From: Berg, Dave [mailto:dberg@airlines.org]
Sent: Wednesday, October 01, 2008 3:25 PM
To: Griego, Fumie Y.
Cc: Rosen, Jeffrey A.
Subject: LGA Congestion Management Rule

Dear Ms. Griego:

When we met with you and your colleagues last week we talked a great deal about the FAA's lack of authority to auction slots. We provided a slide deck outlining our arguments and a pleading from the ODRA administrative proceeding that lays out our arguments in detail.

Yesterday (September 30), the GAO issued a legal opinion on the authority of the FAA to auction arrival and departure slots and to retain and use auction proceeds. The GAO concluded that:

> FAA currently lacks authority to auction departure and arrival slots, and thus also lacks authority to retain and use auction proceeds...FAA lacks the legal authority to go forward with the Newark auction or any other auction, and if FAA were to go forward with auctioning slots without obtaining the necessary authority and retained and used the proceeds, GAO would raise exceptions under its account settlement authority for violations of the '"purpose statute," 31 U.S.C. 1301(a), and the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A).
>
> Opinion, B-316796 at pp. 2-3.

Attached for your records is the OMB opinion. We urge you to consider it in reviewing not only the proposed congestion management rule for LaGuardia, but also the proposed rule for John F. Kennedy International Airport and Newark Liberty International Airport.

In addition to the GAO opinion, also attached is the final order, recommendations and findings issued yesterday in the ODRA proceeding. ODRA/FAA declined to rule on the questions addressed by GAO, concluding that they are beyond ODRA's authority.

Please forward this email within OMB as appropriate.

Very truly yours,

David A. Berg
Vice President & General Counsel
Air Transport Association of America, Inc.
202-626-4234
dberg@airlines.org

GAO
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United States Government Accountability Office
Washington, DC 20548

B-316796

September 30, 2008

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
House of Representatives

The Honorable Patty Murray
Chairman
Subcommittee on Transportation, Housing, and Urban
Development, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Christopher S. Bond
Ranking Minority Member
Subcommittee on Transportation, Housing, and Urban
Development, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Frank R. Lautenberg
The Honorable Robert Menendez
The Honorable Charles E. Schumer
The Honorable Hillary Rodham Clinton
United States Senate

Subject: *Federal Aviation Administration—Authority to Auction Airport Arrival and Departure Slots and to Retain and Use Auction Proceeds*

This responds to your request for our legal opinion regarding the authority of the Federal Aviation Administration (FAA) to auction airport arrival and departure slots. As part of its efforts to reduce congestion in the national airspace, in April and May 2008, FAA issued proposed regulations to conduct such auctions at three New York-area airports—LaGuardia Airport (LaGuardia), John F. Kennedy International Airport (JFK), and Newark Liberty International Airport (Newark)—at some time in the future.[1] In August 2008, FAA announced that it was proceeding to auction two specific slots at Newark on

[1] *See* 73 Fed. Reg. 20846 (Apr. 17, 2008) (LaGuardia); 73 Fed. Reg. 29626 (May 21, 2008) (JFK and Newark).

September 3, an action that has since been administratively stayed.[2] On September 16, 2008, FAA announced that "[i]n accordance with rulemaking activity that is not yet complete" and "if the rule is adopted," it may auction slots at Newark, LaGuardia, and JFK starting on January 12, 2009.[3] As agreed with your staff, this opinion addresses whether FAA has authority to auction slots and if it does, whether it may retain and use funds obtained through such auctions.[4]

We conclude that FAA currently lacks authority to auction arrival and departure slots, and thus also lacks authority to retain and use auction proceeds.[5] For the first time since it began regulating U.S. navigable airspace nearly 40 years ago, FAA now asserts that it may assign the use of that airspace using its general property management authority. According to FAA, slots are intangible "property" that it "constructs," owns, and may "lease" for "adequate compensation" under 49 U.S.C. §§ 106 (*l*)(6) and (n) and 40110(a)(2). An examination of those statutes read as a whole, however, makes clear that Congress was using the term "property" to refer to traditional forms of property. It was not referring to FAA's regulatory authority to assign airspace slots, no matter how valuable those slots may be in the hands of the regulated community. Related case law confirms our conclusion. The only other source of authority for FAA to raise funds in connection with its slot assignments is the Independent Offices Appropriations Act (IOAA), 31 U.S.C. § 9701, commonly referred to as the "user fee statute," but that authority is currently unavailable. Since 1998, Congress has, through annual appropriations restrictions, specifically prohibited FAA from imposing "new aviation user fees," and we conclude that proceeds from FAA's proposed auctions would constitute such a fee. Accordingly, in our opinion, FAA lacks a legal basis to go forward with the Newark auction or any other auction, and if FAA were to go forward with auctioning slots without obtaining the necessary authority and retained and used the proceeds, GAO would raise exceptions under its account settlement authority for

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[2] 73 Fed. Reg. 46136 (Aug. 7, 2008). Multiple parties have filed administrative and judicial litigation against FAA challenging the Newark auction as unlawful. *See, e.g., Air Transport Association v. FAA,* No. 08-1262 (D.C. Cir.) (filed Aug. 11, 2008); *Consolidated Protests of Air Transport Association et al. of the Bid Solicitation and Conduct of Auction Process,* Docket No. 08-ODRA-00452 (filed Aug. 14, 2008). Acting for the FAA Administrator, the FAA Chief Counsel has stayed the Newark auction pending resolution of the administrative protests. *Order for Suspension,* FAA Order No. ODRA-08-466 (Aug. 28, 2008), ODRA Docket No. 08-ODRA-00452.

[3] See 73 Fed. Reg. 53477, 53477 (Sept. 16, 2008).

[4] As stated in our letter of September 5, 2008, we are issuing this opinion notwithstanding GAO's longstanding policy to decline to address issues pending in litigation before a court or administrative body. Because Congressional committee leadership has stressed the importance of obtaining GAO's views as soon as possible to carry out Congress' oversight and legislative responsibilities, GAO provides this opinion pursuant to its authorities and responsibilities under 31 U.S.C. §§ 712, 717, and 3526. Ultimately, these questions may be answered in the litigation.

