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48 CFR Parts 1, 33, 42, 50, and 52

[FAC 90-32; FAR Case 94-730; Item II]

RIN 9000-AG28

**Federal Acquisition Regulation;
Protests, Disputes, and Appeals**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act) dated October 13, 1994, to implement the Act's requirements with respect to disputes and protests to the General Accounting Office and General Services Administration Board of Contract Appeals. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Effective date:* October 1, 1995.

Applicability date: Where this rule repeats a GSBCA rule that went into effect earlier, the date of the GSBCA rule

and its applicability provision prevails; otherwise, this rule is applicable to protests or claims filed on or after the effective date of this rule.

FOR FURTHER INFORMATION CONTACT: Mr. Craig E. Hodge, Protests/Disputes Team Leader, at (703) 274-8940 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-32, FAR case 94-730, Protests, Disputes and Appeals.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, (the Act) provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements.

This notice announces FAR revisions developed under FAR Case 94-730, Protests, Disputes, and Appeals. The Act changed the General Accounting Office (GAO) protest procedures, the General Services Board of Contract Appeals (GSBCA) protest procedures, and the alternative dispute resolution (ADR) procedures. This rule reflects those changes to GAO, GSBCA, and

ADR procedures that require revisions to the FAR.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because a relatively small number of firms file protests or claims. In addition, this rule is generally derivative of GAO and GSBCA rules which implement the statute. Neither the GAO nor the GSBCA concluded that the rules they were promulgating, which form the basis for this rule, had a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the change to the FAR does not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Public Comments

On January 10, 1995, a proposed rule was published in the Federal Register (60 FR 2630). In response to the notice of proposed rulemaking, 19 public comments were received.

The largest number of public comments concerned the definition of "accrual". Some commenters felt that contractor and Government claims were to be treated differently because "accrual" was defined only in terms of the contractor claim. To resolve that problem, a general definition of "accrual" has been added. Several commenters requested retroactive language be added. Therefore, the six-year limitation was specifically applied only to contracts awarded after the end of the current fiscal year. There were also a number of alternate definitions of "accrual" proposed. In addition to the discovery of the events, a discovery of some damage has been added to cover the unusual case where the party is aware of the events giving rise to the claim, but not of any resulting damage.

In the protest area, commenters exhibited the most interest in the GAO bid protest file, and requested guidance on GAO and GSBCA witness fee limitations. The protest file requirement has been clarified. Although the GAO rule was concerned with providing

protest files to the intervenors, Congress mandated protest files be made available by the contracting officer even to parties which failed to intervene. The extent to which the discussion of protest files differs between the proposed GAO regulation and this regulation reflects that difference. In any event, the GAO final regulation dropped the requirement for a protest file. Further specific guidance concerning witness fee limitations has now been incorporated in the regulation.

List of Subjects in 48 CFR Parts 1, 33, 42, 50 and 52

Government procurement.

Dated: September 7, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR Parts 1, 33, 42, 50, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 33, 42, 50, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATION SYSTEM

2. Section 1.602-3 is amended by revising paragraph (c)(2) to read as follows:

1.602-3 Ratification of unauthorized commitments.

* * * * *

(c) * * *

(2) The ratifying official has the authority to enter into a contractual commitment;

* * * * *

PART 33—PROTESTS, DISPUTES, AND APPEALS

3. Section 33.101 is amended by adding in alphabetical order the definitions "Day" and "Filed", and revising the definition "Protest" to read as follows:

33.101 Definitions.

Day, as used in this subpart, means a calendar day, unless otherwise specified. In the computation of any period—

(a) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(b) The last day after the act, event, or default is included unless—

(1) The last day is a Saturday, Sunday, or legal holiday; or

(2) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

(c) In the case of the 5-day period after a debriefing date and the 10-day period after contract award for filing a protest resulting in a suspension (as described at 33.104(c)), Saturdays, Sundays, and legal holidays shall be counted.

Filed, as used in this subpart, means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

* * * * *

Protest, as used in this subpart, means a written objection by an interested party to any of the following:

(a) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(b) The cancellation of the solicitation or other request.

(c) An award or proposed award of the contract.

(d) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

4. Section 33.102 is amended by revising paragraph (a); redesignating paragraphs (b) and (c) as (c) and (e), respectively, and adding new paragraphs (b) and (d); and revising newly designated paragraphs (e)(2) and (e)(3) to read as follows:

33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the General Accounting Office (GAO), or for automatic data processing acquisitions under 40 U.S.C. 759 (ADP contracts), the General Services Board of Contract Appeals (GSBCA or the Board). (See 19.302 for protests of small business status and 22.608-3 for protests involving eligibility under the Walsh-Healey Public Contracts Act.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the General Accounting Office; and

(2) Pay appropriate costs as stated in 33.104(h).

