federal register

Tuesday
August 25, 1998

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Parts 14 and 17

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 14 and 17

[Docket No. 29310; Notice No. 98–8]

RIN 2120–AG19

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes regulations for the conduct of protests and contract disputes under the Federal Aviation Administration Acquisition Management System. The proposed regulations set forth procedures for the efficient management of protests and contract disputes within the Federal Aviation Administration procurement system. The regulations would allow protesters and contractors a uniform, economical means of pursuing protests and contract disputes with the Federal Aviation Administration. Also, the Federal Aviation Administration regulations governing the application for, and award of, Equal Access to Justice Act fees are amended to include procedures applicable to the resolution of protests and contract disputes under the Acquisition Management System, and to conform to the current Equal Access to Justice Act statute.

DATES: Comments must be received on or before October 26, 1998.

ADDRESSES: Comments on this notice may be delivered or mailed, in triplicate, to: U.S. Department of Transportation Dockets, Docket No.: FAA–98–29310, 400 Seventh Street, SW., Room 401, Washington, DC 20591. Comments submitted must be marked: ''Docket No. 29310.'' Comments may also be sent electronically to the following Internet address: 9-NPRM-CMTS@faa.dot.gov. Comments may be filed and examined in Room Plaza 401 between 10:00 a.m. and 5:00 p.m., weekdays except Federal holidays.

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:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments must identify the regulatory docket or notice number and be submitted in triplicate to the Rules Docket address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the closing date will be considered by the Administrator before taking action on this proposed rulemaking. Late-filed comments will be considered to the extent practicable. The proposals contained in this notice may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a pre-addressed, stamped postcard with those comments on which the following statement is made: ''Comments to Docket No. 29310.'' The postcard will be date stamped and mailed to the commenter.

Availability of NPRMs

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: 202–512–1661), or the FAA's Aviation Rulemaking Advisory Committee Bulletin Board service (telephone: (800) 322–2772 or (202) 267–5948).

Internet users may reach the FAA's web page at http://www.faa.gov/avr/arm/nprm/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 NPRM 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 notice number or docket number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, that describes the application procedure.

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. In recent years, the FAA acquisition system was hampered both by the number of procurement and acquisition laws and by the different forums that heard and decided procurement protests and contract disputes. Both the Administration and the Congress became concerned that the safety mission of the FAA might suffer from the complexity of the existing acquisition system.

In the Fiscal Year 1996 Department of Transportation Appropriations Act, Pub. L. 104–50, 109 Stat. 436 (November 15, 1995), the Congress directed the FAA ''to develop and implement, not later 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 instructed the FAA to design the system notwithstanding provisions of federal acquisition law, and specifically instructed the FAA not to use certain provisions of federal acquisition law. In response, the FAA developed the Acquisition Management System (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 a 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 included or referenced in all FAA Screening Information Requests (SIRs) and contracts, and are made available to offerors and contractors upon request or through briefings. The FAA has determined that it will be more

effective and efficient to establish by rulemaking the dispute resolution procedures that apply to all protests concerning SIRs and contract awards, and to all disputes arising from established contracts. The proposed 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 altered 49 U.S.C. 106(f) to make the Administrator of the FAA the final authority over the FAA procurement process.

These FAA dispute resolution procedures will encourage the parties to protests and contract disputes to use Alternate Dispute Resolution (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 in consonance with Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under these procedures, the ODRA would actively encourage 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 in part 17. 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, Part 14 is amended to provide guidance for the conduct of EAJA applications under the dispute resolution regulations promulgated in 14 CFR part 17.

General Discussion of the Proposals

14 CFR Part 14

The dispute resolution procedures in part 17 can include adversary adjudication, where the FAA program office responsible for the procurement activity is represented by counsel. The FAA EAJA regulations, 14 CFR part 14, would be amended to include procedures applicable to part 17. Also, part 14 would be amended to conform to changes made in the EAJA statute since the initial regulations were issued.

14 CFR Part 17

The proposed procedures implement the FAA Dispute Resolution Process under the direction of the Director of the ODRA. The procedures are designed to promote resolution of protests and contract disputes without formal adjudication. This process promotes informal resolution prior to and during direct ODRA involvement. The procedures promote the use of ADR, with the use of the Default Adjudicative Process available if ADR cannot resolve a protest or contract dispute.

Under Title 49, the Administrator has final authority with respect to the procurement of goods and services. That final authority is exercised when the Administrator approves or rejects an ODRA recommendation by a final order. Under Title 49, review of a final order by the Administrator must be sought in the U.S. courts of appeals.

Part 17 is organized along functional lines. Subpart A addresses general matters such as protective orders, filing, computing time, and the delegation of authority to the Director of the ODRA. Subpart B addresses initial matters pertaining to protests, including procedures for the use of ADR or for resort to the Default Adjudicative Process. Subpart C addresses initial matters pertaining to contract disputes, including procedures for use of ADR or for resort to the Default Adjudicative Process. Subpart D addresses the initiation and conduct of ADR. Subpart E addresses the Default Adjudicative Process. Subpart F addresses when a final order has been issued by the Administrator, and seeking review of a final order in a U.S. court of appeals.

Section-by-Section Discussion of the Proposals

14 CFR Part 14

Subpart A—General provisions

Section 14.02 Proceedings Covered

Section 14.02 would be amended to include adversary adjudication under the AMS.

Section 14.03 Eligibility of Applicants

Section 14.03(a) would be amended to add notice of the eligibility requirements set forth in 5 U.S.C. 504(b)(1)(B).

Section 14.03(f) would be amended to add the term ''adjudicative officer'' to the term ''administrative law judge (ALJ)'' for proceedings held under 14 CFR part 17 and the AMS.

Section 14.05 Allowance Fees and Expenses

Section 14.05(b) would be amended to alter the maximum hourly rate awarded for attorney's fees from $75 per hour to $125 per hour in order to conform to the revision of the EAJA statute in Pub. L. 104–121 (March 29, 1996).

Section 14.05(c) would be amended to add the term ''adjudicative officer'' for proceedings held under 14 CFR part 17 and the AMS.

Section 14.05(e) would be amended to reflect that the adversarial portion of a proceeding under 14 CFR part 17 and the AMS commences with the initiation of the adjudicative phase of the proceedings.

Subpart B—Information Required From Applicants

Section 14.11 Net Worth Exhibit

Section 14.11(c) would be amended to add the term ''adjudicative officer'' for proceedings held under 14 CFR part 17 and the AMS.

Subpart C—Procedures for Considering Applications

Section 14.20 When an Application May Be Filed

Section 14.20(a) would be amended to reflect that adversary proceedings under 14 CFR part 17 and the AMS conclude with the service of an order from the Administrator.

Section 14.20(c) would be amended to add a new paragraph (1) noting that the date of service of an order from the Administrator is the date of final disposition for proceedings under 14 CFR part 17 and the AMS; previous paragraphs (1) through (4) are renumbered (2) through (5) without change.

Section 14.21 Filing and Service of Documents

Section 14.21 would be amended to add the requirement that an application for award or other filing for proceedings under 14 CFR part 17 and the AMS must be filed with the opposing FAA attorney and the ODRA.

Section 14.22 Answer to Application

Section 14.22(b) would be amended to add the term ''adjudicative officer'' for proceedings held under 14 CFR part 17 and the AMS.

Section 14.24 Comments by Other Parties

Section 14.24(b) would be amended to add the term ''adjudicative officer'' for proceedings held under 14 CFR part 17 and the AMS.

