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March 18, 2005

VIA FACSIMILE & OVERNIGHT DELIVERY

Mr. Anthony Palladino
Director
Office of Dispute Resolution for Acquisition, AGC-70
Federal Aviation Administration
800 Independence Avenue, SW
Room 323
Washington, DC 20590

Re: Contest of Agency Tender Official (05-ODRA-00342C) and Contest of Kate Breen as Agent for Majority of Directly Affected Employees (05-ODRA-00343C) Under Solicitation No. DTFAAWAACA-86-001

Dear Mr. Palladino:

Kate Breen, as agent for a majority of the directly affected employees, hereby responds to the Product Team's response concerning the request for a suspension submitted by the MEO ("FAA Response"). In accordance with ODRA's letter of March 17, 2005, this submission is also in support of Ms. Breen's suspension request stated in her Contest filed on March 16, 2005.

Substantial Case on the Contest Merits

The MEO and Ms. Breen have made out substantial cases on the Contest merits. Ms. Breen and the MEO have raised glaring deficiencies in the technical evaluation which resulted in the improper downgrading of the MEO's proposal so that it was not even considered in the best value trade off. Moreover, the FAA admittedly did not conduct discussions with the MEO regarding influential weaknesses. Had the FAA conducted meaningful discussions, the MEO could have addressed the FAA's questions. If the FAA had evaluated costs such as overhead and Government Assessed Costs in accordance with the Circular, the MEO's evaluated cost would have been substantially lower. Had the FAA evaluated the technical risk associated with Lockheed's proposal, Lockheed would have been rated lower than the MEO, e.g., given that it has proposed untested and uncertified voice switches, and systems which failed operational testing while the procurement was ongoing. And, had the FAA properly assessed the substantial cost risk to the Government of the Lockheed proposal for, e.g., the Government's liability to Lockheed once a wage determination is issued for the contract, the MEO would have had a lower evaluated cost.

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Irreparable Harm to Employees

An A-76 contest is not a protest. In an A-76 procurement, where a decision has been made to contract out for services, the lives of Federal employees are immediately and directly impacted. Federal employees who have scarified much through their public service and who have relied upon and structured their lives based on the Federal pay, benefits, retirement and RIF systems immediately have their lives and futures turned upside down. The interests of these employees should be entitled to heightened weight in any balancing of the harms and interests done to evaluate a suspension request in a contest. If no suspension is ordered here, the current Federal workforce consisting of some 2,000 employees will suffer irreparable harm.

The FAA states that it is "counter-intuitive" to believe (as suggested by the MEO) that receiving an offer from Lockheed will increase the employees' stress. FAA Response at 2. This statement paints a false picture of the situation because it covers up the actual content of the Lockheed offers. If Lockheed were extending offers for employment that had some reasonable level of job security and for wages and benefits that matched what the employees would earn if they continued in their current positions, that would not create any concerns. However, the exact opposite is true. There is no job security at all with the Lockheed offers as at least one-half of them are for mere short term temporary positions. Lockheed has announced already at its orientation sessions (one held on February 24th and the other on March 2, 2005) that at least 1,000 employees will be terminated by the end of 18 months. Many will be terminated well before that 18 month period so that Lockheed can achieve its proposed end state work force. And Lockheed has announced that neither their benefits nor their pay will be the same. (For example, accepting a Lockheed offer will mean the loss of locality pay for some employees and of Federal retiree health benefits for all.)

These employees are faced with trying to decide if it would be better to get RIF'ed by the Federal Government, be without a job, and take one's chances in the Federal job market; or, to accept the Lockheed offer because it's in hand but lose (for about one-half of the employees) full retirement eligibility, RIF benefits such as training/relocation assistance (when they are let go by Lockheed instead of the Federal Government), and their Selection Priority Program rights for finding another Federal position once they are let go by Lockheed. The issuance of these offers by Lockheed during the early part of Phase-In (while the Contest is pending) is what is placing the employees in an untenable position. They should not be put in that position while the procurement is being reviewed.

While the FAA has stated that the receipt of a Lockheed offer will not deprive employees of their Preferred Placement Program rights (*see* Attachment A), those rights will only be in effect through October 1, 2005. Moreover only a small handful of vacancies have been advertised under this program. Of those offered, an even smaller ratio of Air Traffic Control Specialist (ATCS) vacancies are listed. These positions are essential if an employee wants to remain in the Government and continue to earn time in towards Early Retirement eligibility.