* * * * *

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and
(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) * * *

(2) May protest to the GAO in accordance with GAO regulations (4 CFR Part 21). An interested party who has filed a protest regarding an ADP procurement with the GAO may not file a protest with the GSBCA with respect to that procurement.

(3) May protest to the GSBCA regarding an award of an ADP contract in accordance with GSBCA Rules of Procedure (48 CFR Chapter 61). An interested party who has filed a protest regarding an ADP procurement with GSBCA (40 U.S.C. 759(f)) may not file a protest with the GAO with respect to that procurement.

5. Section 33.103 is amended in the first sentence of (b)(1) by removing "or" and inserting "and" in its place; revising the second and third sentences of (b)(2) and the second sentence in (b)(4); and adding (b)(5) to read as follows:

33.103 Protests to the agency.

* * * * *

(b) * * *

(2) * * * In all other cases, protests shall be filed not later than 14 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

* * * * *

(4) * * * Failure to substantially comply with any of the requirements of this paragraph (b) may be grounds for dismissal of the protest.

(5) The agency should furnish a copy of the written protest ruling to the protester by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

6. Section 33.104 is amended—

a. By revising the introductory text, paragraphs (a)(1), (a)(3), the first sentence of (a)(4)(i) introductory text, (a)(4)(ii) (A) and (B), (a)(5) introductory text, (a)(5) (i), (ii), and (iii), (a)(6), (c)(1), (c)(5), (e), (f), (g), and (h);

b. By removing from the first sentence of (a)(2) the words "substantial and";

c. By adding a sentence to the end of paragraph (a)(2)(ii); and

d. By removing from (b)(1)(ii) the word "calendar"; and by removing the word "protester" and inserting "protester" in (a)(4)(i) introductory text, (a)(4)(ii)(C), and (d), and by removing the word "Protestor's" in paragraph (a)(4)(i)(B) and adding "Protester's" in its place.

The revised and added text reads as follows:

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) *General procedures.* (1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is

received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) * * *

(ii) * * * However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 35 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency

shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

- (A) The protest;
- (B) The offer submitted by the protester;
- (C) The offer being considered for award or being protested;
- (D) All relevant evaluation documents;
- (E) The solicitation, including the specifications or portions relevant to the protest;
- (F) The abstract of offers or relevant portions; and
- (G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) The agency report to the GAO shall include—

- (A) A copy of the documents described in 33.104(a)(3)(ii);
- (B) The contracting officer's signed statement of relevant facts and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest;
- (C) A list of the documents withheld from the protester, or intervenors, and the reasons for withholding them. The list identifies any documents specifically requested by, and withheld from, the protester; and
- (D) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protestor and any intervenors. *

* * * * *

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 5 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and

other interested parties within this 5-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

* * * * *

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

* * * * *

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 14 days, or 7 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 7 days after the hearing.

* * * * *

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.1004, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c) (2) and (3) of this section.

* * * * *

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in subparagraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

* * * * *

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and report within 7 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 125 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive

of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) If the GAO recommends the award of costs to an interested party, the agency shall attempt to reach an agreement on the amount of the cost to be paid. If the agency and the interested party are unable to agree on the amount to be paid, GAO may, upon request of the interested party, recommend to the agency the amount of cost that the agency should pay.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (5 CFR 304.105); or

(ii) For attorneys' fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(4) A recommended award of costs may be paid by the agency from funds available to or for the use of the agency for the acquisition of supplies or services. Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs which have not yet been paid.

(5) If the GAO recommends that the agency pay costs (as defined in paragraph (h)(1) of this section) and the agency does not promptly pay the costs, the agency shall promptly report to GAO the reasons for the failure to follow the GAO recommendation.

(6) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government and those exclusions should be reflected in the cost agreement.

7. Section 33.105 is amended—

a. By adding an introductory paragraph;

b. By revising (a)(1) and the introductory text of (d)(1);

c. By removing from (a)(2)(i) "working day" and inserting "work day" in its place, from (a)(2)(ii) "five working days" and inserting "3 work days"; from (b)(6) "protestors" and inserting "protesters"; from (c) "15" and inserting "10", from (d)(1)(i) the word "calendar", and from (e) "25 work days" and "45 work days" and inserting "35 days" and "65 days", respectively;

d. By redesignating paragraphs (f) and (g) as (g) and (h), respectively, and revising the newly redesignated (g) and (h), and

f. By adding new paragraphs (d)(4) and (f).