Section 14.26 Further Proceedings

Section 14.26(a) would be amended to add the term ''adjudicative officer'' for proceedings held under 14 CFR part 17 and the AMS.

Section 14.27 Decision

Section 14.27 would be amended to add a new paragraph (b), requiring the adjudicative officer to prepare findings and recommendations concerning proceedings under 14 CFR part 17 and the AMS for the ODRA. Paragraph (c) sets forth the content of the initial decision of the ALJ in paragraph (a), and the findings and recommendations for the ODRA in paragraph (b).

Section 14.28 Review by FAA Decisionmaker

Section 14.28 would be amended to distinguish between proceedings under part 13 using an ALJ in paragraph (a), and proceedings under 14 CFR part 17 and the AMS in paragraph (b). A new paragraph (b) is added, requiring that, in proceedings under 14 CFR part 17 and the AMS, the adjudicative officer prepares findings and recommendations for the ODRA with recommendations as to whether or not an award should be made, the amount of the award, and the reasons therefor. The ODRA should submit a recommended order to the Administrator within sixty (60) business days after 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.

14 CFR Part 17

Subpart A—General

Section 17.1 Applicability and Purpose

Proposed § 17.1 would apply part 17 to all protests or contract disputes against the FAA arising from or relating to contracts entered into under the AMS.

Section 17.3 Definitions

Proposed § 17.3 would define certain terms used in this part. Of special note is that the definition for ''interested party'' pertains only to protests and to specific parties, and that a ''contract dispute'' does not require a final Contracting Officer (CO) decision, nor that the issue be in dispute. Part 17 defines the ''Program Office'' as the party representing the FAA in a protest or a contract dispute, and includes the responsible FAA procurement organization, the CO, and the assigned FAA legal counsel.

Section 17.5 Delegation of Authority

Proposed § 17.5(a) would set forth the delegation of the Administrator's authority to the Director of the Office of Dispute Resolution for Acquisition.

Proposed § 17.5(b) would state that the authority which has been delegated to the Director of the Office of Dispute Resolution for Acquisition may be re-delegated by the Director, Office of Dispute Resolution for Acquisition to a DRO or Special Master in order to resolve issues pertaining to protests or contract disputes.

Section 17.7 Filing and Computation of Time

Proposed § 17.7 would set forth the procedural requirements for filing a protest or contract dispute with the ODRA.

Proposed § 17.7(a) would set forth two important aspects of filing a protest or contract dispute with the ODRA. First, in addition to mail, overnight delivery, or hand delivery, a protest or contract dispute may be filed by facsimile. Second, there is no ''mail box rule.'' A filing must be received by the ODRA by the close of its normal business hours '' 5:00 p.m. (EST or EDT, whichever is in use)—on the last day of a given period, or the filing will be rejected as untimely.

Proposed § 17.7(b) would allow all submissions after the initial filing to be performed by any means available in paragraph (a).

Proposed § 17.7(c) would note that time limits stated in part 17 are calculated in business days only. The day of the event which starts the running of a time period is not counted, but the last day is counted, except where the last day falls on a weekend or federal holiday.

Proposed § 17.7(d) would inform the party wishing to seek judicial review of a final order that the procedures set forth in 49 U.S.C. 46110 shall govern. Please note that, independently of 49 U.S.C. 46110, proposed § 17.7(d) would require service of a copy of the petition for review upon the ODRA and the FAA attorney of record when the petition is filed with the court.

Section 17.9 Protective Orders

Proposed § 17.9 would address the formulation and use of protective orders. Many procurement protests or contract disputes potentially involve the use of trade secrets or confidential commercial information.

Proposed § 17.9(a) would state that the ODRA may issue protective orders upon the request of any party or on its own initiative. Proposed § 17.9(b) would set forth the requirements for a protective order.

Proposed § 17.9(c) would set forth the procedures for the access of counsel or consultants to material protected under the terms of a protective order. Persons participating in the protective order process must apply for access, and attest to a professional relationship with the party represented, and not be involved in competitive decisionmaking, as discussed in *U.S. Steel Corp.* v. *United States*, 730 F.2d 1465 (Fed. Cir. 1984).

Proposed § 17.9(d) would provide notice that sanctions are available against a person who violates the terms of a protective order agreement.

Proposed § 17.9(e) would allow the parties to agree upon what material may be covered by a protective order, subject to the approval of the Director of the ODRA.

Subpart B—Protests

Section 17.11 Matters Not Subject to Protest

Proposed § 17.11 would set forth those procurement actions that are not subject to protest before the ODRA.

Section 17.13 Dispute Resolution Process for Protests

Proposed § 17.13 would outline the FAA Dispute Resolution Process for protests, emphasizing efficient and rapid resolution consistent with sound case management.

Proposed § 17.13(a) would require that all protests be conducted under the FAA Dispute Resolution Process for Protests.

Proposed § 17.13(b) would encourage the potential protester to seek informal resolution with the Contracting Officer (CO) prior to filing a protest with the ODRA.

Proposed § 17.13(c) would allow a protest to be filed pursuant to § 17.15 if either informal resolution with the CO is not successful, or the time limits set forth in proposed § 17.17 are about to expire. Attempts at informal resolution with the CO will not extend the time limits in § 17.17.

Proposed § 17.13(d) would set forth the protest procedure that would be followed. The initial process includes a status conference being held by the ODRA, after which the parties will have five (5) working days to determine whether they can use ADR pursuant to Subpart D of this part, and if they are unable to do so, the parties will have to state why they cannot. If the parties can

use ADR, they are allowed five (5) working days in which to submit a signed ADR agreement to the ODRA. The parties will have twenty (20) working days within which to complete the ADR process. If the parties cannot agree to ADR and must resort to the Default Adjudicative Process, the Program Office will have ten (10) working days after the status conference to submit an initial response to the protest, after which the Default Adjudicative Process under Subpart E will commence. If the ADR process is unsuccessful, the ODRA will assign a DRO or Special Master for the Default Adjudicative Process under Subpart E of this part.

Proposed § 17.13(e) would allow the ODRA to modify any time constraints for pending protests.

Proposed § 17.13(f) would allow the ODRA to combine multiple protests concerning the same SIR or contract award for efficient case resolution.

Proposed § 17.13(g) would state the presumption against suspension of a procurement during the pendency of a protest. The section states that procurement will continue unless compelling reasons warrant suspension.

Section 17.15 Filing a Protest

Proposed § 17.15 would govern the timing and content of a protest. The protester is required to set forth all information that will allow an early assessment of the protest by the ODRA.

Proposed § 17.15(a) would state that only an interested party may file a protest, and would set forth the times within which a protest must be filed with the ODRA. Where a protest addresses an alleged impropriety in the SIR, the protest must be filed prior to bid opening or the time for initial offers. For protests other than those involving solicitation improprieties, the protester must file a protest within seven (7) business days of the time that the protester knew or should have known of the grounds for protest. Where a debriefing was offered, the protester must file within 5 business days of the date on which the debriefing was held.

Proposed § 17.15(b) would set forth the ODRA address for filing purposes, including the ODRA's telephone and facsimile numbers.

Proposed § 17.15(c) would set forth the information that must be included in a protest. Of special note are the following:

- The protester must identify a Protester Designee, who shall be the point of contact for the protest.
- The protester must state its case for timeliness and standing.
- The protester must state its need for a protective order.

