DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 14 and 17

[Docket No. FAA–1998–4379; Amendment No. 14–0317–01]

RIN 2120–AG19

Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations

ACTION: Final rule.

SUMMARY: This document provides regulations for the conduct of protests and contract disputes under the Federal Aviation Administration Acquisition Management System (AMS). Also, the Federal Aviation Administration (FAA) regulations governing the application for, and award of, Equal Access to Justice Act (EAJA) fees are amended to include procedures applicable to the resolution of protests and contract disputes under the AMS, and to conform to the current EAJA statute.

EFFECTIVE DATE: June 28, 1999.

FOR FURTHER INFORMATION CONTACT: Marie A. Collins, Staff Attorney, and Dispute Resolution Officer, FAA Office of Dispute Resolution for Acquisition, AGC–70, Room 8332, Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590, telephone (202) 366–6400.

SUPPLEMENTARY INFORMATION:

Availability of Final Rules

An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the FAA regulations section of the Fedworld electronic bulletin board service (telephone: 703–321–3339), the Government Printing Office's electronic bulletin board service (telephone: 703–321–1661), or the FAA's Aviation Rulemaking Advisory Committee Bulletin Board service (telephone: 800–322–2722 or 202–267–5948).

Internet users may reach the FAA's web page at http://www.faa.gov/avr/arm/nprm.htm or the Government Printing Office's webpage at http://www.access.gpo.gov/nara for access to recently published rulemaking documents.

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Communications must identify the amendment number or docket number of this final rule.

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Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to report inquiries from small entities concerning information on and advice about compliance with statutes and regulations within the FAA's jurisdiction, including interpretation and application of the law to specific sets of facts supplied by a small entity.

If your organization is a small entity and you have a question, contact your local FAA official. If you do not know how to contact your local FAA official, you may contact Charlene Brown, Program Analyst Staff, Office of Rulemaking ARM–27, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, (888) 551–1594. Internet users can find additional information on SBREFA in the ''Quick Jump'' section of the FAA's web page at http://www.faa.gov and may send electronic inquiries to the following internet address: 9–AWA–SBREF@faa.gov.

Background

Statement of the Problem

In accordance with Congressional mandate, the FAA procures, acquires, and develops services as well as material in support of its mission of safety in civil aviation. Prior to April 1, 1996, several major FAA acquisitions under the Government-wide acquisition system were substantially behind schedule and experienced large cost over runs. Both the Administration and the Congress became concerned that the safety mission of the FAA might suffer from the inefficiency of the then existing acquisition system, including its dispute resolution system.

In the Fiscal Year 1996 Department of Transportation Appropriations Act, Public Law 104–50, 109 Stat. 436 (November 15, 1995), the Congress directed the FAA ''to develop and implement, not late than April 1, 1996, an acquisition management system that addressed the unique needs of the agency and, at a minimum, provided for more timely and cost effective acquisitions of equipment and materials.'' In that Act, the Congress gave the FAA authority to create a new acquisition system, ''notwithstanding provisions of Federal Acquisition law.'' In addition, Congress specifically instructed the FAA not to use certain provisions of federal acquisition law. In response, the FAA developed the AMS for the management of FAA procurement. The AMS is a system of policy guidance that maximizes the use of agency discretion in the interest of best business practice.

As part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to facilitate the Administrator's review of procurement protests and contract disputes. Notice of establishment of the ODRA was published on May 14, 1996, in the **Federal Register** (61 FR 24348). In that notice, the FAA stated it would promulgate rules of procedure governing the dispute resolution process. Currently, procedures and other provisions related to dispute resolution are negotiated and included or referenced in all FAA Screening Information Requests (SIRs) and contracts. The FAA has determined that it will be more effective and efficient to establish by rulemaking the dispute resolution procedures that apply to protests concerning SIRs and contract awards, and to disputes arising from established contracts. The rule is designed to contain the minimum procedures necessary for efficient and orderly resolution of protests and contract disputes arising under the AMS.

The FAA Dispute Resolution Process, and the procedures implementing that process, are based upon the powers Congress delegated to the Administrator of the FAA under Title 49, United States Code, Subtitle VII (49 U.S.C. 40101, *et seq.*). These delegated powers include the administrator's power to procure goods and services, and to investigate and hold hearings regarding any matter placed under the Administrator's authority. In the Federal Aviation Reauthorization Act of 1996, Pub. L. 104–264 (October 9, 1996), the Congress amended 49 U.S.C. 106(f) to make the Administrator of the FAA the final authority over the FAA acquisition process and FAA acquisitions.

These FAA dispute resolution procedures encourage the parties to protests and contract disputes to use Alternative Dispute Resolution (ADR) as the primary means to resolve protests and contracts disputes, in consonance with Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under these procedures, the ODRA actively encourages parties to consider ADR techniques such as case evaluation,

mediation, arbitration, or other types of ADR.

The procedures for protests and contract disputes anticipate that, for a variety of reasons, certain disputes are not amenable to resolution through ADR. In other cases, ADR may not result in full resolution of a dispute. Thus, there is provision for a Default Adjudicative Process. The EAJA, 5 U.S.C. 504, can apply in instances where an eligible protester or contractor prevails over the FAA in the Default Adjudicative Process. Title 14 of the Code of Federal Regulations (CFR), Part 14 is amended to provide guidance for the conduct of EAJA applications under the dispute resolution regulations promulgated in 14 CFR part 17.

Discussion of Comments

Two comments were received on the proposed rule from the American Bar Association Section of Public Contract Law (ABA) and the Associated General Contractors of American (AGC). The ABA submitted both draft and final comments.

The comments of both the ABA and AGC generally supported the goals of the proposed rule and endorsed its emphasis on ADR techniques. The comments of the AGC raised only two points and, with respect to those two points, indicated general agreement with the comments filed by the ABA. The two points raised by the AGC pertain to sections of the proposed rule that had dealt with matters of contract administration—the obligation to continue work pending resolution of a contract claim, and the accrual of interest on a contract claim. The ABA, in addition to addressing those points, sets forth a variety of comments outlining concerns with the proposed rule. These pertain to, among other things: (1) Whether the ODRA has exclusive jurisdiction over protests and contract disputes under the AMS, and the continued applicability of both the Tucker Act and the Contract Disputes Act (CDA); (2) procurement suspensions in the context of a bid protest; (3) discovery; (4) the opportunity for a hearing; (5) time limitations for the filing of contract disputes; and (6) basic definitions. The ABA comments are discussed in detail below. Some of the ABA comments seek within the rule further elaboration and guidance regarding the ODRA's practices. The FAA agrees that further guidance as to ODRA practices would foster predictability in the FAA's protest and contract dispute procedures. Additional guidance to the public on ODRA procedures will be published on the Internet or otherwise, and may be revised by the ODRA as it deems necessary, to conform to and more accurately describe current dispute resolution practices employed by the ODRA. The ODRA publishes a guide on its Website, which is accessible through the FAA Homepage (http://www.faa.gov).

Applicability of the Tucker Act and the Contract Disputes Act

The ABA urges that the ODRA dispute resolution process is not exempt from either the Tucker Act (28 U.S.C. 1491) or the Contract Disputes Act (41 U.S.C. 601–613), and suggests that the rule limit its applicability to protests and disputes brought before the ODRA, without implying any jurisdictional exclusivity.

FAA Response: The FAA disagrees. Section 348 of the FY 1996 Department of Transportation Appropriation Act, Public Law 104–50, 109 Stat. 436 (November 15, 1995) (the ''1996 Act'') did not merely list specific statutes that were not to apply to the FAA AMS. Rather, in calling for the establishment of the new AMS, Congress, in the 1996 Act, called more generally for the Administrator of the FAA to ''develop and implement'' the new AMS ''notwithstanding provisions of Federal acquisition law.'' Congress established the FAA Administrator as the final authority for all acquisition activity necessary to carry out the Agency's functions (49 U.S.C. 106(f)(2), 49 U.S.C. 46101, *et.seq.,* and Pub. L. 104–50). For dispute resolution purposes, the Administrator's authority was expressly delegated to the ODRA on July 29, 1998, with the exception of final decision-making authority, other than for dismissals arising from settlements or voluntary withdrawals; or final authority to stay awards or contract performance (63 FR 49151).

The FAA views the CDA as falling into the general category of ''Federal acquisition law''. Indeed, like the Competition in Contracting Act (CICA), the CDA is widely regarded as one of the basic elements of the current system of ''Federal acquisition law.'' The 1996 Act specifically requires that the Federal Acquisition Streamlining Act (FASA) not apply. Several sections of the CDA were amended under the FASA in 1994. For example, Section 605 of the CDA was amended by the FASA to include for the first time a six (6) year statute of limitation on the submission of contract claims under the CDA. The FASA also raised the CDA claim certification threshold from $50,000 to $100,000. In addition, it added to Section 605 of the CDA a provision regarding termination of ADR efforts to resolve CDA claims. Given the express inapplicability of the FASA to FAA procurements, the ABA position would require the FAA either to conform the AMS dispute resolution process the pre-1994 (pre-FASA) version of the CDA or to disregard the express direction of Congress regarding non-applicability of FASA.

Furthermore, the Congress clearly intended the AMS to be free of more than just those statutes enumerated in section 348. Section 348(a)(8) contains a ''catch all'' for any other unnamed acquisition related statutes, exempting the AMS from ''(t)he Federal Acquisition Regulation and any laws not listed (above in) this section providing authority to promulgate regulations in the Federal Acquisition Regulation.'' The CDA authorizes implementation through the promulgation of regulations in the Federal Acquisition Regulation (FAR), in that it authorizes guidelines to be promulgated by the Office of Federal Procurement Policy (OFPP). The OFPP promulgates such guidelines as part of the FAR under the authority of the OFPP Act. The OFPP Act also was expressly made inapplicable to the AMS by the 1996 Act.

As previously discussed, in 1996 Congress made the FAA Administrator the final authority for all matters related to ''the acquisition and maintenance of property and equipment of the Administration.'' 49 U.S.C. 106. Further, under 49 U.S.C. 46110, any person with a substantial interest in an order issued by the Administrator may appeal exclusively to the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals for the circuit in which the person resides or has its principal place of business. The FAA believes, based on all of the above, that the only reasonable reading of the 1996 Act is that it rendered the CDA inapplicable to the FAA's new AMS.

The same statutory provisions, 49 U.S.C. 106 and 46110, resolve the question of Tucker Act jurisdiction. For purposes of judicial review of final acquisition-related decisions of the FAA Administrator, the specific, exclusive jurisdictional authority granted to the United States Court of Appeal in 49 U.S.C. 46110 controls and takes precedence over the non-exclusive, general authority over a variety of disputes afforded the United States Court of Federal Claims and Federal District Courts under the Tucker Act. *See* 28 U.S.C. 1491. In order to clarify when judicial review may be had, § 17.43 has been modified to expressly recognize the availability of such review, only after exhaustion of

administrative remedies through the FAA dispute resolution process.

Definition of ''Compensated Neutral''

The ABA recommends that § 17.3(f), the definition of ''Compensated Neutral,'' provide for the possibility of alternative sharing formulas regarding the costs associated with engaging a Compensated Neutral. The proposed rule had called for equal sharing of such costs.

FAA Response: The FAA agrees. Additional language has been incorporated in § 17.3(f) of the final rule, to allow for the possibility that the costs associated with a Compensated Neutral be shared between the parties.

