7. The selection of the arbitrator shall be upon mutual agreement of the parties. (*See* 5 U.S.C. §577(a)). In accordance with Title 14 C.F.R. Part 17, Subpart D, the parties may elect to have the ODRA Director designate an ODRA Dispute Resolution Officer (DRO) to serve as the arbitrator. In the alternative, they may request that the ODRA attempt to make qualified non-FAA personnel available to serve as an arbitrator, through neutral-sharing programs and other similar arrangements. Finally, the parties may elect to employ a mutually acceptable Compensated Neutral (as defined under 14 C.F.R. §17.3(f)) as the arbitrator, if the parties agree as to how the costs of any such Compensated Neutral are to be shared. In no event shall the arbitrator have an official financial or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he/she may serve as the arbitrator. (*See* 5 U.S.C. §§573, 577(b)).

8. An arbitrator may regulate the course and conduct of the arbitration hearing. (*See* 5 U.S.C. §578(1)).

9. An arbitrator may administer oaths and affirmations. (*See* 5 U.S.C. §578(2)).

10. An arbitrator may compel the attendance of witnesses and the production of documents. (*See* 5 U.S.C. §578(3)).

11. An arbitrator may make awards. (*See* 5 U.S.C. §578(4)).

12. The arbitrator shall set the time and place for the arbitration hearing and shall notify the parties of same at least five days before the hearing is to take place.

13. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall: (1) make the arrangements for it; (2) notify the arbitrator and other parties that a record is being prepared; (3) supply copies to the arbitrator and the other parties; and (4) pay all costs, unless the parties have agreed to share the costs. (*See* 5 U.S.C. §§579(b)(1)-(4)).

14. At any arbitration hearing, parties are entitled to be heard and present evidence. (*See* 5 U.S.C. §§579(c)(1) and (2)).

15. The arbitrator may hear any oral and documentary evidence that is not irrelevant, immaterial, unduly repetitious, or privileged. (*See* 5 U.S.C. §579(4)).

16. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents and policy directives. (*See* 5 U.S.C. §579(5)).

17. No party shall have any unauthorized *ex parte* communication with the arbitrator. If a party violates this provision, the arbitrator may require that party to show cause why the issue in controversy should not be resolved against it for the improper conduct. (*See* 5 U.S.C. §579(d)).

18. The arbitration award for protests shall be made within twenty (20) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted, an extension of time from the Office of Dispute Resolution for Acquisition. For contract disputes, the arbitration award shall be made within forty (40) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted, an extension of time from the Office of Dispute Resolution for Acquisition. (*See* 5 U.S.C. §§579(e)(1) and (2); 14 C.F.R. §§17.33(g) and (h)).

19. An arbitration award shall include a brief informal discussion of the factual and legal basis for the award. Formal findings of fact and law are not required. (*See* 5 U.S.C. §580(a)(1)).

20. A final award is binding on the parties and may be enforced pursuant to sections 9 through 13 of Title 9, U.S. Code. (*See* 5 U.S.C. §580(c)).

21. An arbitration award may not serve as an estoppel in any other proceeding and may not be used as precedent in any factually unrelated proceeding. (*See* 5 U.S.C. §580(d)).

22. Any action for review of an arbitration award must be made pursuant to sections 9 through 13 of Title 9, U.S. Code. (*See* 5 U.S.C. §581(a)).

23. Arbitration shall be subject to judicial review under section 10(b) of Title 9, U.S. Code, for evident partiality or corruption of the arbitrator(s). (*See* 5 U.S.C. §581(b)).

II. Binding Arbitration Guidance

A. The ADR Spectrum

ADR processes, as defined in 5 U.S.C. §571(3) include, but are not limited to, conciliation, facilitation, mediation, fact-finding, ombuds, mini-trials, and arbitration. ADR processes are generally designed to reduce costs, avoid the delays of judicial proceedings, protect the privacy of the parties and increase the level of compliance by involving decision makers in the process. The FAA Associate Administrator, Research and Acquisitions (ARA), and Procurement Executive has executed an ADR Pledge, committing the agency to using ADR in appropriate cases for the resolution of issues in controversy relating to FAA acquisitions. ADR is viewed by the FAA as an indispensable tool for accomplishing its overall mission in the most productive and efficient manner. The FAA, through the Office of Dispute Resolution for Acquisition, has successfully resolved the majority of bid protests and contract disputes under the AMS by means of ADR. ADR is the primary focus of dispute resolution for the ODRA. The forms of ADR employed by the ODRA have been consensual for the most part, principally facilitative mediation and neutral evaluation. Consensual forms of ADR are clearly preferred by the FAA as a general matter. However, as noted above, the ODRA's procedural rules contemplate the availability of binding arbitration, in the event parties desire to utilize that form of ADR to resolve a particular dispute.