Proposed § 17.15(d) would require the protester to set forth any compelling reasons that would support a decision by the FAA Administrator to suspend or delay the procurement. The protester is required to supply detailed information concerning the protester's position, and to clearly identify any adverse consequences that relate to the requested suspension or delay.

Proposed § 17.15(e) would require the protester to: (1) Serve a copy of the protest on the CO so that the protest will be received by the CO on the same day that it is received by the ODRA; and (2) certify as to that service, by a signed statement to the ODRA.

Proposed § 17.15(f) would require the CO to: (1) Provide the ODRA with the names, addresses, telephone numbers and facsimile numbers of the awardee and interested parties to a protest, and (2) notify these parties of the existence of the protest. This proposed section would require such interested parties to inform the ODRA within two (2) business days of the notification of their interest in participating in the protest.

Proposed § 17.15(g) would note that the Director of the ODRA has the discretion to designate those parties who may participate in a protest as intervenors.

Section 17.17 Initial Protest Procedures

Proposed § 17.17 would contain the initial protest procedures. These procedures over an initial period of ten business days would include assigning a DRO, holding a status conference, and determining whether the protest is to be resolved by use of ADR or the Default Adjudicative Process.

Proposed § 17.17(a) would provide that the ODRA will assign a DRO to a protest when one is filed.

Proposed § 17.17(b) would require the FAA to respond within two (2) business days to a protester's request made pursuant to § 17.15(d) that the procurement be suspended by the Administrator, and would allow the ODRA, in its discretion, to recommend such suspension.

Proposed § 17.17(c) would require the ODRA to hold a status conference with the parties as soon as practicable after the protest is filed, and establishes the matters to be addressed during the status conference. The subjects to be covered in a status conference would include: a review of procedures; exploration of any issues relating to summary dismissal of the protest or to suspension recommendations; establishing a protective order, if needed; exploring the possibility of using ADR; the conduct of early neutral evaluation, if appropriate; and other appropriate matters.

Proposed § 17.17(d) would require the parties to file a joint statement with the ODRA on the fifth business day following the status conference indicating: (1) That the parties will use ADR to resolve the protest; or (2) submit a written explanation of why ADR cannot be used and why the parties will have to resort to use of the Default Adjudicative Process.

Proposed § 17.17(e) would require the parties to submit their choice of an ADR neutral and ADR technique, together with an executed ADR agreement within five (5) business days of the status conference.

Proposed § 17.17(f) would require that, if the Default Adjudicative Process must be used, the Program Office will have ten business days from the status conference to file with the ODRA a Program Office response to the protest. The Program Office response shall consist of a statement of pertinent facts, and applicable legal or other defenses, and shall be accompanied by all documents deemed relevant to the Program Office actions, plus any affidavits or other forms of support for the Program Office position. A copy of the responses shall be furnished to the protester at the same time, and by the same means, it is filed with the ODRA. At that point, the protester would proceed under the Default Adjudicative Process, pursuant to § 17.37.

Proposed § 17.17(g) would allow the ODRA the discretion to extend time limitations for the process.

Section 17.19 Dismissal or Summary Decision of Protests

Proposed § 17.19 would set forth the procedures for dismissal of a protest or any portion of a protest, thereby promoting economy and efficiency in dispute resolution.

Proposed § 17.19(a) would state three bases for dismissal. Proposed § 17.19(a)(1) would allow dismissal for lack of standing or for lack of timeliness. Proposed § 17.19(a)(2) would allow dismissal for failure to state a claim upon which relief can be granted. Proposed § 17.19(a)(3) would allow for summary decision, where no material facts remain at issue and a protest, or portion thereof, can be decided as a matter of FAA policy as stated in the AMS, or as a matter of applicable law.

Proposed § 17.19(b) would provide that the ODRA will consider any material facts in dispute relating to the motion to dismiss or to a motion for

summary decision in a light most favorable to the non-moving party.

Proposed § 17.19(c) would allow the Director of the ODRA at any time, to recommend to the Administrator either dismissal or the issuance of a summary decision with respect to an entire protest, or for the Director of the ODRA, to dismiss or issue a summary decision of any portion of a protest.

Proposed § 17.19(d) would state that where an ODRA recommendation for dismissal or summary decision of an entire protest is adopted by the Administrator, or where the ODRA dismisses or issues a summary decision of an entire protest under a delegation of authority from the Administrator, the dismissal would be a final agency order. However, dismissal or summary decision of a count or portion of a protest is not a final agency order, unless and until the dismissal or decision is incorporated into a decision by the Administrator (or the ODRA, by delegation) regarding the entire protest.

Section 17.21 Protest Remedies

Proposed § 17.21 would list remedies that may be recommended by the ODRA. These remedies are consistent with remedies available to other agencies, with the addition of discretion to fashion a remedy under the AMS that is appropriate under the circumstances of a particular FAA procurement.

Proposed § 17.21(a) would list the remedies available, and notes that either a combination of the remedies, or a remedy appropriate to the situation and consistent with the AMS may be acceptable.

Proposed § 17.21(b) would set forth factors to be considered by the ODRA when considering a remedy.

Proposed § 17.21(c) would allow the award of attorney's fees to a qualified prevailing protester under the EAJA, 5 U.S.C. 504(a)(1). EAJA decisions or recommendations made under auspices of the ODRA would weigh whether (1) the Program Office decision was substantially justified or (2) special circumstances make an award unjust. The EAJA applies to final adjudicative FAA orders pursuant to 49 U.S.C. § 46102.

Subpart C—Contract Disputes

Section 17.23 Dispute Resolution Process for Contract Disputes

Proposed § 17.23 would describe the FAA Dispute Resolution Process for Contract Disputes. The dispute resolution process contemplates that many contract disputes can be solved by cooperative action between the contractor, the CO, and the project team.

The filing of a contract dispute under this section requires the contractor to define the nature of the problem, and to request a remedy. In view of the goal of informal resolution through the use of ADR, there is no need for a ''final decision'' by the CO. The process contemplates an attempt at informal resolution between the contractor and the CO, with assistance from the ODRA if requested, prior to any formal action. Once formal ODRA action is initiated, the emphasis will be upon the use of ADR techniques, unless the contract dispute cannot be resolved except through the Default Adjudicative Process.

Proposed § 17.23(a) would require that all contract disputes pertaining to contracts entered into pursuant to the AMS be resolved under the FAA Dispute Resolution Process.

Proposed § 17.23(b) would require the contractor to file a contract dispute with the ODRA and with the CO.

Proposed § 17.23(c) contemplates that the contractor will seek informal resolution with the CO. The CO has full authority and discretion, with the aid of FAA legal counsel, to settle the contract dispute. The parties will have up to thirty (30) business days in which to reach an informal resolution of the dispute, and may seek the informal assistance of the ODRA during that time. If no informal resolution is foreseeable within the thirty (30) business day period, the parties must file a joint statement regarding whether or not ADR will be employed, in accordance with § 17.27.

Proposed § 17.23(d) would allow the parties to make one joint request to the ODRA for an extension of time beyond the original thirty (30) business day period, to file the joint statement under § 17.27.

Proposed § 17.23(e) would provide that a status conference be scheduled within ten (10) business days after receipt by the ODRA of the joint statement required by § 17.27, in order to establish the procedures that will be used to resolve the contract dispute.

Proposed § 17.23(f) would require continued performance in accordance with the provisions of the contract, pending resolution of a contract dispute arising under or related to that contract.

Section 17.25 Filing a Contract Dispute

Proposed § 17.25 would set forth the requirements for filing a contract dispute with the ODRA. A contract dispute is filed with the ODRA prior to the commencement of the thirty (30) business day informal resolution period.