The revised and added text reads as follows:

33.105 Protests to GSBCA.

Procedures for protests to the GSBCA, are found at 48 CFR Chapter 61 (GSBCA Rules). In the event guidance concerning GSBCA procedures in this subpart conflicts with 48 CFR Chapter 61, 48 CFR Chapter 61 governs.

(a)(1) Upon request of an interested party in connection with any procurement that is subject to Section 111 of the Federal Property and Administrative Services Act (40 U.S.C. 759), the GSBCA reviews any decision by the contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of procurement authority. ADP acquisition protests not covered under this section may not be heard by the GSBCA, but may be heard by the agency, the courts, or GAO. A protester shall furnish a copy of its complete protest to the official and location designated in the solicitation, or in the absence of such a designation, to the contracting officer on the same day the protest is filed with the GSBCA. Any request for a hearing on either a suspension of procurement authority or on the merits shall be in the protest.

(d)(1) If a protest contains a timely request for a suspension of procurement authority, the Board will hold a hearing, unless the agency does not contest an order suspending its procurement authority. A timely request for suspension of procurement authority is one that is filed before award, within 10 days of award, or within five days of the offered debriefing, when the debriefing is required by 15.1004, whichever applies. The Board suspends the procurement authority unless the agency establishes that—

(4) A suspension shall not preclude the agency concerned from continuing

the procurement process up to, but not including, the award of the contract unless the Board determines the action is not in the best interests of the United States.

* * * * *

(f) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be made part of the public record (subject to any protective order considered appropriate by the Board) before dismissal of the protest. If an agency is party to a settlement agreement, the submission of the agreement to the Board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

(g)(1) The GSBCA may declare an appropriate prevailing party to be entitled to the cost, exclusive of profit, of—

(i) Filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees; and

(ii) Bid and proposal preparation.

(2) Costs awarded under subparagraph (g)(1) of this section, or payments of amounts due under settlement agreements, shall be paid out in accordance with the procedures provided in 31 U.S.C. 1304 (the Permanent Indefinite Judgment Fund). The agency concerned shall reimburse that fund out of funds available for the procurement.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under paragraph (g)(1) of this section for—

(i) Consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (5 CFR 304.105); or

(ii) Attorneys' fees that exceed \$150 per hour, unless the Board determines, on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(4) Within 30 days after receipt by the agency of an application for costs, the agency may file an answer.

(h) The GSBCA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

8. Section 33.201 is amended by adding in alphabetical order definitions for "Accrual of a claim" and "Alternative dispute resolution (ADR)" removing the definition "Alternative means of dispute resolution (ADR)"; and in the definition "Claim" by removing the amount "\$50,000" and inserting "\$100,000" in its place.

33.201 Definitions.

Accrual of a claim occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures may include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration.

* * * * *

9. Section 33.206 is revised to read as follows:

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

33.207 [Amended]

10. Section 33.207 is amended in paragraph (a)(1) by removing "\$50,000" and inserting "\$100,000" in its place.

33.208 [Amended]

11. Section 33.208 is amended in paragraph (c) by removing "as defined in 33.201,".

12. Section 33.211 is amended in paragraph (a)(4)(v) by removing "\$10,000" and "\$50,000" and inserting "\$50,000" and "\$100,000", respectively; in (c)(1), (c)(2) and (e) by removing "\$50,000" and inserting "\$100,000" in its place; and by revising paragraph (f) to read as follows:

33.211 Contracting officer's decision.

* * * * *

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

* * * * *

13. Section 33.214 is amended by redesignating paragraphs (b) through (d) as (c) through (e) and adding a new paragraph (b) to read as follows:

33.214 Alternative dispute resolution (ADR).

* * * * *

(b) If the contracting officer rejects a request for ADR from a small business contractor, the contracting officer shall provide the contractor written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

* * * * *

14. Subpart 42.16 is added to read as follows:

Subpart 42.16—Small Business Contract Administration

42.1601 General.

The contracting officer shall make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern with respect to a contract administration matter. In the event the contracting officer cannot respond to the request within the 30-day period, the contracting officer shall, within the period, transmit to the contractor a written notification of the

specific date the contracting officer expects to respond. This provision shall not apply to a request for a contracting officer decision under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS

15. Section 50.303 is redesignated as 50.303-1 and a new 50.303 heading is added to read as follows:

50.303 Contract adjustment.

* * * * *

16. Section 50.303-2 is added to read as follows:

50.303-2 Contractor certification.

A contractor seeking a contract adjustment that exceeds the simplified acquisition threshold shall, at the time the request is submitted, submit a certification by a person authorized to certify the request on behalf of the contractor that (a) the request is made in good faith and (b) the supporting data are accurate and complete to the best of that person's knowledge and belief.