[5] This opinion does not evaluate whether FAA has authority to implement other market-based mechanisms. GAO has supported consideration of the use of market-based mechanisms (assuming sufficient legal authority) as a means of allocating scarce transportation resources and addressing congestion. *See 21st Century Challenge: Reexamining the Base of the Federal Government* (GAO-05-SP) (Feb. 2005). We have not specifically evaluated the potential effectiveness of FAA's slot auction proposal.

violations of the "purpose statute," 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).[6]

BACKGROUND

FAA's control of congestion in the national airspace by use of a "reservation" or "slot" system is not new. What is new is FAA's proposal to assign the slots by auction. FAA first instituted a slot control system nearly 40 years ago, in 1968, in the so-called High Density Rule. *See* 33 Fed. Reg. 17896, 17898 (Dec. 3, 1968); 14 C.F.R. §§ 93.121-93.129 (1969). Supplementing the traditional first-come, first-served traffic control system, the High Density Rule capped the number of hourly arrivals and departures permitted at five designated "high density traffic airports"—LaGuardia, JFK, Newark, Washington National Airport (Washington National),[7] and Chicago O'Hare International Airport—and required air carriers to obtain a "reservation" for these operations from Air Traffic Control (ATC). The number of reservations available for assignment varied by airport, time of day, and class of user.

In promulgating the High Density Rule, FAA acknowledged that it was acting pursuant to its regulatory authority to ensure the efficient use of the national airspace under sections 307(a) and (c) of the Federal Aviation Act of 1958. 33 Fed. Reg. at 17897, 17898. That act created FAA (as the Federal Aviation Agency) and directed the FAA Administrator to:

> *"assign by rule, regulation, or order the use of the navigable airspace* under such terms, conditions, and limitations as he may deem necessary *in order to insure* the safety of aircraft and *the efficient utilization of such airspace.* He may modify or revoke such assignment when required by the public interest. . . . [The Administrator also] is authorized to *prescribe air traffic rules and regulations* governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and *for the efficient utilization of the navigable airspace . . .."*

Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 307(a), (c), 72 Stat. 731, 749-50, 49 U.S.C. §§ 1348 (a), (c) (1968) (emphasis added). *See generally Northwest Airlines, Inc. v. Goldschmidt,* 645 F.2d 1309 (8th Cir. 1981) (upholding 1980 amendment to High Density

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[6] Consistent with our regular practice in preparing legal opinions, see GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at http://www.gao.gov/legal/resources.html, we requested FAA's legal position on these issues. Letter from Susan D. Sawtelle, Managing Associate General Counsel, GAO, to D.J. Gribbin, General Counsel, U.S. Department of Transportation (DOT), Aug. 6, 2008. FAA replied by letter of September 19, 2008. Letter from Patricia A. McNall, Assistant Chief Counsel, FAA, to Susan D. Sawtelle, Managing Associate General Counsel, GAO (2008 FAA Letter). We also reviewed the above cited April 17, May 21, and August 7, 2008 FAA proposals and notices; public comments filed by various parties on those proposals and notices; briefs and other submissions by FAA and other parties in the above cited FAA and D.C. Circuit litigation; and other statements by FAA, DOT, and other parties interested in these issues. On September 11, 2008, we met with counsel for FAA and DOT to discuss the agencies' position.

[7] Washington National Airport has since been renamed Ronald Reagan Washington National Airport.

Rule as exercise of FAA's section 307(a) and (c) authority to regulate efficient use of airspace).

Reservations under the High Density Rule initially were allocated by agreements between the airlines (acting through airport scheduling committees) and ATC and by rule, the vast majority of reservations were set aside for assignment to scheduled air carriers. *See* 14 C.F.R. § 93.123(a) (1969). Because only a few carriers held certificates of public convenience and necessity for these airports, as required prior to deregulation of the airline industry in the early 1980's, there was only limited competition for the reservations.[8] With deregulation, however, any licensed carrier could service any high density airport, with the result that airport scheduling committees could no longer reach agreements acceptable to prospective new entrants and incumbent airlines wishing to expand their operations.

To accommodate the resulting demand for reservations while ensuring continuity of operations for carriers providing regularly scheduled service, FAA amended the High Density Rule effective in 1986. *See* 50 Fed. Reg. 52180 (Dec. 20, 1985). It again acknowledged that it was acting pursuant to its regulatory authority under sections 307(a) and (c) of the Federal Aviation Act to ensure the efficient use of the national airspace. *Id.* at 52181. Under a "grandfather" policy, FAA initially assigned most reservations—now called "slots"[9]—to the carriers who already held them under scheduling committee agreements. For the first time, FAA also authorized carriers to sell, lease, or otherwise transfer the slots among themselves, subject to confirmation by FAA and to a determination by the Secretary of Transportation that transfer "will not be injurious to the essential air service program."[10] Slots could be withdrawn at any time for FAA operational needs, and under a "use-or-lose" provision, slots not used 65 percent of the time would be recalled. FAA made clear that "[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control."[11]

In issuing the 1986 amendments, FAA noted that it had decided not to pursue a proposal it had made in 1980, to assign slots by means of an auction. It explained this was because "legislation would be required for the collection and disposition of the proceeds." *Id.* at 52183. FAA noted that "several unresolved legal questions" had been raised by the Department of Justice which DOJ believed would make an auction "impractical," citing the Independent Offices Appropriations Act (IOAA), 31 U.S.C.

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[8] Prior to deregulation, scheduled air carriers were required to obtain certificates of public convenience and necessity from the Civil Aeronautics Board (CAB), which approved routes and tariffs for air commerce. 49 U.S.C. App. §§1371, 1373 (1988). Deregulation was set in motion by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), and culminated in the January 1, 1985 transfer of the CAB's remaining functions to the Secretary of Transportation and dissolution of the CAB.

[9] A "slot" was defined as "the operational authority to conduct one [Instrument Flight Rules] landing or takeoff operation each day during a specific hour or 30 minute period at one of the High Density Traffic Airports . . .." 50 Fed. Reg. at 52195, codified at 14 C.F.R. § 93.213(a)(2) (1986).

[10] *Id.* at 52196, codified at 14 C.F.R. § 93.221(a)(6) (1986).

[11] *Id.* at 52197, codified at 14 C.F.R. § 93.223(a) (1986). *See also* 50 Fed. Reg. at 52182 ("This amendment does not create proprietary rights in slots.").

§ 9701, commonly referred to as the "user fee statute." IOAA could be problematic, FAA noted, "if these proceeds were to be applied for airport improvements . . .." *Id.* As FAA had explained in its earlier proposal, this is because "in accordance with [IOAA], the money received as a result of any auction system will not be retained by DOT but will be paid into the Treasury of the United States. Other disposition of the revenues . . . [is] not now authorized by statute." 45 Fed. Reg. 71236, 71240, 71241 (Oct. 27, 1980).