B. Binding Arbitration: Description and Forms

The ODRA will administer a form of binding arbitration that the parties select for the purpose of resolving a bid protest or contract dispute. Binding arbitration is said to be the dispute resolution process most like adjudication. In binding arbitration, the parties agree to use a mutually selected decision-maker to hear their dispute and resolve it by rendering a binding decision or award. In the case of bid protests or contract disputes before the ODRA, the parties' decision to arbitrate or to utilize another form of ADR will be made immediately after the case is docketed by the ODRA. *See* 14 C.F.R. §§17.17 and 17.27.

Like litigation, binding arbitration is an adversarial, adjudicative process designed to resolve the specific issues submitted by the parties. Binding arbitration differs significantly from litigation in that it does not require conformity with the legal rules of evidence, and the proceeding is conducted in a private rather than a public forum. Binding arbitration awards typically are enforceable by courts, absent defects in the arbitration procedure. Appeal from such awards, pursuant to the Federal Arbitration Act, 9 U.S.C. §10, is generally limited to fraud or misconduct in the proceedings.

Binding arbitration may also be used in conjunction with mediation in several ways:

- It may be part of a **mediation/arbitration** (so-called "med/arb") proceeding, where the parties attempt to mediate the dispute first. Failing resolution, the same neutral arbitrates and issues a binding award. Using the same person as both mediator and arbitrator may have a chilling effect on full participation in mediation, as a party may not believe that the arbitrator will be able to discount unfavorable information learned during the mediation.

- In **co-mediation/arbitration**, two neutrals preside over the initial joint session. After that, the neutral designated as the mediator works with the parties. Failing settlement, the case, or any unresolved issues, may be submitted to the neutral designated as the "arbitrator," for a binding decision.

- **Arbitration/mediation** is another way to avoid the problem of one neutral serving as both mediator and arbitrator. The arbitrator hears the case and renders a written determination that is not disclosed to the parties. He or she then attempts to mediate, with the understanding that if the parties reach no settlement, his/her earlier determination will become the award.

C. Setting the Award "Cap"

In terms of the ADRA's mandatory requirement for establishing an award "cap", in addition to negotiating a maximum award ("cap"), the parties might consider agreeing to a minimum award prior to arbitration, using the "High-Low" method as described in the Handbook:

> **High-Low.** The parties agree privately without informing the arbitrator that the final award will be within certain parameters. At the conclusion of the hearing, if the arbitrator's award is within the agreed upon range, the parties are bound by that figure. If, however, the award is outside the parameters, it is adjusted accordingly. For example, if the high-low figures were $50,000 and $100,000 and the award was $25,000, it would be adjusted to $50,000. Similarly, if the award were $250,000, it would be adjusted to $100,000.

D. The Checklist of Arbitration Issues

The following responds to each of the substantive issues identified in the Handbook as "substantive issues to consider."

Issue 1:	**For what types of cases will the agency be willing to use binding arbitration?**

Response: The FAA is willing to consider the use of binding arbitration for the resolution of any issue in controversy involving a bid protest or contract dispute, where the aforesaid specified circumstances under the ADRA (*i.e.,* for considering non-use of ADR) are not involved. (*See* I.A. above).

Issue 2:	**Will the FAA agree to arbitrate issues other than money, *e.g.*, specific performance, punitive damages, injunctive relief, apportionment of fees?**

Response: Because established case law provides that an award of punitive damages against the Government would be a violation of sovereign immunity, the FAA will not agree to having such damages as part of any arbitration award under the ODRA dispute resolution process. On the other hand, non-monetary relief may be and frequently is necessary for the proper resolution of bid protests, *e.g.,* directed cancellations of, or amendments to solicitations or ordered terminations for the convenience of the Government and/or directed contract awards. In such protest cases, should the arbitrator conclude that non-monetary relief is appropriate, the arbitrator's authority would be limited to recommending to the ODRA Director and the Administrator that such relief be granted. The resolution of contract disputes also may entail the need for declaratory or equitable relief. Where declaratory relief is needed, the arbitrator may be authorized to grant such relief. The arbitrator may be authorized to recommend other forms of equitable relief, such as specific performance. If either party contemplates the need for non-monetary relief, it is strongly suggested that the issue of such relief be addressed specifically as part of the parties' Arbitration Agreement.