Proposed § 17.25(a) would require that the contract dispute be in writing and contain the following information when it is filed:

- The contractor's name, address, telephone, and fax number;
- The contract number and the name of the Contracting Officer;
- A detailed statement of the legal and factual basis of the contract dispute, or of each element or count of the contract dispute, including copies of relevant documents;
- All information establishing that the contract dispute was timely filed; a request for a specific remedy or the specification of a monetary request in a sum certain; and the signature of a duly authorized representative.

Proposed § 17.25(b) would state the ODRA address where a contract dispute is to be filed.

Proposed § 17.25(c) would require a contractor with a contract dispute against the FAA to file that contract dispute with the ODRA within six months of the date that the contract dispute accrues. A contract dispute by the FAA against a contractor (other than those alleging warranty issues, fraud or latent defects) likewise must be filed within six months of the accrual of the contract dispute. If a contract clause provides for different time limitations, such limitations will apply. With limited exceptions, neither party will be permitted to file a contract dispute with the ODRA after the contractor's acceptance of final contract payment.

Proposed § 17.25(d) would state that a party who files a contract dispute with the ODRA shall serve a copy of the contract dispute with the other party.

Section 17.27 Submission of Joint Statement

Proposed § 17.27(a) would require parties to submit a joint statement to the ODRA by no later than the end of the thirty (30) business day informal resolution period of proposed § 17.23, where the dispute has not been resolved during that period.

Proposed § 17.27(b) would set forth the information required for that joint statement, namely, either a request for ADR—together with an executed ADR agreement, pursuant to § 17.33(d)—or, in the event ADR will not be utilized, a written explanation as to why ADR will not be utilized and why the parties must resort to the Default Adjudicative Process.

Proposed § 17.27(c) would state the ODRA address to which the statement of the case is to be filed, including the ODRA telephone and facsimile numbers.

Section 17.29 Dismissal of Contract Disputes

Proposed § 17.29 would address the procedures to be followed for dismissal of a contract dispute, or individual portions of a contract dispute. Dismissal is appropriate where the contract dispute is not filed within time, or is filed by a subcontractor, or fails to state a claim upon which relief can be granted. The dismissal of a contract dispute, or the striking of an individual portion of a contract dispute, is allowed in the interest of economy and efficiency.

Proposed § 17.29(a) would allow dismissal of a contract dispute, or the striking of an individual portion of a contract dispute: (1) On timeliness grounds; (2) if filed by a subcontractor; (3) where there is a failure to state a claim upon which relief can be granted; and (4) if the dispute involves a matter not subject to the jurisdiction of the ODRA.

Proposed § 17.29(b) would provide that the ODRA, when weighing a motion to dismiss or to strike, should consider disputed facts in a light most favorable to the party against whom the motion to dismiss or strike is made.

Proposed § 17.29(c) would allow the ODRA to dismiss or strike any portion of a contract dispute upon its own initiative at any time. This section also provides for the dismissal of an entire contract dispute, either by the Administrator, upon recommendation by the ODRA, or directly by the ODRA, when such authority is delegated by the Administrator.

Proposed § 17.29(d) would state that an order dismissing an entire contract dispute, issued either by the Administrator, or by the ODRA, upon delegation of authority from the Administrator, will constitute a final agency order. It further provides that an ODRA order dismissing or striking an individual count or portion of a dispute would not constitute a final agency order.

Subpart D—Alternative Dispute Resolution

Section 17.31 Use of Alternate Dispute Resolution

Proposed § 17.31(a), (b), and (c) would set forth the basic requirements for both the ODRA and the parties respecting the use of ADR. Pursuant to the Alternative Dispute Resolution Act of 1996, Pub. L. 104–320 and Department of Transportation and FAA policies, the ODRA will be required to utilize ADR to the maximum extent practicable, that the ODRA encourage the parties to utilize ADR to resolve protests and contract disputes as their primary means of dispute resolution. The section clarifies that the Default Adjudicative Process is to be used only when the parties cannot achieve agreement on the use of ADR or when the ODRA concludes that ADR will not provide an expeditious means of dispute resolution in a particular case.

Section 17.33 Election of Alternative Dispute Resolution Process

Proposed § 17.33 would set forth procedures for initiating the use of ADR.

Proposed § 17.33(a) would state that the ODRA makes its personnel available to serve as Neutrals in ADR proceedings and attempts to make qualified non-FAA personnel available, if requested by the parties, through neutral sharing arrangements. The section also permits the parties to select a mutually acceptable Compensated Neutral at their shared expense.

Proposed § 17.33(b) would require the parties to a protest who use ADR to submit an executed ADR agreement containing the information required in paragraph (d) of this section to the ODRA within five (5) business days from the time the ODRA holds the status conference pursuant to § 17.17(c).

Proposed § 17.33(c) would require the parties to a contract dispute who use ADR to submit to the ODRA an executed ADR agreement containing the information required in paragraph (d) of this section, as part of the joint statement specified under § 17.27.

Proposed § 17.33(d) would require the parties who use an ADR process, to prepare and submit to the ODRA an executed ADR agreement detailing: the type of ADR they wish to use; the manner that they will use ADR; the Neutral or Compensated Neutral to be used; and sharing equally the cost of any Compensated Neutral they choose.

Proposed § 17.33(e) would permit the use of various non-binding ADR techniques in combination with each other, provided that the techniques are agreed upon and specified in the ADR agreement; and would allow the parties to consider the use of any ADR technique that is fair and reasonable and designed to achieve a prompt resolution of the matters in dispute.

Proposed § 17.33(f) would allow binding arbitration only on a case-by-case basis, subject to the provisions of 5 U.S.C. § 575 (a), (b) and (c), and applicable law or where the Administrator's non-concur with the arbitrator's decision is preserved by agreement.

Proposed § 17.33(g) would provide that the ADR process for protests will be completed within twenty (20) business days from the filing of an ADR agreement with the ODRA, unless the parties obtain an extension of time from the ODRA.

Proposed § 17.33(h) would provide that the ADR process for contract disputes will be completed within forty (40) business days from the filing with the ODRA of an executed agreement with the ODRA, unless the parties obtain an extension of time from the ODRA.

Proposed § 17.33(i) would require the parties to submit to the ODRA an agreed-upon protective order, if one is necessary, in accordance with the requirements of § 17.9.

Section 17.35 Selection of Neutrals for the Administrative Dispute Resolution Process

Proposed § 17.35 would address the selection of Neutrals for the ADR process, whether for protests or for contract disputes.

Proposed § 17.35(a) would allow the parties to select a Compensated Neutral acceptable to both, or to request the ODRA for the services of a DRO, or a Neutral who is not an employee of the FAA.

Proposed § 17.35(b) would allow the parties who select a Compensated Neutral, acceptable to both, to request the services of a DRO to advise on matters of ODRA procedure, if the Compensated Neutral is not familiar with ODRA procedural matters.

Proposed § 17.35(c) would allow the ODRA to assign a DRO to be the Neutral in ADR for appropriate protests or contract disputes, unless the parties agree otherwise.

Subpart E—Default Adjudicative Process

Section 17.37 Default Adjudicative Procedures for Protests

Proposed § 17.37 would address the Default Adjudicative Process for protests, lasting thirty (30) business days. The Default Adjudicative Process is available if there is no resolution at the CO level, the parties cannot agree to ADR, or are unsuccessful in resolving the protest fully. Under the Default Adjudicative Process, the parties present their positions with supporting evidence. The question to be resolved is whether the protested FAA decision had a rational basis, or was not arbitrary, capricious or an abuse of discretion under the AMS.