Over time, Congress became concerned that the High Density Rule, particularly the 1986 amendments, hurt competition, unfairly favored incumbent airlines, and was not the best means to reduce congestion.[12] After enacting several measures in the 1980's and 1990's requiring greater access for certain service providers,[13] in 2000, Congress directed FAA to phase out the High Density Rule altogether, at LaGuardia, JFK, and O'Hare, no later than January 1, 2007.[14] At about this same time, Congress also began to enact annual appropriations restrictions prohibiting FAA from promulgating any "new aviation user fees" unless specifically authorized by statute. The first of these restrictions was enacted in 1997 for fiscal year 1998, and the most recent was enacted in 2007 for fiscal year 2008.[15]

As the 2007 High Density Rule phase-out deadline approached, FAA remained concerned about congestion. In August 2006, it therefore proposed to continue caps on hourly arrivals and departures at LaGuardia and to assign the majority of slots (now called "operating authorizations") to incumbent carriers.[16] 71 Fed. Reg. 51360 (Aug. 29, 2006). FAA also now proposed to set expiration dates for most slots, with 10 percent of the slots each year to be redistributed, as they expired, using a market-based mechanism yet to be determined. FAA could not propose a specific market mechanism at that time, it explained, because it lacked authority to do so and would be seeking such authority from Congress:

> "[FAA] will seek authority to utilize market-based mechanisms at LaGuardia in the future [to allocate capacity]. Such legislation would be necessary to employ market-based approaches such as auctions or congestion pricing at LaGuardia because the *FAA currently does not*

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[12] *See, e.g.,* H. R. Rep. No. 103-240 (1993) at 29, 1994 U.S.C.C.A.N. 1676, 1699.

[13] Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 292(b)(7), 101 Stat. 1486, 1507, 1511 (1987), codified at 49 U.S.C. App. § 1389 (b)(7) (1988); Federal Aviation Reauthorization Act of 1994, Pub. L. No. 103-305, § 206(a)(1), 108 Stat. 1584 (1994), codified at 49 U.S.C. § 41714 (1994).

[14] *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, § 231, 114 Stat. 61, 108 (2000), codified at 49 U.S.C. §§ 41715-18. It was unnecessary to require phase-out at Newark because FAA had indefinitely suspended reservation restrictions there in 1970. 35 Fed. Reg. 16591, 16593 (Oct. 23, 1970). The High Density Rule remains in effect at Washington National.

[15] *See* Pub. L. No. 105-66, 111 Stat. 1429 (Oct. 27, 1997); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2379 (Dec. 26, 2007).

[16] FAA believed this action was permissible notwithstanding the January 1, 2007 phase-out deadline because while the legislation required phase-out of the High Density Rule, it "did not strip the FAA of its authority to place operating limitations on air carriers to preserve the efficient utilization of the National Airspace System . . .." *See* 71 Fed. Reg. at 513631; *see also* 2008 FAA Letter at 6-7.

> *have the statutory authority to assess market-clearing charges for a landing or departure authorization.* If Congress approves the use of market-based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia."

Id. at 51362 (emphasis added); *see also id.* at 51363. FAA subsequently requested such authority from Congress, but it has not been enacted.[17] When FAA was unable to finalize its 2006 proposal before the January 1, 2007 phase-out deadline, it issued a series of temporary "capping orders" maintaining caps and slots at LaGuardia, JFK, and Newark.[18]

Finally, as noted above, in April and May 2008, FAA issued its most recent proposals for a cap and slot system at LaGuardia, JFK, and Newark. FAA proposes to continue to assign the majority of slots to incumbent carriers and, as in its 2006 proposal, to withdraw a portion of the slots for re-distribution (along with unassigned slots). However, calling its 2006 legal analysis "overly simplistic" and "incorrect,"[19] FAA now proposes to do what it previously stated it had no authority to do: assign the withdrawn slots by auctioning slot "leaseholds" to the highest bidder. The proceeds from the auctions would either be retained by FAA and used to mitigate congestion in the New York City area or, after deducting FAA's administrative costs, paid to the airline that previously held the auctioned slot. To impose caps on hourly arrival and departure slots, FAA continues to rely on its regulatory authority to ensure efficient use of the airspace, now codified at 49 U.S.C. § 40103(b)(1), (2). *See* 73 Fed. Reg. at 20846, 29626. To assign the slots by auctioning slots leaseholds, FAA for the first time relies on its general authority to lease or otherwise dispose of "property" under 49 U.S.C. §§ 106 and 40110. *See id.* at 20853, 29631.

ANALYSIS

Whether FAA may raise funds in connection with its assignment of slots—by holding a slot auction, imposing a user fee, assessing a tax, or by some other mechanism—depends on whether it has the proper statutory authority. Congress has granted FAA explicit statutory authority to collect fees in several different situations,[20] but no explicit

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[17] The Department of Transportation submitted draft legislation on this subject to Congress in February 2007. See Letter from Mary E. Peters, Secretary of Transportation, to Nancy Pelosi, Speaker of the House of Representatives, Feb. 14, 2007. As the Secretary explained, sections 503 and 504 of the bill would "authoriz[e] the use of market-based mechanisms (e.g., auctions or congestion pricing) to control congestion and delay at capacity-constrained airports." *Id.* at 11.

[18] *See* 71 Fed. Reg. 77854 (Dec. 27, 2006) (LaGuardia); 73 Fed. Reg. 3510 (Jan. 18, 2008) (JFK); 73 Fed. Reg. 14522 (Mar. 18, 2008) (Newark).

[19] 73 Fed. Reg. at 20850 n. 4; *see also* FAA Program Office Response in *Consolidated Protests of Air Transport Association et al. of the Bid Solicitation and Conduct of Auction Process,* No. 08-ODRA-00452 (Sept. 4, 2008) (2008 FAA Brief) at 59-60; 2008 FAA Letter at 7. FAA states that while it continues to believe it lacks authority to implement congestion pricing, it now believes it has authority to conduct auctions.

[20] *See, e.g.,* 49 U.S.C. § 40113(e) (costs for providing safety-related training and operational services to foreign aviation authorities); 49 U.S.C. § 45301(a)(1) (fees from aircraft that fly over but do not take off or depart from the United States); 49 U.S.C. § 45302(b) (fees for issuing certificates of registration of certain aircraft).

authority exists for the imposition of fees related to the assignment of slots. We therefore look to whether FAA has any other authority that would permit it to auction slots.