Definition of ''Discovery''

The ABA recommends striking the definition or removing the permissive language ''may, when allowed'' in § 17.3(i). It notes further that ''due process required sufficient discovery in each case to permit a party to prove its case and challenge the other party's evidence.''

FAA Response: The FAA agrees in principle that discovery should be allowed in order to provide an adequate record for the finder of fact. However, in order to maintain the efficient resolution timeframes established by the rules, the management of discovery must be left to the discretion of the ODRA. To indicate that discovery is voluntary in the first instance and to clarify that an appropriate level of discovery is an integral component of the ODRA dispute resolution process, § 17.3(i) has been revised to read ''may, either voluntarily or to the extent directed by the ODRA.''

Definition of ''Office of Dispute Resolution for Acquisition''

The ABA recommends that the definition in § 17.3(n) either be struck or, in the alternative, defined ''solely in terms of (the ODRA's) authority with respect to bid protests or disputes filed with it.'' The comment relates back to the ABA's stated position regarding the continued applicability of both the Tucker Act and the CDA.

FAA Response: The FAA disagrees. As indicated above, the FAA believes that the ODRA has exclusive jurisdiction over all AMS protests and contract disputes.

Filing and Computation of Time

The ABA notes that proposed § 17.7(b) would be ''unworkable given the short time frames for resolving protest,'' by reason of its permitting submissions after initial filings to be made by regular mail.

FAA Response: The FAA agrees that the use of regular mail after initial filings would not be consistent with a prompt, efficient bid protest process. Therefore, the final rule provides for delivery of such subsequent filings only by overnight delivery, hand delivery, or by facsimile.

Protective Orders

The ABA suggests that the rule provide for the ODRA to develop and publish a standard protective order along the lines of the model order contained in the GAO Guide to GAO Protective Orders.

FAA Response: The FAA disagrees that such a rule is necessary. The ODRA has already developed and published such a standard order as part of its Website. That order was based, in great measure, on the wording of the GAO's model order.

Simultaneous Pursuit of ADR

The ABA observes that proposed §§ 17.13, 17.27 and 17.31(c) contemplate a sequential process, whereby adjudication is done only after completion of ADR efforts. The ABA also notes that the current practice of the ODRA frequently includes the use of ADR techniques concurrently with an on-going adjudication, and that this practice has produced favorable results in many instances. Accordingly, the ABA suggests that the proposed rule be modified to conform to the current practice.

FAA Response: The FAA agrees. Section 17.31(c) has been modified to add language which allows for informal ADR techniques (neutral evaluation and mediation efforts) to be undertaken simultaneously with adjudication under the Default Adjudicative Process. Section 17.13(d) has been revised to conform to this change. Likewise, a new § 17.27(d) has been added to clarify that the submission of statements indicating that ADR will not be utilized will not in any way preclude the parties from engaging in informal ADR techniques during the course of adjudication.

Binding Arbitration

The ABA takes issue with the language of § 17.33(f), which permits the FAA Administrator a limited amount of time within which to ''opt-out'' of an arbitrator's decision in binding arbitration, arguing that such a provision conflicts with the policies enunciated in the Administrative Dispute Resolution Act of 1996. Accordingly, the ABA recommends deletion of such language.

FAA Response: The FAA disagrees. Under 5 U.S.C. 575(c), any binding arbitration undertaken by a Federal agency must be in accordance with guidance issued by the head of the agency in consultation with the Attorney General, i.e, the Department of Justice (DoJ). As of this time, DoJ has advised that federal agencies, including the FAA, may not engage in any form of binding arbitration without the kind of ''opt-out'' provision described in proposed § 17.33(f). The language with which the ABA takes issue does not mandate this form of binding arbitration, but merely makes it a permissible form. Since any form of ADR will require the concurrence of both parties, the FAA does not see any necessity for eliminating this alternative and has not done so in the final rule. The language of the first sentence of § 17.33(f) would allow for binding arbitration without such an ''opt out'' provision, pursuant to 5 U.S.C. 575 (a), (b), and (c), so long as the arbitration process is consistent with current DoJ guidance and ''applicable law.'' Thus, if DoJ modifies its guidance to the agencies so as to allow such binding arbitration, the FAA would not need to revise § 17.33 in order to pursue such a dispute resolution option.

Proposed Appendix A to Part 17

The ABA states that it endorses the proposed Appendix A to Part 17 and suggests that it be enhanced with additional information concerning ADR experience at the ODRA.

FAA Response: The FAA disagrees that additional information concerning ODRA's ADR experiences should be contained in the rule. The FAA believes information of this type should be published in the ODRA Website Guide, rather than as part of a procedural regulation.

Distribution of Decisions

The ABA proposes that the rule contain language requiring the distribution of final decisions and suggests that language in 4 CFR 21.12, pertaining to the distribution of GAO decisions, be used for that purpose.

FAA Response: The FAA concurs with the ABA's comment, and has incorporated language concerning the public dissemination of ODRA findings and recommendations relating to both protests and contract disputes, as part of §§ 17.37(l) and 17.39(l), respectively. Currently, ODRA findings and recommendations and final orders of the Administrator regarding protests and contract disputes are promptly published on the ODRA Website.

Retroactivity

The ABA points out that the proposed rules are silent on the issue of retroactive applicability and recommends that the final rule identify the contracts to which the new regulations will apply.

FAA Response: The FAA agrees. Section 17.1, Applicability, has been modified to indicate that the rule will apply to all protests and contract disputes on or after the effective date of these regulations, with the exception of contract disputes relating to pre-AMS contracts.

Definition of ''Interested Party''

The ABA recommends that § 17.3(k) incorporate the same definition of ''interested party'' as is contained in the GAO bid protest regulations.

FAA Response: The FAA agrees. The definition of ''interested party'' in § 17.3(k) has been modified to incorporate language based upon the definition of ''protester'' in Appendix C to the AMS. That language was patterned after the GAO's definition of ''interested party.''

Intervention

The ABA suggests that the definition of ''intervenor'' in § 17.3(l) should state that the awardee of a contract be given ''intervenor'' status as a matter of right, that the definition include a deadline for requests for intervention, and that a five-day period be used.

FAA Response: The FAA agrees that the awardee of a contract should be given ''intervenor'' status as a matter of right but disagrees that a five-day period be used as a deadline for requesting intervenor status. Section 17.3(l) has been modified to mandate that contract awardees be allowed intervention as a matter of right. The definition has also been clarified to state that for post-award protests, other than the awardees, no other interested parties will be allowed to participate as intervenors. This conforms to an ODRA interlocutory decision in the Protests of *Camber Corp. and Information Systems of Networks Corp.*, 98–ODRA–00079 and 98–ODRA–00080 (Consolidated) and is consistent with GAO procedures regarding intervention in protests.

Proposed § 17.15(f) had already established a deadline of two business days for requests of intervenor status. The two day period has not been increased to five days, in light of the ODRA's policy of providing expedited adjudication and dispute resolution.

Parties

The ABA notes that the definition of ''Parties'' under § 17.3(o) uses the word ''protester'' in the singular, implying that only one protester may be involved in a protest before the ODRA. The ABA suggests the use of the plural.

FAA Response: The FAA agrees with the ABA's comment and has modified the definition under § 17.3(o) accordingly.

Screening Information Request

The ABA finds the current definition of ''Screening Information Request'' in § 17.3(q) to be vague, and suggests alternative language along the lines found in the AMS definition of that term.

FAA Response: The FAA agrees and has incorporated AMS language into § 17.3(q) similar to that offered by the ABA.

Matters Not Subject to Protest

The ABA finds proposed § 17.11, which identifies matters that are not subject to protest, to be overly broad. The ABA contends that this section prevents parties from protesting such matters in any other alternative forum.

FAA Response: The FAA disagrees that this section is overly broad. The AMS does not contemplate such matters to be protestable in any forum.

Commencement of the Protest

The ABA questions the use of the word ''cannot'' in Proposed §§ 17.13(d) and 17.17(d) when those sections refer to the use of ADR, stating that it implies that the parties can only resort to the Default Adjudicative Process where ADR is not possible. The ABA suggests that the phrase ''will not'' be substituted for ''cannot'', so as to allow the parties more flexibility for the use of adjudication under the Default Adjudicative Process.

FAA Response: The FAA agrees. It was not the FAA's intent to limit the Default Adjudicative Process to cases where ADR is not possible. ADR, in all instances, must be voluntary, in order to be successful. By the same token, the ODRA's procedures are structured so as to assure that ADR techniques are given adequate consideration. The FAA has modified the language of the two sections as recommended by the ABA.

Suspension of Procurement

AMS § 3.9.3.2.1.6 contains a presumption that procurement activities will not be suspended during the pendency of a protest, unless there is a compelling reasons to do so. The AMS authorizes the ODRA to recommend to the Administrator that all or part of such activities be suspended when a protest is filed. The proposed rule at § 17.13(g) contains similar provisions. The ABA urges that the ''regulatory presumption'' against suspension be dropped, arguing that permitting performance to proceed during the pendency of a protest precludes an effective remedy.

In the alternative, the ABA suggests that protesters be allowed to respond to the agency's position regarding a requested suspension. It further recommends that the rule contain authority for the ODRA to ''tailor the suspension to the specific exigencies of the protest by providing for consideration of limited or partial suspensions.'' Finally, the ABA questions the effectiveness of the authority for suspension being lodged at the Administrator's level and suggests that such authority be provided at the ODRA, so as to assure expeditious handling of suspension requests.

FAA Response: The FAA agrees in part and disagrees in part. One of the major features of the Competition in Contracting Act (CICA) is its automatic procurement stay provision pertaining to bid protests filed with the General Accounting Office. Section 348 of Public Law 104–50 mandated the creation of the AMS to provide for the ''unique needs'' of the FAA. By enacting this law, Congress sought in part to remedy unacceptable delays that had been encountered with FAA procurement. In Public Law 104–50, the Congress expressly exempts the FAA and its new AMS from the provision of statutes governing procurements at other Federal agencies, including notably with CICA. Thus, it was the intent of Congress that the CICA's automatic procurement should not be made part of the process for resolution of bid protests under the AMS. The presumption that contract performance be permitted to proceed, absent compelling reasons, gives effect to the intent of Congress that the FAA implement a system under which acquisitions are accomplished expeditiously. For this reason, the FAA will not adopt the ABA's suggestion that the presumption be dropped.

However, the final rule does adopt other ABA suggestions regarding suspension. It permits a protester to provide a response to the agency position, prior to the ODRA deciding on whether or not it will recommend suspension to the Administrator. Also, the final rule makes clear that suspensions may be tailored such that they are limited or partial suspension. As to the suggestion that suspension authority be delegated by the Administrator to the ODRA, it should be noted that, by delegation of July 29, 1998, the Administrator delegated to the ODRA Director the authority to issue

temporary stays for up to ten (10) business days, pending any Administrator's decision on a more permanent stay. That delegation was published in the **Federal Register** on September 14, 1998 (**Federal Register** Vol. 63, No. 177, at pp. 49151–49152). A copy may be found on the ODRA Website. The FAA believes that this delegation is sufficient to provide expeditious treatment of suspension requests.