Proposed § 17.37(a) would state that the process begins when either the initial Program Office response to the protest is submitted pursuant to § 17.17(f) ten (10) business days

following the status conference held pursuant to § 17.17(d), or the parties notify the ODRA that the ADR process has failed, or that the twenty (20) business days allotted for resolution through ADR have expired or will expire with no reasonable probability of their achieving a resolution.

Proposed § 17.37(b) would provide that the ODRA may select either a DRO or a qualified person not employed by the FAA to serve as a Special Master to conduct fact-finding proceedings and to provide findings of fact and recommendations concerning some or all of the matters in controversy.

Proposed § 17.37(c) would allow the DRO or Special Master to prepare any necessary procedural orders for the proceedings and would allow the DRO or Special Master to require additional submissions, as appropriate.

Proposed § 17.37(d) would allow the DRO or Special Master to convene the parties or their representatives as necessary to conduct the Default Adjudicative Process.

Proposed § 17.37(e) would allow the DRO or Special Master the discretion to decide the protest on the record if the written material submitted by the parties is sufficient for that purpose.

Proposed § 17.37(f) would allow the DRO or Special Master the discretion to manage the discovery process, including limiting its length and availability, to assure that the discovery schedule is consistent with the time limitations established in this part.

Proposed § 17.37(g) would allow the DRO or Special Master the discretion to permit or request oral presentations, and to limit them to specific witnesses or issues.

Proposed § 17.37(h) would allow the ODRA to review the status of the Default Adjudicative Process with the DRO or Special Master during the pendency of the protest.

Proposed § 17.37(i) would require the DRO or Special Master to submit the findings of fact and recommendations to the ODRA within thirty (30) business days of the commencement of the Default Adjudicative Process, unless a shorter or longer period of time is permitted at the discretion of the ODRA. The findings of fact and recommendations shall contain findings of fact, application of the principles of the AMS, or any law or authority applicable to the findings of fact, a recommendation for a final order, and, if appropriate, suggestions for future agency action.

Proposed § 17.37(j) would instruct the DRO or Special Master to base the findings of fact and recommendations specifically upon whether the FAA actions complained of had a rational basis, or whether or not the FAA decision was arbitrary, capricious or an abuse of discretion, and to assure that any findings of fact underlying a recommendation be supported by substantial evidence.

Proposed § 17.37(k) would allow the DRO or Special Master to exercise broad discretion to recommend a remedy for a successful protest that is consistent with § 17.21.

Proposed § 17.37(l) would require the Special Master or DRO to submit the findings of fact and recommendations only to the Director of the ODRA.

Proposed § 17.37(m) would state that the Administrator, or the Administrator's delegee, issues the final agency decision and order of the Administrator.

Section 17.39 Default Adjudicative Process for Contract Disputes

Proposed § 17.39 would address the Default Adjudicative Process for contract disputes. Under this Default Adjudicative Process, the parties present their respective positions on the issues underlying the contract dispute, and present evidence supporting those positions.

Proposed § 17.39(a) would call for the Default Adjudicative Process to commence on the latter of the parties' submission of a joint statement under § 17.27, indicating that the ADR will not be utilized, or their submission of joint notification regarding the inability of ADR to achieve a resolution of the contract dispute.

Proposed § 17.39(b) would require the Program Office to prepare and file a Dispute File, consisting of relevant documents chronologically arranged and indexed. The contractor would be permitted to supplement such a Dispute File.

Proposed § 17.39(c) would provide that the Director of the ODRA assign a DRO or Special Master to conduct fact-finding and provide findings and recommendations on some or all of the issues in the dispute.

Proposed § 17.39(d) would require the DRO or Special Master to convene a Status Conference within ten (10) business days of commencement of the Default Adjudicative Process and would permit the DRO or Special Master to issue such orders and directives as are necessary to carry out the Default Adjudicative Process.

Proposed § 17.39 (e) would set forth the basic subject matter of the Status Conference. First, it directs that the issues be analyzed by the DRO or Special Master and the parties, in order to: (1) Prepare a discovery plan sufficient to prepare any remaining issues for resolution; (2) review the need for a protective order, and if one is needed, issue a protective order, agreed upon by the parties; (3) determine whether any issue can be stricken; and (4) prepare and issue a procedural order for the proceedings.

Proposed § 17.39(f) would require that the parties prepare final submissions to the DRO or Special Master in advance of the decision. The submissions are to include: a joint statement of the issues; a joint statement of undisputed facts related to each issue; separate statements of disputed facts related to each issue, with appropriate citations to the record; and separate legal analyses in support of each party's respective position on the disputed issues.

Proposed § 17.39(g) would require the parties to provide copies of their final submissions to one another, so that such copies are received on the same date they are received by the ODRA.

Proposed § 17.39(h) would allow the DRO or Special Master either to decide the contract dispute on the record, or to allow the parties to make further presentations in person and in writing.

Proposed § 17.39(i) would require the DRO or Special Master to prepare and submit findings of fact and recommendations to the ODRA within thirty (30) business days of the final submissions of the parties, unless that time is extended by the ODRA for good cause. The findings of fact 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 order, and, if appropriate, suggestions for future agency action.

Proposed § 17.39(j) would instruct the DRO or Special Master to review the disputed issue or issues in the context of the contract, applicable law and the AMS, and to support any findings of fact with substantial evidence.

Proposed § 17.39(k) would require the Special Master or DRO to submit a findings of fact and recommendations only to the Director of the ODRA.

Proposed § 17.39(l) would state that the Administrator, or the Administrator's delegee, would issue the final FAA order concerning the contract dispute.

Proposed § 17.39(m) would state that attorneys' fees of a prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. § 504(a)(1); and that if required by contract or applicable law, the FAA will pay interest on the amount found due the contractor, if any.

Subpart F—Finality and Review

Section 17.41 Final Orders

Proposed § 17.41 would state that a final agency order shall be issued only after the protester or contractor has exhausted all available administrative remedies under this FAA dispute resolution process. Exhaustion of administrative remedies occurs when the Administrator, or a person who has been delegated by the Administrator to act in circumstances where such delegation applies, has issued a final order accepting or modifying a recommendation from the ODRA.

Section 17.43 Judicial Review

Proposed § 17.43(a) would direct the parties to seek review of a final FAA order in the manner allowed by law.

Proposed § 17.43(b) would require that a petition for review also be filed with the ODRA and the FAA attorney involved, at the time the petition for review is filed.

Paperwork Reduction Act

This proposal contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The title, description, respondent description and annual burden are shown below.

Title: Procedures for Protests and Contract Disputes—Equal Access to Justice Act (EAJA) Regulations.

Description: The FAA proposes to publish procedural requirements for the conduct of protests and contract disputes before the Office of Dispute Resolution for Acquisition. These procedures are designed to reduce the paperwork requirement ordinarily associated with such actions in other forums. The emphasis in the procedures is the resolution of a case as soon as is practicable, but also to provide for resolution through adjudication should the resolution require such.

Description of Respondents: Businesses or other organizations or persons who do business with the FAA.