It is the Selection Priority Program (*see* Attachment B) which would offer an employee the most protection. It lasts for a period of 2 years. The Agency's position to date is that any employee who either accepts or declines a Lockheed offer loses the benefits and protections outlined in EMP-1.9 – even those incumbent employees at the 38 closing facilities who are being offered what amounts to a 6-17 month 'term' employment offer. *See* FAA Response, Attachment 1, ¶ 3. In short, the FAA is stripping the rights of an employee who was, in effect, forced into an arrangement of trading his/her FAA career (19 years in cases) for a Lockheed offer of in some cases merely 6 months. His/her protections under EMP-1.9 would be terminated regardless of the acceptance or declination of this "offer." Under the Selection Priority Program, when an employee receives a RIF notice, he/she will lose all rights under the program if an employment offer is either accepted, declined, or not responded to. *Id.* Even though the RIFs can not actually occur until September 30, 2005 (after the end of Phase In), the FAA has told NAATS that there is nothing in the EMP 1.9 policy that precludes the FAA from issuing RIF notices much earlier, even 90 days + out from the actual RIF date. So, an employee will have a Lockheed offer in hand and potentially a RIF notice in hand while this Contest is pending and *will* lose all of his her his/her Selection Priority rights.

The FAA's representations in the Attachment to its Response actually make matters worse. Specifically, the FAA states, "Once the Contest is concluded the employees who accepted or declined job offers with Lockheed Martin during the Contest are immediately subject to the termination of eligibility provisions contained the FAA's Selection Priority , EMP-1.9, effective October 22, 2001 based on that prior acceptance/declination." FAA Response, Attachment 1, ¶ 3 (emphasis added). Thus the FAA is now saying that, with or without a RIF Notice, an offer accepted or declined during the Contest would in fact terminate the employee's Selection Priority rights.

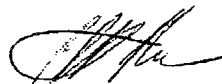
Public Interest

The FAA argues that the public interest favors the contract going forward while the Contest is pending because the aviation community would benefit from the alleged technology upgrades and facility modernization. FAA Response at 3. First of all, the public interest is most advanced by air traffic controllers who are not distracted and distressed by their future livelihoods being put in jeopardy over the next 100 days while performing air traffic control services. Second of all, as an alternative to a full cessation of all Phase-In activities while the Contest is pending, just the issuance of offers and RIF notices could be suspended. The implementation of the alleged technology upgrades and facility modernization referred to by the FAA as being the primary public interest could proceed. What should not occur during this Contest is the loss of substantial Federal employee rights merely because of the receipt of a Lockheed offer (even if declined) and/or an advance notice of RIF. A targeted stay of these two activities would accomplish this. At a minimum, no RIF notices and no Lockheed offers of employment should be issued while the Contest is pending. Otherwise, even if the protest is sustained, the employees will have forever lost these significant rights. This will not have a substantial negative impact on the schedule and the start of Transition if the Contest is not sustained. There will still be 3 ½ months or

more for the issuance and acceptance or declination of offers and issuance of RIF notices.

In consideration of the foregoing, Ms. Breen respectfully requests that ODRA order a limited stay of contract performance specifically precluding the issuance of Lockheed offers and Federal RIF notices while the Contest is pending. The FAA could agree that even if an offer or RIF notice is received by the employee during the Contest they would not have any impact or be of any legal effect if the Contest is sustained. But not only have they not agreed to that, they have expressly stated that even a declination of an offer during the Contest will in fact terminate the employee's Selection Priority Program rights regardless of whether the protest is sustained or denied.

Respectfully submitted,



David M. Nadler
Charlotte R. Rosen
Joseph R. Berger

*Counsel to Kate Breen, As Agent For A
Majority Of Directly Affected FAA Employees*

Attachments

cc: Honorable Edwin B. Neill
Cyrus E. Phillips, IV
Nathan Tash
Thomas C. Papson
Carl J. Peckinpough
Gerard F. Doyle

EXHIBIT A

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Policy Bulletin

Human Resource Management (AHR)

AIR TRAFFIC ORGANIZATION PREFERRED PLACEMENT PROGRAM

POLICY BULLETIN # 29

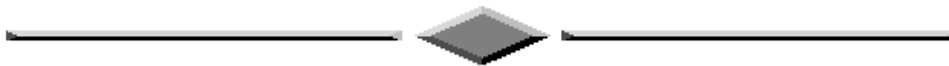
This policy bulletin applies to: (1) Non-bargaining unit employees/positions (2) bargaining unit employees/positions, except where the applicable collective bargaining agreement contains conflicting provisions.