50.304, 50.305 & 50.306 [Amended]

17. Sections 50.304(a) introductory text, 50.305(a) and 50.306 introductory text are amended by removing the reference "50.303" and inserting "50.303-1" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Section 52.233-1 is amended by revising the date of the clause, the third sentence in paragraph (c), and paragraphs (d)(1) and (g); in (d)(2)(i)(A) and twice in (e) by removing "\$50,000" and inserting "\$100,000" to read as follows:

52.233-1 Disputes.

* * * * *

Disputes (Oct 1995)

* * * * *

(c) * * * However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. * * *

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

* * * * *

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent,

may agree to use ADR. If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

* * * * *

19. Section 52.233-2 is amended by revising the date of the clause and adding paragraph (c) to read as follows:

52.233-2 Service of Protest.

* * * * *

Service of Protest (Oct 1995)

* * * * *

(c) In this procurement, you may not protest to the GSBICA because of the nature of the supplies or services being procured. *(Contracting Officer shall strike the word "not" where the GSBICA is a correct forum.)*
(End of provision)

20. Section 52.233-3 is amended by revising the date of the clause and the first sentence of (a) to read as follows:

52.233-3 Protest after Award.

* * * * *

Protest After Award (Oct 1995)

* * * * *

(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. * * *

* * * * *

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BILLING CODE 6820-EP-P

48 CFR Parts 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 22, 23, 31, 36, 42, 44, 46, 47, 49, 52, and 53

[FAC 90-32; FAR Case 94-790; Item III]

RIN 9000-AG38

Federal Acquisition Regulation; Acquisition of Commercial Items

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to implement

the revised statutory authorities in Title VIII of the Act for the acquisition of commercial items and components by Federal Government agencies as well as contractors and subcontractors at all levels. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

Applicability date: For solicitations issued on or after October 1, 1995; use of the new policies, provisions and clauses is optional for solicitations issued before December 1, 1995, and mandatory for solicitations issued after December 1, 1995.

FOR FURTHER INFORMATION CONTACT:

Colonel Laurence M. Trowel, Commercial Item Team Leader, at (703) 695-3858 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-32, FAR case 94-790.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. This notice announces revisions developed under FAR case 94-790, Acquisition of Commercial Items, which encourage the acquisition of commercial end items and components by Federal Government agencies as well as contractors and subcontractors at all levels. The most significant revisions are in the following FAR parts:

Part 2 has been amended to incorporate the definitions of "commercial item," "component," "commercial component" and "nondevelopmental item" from the Act with only minor revisions for clarification. The clause at 52.202-1, Definitions, has been similarly revised to make the definitions available to prime and subcontractors.

Part 10 has been completely revised to address market research. It contains some language taken from the current FAR Part 11. This new part establishes the requirement for market research as the first step in the acquisition process. Market research is an essential element in the later steps of describing the agency's need, developing the overall acquisition strategy and identifying terms and conditions unique to the item being acquired.

Part 11 has been completely revised to address the process of describing agency needs. It contains some of the language on specifications and standards formerly found in FAR Part 10, but takes a more streamlined approach. In addition, the revised Part 11 establishes the Government's order of precedence for requirements documents and addresses the concept of market acceptance contained in the Act. The revised Part 11 also contains coverage on Delivery or Performance Schedules, Liquidated Damages, Priorities and Allocations, and Variations in Quantity taken from the current Part 12 with only minor editorial revisions. The current Part 12 coverage on Suspension of Work, Stop Work Orders, and Government Delay of Work has been moved to Subpart 42.13 with only minor editorial revisions.

Part 12 has been completely revised to address the acquisition of commercial items. The Team created this entirely new coverage to address in one FAR part the policies for the acquisition of commercial items.

—Subpart 12.1 states that the policies in the revised Part 12 are applicable to all acquisitions of commercial items above the micro-purchase threshold. The requirements of other parts of the FAR apply to commercial items to the extent they are not inconsistent with Part 12;

—Subpart 12.2 identifies special requirements for the acquisition of commercial items. These requirements generally reflect the requirements of Title VIII.

—Subpart 12.3 establishes standard provisions and clauses for use in the acquisition of commercial items. This approach is essential to meet the requirements of the statute and provide contracting officers and industry with an easy to use, simplified method for acquiring commercial items. However, it is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the marketplace for that item. Subpart 12.3 gives contracting officers broad authority to tailor solicitations and contracts, a practice itself that is consistent with commercial practices. The Act requires that some limitations be placed on this authority to tailor, and that has also been accommodated in this subpart.

—A new form, the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, was established.