Product Team Response

The ABA raises several issues regarding the Product Team Response required by § 17.17(f) of the proposed rule. (It should be noted that the term ''Product Team'' has been substituted for the term ''Program Office'' throughout the final rule, so as to be more consistent with terminology used in the FAA's AMS, and has been defined so as to conform to the AMS). First, the ABA objects to the language which requires the Response to include all documents which the Product Team ''deem(s) relevant,'' urging that an ''objective'' standard for relevance should be applied. Second, the ABA suggests that, to assure that all relevant documents are provided, the Product Team be required to furnish, in advance of the Response submission, a list of documents to be included with the Response. Third, the ABA points out that the proposed rule fails to require the submission of a Product Team Response in the event the matter proceeds to ADR and the ADR is unsuccessful.

FAA Response: The FAA agrees that an objective standard of relevance is needed and that the rule needs to require the submission of a Product Team Response in the event ADR is unsuccessful. The language of § 17.17(f) has been modified to require simply the provision of ''all relevant documents''—thus invoking an ''objective'' standard of relevance. As to the matter of requiring submission of a Product Team Response in the event ADR is unsuccessful, the new § 17.17(h) satisfies this concern.

As to the ABA suggestion regarding the furnishing of a list of documents in advance of the Product Team Response, the FAA does not concur with this suggestion. Such a requirement would mean one more written submission in a process that is to be focused on expediting dispute resolution and eliminating unnecessary paperwork.

Dismissal or Summary Decision of Protests—Opportunity to Respond

The ABA suggests that a new section be inserted into the rule to permit parties against whom a dismissal or summary decision is to be entered the opportunity of submitting to the ODRA a response, before the ODRA acts to recommend dismissal or summary decision.

FAA Response: The FAA agrees. A new § 17.19(e) has been included, which contains the suggested language.

Default Adjudicative Process for Protests—Discovery

The ABA finds absent from the proposed language of § 17.37(f) guidance regarding the standard to be employed by the Dispute Resolution Officer (DRO) or Special Master when considering the necessity for and scope of discovery in conjunction with protests. The proposed rule is criticized for lack of ''predictability.'' The ABA suggests substitute language for § 17.37(f).

FAA Response: The FAA has adopted most, but no all of the suggested language for § 17.37(f). Although ''predictability'' is certainly a laudable goal, to achieve the major FAA goal of expeditious dispute resolution, significant flexibility in the process must also be maintained. What may be an appropriate level of discovery in one case may be wholly unwarranted in another. Accordingly, the language of the final rule, while providing additional guidance as to the types of discovery that may be allowed, continues to authorize the DRO or Special Master to exercise broad discretion in terms of managing discovery in each case.

Comments on Product Team Response

The ABA points out that the proposed rule omits any procedure for allowing comments by protesters and intervenors on the Product Team Response.

FAA Response: The FAA agrees. This omission was inadvertent and contrary to current ODRA practice. Section 17.37(c) of the final rule requires the submission of such comments within five (5) business days of the filing of the Product Team Response.

Hearings

The ABA notes that proposed § 17.37(g) speaks of ''oral presentation'' and does not distinguish between hearings and oral argument. The ABA suggests language that would provide additional guidance on when hearings would be conducted. Such language, the ABA urges, is needed to establish ''predictability'' regarding the ODRA process.

FAA Response: The FAA agrees. The final rule has been modified regarding ODRA hearings. More specifically, the final rule states that they are to be held ''where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on an assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts.'' In addition, the final rule permits any party to a protest to request the ODRA to conduct a hearing and, in connection with any such request, provides that the ODRA shall conduct a hearing whenever one is requested, unless it finds that one is not necessary and that neither party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. The final rule makes clear that all witnesses at such hearings will be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

Commencement of Default Adjudicative Process

The ABA takes issue with the provisions of proposed § 17.37(a) calling for the Default Adjudicative Process to commence on the later of (1) the filing of the Product Team Response, or (2) the submission to the ODRA of a joint notification that the ADR process has not resolved all outstanding issues, or that the 20 business day ADR period has or will expire with no reasonable probability of the parties achieving a resolution. The ABA states that this formulation creates a ''significant disincentive for any protester to elect to proceed with the ADR process,'' since, once ADR is elected, the Default Adjudicative Process cannot start for at least 20 business days. The ABA urges that either party be permitted to ''trigger'' the Default Adjudicative Process at any time during ADR and recommends that the commencement of the Default Adjudicative Process be measured from the filing of a Product Team Response in all instances.

FAA Response: The FAA concurs that ADR is not intended to be and should not be an obstacle to efficient case resolution. Therefore, under new § 17.17(g), any party will be able to ''trigger'' the Default Adjudicative Process by notifying the ODRA that the parties have failed to achieve a complete resolution of the protest via ADR. Joint notification is no longer being required. Under § 17.37(a) of the final rule, the commencement of the Default Adjudicative Process is marked in all cases by the filing of the Product Team Response. The language regarding expiration of the 20 business day period has been deleted entirely.

Use and Definition of the Term ''Contract Dispute''

The ABA suggests that the term ''contract dispute'' be changed to ''contract claim'' in various sections of the proposed rule and that separate definitions be provided for both ''contract claim'' and ''contract dispute.''

FAA Response: The FAA agrees. The definition of ''contract dispute'' has been clarified in the final rule. The term ''claim'' has now been incorporated within that definition. Additional language has been inserted into the definition of ''contract dispute'' in order to clarify that the term includes situations where (1) parties to contracts pre-dating the AMS elect generally to make such contracts ''subject to the AMS,'' including the ODRA dispute resolution process; and (2) parties to such contracts, even where they do not make such a general election, agree to permit the ODRA to employ ADR techniques to resolve disputes under those contracts.

''Accrual'' of a Contract Dispute

The ABA believes that the definition of ''accrual of a contract dispute'' is ambiguous and recommends that the FAA adopt a definition used by the Court of Federal Claims under the Tucker Act, or alternatively, adopt the definition of accrual that is incorporated into FAR § 33.201.

FAA Response: The FAA agrees. The FAA has adopted the Court of Federal Claims definition of ''accrual of a contract claim'' and has included it in § 17.3(b) of the final rule. Minor changes have been made to the ABA's proposed language so as to clarify that the determination as to whether there has been ''active concealment or fraud'' or facts ''inherently unknowable'' will rest with the ODRA (and, ultimately, with the Administrator).

Informal Resolution

The ABA finds confusing the provision in § 17.23(d) regarding an extension of the time under § 17.27 for the filing of a joint statements, in particular, whether the parties are entitled to only one extension.

FAA Response: The FAA agrees that the provision is confusing. The FAA has clarified the provision in proposed § 17.23(d) making plain that extensions for up to twenty (20) business days will be allowed by the ODRA, if informal resolution of the contract disputes appears probable.

Continued Performance

The ABA and AGC seek clarification as to the provision of proposed § 17.23(f) regarding the requirement for continued performance, pending resolution of a contract dispute. They also suggest that the FAA consider providing financing for such continued performance.

FAA Response: The FAA has decided to eliminate the provision in question from the final rule, since it relates to a matter of contract administration, rather than to procedures before the ODRA. The issues involved will be governed by the express terms of the pertinent FAA contract.

Filing Contract Disputes

The ABA suggests that FAA-initiated contract disputes not be considered as having been ''filed'' until they are received by the contractor from the contracting officer. The ABA perceives § 17.25(a) and (b) as pertaining only to contractor initiated disputes.

FAA Response: The FAA disagrees. The sections, as drafted, were intended to cover both contractor-initiated and FAA-initiated disputes. In order for the ODRA to manage the dispute resolution process properly, the time for commencement in either case must be measured by the ODRA's receipt of the contract dispute. Just as there need not be an initial submittal of a claim to an FAA contracting officer (CO) and the issuance of a CO final decision as prerequisites to the contractor filing a contract dispute with the ODRA, the same must be true for claims against contractors by FAA product teams. Any concern regarding the contractor having adequate notice of the FAA's claim is satisfied by the provision of § 17.25(d), which requires service if a copy of the contract dispute by means reasonably calculated to be received on the same day as the contract dispute is filed with the ODRA.

Six Months' Time Limit

The ABA questions the six month time limitation specified by § 17.25(c) for the filing of contract disputes and suggests that the limitation be extended to six years, so as to conform to that established by the Federal Acquisition Streamlining Act of 1994, Public Law 103–355, 108 Stat. 3243 (1994)(''FASA'') for claims under the CDA. The ABA further suggests that the time limitation be identical for both contractor and FAA claims. Proposed § 17.25(c) concerns the possibility of different time limitations established by contract provision, and the requirement that such provisions govern over the limitation period set forth in the rule. The ABA proposes that, if the contract specified period is less than six years, it will only be enforced on the contractor if agreed to, and if the failure to agree does not constitute grounds for denying contract award. The ABA suggests language for § 17.25(c) to address this modification. Finally, with regard to the exception of the time limitation for FAA-initiated claims relating to warranty, fraud, or latent defects, the ABA suggests that that exception be conditioned on there being a limitation imposed on the FAA for filing of such claims. Specifically, the ABA would bar any such claims if filed more than six years after the FAA knows or should have known of the ''warranty issues, fraud or latent defects.''

FAA Response: The FAA agrees that the limitation period should be identical for both contractor and government claims. However, the FAA does not accept the suggestion that that period should be six years. The FASA, which amended the CDA to implement a six year time limitation, is a statute which is expressly excluded from applicability to the AMS. The FAA believes that the two (2) year limitation period incorporated in the final rule (subject only to different periods specified in contracts entered into prior to the effective date of this rule) would be less disruptive to the operations of the FAA's product teams. Such a time limitation would allow adequate opportunity for resolution of contract claims at the contracting officer level and would not necessitate the filing of protective litigation.

The FAA does agrees that there should be some limitation on contract disputes before the ODRA relating to FAA claims against contractors for gross defects amounting to fraud and/or latent defects. Accordingly, the final rule provides for the same two (2) year time limitation to apply to such contract disputes, the two (2) year period to begin from the point when the FAA knew or should have known of the fraud or latent defects. Regarding warranty claims, the time limitation for asserting such claims would be that specified in any contract warranty provision. As for any potential variations in time limitations established by contract provision, the final rule allows such variances only in terms of longer time limitations. The two (2) year period thus is established as a minimum.

Right to an Adjudicative Hearing

The ABA urges that a hearing be provided as a matter of right in all contract disputes under the Default Adjudicative Process and opines that such a hearing would be essential to ensure due process of law.

FAA Response: The FAA disagrees that a hearing must be provided

automatically as a matter of right in every case. Even so, the FAA is committed to providing fair and complete consideration of all relevant evidence pertaining to the contract disputes before the ODRA. Accordingly, the final rule, while emphasizing that the ODRA DRO or Special Master will have discretion as to whether a hearing will be conducted in any given case, provides guidance as to when hearings will be conducted. More specifically, § 17.39(h) now calls for hearings ''where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts.'' The final rule also permits any party to a contract dispute to request the ODRA to conduct a hearing and calls for the ODRA to conduct a hearing and calls for the ODRA to conduct hearings whenever requested, unless it finds specifically that the lack of a hearing will not result in prejudice to either party. The final rule makes clear that all witnesses at such hearings will be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

Discovery

The ABA suggests that the Default Adjudicative Process for contract disputes fails to afford participants the opportunity for ''full discovery'' and takes issue with the language of proposed § 17.39(e)(1), which calls for DRO or Special Master to determine the ''minimum amount of discovery required to resolve the dispute.'' Further, the ABA asserts that the matter of discovery should be left to the control of each party, ''subject only to the long-established rules of reasonableness and relevance.''