Policy bulletin effective date: January 12, 2005. This policy bulletin remains in effect until cancelled by AHR-1.

Use this policy bulletin in conjunction with: [EMP-1.9 Selection Priority](#), [EMP-1.14 Permanent Internal Assignments](#), and [EMP-1.15 Temporary Internal Assignments](#).

Background information: The Air Traffic Organization's (ATO) Flight Services organization is undergoing an A-76 Competitive Sourcing Study, which began in December 2003. This study will determine how flight services will be provided in the future. The study covers 58 Automated Flight Service Stations throughout the contiguous 48 states, Hawaii and Puerto Rico, with approximately 2,500 employees. Competing under the study is FAA's Most Efficient Organization (MEO), which is teamed with a vendor, and four other vendors.

Selection priority will be afforded to displaced employees in accordance with FAA policy contained in [EMP-1.9 Selection Priority](#), and with applicable collective bargaining agreements. A career transition assistance program will also be established to provide affected employees with assistance in finding continued employment. However, many of the affected employees have worked elsewhere in FAA, the Federal Government or in the private sector; therefore, their skills will be varied and not limited to their current occupations. Therefore, ATO is offering additional outplacement opportunities to those employees adversely affected by the outcome of the study.



1. PURPOSE: This policy bulletin establishes that the ATO is authorized to create an internal preferred placement program to provide AFSS adversely affected employees placement consideration for positions throughout ATO for which they qualify.

2. POLICY: As established by this policy, the ATO may implement a limitation on filling internal ATO vacancies, including those recruitment actions already in progress. Any internal hiring limitation would apply to all ATO facilities located in the United States, including Alaska and Puerto Rico. Any limitation on filling internal ATO vacancies that may be implemented will remain in effect until rescinded.

3. VACANCY ANNOUNCEMENT PROCEDURES: The following procedures will be followed when filling vacancies while a hiring limitation is in effect:

(a) All ATO organizational components (facilities/offices) that wish to fill positions will first consider adversely affected AFSS employees who (1) have been

designated as "surplus" (likely to be displaced), or as "displaced" (in receipt of a reduction-in-force notice), **and** (2) have applied for consideration for a specific vacancy at the facility or office.

(b) All internal vacant position announcements will be announced within ATO and will be open to all AFSS surplus/displaced employees, consistent with collective bargaining agreements. All ATO offices are responsible for announcing internal vacancies to be filled and taking all reasonable steps to notify those adversely affected employees of the recruitment. The area of consideration will be modified to include "and all Surplus/Displaced AFSS employees" and, when possible, the recruitment grade/levels will accommodate the current grade/level range of the AFSS workforce.

(c) AFSS employees will be responsible for indicating their interest in employment at specific locations for specific positions through making application via vacancy announcements as described in paragraph 3b above.

(d) All ATO organizational components will make selections from among those AFSS employees, consistent with collective bargaining agreements, as appropriate, unless the applicant is not qualified to perform the functions of the vacant position, or the facility has been granted a "facility waiver." (see waiver information below).

(e) Management at each facility covered by this program must meet their local labor-management obligations.

4. WAIVER OF QUALIFICATIONS: FAA does not automatically waive Office of Personnel Management qualifications standards and requirements, even if an employee meets any minimum educational requirements of the position. However, waiver of qualifications can be considered if the employee has the capacity, adaptability, and special skills needed to perform the duties of the position within a 90-day period and management determines the offer is in the best interest of the agency. The waiver of qualifications cannot be used to assign an employee to a position with a higher representative rate than the rate of the current position held.

5. EXEMPTION TO THE AGE-31 MAXIMUM ENTRY AGE IN TERMINALS AND CENTERS: Separate information on an age-31 exemption program will be distributed via a separate policy bulletin. Selecting officials may apply the provisions of this program concurrent with any age-31 exemption program in effect.

6. SELECTION LISTS: Managers will receive a selection list of only surplus/displaced AFSS employees who have bid and been found qualified. Managers may receive a list of additional candidates, to include non-AFSS candidates, only after the AFSS lists have been exhausted or an approved hiring or facility/office waiver has been received.