I. FAA's Authority to Auction Slots Under its Property Disposition Authority

In evaluating whether FAA may assign slots using its general property disposition authority, it is important to understand what a slot is. FAA has consistently characterized a slot as an "operating authorization" or "operational authority" to conduct one operation (arrival or departure) in the airspace during a specified time period.[21] At the five high density airports, this authorization is in addition to the authorization—or "clearance"—that must be obtained from ATC to operate within the airspace at those facilities. 14 C.F.R. §§ 91.131(a)(1), 91.173. While these two authorizations differ in some respects—clearances are normally required of all users of this airspace, while slots, due to capacity demands, are issued only to some users—both constitute regulatory permission without which aircraft may not be operated. So understood, a slot is a regulatory license—a legal permission, revocable by FAA, to conduct an act that otherwise would not be permitted.

As FAA itself emphasizes, it is also important to understand that caps and slots are two interconnected parts of FAA's regulatory structure to ensure the efficient use of the airspace. 2008 FAA Letter at 1. Limiting aircraft traffic by capping the number of arrivals and departures reduces the amount of traffic that is airborne, but it does not avoid the backup of aircraft seeking access to the air traffic system or provide a mechanism for prioritizing traffic. Assigning slots accomplishes this objective; without slots, traffic will queue on a first-come-first-served basis (as it does at non-slot controlled airports), undermining scheduling. Whether the assignment system is called a reservation system, an operating authorization system, or a slot system, the use of an assignment mechanism is key to accomplishing what FAA believes is necessary to promote orderly and efficient traffic flow and use of airspace.

According to FAA, however, slots are not a license but "property" that it "acquires" or "constructs" and, as the property "owner," may "lease" using its general property disposition and contracting authority in 49 U.S.C. §§ 106 (*l*)(6) and (n) and 40110(a)(2).[22] Section 106(n)(1) authorizes FAA:

> "(A) to *acquire* (by purchase, lease, condemnation, or otherwise), *construct,* improve, repair, operate, and maintain—(i) air traffic control facilities and equipment; (ii) research testing sites and facilities; and (iii) such other real and personal *property* (including office space and patents), or any interest therein . . . as the Administrator considers necessary; [and] (B) to *lease* to others such real and personal *property* . . . ."

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[21] *See, e.g.,* 14 C.F.R. § 93.213(a)(2) (1986); proposed 14 C.F.R. §§ 93.62, 93.162, 73 Fed. Reg. at 20866, 29642.

[22] *See* 73 Fed. Reg. at 20853, 29631; 2008 FAA Letter at 1-3; 2008 FAA Brief at 41, 50-53, 62.

Section 106(*l*)(6) authorizes FAA:

> "[to enter into] such contracts, *leases,* cooperative agreements, or other transactions as may be necessary to carry out the functions of FAA."

Section 40110(a)(2) authorizes FAA:

> "[to] dispose of an interest in *property* for adequate compensation . . .."

(All emphasis added.)

As evidence that these provisions authorize slots to be "leased" as "property," FAA points to bankruptcy proceedings where slots subject to lease have been accorded some proprietary status. 2008 FAA Brief at 41-43. FAA asserts that it, too, has a property interest in slots subject to lease because: (1) FAA has sovereignty over U.S. navigable airspace;[23] (2) airspace has been characterized as "public property;"[24] (3) FAA regulates the use of navigable airspace; (4) as a "product" of its regulation, FAA has "constructed" slots as an "intangible property interest" in airspace use; and (5) as the slot "constructor," FAA "owns" and may "lease" its "intangible" slots. FAA states further that it may—in fact, must—charge "adequate compensation," and even "market prices," for this "property" under 49 U.S.C. § 40110.[25] 2008 FAA Brief at 41, 50-53.

As discussed below, however, slots are not "property" subject to FAA's property disposition authority. Nor are they the mere "product" of FAA regulation; they *are* FAA regulation. Moreover, FAA's argument that slots are property proves too much—it suggests that the agency has been improperly giving away potentially millions of dollars of federal property, for no compensation, since it created the slot system in 1968.

A.

Parsing its property acquisition and disposition authorities under 49 U.S.C. §§ 106(n) and 40110(a)(2) and applying general dictionary definitions, FAA maintains that when it uses its regulatory authority to delineate a time period for authorized takeoff or landing—a slot—it "constructs" or "acquires" an intangible "property" interest in airspace use that it may "lease" to others for "adequate compensation." 2008 FAA Letter at 2-3; 2008 FAA Brief at 47-48. "Understanding Congressional will requires more than the mechanical

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[23] 49 U.S.C. § 40103(a)(1) ("The United States Government has exclusive sovereignty of airspace of the United States.").

[24] 2008 FAA Brief at 47, citing *Air Pegasus of D.C., Inc. v. United States,* 424 F.3d 1206 (Fed. Cir. 2005) ("[N]avigable airspace is public property not subject to private ownership.").

[25] Acknowledging that 49 U.S.C. § 40110(a)(2) requires FAA's payment of "adequate compensation" when it disposes of property, FAA suggests this compensation would have to be market price: "[w]hen the Government provides . . . access to public property, whether by a lease or a license, the standard that the OMB requires and [that] agencies . . . follow unless otherwise prohibited by law, is that the Government *must* charge market prices. OMB Circular A-25 (when the Government leases or sells goods, such as leasing space in a federal building, the charge will be based on market prices)." 2008 FAA Brief at 50 (emphasis added).

application of dictionary definitions," however, *see Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 660 (4th Cir. 1996) (Michael, J., concurring and dissenting), and it is a cardinal rule of statutory construction that statutes must be read as a whole, "since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citations omitted). When taken in context and read as a whole, the term "property" as used in FAA's statute clearly refers to traditional property, not to FAA's regulatory licensing authority over the use of navigable airspace. Almost all of the "property" examples listed in 49 U.S.C. § 106(n)(1) are traditional tangible property—real estate, equipment, and infrastructure—and the legislative history repeats the same examples. *See* H. R. Conf. Rep. 104-848 (1996) at 107, 1996 U.S.C.C.A.N. 3703, 3729. The other example referenced in § 106(n)—a patent— has long been recognized as intangible property. Other terminology used in § 106(n)(1) reinforces that Congress was referring to traditional property. For example, the statute refers to property that is "leased" and "condemned" (applied to traditional real property) and "constructed, improved, repaired, operated, and maintained" (applied to traditional real and personal property). Under the statutory construction rule of *ejusdem generis*, "such other . . . property . . . or any interest therein" as used in § 106(n)(1)(A) must mean property of a nature similar to the traditional real and personal property examples cited in the statute. This would not include FAA's regulatory authorizations for aircraft takeoffs and landings—that is, slots.