FAA Response: The FAA agrees. The final rule at § 17.39(e)(1) was revised to speak of the ''appropriate amount of discovery required to resolve the dispute.'' This language addresses the ABA's concern regarding the sue of the term ''minimum.'' As to the matter of who controls the discovery process, the definition of discovery in the final rule, § 17.34(i), in addition to contemplating ODRA management and direction as to discovery, was revised to provide for voluntary discovery by the parties.

Interest

The ABA and AGC take issue with the proposed § 17.34(m), which deals with the recovery of interest on contractor claims, and suggests that the FAA would be subject to the payment of interest under the CDA. They recommend, ''at a minimum, the FAA provide, by regulation, entitlement to interest.''

FAA Response: The FAA disagrees that the CDA has applicability to contract claims under the AMS. In any event, because the payment of interest would be a matter of contract administration, rather than ODRA procedure, the provision in question has been eliminated from the final rule. The issue of interest is to be governed by the terms of FAA contract documents.

Procedural Predictability and Efficiency

The ABA generally raised concerns regarding the rule's ''clarity and predictability'', claiming that the rule should strive to minimize litigation over procedural issues. The ABA asserts that the rules must afford ''adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient and just resolution of controversies.''

FAA Response: The FAA agrees. To promote the goal of minimizing litigation over procedural issues, and to provide clarity and predictability, several sections of the rule were revised. Section 17.13(d) now calls for status conference for protests to be mandatory (using the work ''shall'' rather than ''may''), in order to satisfy process predictability concerns. Likewise, § 17.5(b) has been clarified so as to indicate that the ODRA has authority, within its delegation from the Administrator, to ''impose sanctions or [take] other disciplinary actions'' in furtherance of the ''efficient resolution of disputes.''

For the sake of clarity, § 17.13(c) was revised to include additional language, making clear that the ODRA may extend for good cause specified time limitations other than for the initial protest filing. Proposed § 17.13(e), which seemed to allow the ODRA to waive the limitation regarding initial protest filings, has been deleted to eliminate an apparent ambiguity regarding such waiver.

A new § 17.13(e) has been inserted to state what had initially been contained in proposed § 17.17(a), that the ODRA Director will designate either Dispute Resolution Officers (DROs) or Special Masters for protests. Inclusion of this new section is consistent with the ABA's goal of process predictability. The additional reference to ''Special Masters'' in § 17.17 (e) and (f) was to clarify that DROs are not used in every case.

New § 17.17(a) (former § 17.17(b)) includes the words ''as part of protest'' to clarify that the request for a suspension is to be part of the protest document itself. Section 17.17(b)(50 of the final rule (formerly § 17.17(c)(5)) adds the clarifying language ''or arrange for';' to the word ''conduct'' to cover situations where an outside neutral has been agreed upon to handle ADR proceedings, including the provision of early neutral evaluation. This section likewise has been revised by inserting for that purpose the words ''or other Neutral or Compensated Neutral, at the discretion of the ODRA, and/or based upon the agreement of the parties or request of any party(ies) seeking such evaluation.'' This clarifying language foster process predictability.

Section 17.17(c)(1) has been clarified to call for a joint statement where the parties have decided to ''pursue ADR proceedings in lieu of adjudication in order to resolve the protest'' (instead of merely referring to their decision to ''pursue ADR to resolve the protest''). The phrase ''A joint written explanation'' in § 17.17(c)(2) has been clarified to read ''Joint or separate written explanations,'' to recognize the possibility that the parties may not agree to a joint submission. The balance of that paragraph has been revised to eliminate reference to the term ''parties,'' since intervenors (included within the definition of ''parties'') do not participate in the decision to pursue ADR. Sections 17.17 (d) and (e) of the final rule use the phrases ''Product Team and protester'' and ''Product Team or protester'' for this same reason.

Section 17.17(d) has been clarified to explicitly state that ''Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.'' Section 17.17(e) has also been clarified to state that the ODRA may alter the schedule for filing of the Product Team response, in order to accommodate requirements of a particular protest. These clarifying revision support the goal of minimizing litigation over procedural issues.

Section 17.17(f) clarifies the time for circulating to other parties copies of the Product Team Response and requires a more specific format for the information to be provided as part of the Product Team Response. The timing for provision of copies of the Product Team response to the protester and intervenor has been clarified to require that such copies be furnished on the same date as it is filed with the ODRA, if practicable, but in any event no later than one (1) business day after such filing. Similarly, § 17.25(a) specifies more explicitly the format to be used for contract dispute filings for those reasons. Section 17.19(a)(2) clarifies the basis for

possible dismissal or summary dismissal of a protest to state that such dismissal may be done if the protest is ''frivolous, without basis in factor law, or (fails) to state a claim upon which relief may be had.''

Two potential protest remedies previously grouped (recompetition and termination for convenience) are stated separately in § 17.21(a) of the final rule, to clarify an ambiguity as to whether the ODRA may recommend one or both of these remedies in any given case. Section 17.23(a) of the final rule has been clarified to include the phrase ''subject to the AMS, ''rather than ''entered into pursuant to the AMS,'' in order to cover situations where parties to a pre-AMS contract opt to subject the contract to the AMS and its ODRA dispute resolution process. Again, these changes foster process predictability.

A substitute § 17.23(f) has been inserted (in lieu of the deleted § 17.23(f), which had dealt with the obligation to continue performance pending resolution of a dispute). The substitute section provides a remedies section for contract disputes. This section parallels the remedies section for bid protests and serves to make the provisions of the rule consistent.

Section 17.27(a) is revised to allow the parties twenty (20) business days to submit a joint statement in order to promote expeditious resolution. It also uses the phrases ''joint or separate statements'' and ''written explanation(s,)'' in recognition of the possibility that parties may not be willing to agree to a joint submission section information 17.27(d) has been revised by deleting the word ''joint'' for the same reason. However, when speaking of a request for ADR, § 17.27(b)(1) specifies that such request must be ''joint.'' This is in recognition that ADR is a voluntary process that must be mutually entered into by the parties.

To foster predictability of the process, § 17.31(b) was revised to insert language clarifying that in all cases the parties will be expected to explore ADR. Additional clarifying language was included in that section to address the assignment by the ODRA of a DRO to explore ADR options with the parties and to arrange for early neutral evaluation of the merits of a case, at a party's request. The final rule has been revised to delete § 17.359c), which had provided for the automatic appointment of a DRO for small dollar value matters or matters involving simplified acquisitions, so long as such appointment was not objected to by the parties. Specifying the automatic use of ADR in this context was inconsistent with the balance of the ADR section of the rule and was considered contrary to the basis concept that ADR is to be a completely voluntary process.

Section 17.37(b) clarifies that it is the Director of the ODRA who selects the DRO or Special Master to conduct fact findings; thus serving the interest of process predictability. Section 17.37(j) has been clarified to state only that, in arriving at findings and recommendations relating to protests, DROs and Special Masters are to ''consider'' whether or not the Product Team actions in question had a rational basis, and whether or not the Product Team decision under question was arbitrary, capricious or an abuse of discretion.

Finally, a new § 17.45 has been added to address concerns regarding predictability in the relationship of this rule to changes in future FAA policy. This section requires all amendments to the AMS, standard contract forms and clauses,and any guidance to FAA contracting officials, to conform with the provisions of the final rule.

Additional Clarifying Changes in the Final Rule

In addition to the revisions of the proposed rule made in response to comments received, the FAA has made a number of revisions in order to clarify the language of the rule and to correct awkward language without substantive changes. More specifically, 14 CFR Part 14, § 14.05(b) was modified to add the language ''or such rate as prescribed by 5 U.S.C. 504,''in order to include any subsequent rate adjustments that might be permitted for attorneys' fees and other costs under revisions to the EAJA. Section 14.05(e) was modified to provide EAJA recovery for attorneys' fees and costs incurred in the Default Adjudicative Process under 14 CFR part 17 and the AMS.

Section 17.7(d) was deleted and its language combined with similar language in § 17.43. Section 17.11, which had previously made non-protestable ''FAA purchased from or through federal * * * governments'' now reads ''FAA purchases from or through other federal agencies.'' Section 17.13(c) was revised to add the word ''protest'' in describing filing time limitations, for the sake of clarity. Section 17.13(c) was revised to correct a mistaken reference to § 17.17 (now referring to § 17.15). Section 17.13(d) has been modified to eliminate redundancy with other sections and now merely makes cross-reference to those sections.

The words ''for adjudication'' were included in § 17.17(f) for the sake of clarity. Section 17.15(a)(3) has been revised to clarify ambiguities in the language regarding protest filing timeliness. The wording of § 17.15(f) has been rearranged and the language ''if known'' added to the requirement for notifying other interested parties of the existence of a protest, so as to clarify the obligation of the FAA Contracting Officer. Former § 17.17(a) has been eliminated, since its content had been inserted as new § 17.13(e).

The word ''part'' in § 17.23(a) has been revised to read ''subpart,'' to clarify that the covered contract disputes are to be resolved under subpart C of the rule, entitled ''Contract Disputes.'' Rather than have a redundant provision for the ODRA's granting of time extensions, § 17.27(a) of the final rule merely contains a cross-reference to § 17.23(d). In § 17.29(d) of the final rule, the words ''or the Administrator's delegee'' have been added to conform to other references to Administrator's orders within the rule. To avoid confusion, the words ''Associate Chief Counsel and'' were deleted from both §§ 17.37(l) and 17.39(l).

Former § 17.37(m) was eliminated as redundant to Subpart F regarding final orders. In its stead, the final rule contains a clarifying provision with respect to ODRA time extensions. This same substitution was made for former § 17.39(m) as well. Besides eliminating redundancies in the rule, these substitutions also satisfy the ABA's concern for predictability of the process. A new § 17.39(k) was inserted to allow the ODRA Director to confer with the DRO or Special Master during the pendency of adjudication of contract disputes. This insertion was to make the process for contract disputes consistent with that specified for protests. The new § 17.39(k) is virtually identical to the language regarding adjudication of protests and the role of the ODRA Director contained in § 17.37(h). Finally, in § 17.43, the words ''FAA Chief Counsel'' were substituted for ''Product Team attorney'' so as to provide consistency with other FAA regulations.

Paperwork Reduction Act

Information collection requirements in the amendment of 14 part 14 and the addition of part 17 to the Code of Federal Regulations (14 CFR parts 14 and 17) have previously been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and have been assigned OMB Control Number 2120–0632.

International Compatibility

The FAA has determined that a review of the Convention on International Civil Aviation Standards and Recommended Practices is not warranted because there is not a comparable rule under ICAO standards.

Federalism Implications

The regulations herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Evaluation Summary

Four principal requirements pertain to the economic impacts of changes to the Federal Regulations. First, Executive Order 12866 directs Federal agencies to promulgate new regulations or modify an existing regulation after consideration of the expected benefits to society and the expected costs. The order also requires Federal agencies to assess whether a final rule is considered a ''significant regulatory action.'' Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. Finally, Public Law 104–4, Department of Transportation Appropriations Act (November 15, 1995), requires Federal agencies to assess the impact of any Federal mandates on State, Local, Tribal governments, and the private sector.

In conducting these analyses, the FAA has determined that this rule will generate cost-savings that will exceed any costs, and is not ''significant'' as defined under section 3(f) of Executive Order 12866 and Department of Transportation's (DOT) policies and procedures (44 FR 11034, February 26, 1979). In addition, under the Regulatory Flexibility Determination, the FAA certifies that this proposal will not have a significant impact on a substantial number of small entities. Furthermore, this proposal will not impose restraints on international trade. Finally, the FAA has determined that the proposal will not impose a Federal mandate on state, local, or tribal governments, or the private sector of $100 million per year. These analyses, available in the docket, are summarized below.