7. HIRING WAIVERS: Selecting officials who have considered but do not wish to select an AFSS candidate(s) for a vacancy must provide written justification to support any non-selection, and submit that justification to ATO-1, or designee. Only after approval has been received may the selecting official proceed with recruitment activities and consideration of any additional candidates.

8. FACILITY/OFFICE WAIVERS: Exceptions to individual facilities or offices from being covered under this hiring limitation may be authorized on a case-by-case basis only. Requests for exceptions must address the organization's problems and needs, and the specific adverse impact on operations or services that would occur if the exception were not approved. Requests for facility/office waivers will be directed to ATO-1, or designee, for consideration and approval/disapproval action.

9. PAYMENT OF RELOCATION EXPENSES: Payment of relocation expenses will be determined on a vacancy-by-vacancy basis.

10. EFFECT ON OTHER HIRING OPTIONS: This hiring limitation will apply to all types of appointments used to internally fill vacant positions. This includes, but is not limited to,

appointment of temporary and part-time personnel, conversion of any individuals currently serving on such appointments to full-time or permanent status, promotions, reassignments, voluntary change to lower grades (demotions), and reemployed annuitants. The only exception would be extensions to current temporary appointments, which may be continued.

11. ADDITIONAL INSTRUCTIONS TO RESOURCE MANAGEMENT OFFICES AND HUMAN RESOURCE MANAGEMENT DIVISIONS: All ATO resource management offices and servicing Human Resource Management Divisions will ensure that any positions filled are in accordance with all procedures and/or guidance associated with this program. There will be no exceptions unless specifically granted, in writing, by ATO-1, or designee.

12. POINT OF CONTACT: Questions about this guidance should be directed to Jay Aul, AHR Manager, ATO Support Team, AHR-4, at (202) 267-9862.

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EXHIBIT B

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Human Resource Policy Manual (HRPM)

Human Resource Management (AHR)

SELECTION PRIORITY EMP-1.9

This Chapter applies to: (1) Non-bargaining unit employees /positions (2) bargaining unit employees/positions, except where the applicable collective bargaining agreement contains conflicting provisions.

Chapter established: October 16, 1998

This version effective: October 22, 2001

Background Information: This version replaces [EMP-1.9 dated October 16, 1998](#). Paragraph 1: Basic Requirements, was revised to clarify that a position must be both appropriate and available and to specify that all priority consideration list must be maintained by the HRMD. Paragraph 4: Selection Requirements, Category 1 was revised to clarify management's obligations related to OWCP claimants. Paragraph 4: Selection Requirements, Category 5 was revised to put Category 5 entitlements in line with the timeframes for higher priority categories such as categories 2 and 4. Paragraph 4: Selection Requirements, Category 7 was deleted since this requirement expired as of 12/30/99.



1. BASIC REQUIREMENT: Prior to filling an appropriate and available vacancy, any applicable [priority considerations](#) lists maintained by the HRMD must be reviewed for available qualified and eligible individuals. It is essential to distinguish between those programs that provide for mandatory placement of eligible candidates prior to the selection of another candidate and those which require priority consideration. Requirements vary from program to program and can be found in the appropriate HRPM issuance or statutory/regulatory reference.

2. DETERMINING APPROPRIATE VACANCIES: For purposes of this policy, an appropriate vacancy for priority consideration and/or selection **does not include:**

- a. A position to be filled by "[job swap](#)" [reassignment](#) between two FAA employees.
- b. A position that is reclassified because of a change in classification standard or to correct a classification error, provided the incumbent is to be retained in the position.
- c. A position immediately established as a successor position and filled by the incumbent of an abolished position through an authorized personnel action.
- d. Positions which, although vacant, will not be filled due to budgetary or [ceiling](#) restrictions, or other managerial requirement.

Vacancies will be viewed at their [target/journeyman grade level](#) when determining

if there are eligible priority candidates.