Issue 3:	**How and by whom will the decision to arbitrate be made?**

Response: The decision to arbitrate is strictly that of the parties to the bid protest or contract dispute. As with any other form of ADR, arbitration must be a completely voluntary process. Within the FAA, a decision to arbitrate will be made by the FAA Product Team. Under the AMS, Product Teams are given considerable independent authority and are to operate by consensus. An FAA Product Team ordinarily consists of a Contracting Officer, one or

more program officials, and a Product Team Counsel who is a representative of the FAA Office of Chief Counsel.

a. Who will have authority to recommend arbitration?

Response: Arbitration may be recommended by a party or by the ODRA.

b. Who has the authority to enter into settlement? Can this authority be delegated?

Response: Generally, it will be the Contracting Officer who will have authority to execute a settlement agreement on behalf of the FAA. His/her authority might be delegable to another member of an FAA Product Team, so long as the individual holds an appropriate warrant.

c. Who will negotiate the cap on the award?

Response: Negotiation should ordinarily involve the Contracting Officer. It is expected that Product Team Counsel will participate in any negotiation.

d. Who will negotiate the rules and selection of the arbitrator?

Response: The parties must mutually agree upon the arbitrator and will have several options from which to choose, including: (1) an ODRA Dispute Resolution Officer (DRO); (2) a Board of Contract Appeals Judge from the General Services Administration Board of Contract Appeals (GSBCA) or other non-FAA federal employee made available to the ODRA for purposes of serving as an ADR Neutral under the terms of an interagency agreement with the FAA; and (3) a Compensated Neutral from outside the Government, whose costs are to be shared by agreement of the parties. For the FAA, the decision regarding selection of the arbitrator will be that of the FAA Product Team. The procedural rules that will govern any binding arbitration are to be established by the parties, preferably with input from the arbitrator whom they select, and should be memorialized as part of the Arbitration Agreement.

e. Who will draft the Agreement to Arbitrate?

Response: The Agreement will be drafted by the parties, ordinarily by their respective counsel with the assistance of an ODRA Dispute Resolution

Officer (DRO)[2], if desired, and preferably with substantive input from the selected arbitrator.

Issue 4: What will the process be for entering into arbitration?

Response: As described above, the process for entering into arbitration in an ODRA proceeding is an informal process assisted by a designated ODRA DRO and one that is contemplated by the ODRA procedural rules.[3] An FAA Product Team has complete delegated authority from the Administrator under the AMS to resolve acquisition related disputes at the lowest possible level and to employ ADR techniques whenever appropriate. As a member of the Product Team, the FAA Contracting Officer, depending on the extent of his/her warrant, is authorized to execute Arbitration Agreements, provided he/she ascertains first that sufficient funds will be available to cover the maximum possible award against the FAA and second that the circumstances of a case are such that binding arbitration would not be precluded under the guidance of Section I.A. hereinabove and/or would serve the best interests of the Government. Under the FAA's system, no justification of binding arbitration for approval by a higher level within the agency is required. Accordingly, in lieu of any Request to Arbitrate, the Product Team's Counsel, with the assistance of other Team members as appropriate, will be required to prepare a Memorandum of Counsel for the Contracting Officer, in order to document Counsel's evaluation of the merits of the case and the rationale for any election to submit the matter to binding arbitration. This Memorandum of Counsel, which shall be maintained in the Product Team's files, shall not be made part of any administrative record, shall not be used in the arbitration, and shall carry whatever privileges regarding non-disclosure and non-admissibility may attach to such documents.

Issue 5: What should the Memorandum of Counsel include?

Response: The following information should be included:

[2] The ODRA's practice immediately upon receipt of a bid protest or contract dispute is for the ODRA Director to designate a DRO to assist the parties with exploring possibilities for resolution by means of ADR. This DRO – who may or may not ultimately be selected as an ADR Neutral – will present for the parties' consideration various ADR techniques, including binding arbitration. The ODRA procedural rules require that the parties file with the ODRA written statements as to whether ADR will be employed and, if so, they further mandate the submission of a written ADR Agreement. 14 C.F.R. §§17.17, 17.27, and 17.33. If the parties elect to use binding arbitration, the Agreement will be an Arbitration Agreement. Ordinarily, the designated DRO will offer to assist the parties in drafting the ADR Agreement and frequently, to expedite the process, will provide them with a proposed Agreement based on standard forms mounted on the Internet as part of the ODRA's Website (http://www.faa.gov/agc). These forms have been modified to conform to the guidance herein, and copies are appended hereto as Addenda 1 and 2.