This proposal generates a paperwork requirement upon only those respondents who pursue protests or contract disputes. The actual paperwork burden and cost for an individual case would vary with the complexity of the subject matter, and whether the protester or contractor and the FAA are able to reach an early resolution of the issues in the case. The following estimate is based upon cases filed with the ODRA in the first year, but assumes a higher annual caseload of 100 protests or contract disputes. In this analysis, the annual paperwork burden for all respondents would be approximately 3385 hours. This figure is derived from estimates based on cases processed in the first year of ODRA operation. At 2 hours per pleading, the total pleading burden for all cases is 200 hours (100 × 2). Fifty percent of all cases filed with the ODRA are settled or withdrawn after the initial pleadings are made. That means that for 50 of the cases filed with ODRA, there is no additional paperwork burden (50 × 0).

Only Of the 50 remaining cases requiring additional paperwork, 34 cases filed with ODRA go through the full adjudicative procedure. Of those cases, only 90% (31/34) can be described as average. One such case, based on an EAJA submission, involved 55 hours of paperwork burden. Using this figure yields a total of 1705 hour burden for the average cases (31 × 55). This estimate further assumes that of the 34 cases that go through full adjudicative procedure, 3 of them will be complex and contentious, requiring an above average number of hours. For purposes of this analysis, the FAA will use the estimate of 200 hours per complex/contentious case. Accordingly, for the above average cases, the total paperwork burden is 600 hours (3 × 200). There still remain the 16 cases that are settled/withdrawn after the pleadings are filed but that require some additional paperwork. Assuming that each of these cases incur an additional burden of 55 hours to achieve settlement/withdrawal, the total burden for these cases increases by 880 hours (16 × 55). The sum of all the hours described above is 3385 and is depicted graphically in the table below.

Description of effort	Number of cases	Hours incurred	Total hourly burden
Filing of Pleadings	100	2	200
Cases Settled/Withdrawn After Initial Pleadings Filed	50	0	0
Cases Requiring Average Number of Hours	31	55	1705
Cases Requiring Above Average Number of Hours	3	200	600
Cases Requiring Below Average Number of Hours	16	55	880
Total			3,385

It is important to note that these numbers are merely estimates and the hourly cost for preparation of pleadings and responses to procedural requirements varies upon whether a respondent hires a law firm, or pursues the matter with in-house counsel, or chooses to proceed pro se, without the services of a lawyer.

Individuals and organizations may submit comments on the information collection requirement by October 26, 1998, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 10202, 725 17th Street NW., Washington, DC 20503, Attn: Desk Officer for FAA.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number. The burden associated with this proposal has been submitted to OMB for review. The FAA will publish a notice in the **Federal Register** notifying the public of the approval numbers and expiration date.

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 existing regulations after consideration of the expected benefits to society and the expected costs. The order also requires federal agencies to assess whether a proposed 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 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 would generate cost-savings that would 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 would not have a significant impact on a substantial number of small entities. Furthermore, this proposal would not impose restraints on international trade. Finally, the FAA has determined that the proposal would 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 the proposed regulations while recognizing that some costs and benefits are difficult to quantify. A proposed rule is promulgated only upon a reasoned determination that the benefits of the proposed rule justify its costs.

In this proposed rule, the establishment of the Office of Dispute Resolution for Acquisition (ODRA) under the FAA's new Acquisition Management System would provide a cost savings to the private sector (protesters and contractors). To resolve protests and contract disputes with the FAA, offerors and contractors would realize a cost savings of $1,000 to $1,000,000 per case, and the FAA would realize an average cost savings of $2,200 per protest case and $4,200 per contract dispute. Costs for this proposed rule are estimated to be about $1,000 or less per case for the private sector to abide by the procedures of the ODRA, and no additional costs would be attributed to the FAA for implementing such procedures. Therefore the FAA concludes that not only do the benefits justify the costs, but that they actually exceed the costs.

The proposed rule would 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 proposed rule was 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 proposed rule with ones from other agencies.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 establishes ''as principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statues, 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 proposed or final rule would 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 proposed rule is not expected to have a significant economic impact on a substantial number of small 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 proposal and determined that it would 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 would not have a significant economic impact on a substantial number of small entities for the following reason: The proposed rule would provide an estimated cost savings of $1,000 to $1 million per case in resolving its differences with the FAA, while requiring about $1,000 or less per case per entity to resolve the issue. For small entities, the FAA estimates that cost savings per case would be closer to $1,000 than $1 million and concludes there would be no significant economic impact on small entities. The FAA solicits comments from affected entities with respect to this finding and determination.

International Trade Impact Assessment

The FAA has determined that the proposed rule would 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.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 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 proposed or 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 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 proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would 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 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 act do not apply.

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 compatible rule under ICAO standards.

Federalism Implications

The regulations proposed 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 proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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), Authority delegations (Government agencies), Government contracts, Government procurement.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14 of the 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. Section 14.02 is amended by revising paragraph (a) to read 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 14 CFR part 17 and the AMS.

* * * * *

3. Section 14.03 is amended by revising paragraphs (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 administrative law judge (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 administrative law judge 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. Section 14.05 is amended by revising paragraphs (b), (c), and (e) to read as follows:

§ 14.05 Allowance fees and expenses.

* * * * *

(b) No award for the fee of an attorney or agent under this part may exceed $125 per hour. 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 administrative law judge 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 the initiation of the adjudicative phase of a protest or contract dispute under 14 CFR part 17 and the AMS.

5. Section 14.11 is amended 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 administrative law judge 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 administrative law judge 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. Section 14.20 is amended 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 14 CFR part 17 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. Section 14.21 is revised 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 14 CFR part 17 and the AMS, the application shall be filed with the FAA's attorney and with the Office of Dispute Resolution for Acquisition (ODRA).

8. Section 14.22 is amended 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 administrative law judge or adjudicative officer upon request by the FAA's counsel and the applicant.

* * * * *

9. Section 14.24 is revised 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 administrative law judge or adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

10. Section 14.26 is amended 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 administrative law judge 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. Section 14.27 is revised to read as follows:

§ 14.27 Decision.

(a) The administrative law judge 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 14 CFR part 17 and the AMS shall prepare a findings and recommendations for the ODRA.

(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 a 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. Section 14.28 is revised to read as follows:

§ 14.28 Review by FAA decisionmaker.

(a) In proceedings other than those under 14 CFR part 17 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 administrative law judge who issued the initial fee award determination for further proceedings.

(b) In proceedings under 14 CFR part 17 and the AMS, the adjudicative officer shall prepare a findings and recommendations for the ODRA with recommendations as to whether or not an award should be made, the amount of the award, and the reasons therefor. The ODRA 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. A new part 17 is added to 14 CFR chapter I, subchapter B, to read as follows:

PART 17—PROCEDURES FOR PROTESTS AND CONTRACT 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.
17.15 Filing a protest.
17.17 Initial protest procedures.
17.19 Dismissal or summary decision of protests.
17.21 Protest remedies.

Subpart C—Contract Disputes

17.23 Dispute resolution process for contract disputes.
17.25 Filing a contract dispute.
17.27 Submission of joint statement.
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.
17.35 Selection of neutrals for the alternative dispute resolution (ADR) process.

Subpart E—Default Adjudicative Process

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

Subpart F—Finality and Review

17.41 Final orders.
17.43 Judicial review.

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.

§ 17.3 Definitions.

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

(b) *Accrual of a contract dispute* occurs on the date when all events underlying the dispute were known or should have been known.

(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 (ODRA). 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 ODRA. The parties pay equally for the services of a Compensated Neutral. 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 ODRA seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under, relating to or involving an alleged breach of contract, entered into pursuant to the AMS. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision.