3. ELIGIBILITY: Except for Category 5, employees eligible for priority selection or consideration are considered for vacancies in their local [commuting area](#). In the case of an employee who has been given a [reduction in force notice](#), he/she may choose another location for priority consideration as long as he/she agrees to pay relocation costs. ➤ An LOB may offer its employees more extensive consideration than that required if doing so does not conflict with the rights of other LOB employees. ◀

➤ The Assistant Administrator of Human Resources may enter into reciprocal agreements with other Federal agencies regarding mandatory placement. ◀

4. SELECTION REQUIREMENTS: The priority categories below must be considered in the order listed.

Category 1: A current or former FAA employee with mandatory assignment rights (e.g., mandatory placement after military service, a fully-recovered [OWCP](#) claimant within the one-year period after compensation begins, a 3R employee, etc.) or when placement of an applicant is directed by a higher authority such as the EEOC or district court. Note: An employee on OWCP whose full recovery takes longer than one year from the date eligibility for compensation began is not mandatorily covered. However, it is encouraged that the Agency give priority consideration.

Required Action: Placement is mandatory whether or not a vacancy exists.

Category 2: FAA employee who is on [grade](#) or [pay retention](#) based on being involuntarily placed in a position at a lower grade or rate of basic pay:

Required action: Placement is mandatory during his/her two-year eligibility period for priority repromotion consideration to appropriate vacancies at the grade level from which [downgraded](#). This two-year period begins on the date of his/her initial downgrading action but is not extended when an employee on retained grade is subsequently placed on pay retention (see [FAPM Letter 536 Grade and Pay Retention under the Civil Service Reform Act](#)).

Category 3: . FAA nonprobationary employee with a permanent medical disability who is no longer able to perform the full range of duties required of his/her current position due to this medical condition.

Required action: The employee shall be offered an appropriate funded vacant position (i.e. he/she must be able to perform the essential functions of the position, with [reasonable accommodation](#) if necessary) located in the same commuting area and at the same grade or level. In the absence of such a position, an offer of [reassignment](#) to a vacant position at the highest available grade or level below the employee's current grade or level shall be required. **Placement is mandatory** (see 29 CFR 1614.203, Rehabilitation Act).

If an announcement for a specific vacancy is posted at the time the FAA determines that the employee is [medically disqualified](#) for his/her current position, the agency is not required to offer to reassign the individual to that position but must rather consider the individual on an equal basis with those who applied for the position.

Category 4: A permanent FAA employee who has received a reduction in force notice.

Required Action: Employee must submit an application for a vacancy and must be selected at any grade level, if he/she is [well-qualified](#), before any non-FAA candidate in the employee's local commuting area (or substitute location chosen by the employee if he/she agrees to pay relocation

expenses). Note that even if the displaced employee is found well-qualified for a position, there is no agency obligation to give priority if selecting a current FAA employee in the commuting area.

The entitlement to selection priority will begin when the RIF notice is issued and will continue for two years from the date of the separation or until the individual accepts or declines a position at the same pay as that from which he/she was separated or downgraded with any other employer, Federal or non-Federal (see [FAA PMS, Chapter 1, Section 14\(d\)\(ii\)](#)).

Category 5: FAA employee or outside applicant who as a result of a settlement agreement, or due to improperly missed consideration on an internal permanent or external [selection list](#) will remain on the list for 2 years from the date the employee or applicant is formally notified of a procedural violation during which the applicant/employee receives priority referral.

Required action: Applicant/employee receives priority referral to the next available vacancy at the grade level for which consideration was improperly missed but selection is at the discretion of the selecting official. If the priority consideration arises from an internal permanent action, the position for which priority consideration is granted must match the conditions (i.e. geographic location, Line of Business, series, grade or level etc.) of the position for which the employee improperly missed consideration. If the priority consideration arises from either an internal permanent action OR when it is part of a settlement agreement arising from an external selection list, the vacancy must be acceptable to the employee or applicant. If an applicant misses consideration on an external selection list, the agency will determine the appropriate vacancy (at the same grade and geographic location) for priority referral.

Category 6: FAA employee or former employee who has partially recovered from a compensable injury.

Required action: Selection is at the discretion of the selecting official; however, ➤ consideration and selection for appropriate vacancies at the same or lower grade is strongly encouraged. ⚡

Related Policies:	FAA PMS Chapter 1, Section 14 EMP-1.10 Permanent External Hiring EMP-1.11 Temporary External Hiring EMP-1.14 Permanent Internal Assignments EMP-1.15 Temporary Internal Assignments EMP-1.17 Downsizing and Staffing Adjustments FAPM Letter 536 Grade and Pay Retention under the Civil Service Reform Act
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📖 All text located within the arrows (➤⚡) is discretionary

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