

**Corrective Action: What Is It and When Is It Complete?**  
*A Neutral Mediator's Perspective*  
**ABA Bid Protest Committee Meeting, December 16, 2004**  
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**Corrective Action is Influenced by Unique Features of the FAA Acquisition System**

*Legislative mandate to use ADR*

- The FAA's Acquisition Management System (AMS) is required to use "consensual alternative dispute resolution techniques to the maximum extent practicable." 49 U.S.C.A. §40110(d)(1)(B).
- "A bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition ...." 49 U.S.C.A. §40110(d)(4).

*Agency Commitment to ADR*

The Alternative Dispute Resolution Pledge of the FAA Acquisition Executive, dated June 17, 1999, pledges to:

- Consider each dispute and each issue in controversy that arises for the appropriate application of consensual methods of dispute resolution to all or part of the matters of disagreement.
- Assure that integrated product teams and management teams receive training on the use of appropriate means of dispute resolution consistent with agency policy and governing statutes and regulations.
- Discourage the use of more formal and more adversarial dispute resolution processes when less formal and consensual methods will produce a fair disposition of a controversy.

*ODRA Process Emphasizes ADR*

- Use of ADR is encouraged at the initial status conference and is presented as an option throughout the dispute resolution process.
- Although ADR use is voluntary, ODRA regulations require affirmative consideration of ADR by the parties.
- ADR encourages collaboration and cooperation between the parties in identifying the relevant facts and law, assessing litigation risks, and finding common ground.

**Corrective Action by Agreement**

An ADR settlement agreement is a valid and enforceable contract. *Protest of Fisher-Cal Industries, Inc., Contract Dispute of Art-Z Graphics, Inc., 98-ODRA-00081 and 00083 (Consolidated).*

Settlement agreements are not only fully authorized, but that settlements are to be "encouraged and enforced," especially when there is a reasonable perception of "litigative risk." *Protest of Computer Associates International, Inc., 00-ODRA-00173.*

Intervenors usually are not parties to ADR settlements, however, their inclusion in the ADR process may reduce risk of reverse protests. An example of a reverse protest resulting from voluntary corrective action pursuant to ADR is the *Protest of Communication Technologies, Inc.*, 03-ODRA-00257. There, the ODRA denied the protest stating:

Once a matter is settled by means of alternative dispute resolution, absent extraordinary circumstances not present here, the ODRA will not adjudicate the settled matter – conducting a “trial within a trial.” As was noted in *Computer Associates*, to do so would have a “chilling effect” on ADR and the potential for ADR-related settlements and would be contrary to the aforesaid guidance within the AMS for seeking settlements at the lowest level as well as FAA policy to utilize ADR to provide “early and effective resolution of contract related disputes and issues in controversy.”

Issues pertaining to corrective action that are not addressed in the settlement agreement can be handled informally with the Neutral. Such efforts might include activities such as facilitating communications, early neutral evaluation, and monitoring implementation.

Corrective action by settlement allows consideration of non-legal issues such as perceptions of loss, unfairness and disrespect (which can affect the “reasonableness” of the parties in negotiating a settlement).

Corrective action by settlement also allows for non-traditional outcomes. For example, in a recent ODRA protest, the parties found a basis for settlement that had nothing to do with the protested procurement. In exchange for withdrawal of the protest, the FAA identified and promised to award the three contracts (or their equivalents) on a sole source basis pursuant to AMS Section 3.2.2.2 to specific SBA 8(a) certified companies associated with Protester pursuant to the Small Business Administration 8(a) Business Development – Mentor-Protégé Program

### **Corrective Action by Adjudication**

14 C.F.R. §17.21 provides for broad discretion of the ODRA to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes.

In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the FAA. 14 C.F.R. §17.21(b).

For example, the corrective action ordered by the Administrator in the *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179 provided step-by-step instructions for the re-evaluation and re-calculation of scores for particular sub-factors.

### **Enforcement of Corrective Action**

The ODRA actively polices implementation of corrective action regardless of whether it is by agreement or by Administrator’s Order, so as to ensure the integrity of the FAA’s Acquisition Management System and ODRA Dispute Resolution Process.

All cases identified above are available on the ODRA Website: <http://www.faa.gov/agc/odra/index.htm>