[3] *See* Note 2, above.

Facts & Analysis – A presentation of the factual bases, legal reasons, and policy considerations supporting the decision to use binding arbitration to resolve the particular dispute, including:

- A detailed description of the facts underlying the controversy, and an identification of the disputed issues and the current status of the matter.
- A litigation risk analysis.
- A statement that none of the circumstances specified in 5 U.S.C. §572(b) are present, such that ADR might not be advisable. *See* Section I.A. above. In the alternative, a statement as to why ADR is advisable and in the best interests of the Government, notwithstanding the existence of such circumstances.
- A description of how binding arbitration was initiated in the present case.
- An explanation of why forms of ADR other than binding arbitration are not feasible for resolution of the issue(s) in controversy, including a description of all consensual forms of ADR that have been offered or attempted and the outcome and a statement as to why further attempts with consensual approaches are inappropriate or impractical. (Note: The foregoing explanation would be obviated if binding arbitration were coupled with mediation – *e.g.*., using a "med-arb" approach – or some other consensual ADR technique.)
- A detailed cost/benefit analysis of arbitration versus litigation –
    - For arbitration: (1) an arbitration timeline (to include the time needed to negotiate and finalize the Arbitration Agreement as well as the time for discovery, submissions of writing presentations, and the hearing); (2) the arbitrator's fees and expenses; (3) agency personnel costs; (4) any fees for using outside counsel; (5) travel and transportation costs associated with discovery and hearing; (6) any transcript costs; and (7) other estimated expenses (including reproduction, equipment rental, etc.)
    - For litigation: (1) a litigation timeline (to include time for any appeal); (2) agency

personnel costs; (3) any fees for using outside counsel; (4) travel and transportation costs associated with discovery, hearing and any appeal; (5) any transcript costs; and (6) other estimated expenses (including reproduction, equipment rental, etc.)

Maximum Award – Identification of the proposed maximum award ("cap") and the funding available to cover that maximum.

Issue 6: How can the FAA encourage the efficiency of the arbitration process?

Response: In all but rare exceptions (*see* Issue 11, below), only single arbitrators (rather than panels of arbitrators) will handle ODRA bid protests and contract disputes. Arbitrators operating under the auspices of the ODRA shall employ the following measures, with the parties' consent and cooperation, in order to assure maximum efficiency of the arbitration process:

A. Limit the scope of discovery
B. Establish reasonable deadlines for discovery, the hearing, and rendering of an award, consistent with the timeframes specified in the ODRA procedural rules for completion of ADR – *i.e.,* for bid protests, 20 business days from the parties' submission to the ODRA of the ADR (Arbitration) Agreement; and for contract disputes, 40 business days from the date of such submission, subject to extensions by the ODRA for cause. *See* 14 C.F.R. §§17.33(g) and (h). These timeframes shall be incorporated into the Arbitration Agreement. Specify therein also that the arbitration award shall be final when served and that service must be effected by means of certified mail, return receipt requested. In accordance with the ADRA of 1996, the award will be enforceable 30 days after service on all parties. *See* 5 U.S.C. §580(b).
C. Limit the number of witnesses.
D. Resolve the controversy or individual issues by means of document review or by arbitration via telephone conference in appropriate cases.

Issue 7: How and by whom will outside requests for binding arbitration be accepted?

Response: As noted previously, at the inception of the ODRA's processing of a bid protest or contract dispute, an ODRA DRO will be designated by the ODRA Director to explore with the parties all ADR options, including binding arbitration. A party (whether the FAA Product Team or a contractor or offeror) wishing to utilize binding arbitration will be provided with the opportunity to request this means of dispute resolution

at that juncture. If the parties agree to using binding arbitration, they will be required to furnish a written Arbitration Agreement for review and approval by the ODRA Director in accordance with a time schedule established during the parties' initial status conference with the Director. The Director will review any such Agreement to assure compliance with the ADRA of 1996 and the guidance herein.

Issue 8: Will the FAA allow arbitration clauses to be written into contracts?