(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 ODRA to serve as ''adjudicative officers,'' as that term is used in 14 CFR part 14.

(i) *Discovery* in the Default Adjudicative Process is the procedure where opposing parties in a protest or contract dispute may, when allowed, 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 ODRA. The term DRO can include the Director of the ODRA, ODRA staff attorneys or other FAA attorneys assigned to the ODRA.

(k) *An interested party* is designated as such at the discretion of the ODRA, and in the context of a bid protest is one who: Prior to the closing date for responding to a Screening Information Request (SIR), is an actual or prospective participant in the procurement, excluding prospective subcontractors; or after the closing date for responding to a SIR, is an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful, or is an actual participant who is not next in line for award under the SIR's selection criteria but who alleges specific improper actions or inactions by the Program Office that caused the party to be other than next in line for award. Proposed subcontractors are not eligible to protest. The awardee of the contract may be allowed to participate in the protest as an intervenor.

(l) An *intervenor* is an interested party other than the protester whose participation in a protest is allowed by the ODRA.

(m) *Neutral* refers to an impartial third party in the ADR process chosen by the ODRA to act as a facilitator, mediator, arbitrator, or otherwise to resolve the 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 ODRA.

(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 the Administrator on matters concerning protests or contract disputes.

(o) *Parties* include a protester or a contractor, the FAA, and any intervenor.

(p) *Program Office*, as used in these rules, refers to the FAA organization responsible for the procurement activity and includes the Contracting Officer (CO) and assigned FAA legal counsel, when that FAA organization represents the FAA as a party to a protest or contract dispute before the ODRA.

(q) *Screening Information Request* (SIR) means a request by the FAA for information concerning an approach to meeting a requirement established by the FAA.

(r) A *Special Master* is a legal professional, usually with extensive adjudicative experience, who has been assigned by the ODRA 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.

§ 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 ODRA during normal business hours. The ODRA's normal business hours are from 8:30 a.m. to 5:00 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 ODRA after the initial filing of the protest or contract dispute may be accomplished by any means available in paragraph (a) of this section.

(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.

(d) A petition for review shall be filed pursuant to 49 U.S.C. 46110, and a copy of the petition shall be served upon the ODRA and the Program Office attorney of record on the day the petition is filed with the court.

§ 17.9 Protective orders.

(a) The ODRA 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 protective orders can be negotiated by the parties, subject to the approval of the ODRA. The protective order shall establish 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 ODRA, 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 ODRA 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 ODRA 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 ODRA.

Subpart B—Protests

§ 17.11 Matters not subject to protest.

The following matters may not be protested:

(a) FAA purchases from or through federal, state, local, and tribal governments and public authorities;

(b) Grants;

(c) Cooperative agreements;

(d) 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 ODRA in accordance with § 17.15. The time limitations set forth in § 17.17 will not be extended by attempts to resolve a potential protest with the CO.

(d) A status conference may be called by the ODRA after the protest is filed to attempt resolution of the protest through a combination of informal communication and early neutral evaluation. If a conference is called, the parties will have five (5) business days after the status conference to inform the ODRA whether the parties agree to use ADR pursuant to Subpart D of this part; or to state why they cannot use ADR and must resort to the Default Adjudicative Process, pursuant to Subpart E of this part.

(1) Should the parties decide to utilize ADR, they will have five (5) business days after the status conference within which to agree upon the use of an ODRA-approved Neutral or a Compensated Neutral, in accordance with § 17.33(c), as well as upon the ADR technique to be employed. Within those five (5) business days, the parties are required to execute and file with the ODRA a written ADR agreement, pursuant to § 17.33(h). The parties will have up to twenty (20) business days to complete the ADR process.

(2) If the parties do not agree to use ADR, the Program Office will have ten (10) business days after the status conference within which to submit a Program Office response to the protest, after which the protest will proceed under the Default Adjudicative Process. If the ADR process is undertaken, but subsequently proves to be unsuccessful, a DRO or Special Master will be assigned to oversee the Default Adjudicative Process, pursuant to Subpart E of this part.

(e) The ODRA retains the discretion to modify any time constraints for pending protests.

(f) Multiple protests concerning the same SIR, solicitation, or contract award may be consolidated at the discretion of the ODRA, and assigned to a single DRO.

(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 ODRA may recommend suspension of contract performance 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 for that purpose.

§ 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 ODRA 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 within seven (7) business days of the time that the protester knew or should have known of the grounds for the protest;

(4) If the protester has requested a post-award debriefing from the FAA, then any protest other than one related to solicitation improprieties shall be filed not later than five (5) business days after the date on which the FAA holds that debriefing.

(b) Protests shall be filed at:

(1) Office of Dispute Resolution for Acquisition, AGC–70, Federal Aviation Administration, 400 7th Street, S.W., 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 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 ODRA, 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 ODRA. The protest shall include a signed statement from the protester, certifying to the ODRA 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 ODRA of the names, addresses, and telephone and facsimile numbers of the awardee and/or other interested parties. The CO shall also immediately notify the awardee and/or interested parties in writing of the existence of the protest. The awardee and/or interested parties shall notify the ODRA in writing, of their interest in participating in the protest as intervenors within two (2) business days of receipt of the CO's notification, and shall, in such notice, designate a person as the point of contact for the ODRA. Such notice may be submitted to the ODRA by facsimile.

(g) The ODRA has discretion to designate the parties who shall participate in the protest as intervenors.

§ 17.17 Initial protest procedures.

(a) When a protest is filed with the ODRA, a DRO will be assigned to the protest.

(b) If the protester requests a suspension or delay of procurement pursuant to § 17.15(d), the Program Office shall submit a response to the request to the ODRA within two (2) business days of receipt of the protest. The ODRA, in its discretion, may recommend such suspension or delay to the Administrator or the Administrator's designee.

(c) The ODRA may 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 early neutral evaluation of the protest by the DRO, at the discretion of the ODRA; and

(6) For any other reason deemed appropriate by the DRO or by the ODRA.

(d) On the fifth business day following a status conference, the parties will file with the ODRA—

(1) A joint statement that they have decided to pursue ADR to resolve the protest; or

(2) A written explanation as to why ADR cannot be used and why the parties will have to resort to the use of the Default Adjudicative Process.

(e) Should the parties elect to utilize ADR to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an ODRA-designated Neutral or a Compensated Neutral of their own choosing) pursuant to § 17.33(c), and shall execute and file with the ODRA a written ADR agreement within five (5) business days after the status conference.

(f) Should the parties indicate at the status conference that ADR will not be used, then within ten (10) business days following the status conference, the Program Office will file with the ODRA a Program Office response to the protest. The Program Office response shall consist of a statement of pertinent facts, applicable legal or other defenses, and shall be accompanied by all documents deemed relevant by the Program Office, position. A copy of the response shall be furnished to the protester at the same time, and by the same means, as it is filed with the ODRA. At that point the protest will proceed under the Default Adjudicative Process pursuant to § 17.37.

(g) The time limitations of this section may be extended by the ODRA 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 ODRA, 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 for failure to state a claim, if the protester fails to state a matter 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 Program Office 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 Program Office 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 ODRA 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 ODRA 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 ODRA 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 ODRA, by delegation) regarding the entire protest.

§ 17.21 Protest remedies.