The structure of FAA's statutory authority and its legislative history support this conclusion. Congress has given FAA different authorities to carry out different responsibilities—it has regulatory authority in 49 U.S.C. § 40103 to ensure the safe and efficient use of the navigable airspace, and property acquisition and disposition authority in 49 U.S.C. §§ 106 and 40110 to support FAA's mission and general operations. As relevant here, FAA has had these same basic authorities since its creation in 1958.[26] The fact that Congress authorized FAA to carry out its regulatory responsibilities (including assignment of slots) under the strictures of § 40103 undercuts FAA's argument that Congress simultaneously authorized FAA to carry out many of these same responsibilities under the very different strictures of §§ 106 and 40110. Congress has never suggested as much in the half-century of FAA's existence, nor, until 2008, has FAA. Thus FAA may not rely on its general property disposition authority to carry out its regulatory slot assignment functions. *See, e.g., American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) (EPA cannot rely on general rulemaking authority to regulate air pollutant in manner conflicting with authority specific to that pollutant and "cannot uncouple the first sentence of [Clean Air Act provision] from the rest of the section in order to expand its authority beyond the aims and limits of the section as a whole.").

Finally, FAA's reading of its property authority, particularly the purported significance of a 1996 amendment to that authority, is unavailing because it would interfere with Congress' constitutional prerogatives to set programmatic spending levels and oversee

[26] *Compare* Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 307(a), 307(c) (FAA "airspace control" authority to "assign by rule, regulation, or order" and "prescribe air traffic rules and regulations" to ensure efficient use of the airspace) *with id.* §§ 303(c)(2), 303(c)(3) (FAA "administrative" authority "to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein" and, "for adequate compensation, by sale, lease, or otherwise, to dispose of any real or personal property or interest therein").

agency activities. U.S. Const. Art. I, Sec. 9, cl. 7. As noted above, in the past FAA has considered imposing a user fee under IOAA in connection with its assignment of slots. Congress also has considered FAA's imposition of user fees. In FAA's 1996 reauthorization legislation, for example, Congress authorized FAA to charge certain cost-based user fees, but called for further study of the agency's funding needs and funding mechanisms. *See* Air Traffic Management System Performance Improvement Act of 1996, Pub. L. No. 104-264, Title II, §§ 221(12), 273, 274. And in 1997, Congress enacted the first of its now-annual appropriations restrictions expressly prohibiting FAA from imposing any "new aviation user fees" without specific statutory authority. FAA nevertheless asserts that when Congress amended its property authority in the 1996 reauthorization act by enacting § 106(n)—which clarified FAA's property acquisition authority to include personal as well as real property, and authority not just to "acquire" property but, as discussed above, to "construct, improve, repair, operate, and maintain" it, *see* Pub. L. No. 104-264, § 228, codified at 49 U.S.C. § 106(n)—this amendment granted FAA authority to "construct" and auction slots. 2008 FAA Brief at 47-48. Given Congress' substantial concerns about FAA's imposing user fees n 1996 and its outright ban on new FAA aviation user fees the following year, we find it highly unlikely that Congress at the same time authorized FAA to obtain non-appropriations funding through the "back door" of its general property disposition authority.[27]

B.

Case law regarding the legal status of slots and regulatory licenses confirms our conclusion that slots are not "property" in the hands of FAA. To demonstrate that slots are property, FAA cites three bankruptcy cases—*In re McClain Airlines, Inc.*, 80 B.R. 175 (Bankr. D. Ariz. 1987); *In re American Central Airlines*, 52 B.R. 567 (Bankr. N.D. Iowa 1985); and *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989)—which considered whether an airline in bankruptcy had a sufficient proprietary interest in its slots to include them as "property of the estate" (or in *McClain*, an interest in a right to seek restoration of a withdrawn slot). 2008 FAA Brief at 42-43, 61; 2008 FAA Letter at 3. The courts in these cases focused in part on the fact that after FAA's 1986 amendments to the High Density Rule, carriers could sell, lease, or otherwise transfer slots among themselves.

The cases do not support FAA's position. At most, they recognize the undisputed fact that slots have value in the hands of carriers to whom they are assigned, at least when the slots are transferable to other carriers. The decisions do not address the issue we face here: the nature of slots when they are *unassigned* and "held" by *FAA*. In fact, the cases underscore the limited nature of slots even *after* they are assigned: they remain subject to FAA withdrawal at any time for operational reasons and to FAA recall for non-

[27] As we explained in *SBA's Imposition of Oversight Review Fees on PLP Lenders*, B-300248, Jan. 15, 2004, in the absence of specific statutory authority, "[a]n agency may not circumvent [Congressional] limitations by augmenting its appropriations from sources outside the government. . . . One of the objectives of these limitations is to prevent agencies from avoiding or usurping Congress' 'power of the purse.'" *See also Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 967-68 (4th Cir. 1984) (FAA's unauthorized imposition of user fees "undermined the integrity of the Congressional appropriations process" and constituted an "end-run around normal appropriations channels").

use. In *Gull Air*, for example, the most recent, and the only appellate court, decision cited by FAA, FAA itself argued that slots were *not* the carrier's property but rather, as specified in FAA's regulations, "operating privileges subject to absolute FAA control." 890 F.2d at 1258. The First Circuit Court of Appeals ruled only that slots' transferability under the High Density Rule created a "limited proprietary interest in slots" that is "encumbered by conditions that FAA imposed in its regulations." *Id.* at 1260. The court declined to decide whether the slots constituted "property of the estate" because whatever that interest was, it was lost automatically under FAA's "use or lose" requirement when the airline ceased operations. Thus *Gull Air* stands only for the proposition that slots have *one* characteristic of property—transferability—which *may* qualify slots as "property of the estate" under the Bankruptcy Code when held by carriers. This is a far cry from finding that slots are FAA's "property" subject to its property disposition statute.

Furthermore, even if slots were not transferable, there is little doubt that they have value to carriers. Yet the U.S. Supreme Court has made clear that the fact that a government license is valuable to the license holder does not render the license "property" in the hands of the issuing agency. Rather, the license is "no more and no less than [the agency's] sovereign power to regulate." *Cleveland v. United States*, 531 U.S. 12, 23 (2000). In *Cleveland,* the Supreme Court had to decide whether a Louisiana video poker machine license was "property" under the federal mail fraud statute, which makes it a felony to use the mail to further "any scheme . . . to defraud, or for obtaining money or *property* by means of false or fraudulent pretenses . . .." 18 U.S.C. §1341 (emphasis added). Upholding the rulings of five circuit courts of appeals, the unanimous Supreme Court ruled that the licenses were not "property" when held by the issuing state agency:

> "Without doubt, Louisiana has a substantial economic stake in the video poker industry. The State collects an upfront 'processing fee' for each new license application . . ., a separate 'processing fee' for each renewal application . . ., an 'annual fee' from each device owner . . ., an additional 'device operation' fee . . ., and, most importantly, a fixed percentage of net revenue from each video poker device . . . It is hardly evident, however, why these tolls should make video poker licenses 'property' in the hands of the State. The State receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only *after* they have been issued to licensees. Licenses pre-issuance do not generate an ongoing stream of revenue. At most, they entitle the State to collect a processing fee from applicants for new licenses. *Were an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an up front fee, including drivers' licenses, medical licenses, and fishing and hunting licenses. Such licenses, as the Government itself concedes, are 'purely regulatory.'"*

531 U,S. at 22 (second emphasis added).

FAA compares its proposed slot leases to patents, a type of intangible property it is authorized to dispose of under 49 U.S.C. § 106(n)(1)(A)(ii). 2008 FAA Brief at 33, 51. But the *Cleveland* Court rejected this patent analogy, which had been made by the United States:

> "[T]hese intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. . . [T]he state's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. *Such regulations are paradigmatic exercises of the States' traditional police powers.*
>
> "The Government compares the State's interest in video poker licenses to a patent holder's interest in a patent that she has not yet licensed. Although it is true that both involve the right to exclude, we think the congruence ends there. Louisiana does not conduct gaming operations itself, it does not hold video poker licenses to reserve that prerogative, and it does not "sell" video poker licenses in the ordinary commercial sense. Furthermore, *while a patent holder may sell her patent . . ., the State may not sell its licensing authority.* Instead of a patent holder's interest in an unlicensed patent, the better analogy is to the Federal Government's interest in an *unissued* patent. *That interest, like the State's interest in licensing video poker operations, surely implicates the Government's role as sovereign, not as property holder."*

531 U.S. at 23-24 (emphasis added).

Just as Louisiana did not run the video poker machines in *Cleveland,* so FAA does not operate commercial air carriers. Just as Louisiana regulated gaming as part of its police power to protect the public welfare, so FAA regulates air traffic as part of its responsibility to ensure efficient use of the national airspace. As in *Cleveland,* the fact that FAA's slots have value to slot holders does not transform them into alienable "property" in FAA's hands. FAA seeks to distinguish *Cleveland* because the licenses there were not transferable, and because a rule of leniency applicable to criminal statutes drove the Supreme Court's interpretation. As noted above regarding *Gull Air,* however, slot transferability is irrelevant to FAA's "property" rights because slots do not acquire this trait until *after* FAA assigns them. And while FAA's property disposition provisions are not criminal statutes, studied skepticism in defining their reach is also warranted. In this regard, there is an acute public interest in protecting Congress' exercise of its constitutional responsibility to set spending levels through the appropriations process, and as discussed above, this would be jeopardized if FAA could circumvent the appropriations process by obtaining funding through slot auctions.

II. FAA's Authority to Auction Slots Under its User Fee Authority

Because FAA may not auction slots under its property disposition authority and has no explicit authority to charge a fee for the assignment of slots, the only other arguable

authority on which FAA could rely is IOAA.[28] That authority is currently unavailable because as of fiscal year 1998, Congress has prohibited FAA's imposition of any new aviation user fees unless it obtains specific statutory authority. Because FAA lacks authority to collect such fees, if it nevertheless goes forward with an auction, it may not retain or use the proceeds.

To understand the impact of Congress' prohibition, some context and a brief history are helpful. FAA is funded from a combination of sources, which can be roughly divided into three types: excise tax revenue,[29] General Fund appropriations, and reimbursements from services provided and user fees charged.[30] FAA, *Fiscal Year 2007 Performance and Accountability Report*, at 121.[31] For the last 10 years, Congress has annually prohibited FAA from implementing any "new aviation user fees" not authorized by Congress. The prohibition first appeared in the 1998 Department of Transportation and Related Agencies Appropriations Act and stated:

> "[N]one of the funds in this Act shall be available for the Federal Aviation Administration to plan, finalize, or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of enactment of this Act."

Pub. L. No. 105-66, 111 Stat. 1425, 1429 (1997). At the time, the Conference Committee expressed "very serious concerns," "on both technical and policy-related grounds," about new aviation user fees that FAA had proposed. The Committee made clear that the existing excise tax system, supplemented by appropriated funds, would provide sufficient revenue for FAA without new fees. H. R. Rep. No. 105-313 at 40-41 (Conf. Rep.) (1997). The Committee specifically acknowledged the authority that IOAA generally provides to agencies and made clear that it intended to restrict this authority in FAA's case:

> "The conferees are aware of FAA's opinion that the agency has the legal authority to establish new user fees under the generic authority provided in the User Fee Statute, and do not wish to see FAA circumvent the legislative process and avoid the normal cost controls

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[28] IOAA is based on the policy that the services the federal government provides should be "self-sustaining to the extent possible." 31 U.S.C. § 9701(a). As such, it authorizes federal agencies to charge fees for services provided by the agency "when there is no independent statutory source for the charging of a fee or where a fee statute fails to define fee-setting criteria." *American Medical Ass'n v. Reno*, 857 F. Supp. 80, 84 (D.D.C. 1994); *Pension Benefit Guaranty Corp.—Reimbursement for Financial Analysis Services*, B-307849, Mar. 1, 2007. IOAA by its own terms does not supersede any other law which prohibits the imposition of specific fees. 31 U.S.C. § 9701(c)(1).

[29] Examples of excise taxes which generate revenue for FAA include a tax on domestic airline tickets (26 U.S.C. § 4261(a)), a tax on the price paid for cargo transportation (26 U.S.C. § 4271(a)), a tax on aviation gasoline and jet fuel (26 U.S.C. §§ 4081(a)(2)(A)(ii), (a)(2)(C)), and a per person tax on international arrivals and departures (26 U.S.C. § 4261(c)).

[30] *See* note 20 above.

[31] Available at http://www.faa.gov/about/plans_reports/media/FAA%20FY%2007%20PAR%20FINAL.pdf (last visited Sept. 24, 2008).

> which apply to other federal agencies through the administrative implementation of new user fees. The conferees emphasize, however, that this provision does not prevent the FAA from implementing new user fees. It only provides that such fees must be specifically authorized by the Congress."

Id. at 41. A slightly modified version of the restriction has been included in every subsequent yearly appropriation. The 2008 fiscal year prohibition states:

> "[N]one of the funds in this [Appropriations] Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act."

Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2379 (2007).