Response: This has not been and will not be the FAA practice under the AMS. Instead, the standard "Disputes" clause makes all bid protests and contract disputes subject to the ODRA Dispute Resolution Process, as set forth in Title 14 C.F.R. Part 17. Arbitration will not be mandated by contract clause or otherwise, but will be considered as one of many ADR options in the manner previously described.

Issue 9: If the agency allows arbitration clauses in contracts, what should be included in the clause?

Response: Not applicable. See Response to Issue 8, above.

Issue 10: What is the arbitrator's role under the ADRA?

Response: As specified in Section I.B. hereinabove, the provisions of the ADRA will apply to arbitrations of bid protests and contract disputes administered by the FAA ODRA. As such, the arbitrator will have, *inter alia*, the authority to:

- Regulate the course and conduct of arbitration hearings;
- Administer oaths;
- Compel attendance of witnesses and production of evidence, to the extent that the agency is authorized to do so by law[4];
- Issue awards.

It is suggested that the parties, as part of their Arbitration Agreement, spell out any specific further powers they wish the arbitrator to have, and further afford the arbitrator broad discretion in terms of efficient case management.

Issue 11: Will the ODRA permit the use of a panel of arbitrators in some circumstances?

Response: In only rare circumstances would the ODRA permit more than a single arbitrator to be utilized. Because of the cost attendant to compensating an

[4] Under the FAA's "Organic Statute," 49 U.S.C. 46101, *et seq.,* the Administrator, in conjunction with the conduct of adjudications, has the authority to subpoena witnesses and documents. This authority has been delegated to the ODRA Director by Memorandum dated July 29, 1998, which has been published at the ODRA Website (http://www.faa.gov/agc under "Delegations"). Such authority is further delegable to ODRA DROs and Special Masters. For purposes of arbitration under the ODRA Dispute Resolution Process, the arbitrator will be considered a "Special Master" and , as such, will have such delegated authority.

arbitration panel, the issue(s) in controversy would have to involve significant dollar amounts. Further, the matter would have to be of such technical complexity that no single arbitrator would have sufficient expertise or experience to be able to resolve the matter.

Issue 12: What selection criteria will be considered in choosing an arbitrator?

Response: The ADRA allows an agency to use, with or without reimbursement, the services and facilities of other Federal agencies, State, local and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals, and without regard to the provisions of 31 U.S.C. §1342 (regarding the acceptance of voluntary services). The ADRA permits selection of all ADR neutrals, including arbitrators, to be done non-competitively. In terms of any arbitrator, the individual must be acceptable to both the FAA and other parties involved in a bid protest or contract dispute. As noted above, the ODRA provides as options for ADR neutrals three categories of individuals: (1) ODRA Dispute Resolution Officers (DROs); (2) Board of Contract Appeals Judges from the General Services Administration Board of Contract Appeals (GSBCA) or other non-FAA federal employees made available to the ODRA for purposes of serving as an ADR Neutral under the terms of an interagency agreement with the FAA; and (3) Compensated Neutrals from outside the Government, whose costs are to be shared by agreement of the parties. Among the primary criteria for selection of an arbitrator would be: (1) overall reputation of the arbitrator in terms of competence, integrity, and impartiality; (2) degree of expertise and experience in Government contract law and with the FAA Acquisition Management System; (3) degree of expertise and experience with the subject matter/ technical issues involved in the controversy; (4) availability of the arbitrator during the periods most convenient for the parties; (5) geographic proximity of the proposed arbitrator to the parties and to witnesses; (6) relative cost; and (7) the absence of any actual or potential conflict of interest. To the extent rosters of qualified arbitrators are developed, these should be consulted. The ODRA DRO designated by the ODRA Director to explore ADR options with the parties will be available to facilitate an agreement on arbitrator selection.

Issue 13: Will the agency agree to allow non-attorneys to represent a party, or for a party to appear *pro se* at the arbitration?

Response: Yes. The ODRA Dispute Resolution Process has been designed so that it is readily accessible to small business enterprises and other entities or individuals that wish to prosecute bid protests or contract disputes without representation of counsel. To that end, the ODRA Website (http://www.faa.gov/agc) contains a plain language Guide, a listing of

standard forms, and a library of all of the ODRA's case decisions, with case summaries, topical and case name indexes, and a key word search capability. As a result, more than half the cases docketed by the ODRA to date have been prosecuted by contractors on a *pro se* basis. (*See* http://www.faa.gov/agc/stats2.htm). Before approving any Arbitration Agreement entered into by an unrepresented party, the ODRA Director will ascertain that the party is aware of the risks and limitations inherent in any arbitration and of the advantages that may be offered by consensual forms of ADR, such as retaining control of the dispute resolution outcome and preservation of cordial business relations with the agency.