Executive Order 12866 and DOT's Policies and Procedures

Under Executive Order 12866, each Federal agency shall assess both the costs and the benefits of final regulations while recognizing that some costs and benefits are difficult to quantify. A final rule is promulgated only upon a reasoned determination that the benefits of the final rule justify its costs.

In this final rule, the establishment of procedures for protests and contract disputes by the Office of Dispute Resolution for Acquisition (ODRA), under the FAA's new Acquisition Management System, will provide a cost savings to the private sector (protesters and contractors). To resolve protests and contract disputes with the FAA, offerors and contractors will realize a cost savings of $1,000 to $1 million per case, and the FAA will realize an average cost savings of $2,300 per protest case and $4,400 per contract dispute. Costs for this final rule are estimated to be about $500 or less per case for the private sector to abide by the procedures of the ODRA, and no additional costs will be attributed to the FAA for implementing such procedures. Therefore, the FAA concludes that not only do the benefits justify the costs, but that benefits actually exceed the costs.

The final rule will also not be considered a significant regulatory action because (1) it does not have an annual effect of $100 million or more or adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, Local or Tribal governments or communities; (2) it does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) it does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients; and (4) it does not raise novel legal or policy issues arising out of legal mandates, the President's priorities or principles set forth in the Executive Order. Because the final rule is not considered significant under these criteria, it was not reviewed by the Office of Management and Budget (OMB) for consistency with applicable law, the President's priorities, and the principles set forth in this Executive Order nor was OMB involved in deconflicting this final rule with ones from other agencies.

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (the Act) establishes ''as principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that and to explain the rationale for their actions, the Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a Regulatory Flexibility Analysis (RFA) as described in the Act.

However, if an agency determines that a final rule is not expected to have a significant economic impact on a substantial number of entities, section 605(b) of the 1980 Act provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA conducted the required review of this final rule and determined that it will not have a significant economic impact on a substantial number of small entities (protesters and contractors). Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FAA certifies that this rule will not have a significant economic impact on a substantial number of small entities for the following reason: the final rule will provide an estimated cost savings of $1,000 to $1 million per case in resolving protests and disputes with the FAA, while requiring about 4500 or less per case per entity to resolve the issue. For small entities, the FAA estimates that cost savings per case will be closer to $1,000 than $1 million and concludes there will be no significant economic impact on small entities. The FAA solicited comments from affected entities with respect to this finding and determination in the Notice of Proposed Rulemaking, and no comments were received.

Final International Trade Impact Assessment

The FAA has determined that the final rule will neither affect the sale of aviation products and services in the United States nor the sale of U.S.

products and services in foreign countries.

Final Unfunded Mandates Reform Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Reform Act) enacted as Public Law 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a final agency rule that may result in the expenditure by State, Local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.

Section 204(a) of the Reform Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, Local, and Tribal governments on a final ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Reform Act is any provision in a Federal agency regulation that will impose an enforceable duty upon State, Local, and Tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year.

Section 203 of the Reform Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This rule does not contain a Federal intergovernmental or private sector mandate that exceeds $100 million a year, therefore the requirements of the Reform Act do not apply.

List of Subjects

14 CFR Part 14

Claims, Equal access to justice, Lawyers, Reporting and recordkeeping requirements.

14 CFR Part 17

Administrative practice and procedure, Alternative Dispute Resolution (ADR), Protests, Authority delegations (Government agencies), Government contracts, Government procurement.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 14 and adds part 17 of Title 14, Chapter I, Code of Federal Regulations as follows:

PART 14—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 504; 49 U.S.C. 106(f), 40113, 46104 and 47122.

2. Amend § 14.02 by revising paragraph (a) as follows:

§ 14.02 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the FAA under 49 CFR part 17 and the Acquisition Management System (AMS). These are adjudications under 5 U.S.C. 554, in which the position of the FAA is represented by an attorney or other representative who enters an appearance and participates in the proceeding. This subpart applies to proceedings under 49 U.S.C. 46301, 46302, and 46303 and to the Default Adjudicative Process under part 17 of this chapter and the AMS.

* * * * *

3. Amend § 14.03 by revising paragraph (a) and (f) to read as follows:

§ 14.03 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term ''party'' is defined in 5 U.S.C. 504(b)(1)(B) and 5 U.S.C. 551(3). The applicant must show that it meets all conditions or eligibility set out in this subpart.

* * * * *

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the ALJ or adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the ALJ or adjudicative officer may determine that financial relationships of the applicant, other than those described in this paragraph, constitute special circumstances that would make an award unjust.

* * * * *

4. Amend § 14.05 by revising paragraphs (b), (c), and (e) to read as follows:

§ 14.05 Allowance of fees and expenses.

* * * * *

(b) No award for the fee of an attorney or agent under this part may exceed $125 per hour, or such rate as prescribed by 5 U.S.C. 504. No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the ALJ or adjudicative officer shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

* * * * *

(e) Fees may be awarded only for work performed after the issuance of a complaint, or in the Default Adjudicative Process for a protest or contract dispute under part 17 of this chapter and the AMS.

5. Amend § 14.11 by revising paragraph (c) to read as follows:

§ 14.11 Net worth exhibit.

* * * * *

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of the net worth exhibit, or any part of it, may submit that portion of the exhibit directly to the ALJ or adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information.

(1) The motion shall describe the information sought to be withheld and explain, in detail, why it should be exempt under applicable law or regulation, why public disclosure would adversely affect the applicant, and why

disclosure is not required in the public interest.

(2) The net worth exhibit shall be served on the FAA counsel, but need not be served on any other party to the proceeding.

(3) If the ALJ or adjudicative officer finds that the net worth exhibit, or any part of it, should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the FAA's established procedures.

6. Amend § 14.20 by revising paragraphs (a) and (c) to read as follows:

§ 14.20 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding, but in no case later than 30 days after the FAA Decisionmaker's final disposition of the proceeding, or service of the order of the Administrator in a proceeding under the AMS.

* * * * *

(c) For purposes of this part, final disposition means the later of:

(1) Under part 17 of this chapter and the AMS, the date on which the order of the Administrator is served;

(2) The date on which an unappealed initial decision becomes administratively final;

(3) Issuance of an order disposing of any petitions for reconsideration of the FAA Decisionmaker's final order in the proceeding;

(4) If no petition for reconsideration is filed, the last date on which such a petition could have been filed; or

(5) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

7. Revise § 14.21 to read as follows:

§ 14.21 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 14.11(b) for confidential financial information. Where the proceeding was held under part 17 of this chapter and the AMS, the application shall be filed with the FAA's attorney and with the Office of Dispute Resolution for Acquisition.

8. Amend § 14.22 by revising paragraph (b) to read as follows:

§ 14.22 Answer to application.

* * * * *

(b) If the FAA's counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the ALJ or adjudicative officer upon request by the FAA's counsel and the applicant.

* * * * *

9. Revise § 14.24 to read as follows:

§ 14.24 Comments by other parties.

Any party to a proceeding other than the applicant and the FAA's counsel may file comments on an application within 30 days after it is served, or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the ALJ or adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

10. Amend § 14.26 by revising paragraph (a) to read as follows:

§ 14.26 Further proceedings.

(a) Ordinarily the determination of an award will be made on the basis of the written record; however, on request of either the applicant or agency counsel, or on his or her own initiative, the ALJ or adjudicative officer assigned to the matter may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.

* * * * *

11. Revise § 14.27 to read as follows:

§ 14.27 Decision.

(a) The ALJ shall issue an initial decision on the application within 60 days after completion of proceedings on the application.

(b) An adjudicative officer in a proceeding under part 17 of this chapter and the AMS shall prepare a findings and recommendations for the Office of Dispute Resolution for Acquisition.

(c) A decision under paragraph (a) or (b) of this section shall include written findings and conclusions on the applicant's eligibility and status as prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the FAA's position was substantially justified, or whether special circumstances make an award unjust.

12. Revise § 14.28 to read as follows:

§ 14.28 Review by FAA decisionmaker.

(a) In proceedings other than those under part 17 of this chapter and the AMS, either the applicant or the FAA counsel may seek review of the initial decision on the fee application. Additionally, the FAA Decisionmaker may decide to review the decision on his/her own initiative. If neither the applicant nor the FAA's counsel seeks review within 30 days after the decision is issued, it shall become final. Whether to review a decision is a matter within the discretion of the FAA Decisionmaker. If review is taken, the FAA Decisionmaker will issue a final decision on the application or remand the application to the ALJ who issue the initial fee award determination for further proceedings.

(b) In proceedings under part 17 of this chapter and the AMS, the adjudicative officer shall prepare findings and recommendations for the Office of Dispute Resolution for Acquisition with recommendations as to whether or not an award should be made, the amount of the award, and the reasons therefor. The Office of Dispute Resolution for Acquisition shall submit a recommended order to the Administrator after the completion of all submissions related to the EAJA application. Upon the Administrator's action, the order shall become final, and may be reviewed under 49 U.S.C. 46110.

13. Add new part 17 to 14 CFR Chapter I, Subchapter B, to read as follows:

PART 17—PROCEDURES FOR PROTESTS AND CONTRACTS DISPUTES

Subpart A—General

Sec.

17.1 Applicability.
17.3 Definitions.
17.5 Delegation of authority.
17.7 Filing and computation of time.
17.9 Protective orders.

Subpart B—Protests

17.11 Matters not subject to protest.
17.13 Dispute resolution process for protests.
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Subpart C—Contract Disputes

17.23 Dispute resolution process for contract disputes.
17.25 Filing a contract dispute.
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17.29 Dismissal or summary decision of contract disputes.

Subpart D—Alternative Dispute Resolution

17.31 Use of alternative dispute resolution.
17.33 Election of alternative dispute resolution process.
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Subpart E—Default Adjudicative Process

17.37 Default adjudicative process for protests.
17.39 Default adjudicative process for contract disputes.

Subpart F—Finality and Review

17.41 Final orders.
17.43 Judicial review.
17.45 Conforming amendments.

Appendix A to Part 17—Alternative Dispute Resolution (ADR)

Authority: 5 U.S.C. 570–581, 49 U.S.C. 106(f)(2), 40110, 40111, 40112, 46102, 46014, 46105, 46109, and 46110.

Subpart A—General

§ 17.1 Applicability.

This part applies to all protests or contract disputes against the FAA that are brought on or after June 28, 1999, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996.

§ 17.3 Definitions.

(a) *Accrual* mean to come into existence as a legally enforceable claim.

(b) *Accrual of a contract claim* means that all events relating to a claim have occurred which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on such equitable grounds as where the office of Dispute Resolution for Acquisition determines that there has been active concealment or fraud or where it finds that the facts were inherently unknowable.

(c) *Acquisition Management System* (AMS) establishes the policies, guiding principles, and internal procedures for the FAA's acquisition system.

(d) *Administrator* means the Administrator of the Federal Aviation Administration.

(e) *Alternative Dispute Resolution* (ADR) is the primary means of dispute resolution that would be employed by the FAA's Office of Dispute Resolution for Acquisition. See Appendix A of this part.

(f) *Compensated Neutral* refers to an impartial third party chosen by the parties to act as a facilitator, mediator, or arbitrator functioning to resolve the protest or contract dispute under the auspices of the Office of Dispute Resolution for Acquisition. The parties pay equally for the services of a Compensated Neutral, unless otherwise agreed to by the parties. A Dispute Resolution Officer (DRO) or Neutral cannot be a Compensated Neutral.