In considering the fiscal year 2008 prohibition, the House Committee on Appropriations commented on its "serious concerns about the impact of user fees,"[32] and the Senate Committee on Appropriations expressed its desire that "any degradation in the Committee's ability to annually set programmatic spending levels and oversee the agency's spending habits as part of the reauthorization process should be strenuously resisted."[33]

This fiscal year 2008 prohibition precludes FAA's use of IOAA as authority to auction slots because FAA's slot auctions would amount to a "new aviation user fee" not specifically authorized by law. FAA has never previously imposed a fee for authorization to use navigable airspace at a specific time; thus FAA's slot auction would constitute exactly the type of "new aviation user fee" that Congress has prohibited. Indeed, FAA recognized that slot auctions would constitute a user fee when it proposed to institute such a fee in 1980, and again in 1986 when it decided not to do so. FAA also appeared to recognize that slot auctions would constitute a user fee in 2006 and 2007 when, in the face of the annual appropriations restrictions, it promised to and did seek legislation authorizing it to conduct the auctions. FAA's April 2008 proposal in fact acknowledges that because of the appropriations restriction, FAA "continues to believe that it cannot rely on a market-based [slot] allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter." 73 Fed. Reg. at 20846, 20852.

FAA suggests that because it will conduct the Newark auction by solicitation of bids for slot leases, rather than by issuance of a new regulation, the language of the 2008 Consolidated Appropriations Act—which prohibits "any regulation" imposing new aviation user fees—does not apply. 2008 FAA Brief at 61 n. 36. Contrary to FAA's suggestion, because the auction would, in effect, amount to a user fee under IOAA, and IOAA requires agencies to prescribe regulations to impose new user fees, *see* 31 U.S.C. § 9701(b), implementation of the auction would require a new regulation. FAA cannot

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[32] H. R. Rep. No. 110-238 at 19 (2007).

[33] S. Rep. No. 110-131 at 21 (2007).

elude the requirements of otherwise applicable law simply by failing to follow the law's requirements. "It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly." *Forest Products Laboratory Agreement with University of Wisconsin*, 55 Comp. Gen. 1059 (1976).

FAA points to examples of other agencies auctioning or charging market-based fees for use of public lands or other public "property." 2008 FAA Brief at 48-49. These are inapposite because unlike FAA, those agencies had specific statutory authority for their activities. *See, e.g,* 16 U.S.C. § 472a (U.S. Department of Agriculture auction of timber rights on National Forest Service land); 43 U.S.C. § 315b (U.S. Department of Interior issuance of grazing permits for public lands for "reasonable fees"). FAA's most analogous example is the Federal Communications Commission's auction of license rights to the electromagnetic spectrum. Again, however, Congress has specifically authorized the FCC to conduct such auctions, including specifying the conditions necessary for auction, bidder qualifications, and treatment of auction proceeds. *See* 47 U.S.C. § 309(j).[34] As discussed above, despite FAA's specific requests, Congress has given FAA no comparable auction authority.

Finally, even if Congress were to remove the annual appropriations restriction that prohibits FAA from promulgating new aviation user fees, without other specific authority, it could impose only a cost-based fee, not the type of market-based fee it seeks to obtain by auctioning slots to the highest bidder. Under IOAA, when an agency is but one actor in the marketplace, it acts in a commercial, non-governmental capacity and may charge a fee based on the market price of the service provided.[35] When instead an agency exercises its sovereign power and regulates activities based on public policy goals—as FAA would be acting, if it were to auction slots—it acts in a regulatory capacity, and user fees are limited to the agency's costs of providing the specific benefit to the individual recipient.[36] If FAA's fee were based on market value and exceeded its cost of providing the slot to the recipient airline, the fee could rise to the level of a tax.[37] A tax would be beyond IOAA's grant of authority and FAA would have to have some other Congressionally-delegated authority to impose it. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974); *National Park Service—Special Park Use Fees,* B-307319, Aug. 23, 2007.

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[34] Before Congress enacted this legislation in 1993, FCC lacked authority to auction the spectrum, although it could issue licenses under its regulatory authority. *Federal Communications Commission's Order on Improving Public Safety Communications in the 800 MHz Band,* B-303413, Nov. 8, 2004.

[35] *National Park Service—Special Park Use Fees,* B-307319, Aug. 23, 2007 (National Park Service could charge special park fee reflective of value of grazing rights on the open market. To do otherwise "could very well interfere, however inadvertently, with a competitive marketplace by having the government 'selling' below the market rate.").

[36] *Id.; National Cable Television Ass'n v. FCC,* 554 F.2d 1094, 1107 (D.C. Cir. 1976).

[37] "When the cost of the benefit conferred is exceeded by any material amount, one immediately gets into the taxing area, and the result is revenue and not a fee." *National Ass'n of Broadcasters v. FCC,* 554 F.2d 1118, 1129 n. 28 (D.C. Cir. 1976); *National Park Service—Special Park Use Fees,* B-307319, Aug. 23, 2007.

CONCLUSION

We conclude that FAA may not auction slots under its property disposition authority, user fee authority, or any other authority, and thus also may not retain or use proceeds of any such auctions. Going forward with the planned Newark auction or any other auction would be without legal basis, and if FAA conducted an auction and retained and used the proceeds, GAO would raise significant exceptions, under its account settlement authority, 31 U.S.C. § 3526, for violations of the "purpose statute," 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A)

If there are questions concerning these matters, please contact Managing Associate General Counsel Susan. D. Sawtelle at (202) 512-6417 or Managing Associate General Counsel Susan A. Poling at (202) 512-2667. Assistant General Counsels David Hooper and Thomas H. Armstrong, Senior Attorney Bert Japikse, and Staff Attorney James Murphy also participated in preparing this opinion.

Sincerely yours,

Gary L. Kepplinger
General Counsel

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

ORDER

FAA Order Number:	**ODRA-08-475**
Matter:	**Protests of Air Transport Association, Northwest Airlines, Inc., Continental Airlines, Inc., US Airways Group, Inc., United Airlines, Inc., Delta Airlines, Inc., The Port Authority of NY & NJ and The New York Aviation Management Association Pursuant to SIR Posting 6996**
Docket Nos.:	**08-ODRA-00452 through -00457and -00461, -00462 (Consolidated for Decision)**
Date Served:	**September 30, 2008**

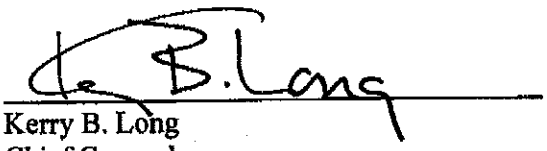
These consolidated Protests were filed with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Protests challenge the FAA's plan to lease, through a competitive auction, one aircraft takeoff slot and one aircraft landing slot at the Newark Liberty International Airport ("Slot Auction").