(a) The ODRA may recommend one or more, or a combination of, the following remedies—

(1) Amend the SIR;

(2) Refrain from exercising options under the contract;

(3) Issue a new SIR;

(4) Terminate an existing contract for the FAA's convenience, and require recompetition;

(5) Direct an award to the protester;

(6) Award bid and proposal costs; or

(7) 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 ODRA 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 procurement 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 entered into pursuant to the AMS shall be resolved under this part.

(b) Contractors shall file contract disputes with the ODRA 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 thirty (30) business days within which to resolve the dispute informally, and may contact the ODRA for assistance in facilitating such a resolution; and

(3) If no informal resolution is achieved during the thirty (30) business day period, the parties shall file a joint statement with the ODRA pursuant to § 17.27.

(d) If informal resolution of the contract dispute appears probable during the informal resolution period, the contractor and the CO may jointly request one extension of time from the ODRA to resolve the matter before filing the joint statement under § 17.27.

(e) The ODRA may hold a status conference with the parties within ten (10) business days after receipt of the joint statement required by § 17.27, in order to establish the procedures to be utilized to resolve the contract dispute.

(f) The FAA will require continued performance in accordance with the provisions of a contract, pending resolution of a contract dispute arising under or related to that contract.

§ 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 number;

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

(3) A detailed statement of the legal and factual basis of the contract dispute or of each element or count of the contract dispute, including copies of relevant 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

(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 ODRA within six months of the accrual of the contract dispute. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise may be filed within six months after the accrual of the contract dispute. If the contract underlying provides for time limitations for filing of contract disputes with the ODRA, 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 ODRA 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, fraud or latent defects.

(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 ODRA.

§ 17.27 Submission of joint statement.

(a) If the matter has not been resolved informally, the parties shall file a joint statement with the ODRA no later than thirty (30) business days after the filing of the contract dispute. The ODRA may extend this time for good cause.

(b) The joint statement of the case shall include either—

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

(2) A written explanation as to why ADR will not be utilized and why the parties must resort to the Default Adjudicative Process.

(c) Such joint 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**.

§ 17.29 Dismissal or summary decision of contract disputes.

(a) Any party may request, by motion to the ODRA, 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 ODRA; (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 ODRA.

(b) In connection with any request for dismissal of a contract dispute, or to strike a count or portion thereof, the ODRA 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 ODRA 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 ODRA where delegation exists, on the grounds set forth in this section, shall constitute a final agency order. An ODRA order dismissing or striking a count or portion of a contract dispute shall not constitute a final agency order, unless and until such ODRA order is incorporated or otherwise adopted in a decision of the Administrator.

Subpart D—Alternative Dispute Resolution

§ 17.31 Use of alternative dispute resolution.

(a) The ODRA 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 employ ADR in every appropriate case. The ODRA 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 ODRA.

(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 when ODRA concludes that ADR will not provide an expeditious means of resolving a particular dispute.

§ 17.33 Election of alternative dispute resolution process.

(a) The ODRA makes its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, attempts 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 acceptable Compensated Neutral, and shall share equally the costs of any such Compensated Neutral.

(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 ODRA within five (5) business days after the ODRA conducts a status conference pursuant to § 17.17(c). The ODRA 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 ODRA as part of the joint statement specified under § 17.27.

(d) The parties to a protest or contract dispute who use ADR shall agree to submit to the ODRA 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 ODRA or to use a Compensated Neutral of their choosing, and, if a Compensated Neutral is to be used, that the cost of the Compensated Neutral's services shall be shared equally.

(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.

(f) Binding arbitration may be permitted on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and 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 ODRA unless the parties request, and are granted an extension of time from the ODRA.

(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 ODRA, unless the parties request, and are granted an extension of time from the ODRA.

(i) The parties shall submit to the ODRA 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 (ADR) process.

(a) In connection with the ADR process, the parties may select a Compensated Neutral acceptable to both, or may request the ODRA to provide the services of a DRO or Neutral.

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

(c) The ODRA may appoint a DRO to serve as the Neutral for small dollar value and/or simplified acquisitions, unless the parties agree otherwise.

Subpart E—Default Adjudicative Process

§ 17.37 Default adjudicative procedures for protests.

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

(1) Submission of the Program Office response to the ODRA pursuant to § 17.17(f) ten (10) business days following the status conference held pursuant to § 17.17(c); or

(2) The parties submission of joint written notification to the ODRA that the ADR process has not resolved all outstanding issues, or that the twenty (20) business-day period allotted for ADR for protests has either expired or will expire with no reasonable probability of the parties achieving a resolution.

(b) The Director of the ODRA may 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.

(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) Discovery may be permitted within the discretion of the DRO or Special Master. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery consistent with time frames established in this part.

(g) The DRO or Special Master may permit or request oral presentations, and may limit the presentations to specific witnesses and/or issues.

(h) The Director of the ODRA 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 ODRA, the DRO or Special Master will submit findings and recommendations for the ODRA that shall contain the following:

(1) Findings of fact;

(2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;

(3) A recommendation for a final FAA order; and

(4) If appropriate, suggestions for future FAA action.

(j) In the findings and recommendations, the DRO or Special Master shall state whether or not the Program Office actions in question had a rational basis, and whether or not the Program Office 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, where appropriate, 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 Associate Chief Counsel and Director of the ODRA. The findings and recommendations will be released to the parties, subject to any protective order, upon issuance of the Administrator's final order in the case.

(m) The FAA Administrator or the Administrator's delegee issues the final agency decision.

§ 17.39 Default adjudicative process procedures for contract disputes.

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

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

(2) The parties' submission to the ODRA of joint notification that the parties have not settled some or all of the dispute issues, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) Within twenty (20) business days of the commencement of the Default Adjudicative Process, the Program Office shall prepare and submit to the ODRA, 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 ODRA 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 ODRA may delegate discretion 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, within the scope of the delegation, either at such a conference, or at any time during the Default Adjudicative Process, to issue such orders or decisions as are considered necessary in the discretion of the DRO or Special Master 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 minimum 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 ODRA 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 dispute 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 reasonably calculated so that such submission is received by the other party on the same date it is received by the ODRA.

(h) The DRO or Special Master may decide the contract dispute on the basis of the submissions referenced in this section and the record, or may, in the DRO or Special Master's discretion, allow the parties to make additional presentations at a hearing, and/or in writing.

(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 ODRA 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 part 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 findings and recommendations must be supported by substantial evidence.

(k) A DRO or Special Master's findings and recommendations shall be submitted only to the Director of the ODRA, and shall be released to the parties upon issuance of the final agency order for the contract dispute.

(l) The FAA Administrator or the Administrator's delegee issues the final agency order on the contract dispute.

(m) Attorneys' fees of a qualified, prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504(a)(1). If required by contract or applicable law, the FAA will pay interest on the amount found due the contractor, if any.

Subpart F—Finality and Review

§ 17.41 Final orders.

A final FAA order is issued by the FAA Administrator or by a delegee of the Administrator. The order would be issued only when the offeror, potential offeror, or contractor exhausts its administrative remedies under, this FAA dispute resolution process.

§ 17.43 Judicial review.

(a) A protester or contractor may seek review of a final FAA order in the manner otherwise prescribed by law.

(b) A copy of the petition for review shall be filed with the ODRA and the Program Office attorney on the date that the petition for review is filed with the appropriate circuit court of appeals.

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 17, the ODRA 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 efficiency in the proceeding expeditiously. 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 August 14, 1998.

James W. Whitlow,

Deputy Chief Counsel.

[FR Doc. 98–22386 Filed 8–24–98; 8:45 am]

BILLING CODE 4910–13–P