(g) *Contract Dispute,* as used in this part, means a written request to the Office of Dispute Resolution for Acquisition seeking resolution, under an existing FAA contract subject to the AMS, of a claim for the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to or involving an alleged breach of that contract. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision. Contract disputes for purposes of ADR only may also involve contracts not subject to the AMS.

(h) *Default Adjudicative Process* is an adjudicative process used to resolve protests or contract disputes where the parties cannot achieve resolution through informal communication or the use of ADR. The Default Adjudicative Process is conducted by a DRO or Special Master selected by the Office of Dispute Resolution for Acquisition to serve as ''adjudicative officers,'' as that term is used in part 14 of this chapter.

(i) *Discovery* is the procedure where opposing parties in a protest or contract dispute may, either voluntarily or to the extent directed by the Office of Dispute Resolution for Acquisition, obtain testimony from, or documents and information held by, other parties or non-parties.

(j) *Dispute Resolution Officer* (DRO) is a licensed attorney reporting to the Office of Dispute Resolution for Acquisition. The term DRO can include the Director of the Office of Dispute Resolution for Acquisition, Office of Dispute Resolution for Acquisition staff attorneys or other FAA attorneys assigned to the Office of Dispute Resolution for Acquisition.

(k) *An interested party,* in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract. Proposed subcontractors are not ''interested parties'' within this definition and are not eligible to submit protests to the Office of Dispute Resolution for Acquisition.

(l) An *intervenor* is an interested party other than the protester whose participation in a protest is allowed by the Office of Dispute Resolution for Acquisition. For a post-award protest, the awardee of the contract that is the subject of the protest shall be allowed, upon request, to participate as an intervenor in the protest. In such a protest, no other interested parties shall be allowed to participate as intervenors.

(m) *Neutral* refers to an impartial third party in the ADR process chosen by the Office of Dispute Resolution for Acquisition to act as a facilitator, mediator, arbitrator, or otherwise to resolve a protest or contract dispute. A Neutral can be a DRO or a person not an employee of the FAA who serves on behalf of the Office of Dispute Resolution for Acquisition.

(n) The *Office of Dispute Resolution for Acquisition* (ODRA), under the direction of the Director, acts on behalf of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to be the Administrator on matters concerning protests or contract disputes.

(o) *Parties* include the protester(s) or (in the case of a contract dispute) the contractor, the FAA, and any intervenor(s).

(p) *Product Team,* as used in these rules, refers to the FAA organization(s) responsible for the procurement activity, without regard to funding source, and includes the Contracting Officer (CO) and assigned FAA legal counsel, when the FAA organization(s) represent(s) the FAA as a party to a protest or contract dispute before the Office of Dispute Resolution for Acquisition. The CO is responsible for all Product Team communications with and submissions to the Office of Dispute Resolution for Acquisition through assigned FAA counsel.

(q) *Screening Information Request* (SIR) means a request by the FAA for documentation, information, presentations, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA. The purpose of a SIR is for the FAA to obtain information needed for it to proceed with a source selection decision and contract award.

(r) A *Special Master* is an attorney, usually with extensive adjudicative experience, who has been assigned by the Office of Dispute Resolution for Acquisition to act as its finder of fact, and to make findings and recommendations based upon AMS policy and applicable law and authorities in the Default Adjudicative Process.

§ 17.5 Delegation of authority.

(a) The authority of the Administrator to conduct dispute resolution proceedings concerning acquisition matters, is delegated to the Director of the Office of Dispute Resolution for Acquisition.

(b) The Director of the Office of Dispute Resolution for Acquisition may redelegate to Special Masters and DROs such delegated authority in paragraph (a) of this section as is deemed necessary by the Director for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions or other disciplinary actions.

§ 17.7 Filing and computation of time.

(a) Filing of a protest or contract dispute may be accomplished by mail, overnight delivery, hand delivery, or by facsimile. A protest or contract dispute is considered to be filed on the date it is received by the Office of Dispute Resolution for Acquisition during normal business hours. The Office of Dispute Resolution for Acquisition's normal business hours are from 8:30 a.m. to 5 p.m. est or edt, whichever is in use. A protest or contract dispute received via mail, after the time period prescribed for filing, shall not be considered timely filed even though it may be postmarked within the time period prescribed for filing.

(b) Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a contract dispute may be accomplished by any means available in paragraph (a) of this section. Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a protest may only be accomplished by overnight delivery, hand delivery or facsimile.

(c) The time limits stated in this part are calculated in business days, which exclude weekends and Federal holidays. In computing time, the day of the event beginning a period of time shall not be included. If the last day of a period falls on a weekend or a Federal holiday, the first business day following the weekend or holiday shall be considered the last day of the period.

§ 17.9 Protective orders.

(a) The Office of Dispute Resolution for Acquisition may issue protective orders addressing the treatment of protected information, either at the request of a party or upon its own initiative. Such information may include proprietary, confidential, or source-selection-sensitive material, or other information the release of which could result in a competitive advantage to one or more firms.

(b) The terms of the Office of Dispute Resolution for Acquisition's standard protective order may be altered to suit particular circumstances, by negotiation of the parties, subject to the approval of the Office of Dispute Resolution for Acquisition. The protective order establishes procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the Office of Dispute Resolution for Acquisition, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decisionmaking for any firm that could gain a competitive advantage from access to the protected information and that the applicant will diligently protect any protected information received from inadvertent disclosure. Objections to an applicant's admission shall be raised within two (2) days of the application, although the Office of Dispute Resolution for Acquisition may consider objections raised after that time for good cause.

(d) Any violation of the terms of a protective order may result in the imposition of sanctions or the taking of the actions as the Office of Dispute Resolution for Acquisition deems appropriate.

(e) The parties are permitted to agree upon what material is to be covered by a protective order, subject to approval by the Office of Dispute Resolution for Acquisition.

Subpart B—Protests

§ 17.11 Matters not subject to protest.

The following matters may not be protested before the Office of Dispute Resolution for Acquisition:

(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.

§ 17.13 Dispute resolution process for protests.

(a) Protests concerning FAA SIRs or contract awards shall be resolved pursuant to this part.

(b) The offeror initially should attempt to resolve any issues concerning potential protests with the CO. The CO, in coordination with FAA legal counsel, will make reasonable efforts to answer questions promptly and completely, and, where possible, to resolve concerns or controversies.

(c) Offerors or prospective offerors shall file a protest with the Office of Dispute Resolution for Acquisition in accordance with § 17.15. The protest time limitations set forth in § 17.15 will not be extended by attempts to resolve a potential protest with the CO. Other than the time limitations specified in § 17.15 for the filing of protests, the Office of Dispute Resolution for Acquisition retains the discretion to modify any time constraints imposed in connection with protests.

(d) In accordance with § 17.17, the Office of Dispute Resolution for Acquisition shall convene a status conference for the protest. Under the procedures set forth in that section, the parties generally will either decide to utilize Alternative Dispute Resolution (ADR) techniques to resolve the protest, pursuant to subpart D of this part, or they will proceed under the Default Adjudicative Process set forth in subpart E of this part. However, as provided in § 17.31(c), informal ADR techniques may be utilized simultaneously with ongoing adjudication.

(e) The Office of Dispute Resolution for Acquisition Director shall designate Dispute Resolution Officers (DROs) or Special Masters for protests.

(f) Multiple protests concerning the same SIR, solicitation, or contract award may be consolidated at the discretion of the Office of Dispute Resolution for Acquisition, and assigned to a single DRO or Special Master for adjudication.

(g) Procurement activities, and, where applicable, contractor performance pending resolution of a protest shall continue during the pendency of a protest, unless there is a compelling reason to suspend or delay all or part of the procurement activities. Pursuant to §§ 17.15(d) and 17.17(b), the Office of Dispute Resolution for Acquisition may recommend suspension of award or delay of contract performance, in whole or in part, for a compelling reason. A decision to suspend or delay procurement activities or contractor performance would be made in writing by the FAA Administrator or the Administrator's delegee.

§ 17.15 Filing a protest.

(a) Only an interested party may file a protest, and shall initiate a protest by filing a written protest with the Office of Dispute Resolution for Acquisition

within the times set forth below, or the protest shall be dismissed as untimely:

(1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.

(2) In procurements where proposals are requested, alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation;

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

(b) Protest shall be filed at:

(1) Office of Dispute Resolution for Acquisition, AGC–70, Federal Aviation Administration, 400 7th Street, SW, Room 8332, Washington, DC 20590, Telephone: (202) 366–6400, Facsimile: (202) 366–7400;

or

(2) Other address as shall be published from time to time in the **Federal Register**.

(c) A Protest shall be in writing, and set forth:

(1) The protester's name, address, telephone number, and facsimile (FAX) number;

(2) The name, address, telephone number, and FAX number of a person designated by the protester (Protester Designee), and who shall be duly authorized to represent the protester, to be the point of contact;

(3) The SIR number or, if available, the contract number and the name of the CO;

(4) The basis for the protester's status as an interested party;

(5) The facts supporting the timeliness of the protest;

(6) Whether the protester requests a protective order, the material to be protected, and attach a redacted copy of that material;

(7) A detailed statement of both the legal and factual grounds of the protest, and attach one (1) copy of each relevant document;

(8) The remedy or remedies sought by the protester, as set forth in § 17.21;

(9) The signature of the Protester Designee, or another person duly authorized to represent the protester.

(d) If the protester wishes to request a suspension or delay of the procurement, in whole or in part, and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement because of the protested action, the protester shall:

(1) Set forth each such compelling reason, supply all facts supporting the protester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.

(2) Clearly identify any adverse consequences to the protester, the FAA, or any interested party, should the FAA not suspend or delay the procurement.

(e) At the same time as filing the protest with the Office of Dispute Resolution for Acquisition, the protester shall serve a copy of the protest on the CO and any other official designated in the SIR for receipt of protests by means reasonably calculated to be received by the CO on the same day as it is to be received by the Office of Dispute Resolution for Acquisition. The protest shall include a signed statement from the protester, certifying to the Office of Dispute Resolution for Acquisition the manner of service, date, and time when a copy of the protest was served on the CO and other designated official(s).

(f) Upon receipt of the protest, the CO shall inform the Office of Dispute Resolution for Acquisition of the names, addresses, and telephone and facsimile numbers of the awardee and/or other interested parties, if known, and shall, in such notice, designate a person as the point of contact for the Office of Dispute Resolution for Acquisition by facsimile. The CO shall also notify the awardee and/or interested parties in writing of the existence of the protest the same day as the CO provides the foregoing information to the Office of Dispute Resolution for Acquisition.

(g) The Office of Dispute Resolution for Acquisition has discretion to designate the parties who shall participate in the protest as intervenors. For awarded contracts, only the awardee may participate as an intervenor.

§ 17.17 Initial protest procedures.

(a) If, as part of a protest, the protester requests a suspension or delay of procurement, in whole or in part, pursuant to § 17.15(d), the Product Team shall submit a response to the request to the Office of Dispute Resolution for Acquisition within two (2) business days of receipt of the protest. Copies of the response shall be furnished to the protester and any intervenor(s) so as to be received within the same two (2) business days. The protester and any intervenor(s) shall have the opportunity of providing additional comments on the response within an additional period of two (2) business days. Based on its review of such submissions, the Office of Dispute Resolution for Acquisition, in its discretion, may recommend such suspension or delay to the Administrator or the Administrator's designee.

