

§ 17.23

14 CFR Ch. I (1–1–19 Edition)

questioning by the DRO or Special Master.

(k) The Director of the ODRA may review the status of any protest in the Adjudicative Process with the DRO or Special Master.

(l) After the closing of the administrative record, the DRO or Special Master will prepare and submit findings and recommendations to the ODRA that shall contain the following:

- (1) Findings of fact;
- (2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;
- (3) A recommendation for a final FAA order; and
- (4) If appropriate, suggestions for future FAA action.

(m) In preparing findings and recommendations in protests, the DRO or Special Master, using the preponderance of the evidence standard, shall consider whether the Product Team actions in question were consistent with the requirements of the AMS, had a rational basis, and whether the Product Team decision was arbitrary, capricious or an abuse of discretion. Notwithstanding the above, allegations that government officials acted with bias or in bad faith must be established by clear and convincing evidence.

(n) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with § 17.23.

(o) A DRO or Special Master shall submit findings and recommendations only to the Director of the ODRA or the Director's designee. The findings and recommendations will be released to the parties and to the public upon issuance of the final FAA order in the case. If an ODRA protective order was issued in connection with the protest, or if a protest involves proprietary or competition-sensitive information, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public, as soon as is practicable, along with a copy of the final FAA order. Only persons admitted by the ODRA under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations that contain propri-

etary or competition-sensitive information.

(p) Other than communications regarding purely procedural matters or ADR, there shall be no substantive *ex parte* communication between ODRA personnel and any principal or representative of a party concerning a pending or potentially pending matter. A potential or serving ADR neutral may communicate on an *ex parte* basis to establish or conduct the ADR.

§ 17.23 Protest remedies.

(a) The ODRA has broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law. Such remedies may include, but are not limited to one or a combination of, the following:

- (1) Amend the SIR;
- (2) Refrain from exercising options under the contract;
- (3) Issue a new SIR;
- (4) Require a recompetition or reevaluation;
- (5) Terminate an existing contract for the FAA's convenience;
- (6) Direct an award to the protester;
- (7) Award bid and proposal costs; or
- (8) Any other remedy consistent with the AMS that is appropriate under the circumstances.

(b) In determining the appropriate recommendation, the ODRA may consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the feasibility of any proposed remedy; the urgency of the procurement; the cost and impact of the recommended remedy; and the impact on the Agency's mission.

(c) Attorney's fees of a prevailing protester are allowable to the extent permitted by the Equal Access to Justice Act, 5 U.S.C. 504(a)(1) (EAJA) and 14 CFR part 14.