Issue 14: What should an Arbitration Agreement include?

Response: In accordance with the Handbook, the Agreement should include the following:

1. The names of the parties.
2. The issues being submitted to binding arbitration. The parties can submit all or only certain issues in controversy to binding arbitration.
3. The maximum award ("cap") that the arbitrator may direct. (Note: The parties must be negotiated such a maximum prior to signing the Agreement. The "cap" amount and any negotiated "low" value (should the parties adopt the aforementioned "High-Low" method) should be redacted from the document prior to presenting it to the arbitrator, if the parties wish not to disclose it.)
4. Any other conditions limiting the range of possible outcomes.
5. The scope of the arbitration. This will limit time and cost and give the arbitrator power to be a "case manager." A sample case management provision might read:

> "The Arbitrator is expected to assume control of the process and to schedule all events as expeditiously as possible, to insure that an award is issued no later than ___ days from the date of this Agreement."
>
> [Note: Although the Arbitrator will have ultimate authority, it is the ODRA's intention that the parties retain some control over the arbitration schedule. Thus, whereas the ODRA procedural rules provide for completion of any ADR, including arbitration, within 20 business days for protests; and within 40 business days for contract disputes, the ODRA Director may extend such timeframes upon request of either the parties or the Arbitrator, or both.]

6. References to all provisions of the ODRA procedural rules regarding discovery and the conduct of hearings that the parties may wish to apply to the arbitration process.

7. The name of the arbitrator, the amount of compensation and how it will be paid. (Note: No Agreement shall provide for deposits in an escrow account to pay for expenses of the proceeding in advance of expenses being incurred.)
8. The date when the arbitration will commence.
9. The types of remedies available.
10. A confidentiality provision invoking the ADRA of 1996 and stating that neither the Agreement nor the arbitration award will be considered confidential.

Sample Arbitration Agreements for bid protests and contract disputes are appended hereto as Addenda 1 and 2.

Issue 15: How will the agency pay the arbitrator(s)?

Response: Generally, the parties will agree in advance to share any arbitrator fees and costs, the costs of any transcripts, etc., all of which will be paid after the award is issued. The Government may not escrow funds or pay in advance for any such costs.

Issue 16: Is the FAA willing to use "administered arbitration"?

Response: No. All ADR relating to FAA bid protests and contract disputes is to be administered by the ODRA and not by an outside ADR organization.

Issue 17: What must the arbitration award include?

Response: The arbitration award need not be in the form of formal findings of fact and conclusions of law, but must at least provide in summary form the monetary amount of the award, if any, and the factual and legal basis for the arbitrator's decision. The award will be subject to the "cap" and any other limitations agreed upon by the parties. Arbitration awards will not be treated as confidential documents.

Issue 18: Will the agency allow arbitration on the documents only, without a hearing, or a telephonic hearing? If so, in what circumstances?

Response: In simple, low dollar amount, cases, or with respect to individual issues, the parties will be authorized to agree to have the arbitrator render an award based solely on his/her review of the documents or based on telephonic testimony. The Arbitration Agreement should specify which issues are to be handled in such manners. The Agreement should also allow the arbitrator discretion to call for live face-to-face testimony on any such issues, should he/she determine that credibility may be a factor in the ultimate decision on those issues.

Issue 19:	**What selection criteria will be considered in choosing or amending arbitration rules and what must those rules include?**

Response: The only rules applicable to the conduct of arbitration under the auspices of the ODRA are the rules pertaining to ADR generally under the ODRA's procedural rules in Title 14 C.F.R. Part 17. Those rules will not be amended, unless the ODRA desires to modify its overall ADR practices. There are no specific rules governing arbitration, *per se.* Accordingly, the conduct of any given arbitration will be left to the parties and the arbitrator and should be set forth with adequate particularity within the Arbitration Agreement. Whatever rules are set forth in the Agreement should be aimed at obtaining an expeditious and impartial resolution of the matters at issue. Simpler cases usually will require less in terms of process (*i.e.,* more tailored discovery and more abbreviated hearings) than cases that are more complex. The ODRA Director must approve the terms of any Arbitration Agreement before arbitration can proceed. The Director's review, among other things, will be to assure that the Agreement conforms to the provisions of the ADRA of 1996.