(b) Within five (5) business days of the filing of a protest, or as soon thereafter as practicable, the Office of Dispute Resolution for Acquisition shall convene a status conference to—

(1) Review procedures;

(2) Identify and develop issues related to summary dismissal and suspension recommendations;

(3) Handle issues related to protected information and the issuance of any needed protective order;

(4) Encourage the parties to use ADR;

(5) Conduct or arrange for early neutral evaluation of the protest by a DRO or Neutral or Compensated Neutral, at the discretion of the Office of Dispute Resolution for Acquisition and/or based upon the agreement or request of any party(ies) seeking such evaluation; and

(6) For any other reason deemed appropriate by the DRO or by the Office of Dispute Resolution for Acquisition.

(c) On the fifth business day following the status conference, the Product Team and protester will file with the Office of Dispute Resolution for Acquisition—

(1) A joint statement that they have decided to pursue ADR proceedings in lieu of adjudication in order to resolve the protest; or

(2) Joint or separate written explanations as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed..

(d) Should the Product Team and protester elect to utilize ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an Office of Dispute Resolution for Acquisition-designated Neutral or a Compensated Neutral of their own choosing) pursuant to § 17.33(c), and shall execute and file with the Office of Dispute Resolution for Acquisition a written ADR agreement within five (5) business days after the status conference. Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.

(e) Should the Product Team or protester indicate at the status conference that ADR proceedings will not be used, then within ten (10) business days following the status conference, the Product Team will file with the Office of Dispute Resolution for Acquisition a Product Team Response to the protest. The Office of Dispute Resolution for Acquisition may alter the schedule for filing of the Product Team Response to accommodate the requirements of a particular protest.

(f) The Product Team Response shall consist of a written chronological statement of pertinent facts, and a written presentation of applicable legal or other defenses. The Product Team Response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed and tabbed. A copy of the response shall be furnished so as to be received by the protester and any intervenor(s) on the same date it is filed with the Office of Dispute Resolution for Acquisition, if practicable, but in any event no later than one (1) business day after the date if it is filed with the Office of Dispute Resolution for Acquisition. In all cases, the Product Team shall indicate the method of service used.

(g) Should the parties pursue ADR proceedings under subpart D of this part and fail to achieve a complete resolution of the protest via ADR, the Office of Dispute Resolution for Acquisition, upon notification of that fact by any of the parties, shall designate a DRO or Special Master for purposes of adjudication under subpart E of this part, and the DRO or Special Master shall convene a status conference, wherein he/she shall establish a schedule for the filing of the Product Team Response and further submissions.

(h) Upon submission of the Product Team Response, the protest will proceed under the Default Adjudicative Process pursuant to § 17.37.

(i) The time limitations of this section maybe extended by the Office of Dispute Resolution for Acquisition for good cause.

§ 17.19 Dismissal or summary decision of protests.

(a) At any time during the protest, any party may request, by motion to the Office of Dispute Resolution for Acquisition, that—

(1) The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, if the protester fails to establish that the protest is timely, or that the protester has no standing to pursue the protest;

(2) The protest, or any count or portion of a protest, be dismissed, if frivolous or without basis in fact or law, or for failure to state a claim upon which relief may be had;

(3) A summary decision be issued with respect to the protest, or any count or portion of a protest, if:

(i) The undisputed material facts demonstrate a rational basis for the Product Team action or inaction in question, and there are no other material facts in dispute that would overcome a finding of such a rational basis; or

(ii) The undisputed material facts demonstrate, that no rational basis exists for the Product Team action or inaction in question, and there are no material facts in dispute that would overcome a finding of the lack of such a rational basis.

(b) In connection with any request for dismissal or summary decision, the Office of Dispute Resolution for Acquisition shall consider any material facts in dispute, in a light most favorable to the party against whom the request is made.

(c) Either upon motion by a party or on its own initiative, the Office of Dispute Resolution for Acquisition may, at any time, exercise its discretion to:

(1) Recommend to the Administrator dismissal or the issuance of a summary decision with respect to the entire protest;

(2) Dismiss the entire protest or issue a summary decision with respect to the entire protest, if delegated that authority by the Administrator; or

(3) Dismiss or issue a summary decision with respect to any count or portion of a protest.

(d) A dismissal or summary decision regarding the entire protest by either the Administrator, or the Office of Dispute Resolution for Acquisition by delegation, shall be construed as a final agency order. A dismissal or summary decision that does not resolve all counts or portions of a protest shall not constitute a final agency order, unless and until such dismissal or decision is incorporated or otherwise adopted in a decision by the Administrator (or the Office of Dispute Resolution for Acquisition, by delegation) regarding the entire protest.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.

§ 17.21 Protest remedies.

(a) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes. Such remedies may include, but are not limited to one or more, 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 recompetition;

(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 combination of the above remedies, or any other action consistent with the AMS that is appropriate under the circumstances.

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

(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).

Subpart C—Contract Disputes

§ 17.23 Dispute resolution process for contract disputes.

(a) All contract disputes arising under contracts subject to the AMS shall be resolved under this subpart.

(b) Contractors shall file contract disputes with the Office of Dispute Resolution for Acquisition and the CO pursuant to § 17.25.

(c) After filing the contract dispute, the contractor should seek informal resolution with the CO:

(1) The CO, with the advice of FAA legal counsel, has full discretion to settle contract disputes, except where the matter involves fraud;

(2) The parties shall have up to twenty (20) business days within which to resolve the dispute informally, and may contact the Office of Dispute Resolution for Acquisition for assistance in facilitating such a resolution; and

(3) If no informal resolution is achieved during the twenty (20)

business day period, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition pursuant to § 17.27.

(d) If informal resolution of the contract dispute appears probable, the Office of Dispute Resolution for Acquisition shall extend the time for the filing of the joint statement under § 17.27 for up to an additional twenty (20) business days, upon joint request of the CO and contractor.

(e) The Office of Dispute Resolution for Acquisition shall hold a status conference with the parties within ten (10) business days after receipt of the joint statement required by § 17.27, or as soon thereafter as is practicable, in order to establish the procedures to be utilized to resolve the contract dispute.

(f) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies for a successful contract dispute, that are consistent with the AMS and applicable law.

§ 17.25 Filing a contract dispute.

(a) Contract disputes are to be in writing and shall contain:

(1) The contractor's name, address, telephone and fax numbers and the name, address, telephone and fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;

(2) The contract number and the name of the Contracting Officer;

(3) A detailed chronological statement of the facts and of the legal grounds for the contractor's positions regarding each element or count of the contract dispute (i.e., broken down by individual claim item), citing to relevant contract provisions and documents and attaching copies of those provisions and documents;

(4) All information establishing that the contract dispute was timely filed;

(5) A request for a specific remedy, and if a monetary remedy is requested, a sum certain must be specified and pertinent cost information and documentation (e.g., invoices and cancelled checks) attached, broken down by individual claim item and summarized; and

(6) The signature of a duly authorized representative of the initiating party.

(b) Contract disputes shall be filed by mail, in person, by overnight delivery or by facsimile at the following address:

(1) Office of Dispute Resolution for Acquisition, AGC–70, Federal Aviation Administration, 400 7th Street, SW, Room 8332, Washington, DC 20590, Telephone: (202) 366–6400, Facsimile: (202) 366–7400;
or

(2) Other address as shall be published from time to time in the **Federal Register**.

(c) A contract dispute against the FAA shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the accrual of the contract claim involved. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise shall be filed within two (2) years after the accrual of the contract claim. If an underlying contract entered into prior to the effective date of this part provides for time limitations for filing of contract disputes with The Office of Dispute Resolution for Acquisition which differ from the aforesaid two (2) year period, the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the Office of Dispute Resolution for Acquisition a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA claims related to warranty issues, gross mistakes amounting to fraud or latent defects. FAA claims against the contractor based on warranty issues must be filed within the time specified under applicable contract warranty provisions. Any FAA claims against the contractor based on gross mistakes amounting to fraud or latent defects shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect.

(d) A party shall serve a copy of the contract dispute upon the other party, by means reasonably calculated to be received on the same day as the filing is to be received by the Office of Dispute Resolution for Acquisition.

§ 17.27 Submission of joint or separate statements.

(a) If the matter has not been resolved informally, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition no later than twenty (20) business days after the filing of the contract dispute. The Office of Dispute Resolution for Acquisition may extend this time, pursuant to § 17.23(d).

(b) The statement(s) shall include either—

(1) A joint request for ADR, and an executed ADR agreement, pursuant to § 17.33(d), specifying which ADR techniques will be employed; or

(2) Written explanation(s) as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed.

(c) Such statements shall be directed to the following address:

(1) Office of Dispute Resolution for Acquisition, AGC–70, Federal Aviation Administration, 400 7th Street, SW., Room 8332, Washington, DC 20590, Telephone: (202) 366–6400, Facsimile: (202) 366–7400;
or

(2) Other address as shall be published from time to time in the **Federal Register.**

(d) The submission of a statement which indicates that ADR will not be utilized will not in any way preclude the parties from engaging in informal ADR techniques with the Office of Dispute Resolution for Acquisition (neutral evaluation and/or informal mediation) concurrently with ongoing adjudication under the Default Adjudicative Process, pursuant to § 17.31(c).

§ 17.29 Dismissal or summary decision of contract disputes.

(a) Any party may request, by motion to the Office of Dispute Resolution for Acquisition, that a contract dispute be dismissed, or that a count or portion of a contract dispute be stricken, if:

(1) It was not timely filed with the Office of Dispute Resolution for Acquisition;

(2) It was filed by a subcontractor;

(3) It fails to state a matter upon which relief may be had; or

(4) It involves a matter not subject to the jurisdiction of the Office of Dispute Resolution for Acquisition.

(b) In connection with any request for dismissal of a contract dispute, or to strike a count or portion thereof, the Office of Dispute Resolution for Acquisition should consider any material facts in dispute in a light most favorable to the party against whom the request for dismissal is made.

(c) At any time, whether pursuant to a motion or request or on its own initiative and at its discretion, the Office of Dispute Resolution for Acquisition may—

(1) Dismiss or strike a count or portion of a contract dispute;

(2) Recommend to the Administrator that the entire contract dispute be dismissed; or

(3) With delegation from the Administrator, dismiss the entire contract dispute.

(d) An order of dismissal of the entire contract dispute, issued either by the Administrator or by the Office of Dispute Resolution for Acquisition where delegation exists, on the grounds set forth in this section, shall constitute

a final agency order. An Office of Dispute Resolution for Acquisition order dismissing or striking a count or portion of a contract dispute shall not constitute a final agency order, unless and until such Office of Dispute Resolution for Acquisition order is incorporated or otherwise adopted in a decision of the Administrator or the Administrator's delegee.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to a proposed dismissal or summary decision.

Subpart D—Alternative Dispute Resolution

§ 17.31 Use of alternative dispute resolution.

(a) The Office of Dispute Resolution for Acquisition shall encourage the parties to utilize ADR as their primary means to resolve protests and contract disputes.

(b) The parties shall make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The Office of Dispute Resolution for Acquisition will encourage use of ADR techniques such as mediation, neutral evaluation, or minitrials, or variations of these techniques as agreed by the parties and approved by the Office of Dispute Resolution for Acquisition. The Office of Dispute Resolution for Acquisition shall assign a DRO to explore ADR options with the parties and to arrange for an early neutral evaluation of the merits of a case, if requested by any party.