For the reasons set forth therein, I hereby adopt and incorporate the attached Findings and Recommendations of the ODRA and: (1) dismiss for lack of standing the Protests of the Air Transport Association, the Port Authority of New York and New Jersey, and the New York Aviation Management Association, all of whom are not potential bidders in the Slot Auction; (2) deny the Protests of Northwest Airlines, Inc., Continental Airlines, Inc., US Airways Group, Inc., United Airlines, Inc., and Delta Airlines, Inc. ("Carrier Protests"), to the extent that they allege the FAA is not authorized to lease property interests through use of an auction and that the Slot Auction Solicitation is deficient; and (3) dismiss all other grounds of the Carrier Protests inasmuch as they do not challenge Slot Auction

procedures and raise constitutional and non-procurement legal issues not appropriate for adjudication in the context of a bid protest proceeding before the ODRA.

This is the final Agency order in this matter. To the extent that this decision is subject to review, such review shall be sought in accordance with 49 U.S.C. § 46110 and the ODRA Procedural Rule, 14 C.F.R. § 17.33, within sixty (60) days of issuance of this Order.

Issued this 30th day of September, 2008
Pursuant to a Delegation of Authority
From the FAA Acting Administrator*



Kerry B. Long
Chief Counsel

* By delegation dated September 30, 2007, the FAA Acting Administrator delegated final decisional authority to the FAA Chief Counsel for all ODRA matters.

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 aircraft 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 another 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, statutory 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, issued by an FAA Program Office ("Program Office"), 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 Airport. The FAA has proposed: establishing "caps" on flight operations; limiting its assignment of "the majority" of flight landing and departure slots at Newark to the existing Carriers

currently operating at that airport; and 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.[1] *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.[2] The Solicitation requested submissions for the auction of 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.[3] *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 27, 2008, the FAA issued a Solicitation Modification purporting to clarify some of the terms of the Slot Auction.[4] The Modification was posted on the FAA's Contracting Opportunities website.

[1] As explained by the May Order, October 26, 2008 is the start of the winter flight season.
[2] The FAA Contracting Opportunities website is located at: http://faaco.faa.gov/index.cfm.
[3] 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.
[4] These clarifications are discussed further below. *See Section D, infra.*

III. THE PARTIES' POSITIONS

A. The Protesters' Allegations

The Protests present essentially identical legal arguments, with some minor differences, contending 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*;[5] (2) the Independent Offices Appropriations Act, which generally requires federal agencies to promulgate regulations before assessing user charges, *see* 31 U.S.C. § 9701;[6] 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.[7] *See United States Constitution, Amendment XIV, Section 1.*

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

[5] *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.
[6] *See ATA Protest* at 5; *NWA Protest* at 4; *US Airways Protest* at 4; *United Airlines Protest* at 6; *Delta Protest* at 5.
[7] *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.

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.

The Program Office disagrees with the Protesters' 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.*

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 acknowledges 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.

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 held on August 21, 2008 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 regulatory 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 derives from 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 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

In the Port Authority Comments, the Port Authority contends 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 argues 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 to the Administrator of the FAA. *Id.* at 39-40. It alleges 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."[8] *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.

[8] It should be noted that the ODRA Director does not have decisional authority in these cases. Rather, the ODRA is authorized to make findings and recommendations to the FAA Acting Administrator's Delegee, the Chief Counsel, 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.

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. 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.[9]

4. Comments of the NYAMA

The NYAMA 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 contends that excluding small cities from

[9] 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.

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.

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."*[10] 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[11], and in the ODRA Procedural Regulations.[12] *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").[13] Notably, the Acquisition Authority further provides that all bid protest and contract dispute adjudications are to be conducted

[10] 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.

[11] The various FAA Administrators' *Delegations of Authority* are published on the ODRA website at http://odra.faa.gov.

[12] The ODRA Procedural Regulations took effect on June 29, 1999.

[13] 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).

"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 incorporated provisions[14] 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.

[14] 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."*

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 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*[15] 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).

[15] 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.

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 reviews the challenged decisions or actions of the FAA's contracting personnel.[16] 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

[16] 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.

contemplate summary dismissal of any factually or legally defective ground of protest. *See* 14 C.F.R. §.17.19(c).

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."*[17] 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

[17] The AMS can be accessed through the ODRA's website: http://odra.faa.gov.

itself as a "Protester Designee" for twenty-one airline carriers,[18] *see ATA Protest* at 1, its interest, at best, is indirect, deriving from the possible interests of its members, five of whom have filed the Carrier Protests.[19] 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.[20] 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.[21]

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

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[18] The airlines that brought the Carrier Protests are among the twenty-one airline members of ATA. *ATA Protest* at 1.

[19] 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.

[20] 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.

[21] 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.

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 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.[22] *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 (4th Cir. 2002).

Id. at 5.[23]

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[22] 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.

[23] 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 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 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.[24]

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

[24] 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.

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 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.[25] *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.*

[25] 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.

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

> 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] addres[s] 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,"*[26] the AMS applies to "all FAA organizations, all appropriations, and all investment programs" except for the

[26] In the AMS, the Administrator has assigned responsibility for waivers, deviations and related functions to the Agency's Acquisition Executive. *Id.*

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 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.*[27] 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,

[27] 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.*

"*Contracting Authority.*" Notably, the AMS Guidance discussing AMS "Agreements" expressly identifies a type of "other transaction agreement" ("OTA") that potentially 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.

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. If a federal court ultimately decides that the Slot Auction is otherwise legal and constitutional, then 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.[28] 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. [29]

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

[28] Although NYAMA alleges that the FAA should allow entities other than air carriers to bid, as discussed above, NYAMA lacks standing to protest.
[29] This Amendment was also posted on the FAA Contracting Opportunities website.

provision was not needed since the ODRA maintains exclusive jurisdiction to adjudicate 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 that the proposed duration of the PLA is 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 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, the Consolidated Comments 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 the Consolidated Comments, the Protesters 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.*

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.[30] 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, then 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

[30] There appears to be a typographical error in Article 13, paragraph (e) which contains language that refers to a non-existent subparagraph (f)(3).

that "[i]f after termination, it is determined that the Lessee [sic] was not in default, or that the 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 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.[31]

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-procurement laws are relevant to interpreting the Slot Auction's terms. *See Contract*

[31] 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.

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.[32]

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.[33] 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 adjudications, would be reviewing the Acting Administrator's final decision in the May

[32]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).

[33] 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.

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[33] 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.

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.*, GSBCA No. 14241-RATE, 97-2 BCA ¶ 29,306 (the GSBCA 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) 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.

Anthony N. Palladino
Associate Chief Counsel and Director,
FAA Office of Dispute Resolution for Acquisition