(c) The Default Adjudicative Process will be used where the parties cannot achieve agreement on the use of ADR; or where ADR has been employed but has not resolved all pending issues in dispute; or where the Office of Dispute Resolution for Acquisition concludes that ADR will not provide an expeditious means of resolving a particular dispute. Even where the Default Adjudicative Process is to be used, the Office of Dispute Resolution for Acquisition, with the parties consent, may employ informal ADR techniques concurrently with and in parallel to adjudication.

§ 17.33 Election of alternative dispute resolution process.

(a) The Office of Dispute Resolution for Acquisition will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually Compensated Neutral, if the parties agree as to how the costs of any such Compensated Neutral are to be shared.

(b) The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition within five (5) business days after the Office of Dispute Resolution for Acquisition conducts a status conference pursuant to § 17.17(c). The Office of Dispute Resolution for Acquisition may extend this time for good cause.

(c) The parties using an ADR process to resolve a contract dispute shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition as part of the joint statement specified under § 17.27.

(d) The parties to a protest or contract dispute who elect to use ADR must submit to the Office of Dispute Resolution for Acquisition an ADR agreement setting forth:

(1) The type of ADR technique(s) to be used;

(2) The agreed-upon manner of using the ADR process; and

(3) Whether the parties agree to use a Neutral through The Office of Dispute Resolution for Acquisition or to use a Compensated Neutral of their choosing, and, if a Compensated Neutral is to be used, how the cost of the Compensated Neutral's services will be shared.

(e) Non-binding ADR techniques are not mutually exclusive, and may be used in combination if the parties agree that a combination is most appropriate to the dispute. The techniques to be employed must be determined in advance by the parties and shall be expressly described in their ADR agreement. The agreement may provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter. An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Default Adjudicative Process, upon the election of any party. Notwithstanding such termination, the parties may still engage with the Office of Dispute Resolution for Acquisition in informal ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication, pursuant to § 17.31(c).

(f) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.

(g) For protests, the ADR process shall be completed within twenty (20) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.

(h) For contract disputes, the ADR process shall be completed within forty (40) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.

(i) The parties shall submit to the Office of Dispute Resolution for Acquisition an agreed-upon protective order, if necessary, in accordance with the requirements of § 17.9.

§ 17.35 Selection of neutrals for the alternative dispute resolution process.

(a) In connection with the ADR process, the parties may select a Compensated Neutral acceptable to both, or may request the Office of Dispute Resolution for Acquisition to provide the services of a DRO or other Neutral.

(b) In cases where the parties select a Compensated Neutral who is not familiar with Office of Dispute Resolution for Acquisition procedural matters, the parties or Compensated Neutral may request the Office of Dispute Resolution for Acquisition for the services of a DRO to advise on such matters.

Subpart E—Default Adjudicative Process

§ 17.37 Default adjudicative process for protests.

(a) Other than for the resolution of preliminary or dispositive matters, the Default Adjudicative Process for protests will commence upon the submission of the Product Team Response to the Office of Dispute Resolution for Acquisition, pursuant to § 17.17.

(b) The Director of the Office of Dispute Resolution for Acquisition shall select a DRO or a Special Master to conduct fact-finding proceedings and to provide findings and recommendations concerning some or all of the matters in controversy.

(c) The DRO or Special Master may prepare procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties. As a minimum, the protester and any intervenor(s) must submit to the Office of Dispute Resolution for Acquisition written comments with respect to the Product Team Response within five (5) business days of the Response having been filed with the Office of Dispute Resolution for Acquisition or within five (5) business days of their receipt of the Response, whichever is later. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the Office of Dispute Resolution for Acquisition.

(d) The DRO or Special Master may convene the parties and/or their representatives, as needed, to pursue the Default Adjudicative Process.

(e) If, in the sole judgment of the DRO or Special Master, the parties have presented written material sufficient to allow the protest to be decided on the record presented, the DRO or Special Master shall have the discretion to decide the protest on that basis.

(f) The parties may engage in voluntary discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest. The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents. Where justified, the DRO or Special Master may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with time frames established in this part and with the FAA policy of providing fair and expeditious dispute resolution.

(g) The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the protest, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(h) The Director of the Office of Dispute Resolution for Acquisition may review the status of any protest in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.

(i) Within thirty (30) business days of the commencement of the Default Adjudicative Process, or at the discretion of the Office of Dispute Resolution for Acquisition, the DRO or Special Master will submit findings and recommendations to the Office of Dispute Resolution for Acquisition 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.

(j) In arriving at findings and recommendations relating to protests, the DRO or Special Master shall consider whether or not the Product Team actions in question had a rational basis, and whether or not the Product Team decision under question was arbitrary, capricious or an abuse of discretion. Findings of fact underlying the recommendations must be supported by substantial evidence.

(k) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with § 17.21.

(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, only upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the protest, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

(m) The time limitations set forth in this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.

§ 17.39 Default adjudicative process for contract disputes.

(a) The Default Adjudicative Process for contract disputes will commence on the latter of:

(1) The parties' submission to the Office of Dispute Resolution for Acquisition of a joint statement pursuant to § 17.27 which indicates that ADR will not be utilized; or

(2) The parties' submission to the Office of Dispute Resolution for Acquisition of notification by any party that the parties have not settled some or all of the dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) Within twenty (2) business days of the commencement of the Default Adjudicative Process, the Product Team shall prepare and submit to the Office of Dispute Resolution for Acquisition, with a copy to the contractor, a chronologically arranged and indexed Dispute File, containing all documents which are relevant to the facts and issues in dispute. The contractor will be entitled to supplement such a Dispute File with additional documents.

(c) The Director of the Office of Dispute Resolution for Acquisition shall assign a DRO or a Special Master to conduct fact-finding proceedings and provide findings and recommendations concerning the issues in dispute.

(d) The Director of the Office of Dispute Resolution for Acquisition may delegate authority to the DRO or Special Master to conduct a Status Conference within ten (10) business days of the commencement of the Default Adjudicative Process, and, may further delegate to the DRO or Special Master the authority to issue such orders or decisions to promote the efficient resolution of the contract dispute.

(e) At any such Status Conference, or as necessary during the Default Adjudicative Process, the DRO or Special Master will:

(1) Determine the appropriate amount of discovery required to resolve the dispute;

(2) Review the need for a protective order, and if one is needed, prepare a protective order pursuant to § 17.9;

(3) Determine whether any issue can be stricken; and

(4) Prepare necessary procedural orders for the proceedings.

(f) At a time or at times determined by the DRO or Special Master, and in advance of the decision of the case, the parties shall make final submissions to the Office of Dispute Resolution for Acquisition and to the DRO or Special Master, which submissions shall include the following:

(1) A joint statement of the issues;

(2) A joint statement of undisputed facts related to each issue;

(3) Separate statements of disputed facts related to each issue, with appropriate citations to documents in the Dispute File, to pages of transcripts of any hearing or deposition, or to any affidavit or exhibit which a party may wish to submit with its statement;

(4) Separate legal analyses in support of the parties' respective positions on disputed issues.

(g) Each party shall serve a copy of its final submission on the other party by means reasonable calculated so that the other party receives such submissions on the same day it is received by the Office of Dispute Resolution for Acquisition.

(h) The DRO or Special Master may decide the contract dispute on the basis of the record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, allow the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings on the record shall be conducted by the ODRA:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(i) The DRO or Special Master shall prepare findings and recommendations within thirty (30) business days from receipt of the final submissions of the parties, unless that time is extended by the Officer of Dispute Resolution for Acquisition for good cause. The findings and recommendations shall contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, a recommendation for a final FAA order, and, if appropriate, suggestions for future FAA action.

(j) As a party of the findings and recommendations, the DRO or Special Master shall review the disputed issue or issues in the context of the contract, any applicable law and the AMS. Any finding of fact set forth in the fundings and recommendation must be supported by substantial evidence.

(k) The Director of the Office of Dispute Resolution for Acquisition may review the status of any contract dispute in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.

(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the contract dispute, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personal shall be provided copies of the unredacted findings and recommendation.

(m) The time limitations set forth in this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.

Subpart F—Finality and Review

§ 17.41 Final orders.

All final FAA orders regarding protests or connect disputes under this part are to be issued by the FAA Administrator or by a delegee of the Administrator.

§ 17.43 Judicial review.

(a) A protestor or contractor may seek of a final FAA order, pursuant to 49 U.S.C. 46110, only after the administrative remedies of this part have been exhausted.

(b) A copy of the petition for review shall be filed with the Office of Dispute Resolution for Acquisition and the FAA Chief Counsel on the date that the petition for review is filed with the appropriate circuit court of appeals.

§ 17.45 Conforming amendments.

The FAA shall amend pertinent provisions of the AMS, standard contract forms and clauses, and any guidance to contracting officials, so as to conform to the provisions of this part.

Appendix A to Part 17—Alternative Dispute Resolution (ADR)

A. The FAA dispute resolution procedures encourage the parties to protests and contract disputes to use ADR as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996, Pub. L. 104–320, 5 U.S.C. 570–579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the Office of Dispute Resolution for Acquisition would encourage parties to consider ADR techniques such as case evaluation, mediation, or arbitration.

B. ADR encompasses a number of processes and techniques for resolving protests or contract disputes. The most commonly used types include:

(1) *Mediation.* The Neutral or Compensated Neutral ascertains the needs and interests of both parties and facilitates discussions between or among the parties and an amicable resolution of their differences, seeking approaches to bridge the gaps between the parties' respective positions. The Neutral or Compensated Neutral can meet with the parties separately, conduct joint meetings with the parties' representatives, or employ both methods in appropriate cases.

(2) *Neutral Evaluation.* At any stage during the ADR process, as the parties may agree, the Neutral or Compensated Neutral will provide a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, so as to facilitate further discussion and resolution.

(3) *Minitrial.* The minitrial resembles adjudication, but is less formal. It is used to provide an efficient process for airing and resolving more complex, fact-intensive disputes. The parties select principal representatives who should be senior officials of their respective organizations, having authority to negotiate a complete settlement. It is preferable that the principals be individuals who were not directly involved in the events leading to the dispute and who, thus, may be able to maintain a degree of impartiality during the proceeding. In order to maintain such impartiality, the principals typically serve as ''judges'' over the mini-trial proceeding together with the

Neutral or Compensated Neutral. The proceeding is aimed at informing the principal representatives and the Neutral or Compensated Neutral of the underlying bases of the parties' positions. Each party is given the opportunity and responsibility to present its position. The presentations may be made through the parties' counsel and/or through some limited testimony of fact witnesses or experts, which may be subject to cross-examination or rebuttal. Normally, witnesses are not sworn in and transcripts are not made of the proceedings. Similarly, rules of evidence are not directly applicable, though it is recommended that the Neutral or Compensated Neutral be provided authority by the parties' ADR agreement to exclude evidence which is not relevant to the issues in dispute, for the sake of an efficient proceeding. Frequently, minitrials are followed either by direct one-on-one negotiations by the parties' principals or by meetings between the Neutral/Compensated Neutral and the parties' principals, at which the Neutral/Compensated Neutral may offer his or her views on the parties' positions (*i.e.*, Neutral Evaluation) and/or facilitate negotiations and ultimate resolution via Mediation.

Issued in Washington, DC, on June 10, 1999.

Jane F. Garvey,

Administrator.

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