

the concern and the percentage of its revenues derived from Energy Saving Activities during its most recently completed fiscal year.

(2) If a pre-Financing determination of eligibility by SBA is required under the definition of Energy Saving Activities or Energy Saving Qualified Investment:

(i) If the concern did not derive at least 50% of its revenues during its most recently completed fiscal year from Energy Saving Activities, submit to SBA in writing all available information concerning the factors considered under paragraph (3) of the definition of "Energy Saving Qualified Investment" in § 107.50, certified by both you and the concern to be true and correct to the best of your knowledge.

(ii) If you are requesting a determination by SBA that the activities in which the concern is primarily engaged are Energy Saving Activities, submit to SBA in writing a description of the product or service being provided or developed, including all available documentation of the energy savings produced or anticipated, addressing the factors considered under paragraph (4) of the definition of "Energy Saving Activities" in § 107.50 and certified by both you and the concern to be true and correct to the best of your knowledge.

4. Amend § 107.1150 by adding a sentence at the end of paragraph (c) introductory text and adding paragraph (d) to read as follows:

**§ 107.1150 Maximum amount of Leverage for a Section 301(c) Licensee.**

\* \* \* \* \*

(c) \* \* \* Any investment that you use as a basis to seek additional leverage under this paragraph (c) cannot also be used to seek additional leverage under paragraph (d) of this section.

\* \* \* \* \*

(d) *Additional Leverage based on Energy Saving Qualified Investments in Smaller Enterprises.* (1) Subject to SBA's credit policies, if you were licensed on or after October 1, 2008, you may have outstanding Leverage in excess of the amounts permitted by paragraphs (a) and (b) of this section in accordance with this paragraph (d). Any investment that you use as a basis to seek additional Leverage under this paragraph (d) cannot also be used to seek additional Leverage under paragraph (c) of this section.

(2) To determine whether you may request a draw that would cause you to have outstanding Leverage in excess of the amount determined under paragraph (a) of this section:

(i) Determine the cost basis, as reported on your most recent filing of SBA Form 468, of any Energy Saving

Qualified Investments in a Smaller Enterprise that individually do not exceed 20% of your Regulatory Capital.

(ii) Calculate the amount that equals 33% of your Leverageable Capital.

(iii) Subtract from your outstanding Leverage the lesser of (d)(1)(i) or (d)(1)(ii).

(iv) If the amount calculated in paragraph (d)(1)(iii) is less than the maximum Leverage determined under paragraph (a) of this section, the difference between the two amounts equals your additional Leverage availability.

Dated: January 6, 2011.

**Karen G. Mills,**  
*Administrator.*

[FR Doc. 2011-486 Filed 1-11-11; 8:45 am]

**BILLING CODE 8025-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 17

[Docket No. FAA-2010-0840; Notice No. 10-18]

RIN 2120-AJ82

#### Procedures for Protests and Contracts Dispute

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action would update, simplify, and streamline the current regulations governing the procedures for bid protests brought against the FAA and contract disputes brought against or by the FAA. It would also add a voluntary dispute avoidance and early resolution process. This action is necessary to ensure the regulations reflect the changes that have evolved since 1999 when they were first implemented. The intended effect of this action is to streamline and further improve the protest and dispute process.

**DATES:** Send your comments on or before March 14, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2010-0840 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey

Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* Fax comments to Docket Operations at 202-493-2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the docket or Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Marie A. Collins, Senior 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:** Later in this preamble under the Additional Information section, we discuss how you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of related rulemaking documents.

#### Authority for This Rulemaking and Background

In 1995 Congress, through the Department of Transportation

Appropriations Act,<sup>1</sup> 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.” The Act instructed the FAA to design the system, notwithstanding provisions of Federal acquisition law, and to not 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 included a system of policy guidance that maximized the use of agency discretion in the interest of best business practices. 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. In a 1996 notice<sup>2</sup> published in the **Federal Register**, the FAA announced the creation of the ODRA and stated the agency would promulgate rules of procedure governing the dispute resolution process.

In August 1998, the FAA issued a Notice of Proposed Rulemaking (NPRM)<sup>3</sup> that proposed regulations under 14 CFR part 17 for the conduct of protests and contract disputes under the FAA AMS. The comment period for the NPRM closed on October 26, 1998. On June 18, 1999,<sup>4</sup> the FAA published the final rule entitled, *Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations*, which codified (effective June 28, 1999) the procedures governing the dispute resolution process. On August 31, 1999, the FAA published a document<sup>5</sup> that made certain corrections to the June 1999 final rule.

In addition to the rules of procedures, ODRA operates pursuant to delegations of authority from the Administrator. In a memorandum signed (1998 Delegation) by the Administrator on July 29, 1998,<sup>6</sup> the Administrator generally authorized the ODRA through its Director to provide dispute resolution services including administrative adjudication of all bid protests and contract disputes under the AMS. The

1998 Delegation further provided that all final decisions must be executed by the Administrator. The 1998 Delegation was expanded by a Delegation dated March 27, 2000 (2000 Delegation), which provided additional authority to the ODRA Director “to execute and issue, on behalf of the Administrator, Orders and Final Decisions for the Administrator in all matters within the ODRA’s jurisdiction valued at not more than \$1 Million.”<sup>7</sup> The 2000 Delegation was superseded by a Delegation of Authority from the Administrator, dated March 10, 2004 (2004 Delegation), which increased the dollar limit of the final decisional authority of the ODRA Director from \$1 Million to \$5 Million.<sup>8</sup> The 2004 Delegation was superseded by another Delegation of Authority dated March 31, 2010 (2010 Delegation), which increased the dollar limit of the final decisional authority of the ODRA Director from \$5 Million to \$10 Million.<sup>9</sup>

Congress provided further confirmation about the FAA’s dispute resolution authority in the Vision 100—Century of Aviation Reauthorization Act of 2003 (2003 Reauthorization Act) *See* Public Law 108–176, § 224(b), 117 Stat. 2490, 2528 (codified as amended at 49 U.S.C. 40110(d)(4)), which confirmed the ODRA’s exclusive jurisdiction. Specifically, the 2003 Reauthorization Act expressly provided at Subsection (b)(2)(4) under the title “Adjudication of Certain Bid Protests and Contract Disputes”, that “[a] bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator, through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition, acting pursuant to Sections 46102, 46104, 46105, 46106 and 46107 and shall be subject to judicial review under Section 46110 and Section 504 of Title 5.”

The ODRA dispute resolution procedures encourage the parties to protests and contract disputes to use Alternative Dispute Resolution (ADR) as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996 (“ADRA”), Pub. L. 104–320, 5

U.S.C. §§ 570–579, and in consonance with Department of Transportation and FAA policies to maximize the use of ADR to the extent possible. Under these procedures, the ODRA actively encourages the parties to consider ADR techniques such as case evaluation, mediation, arbitration, or other types of ADR. In this regard, on October 15, 2001, the FAA published in the **Federal Register** Final Guidance (66 FR 52475) for the use of binding arbitration for purposes of resolving bid protests and contract disputes relating to procurements and contracts under the FAA AMS after receiving the concurrence of the Attorney General in accordance with Section 575 of the ADRA. Additionally, the ODRA developed an informal pre-dispute process, which provides voluntary dispute avoidance services that are available to parties upon request.

#### *Statement of the Problem*

Since the issuance of the FAA’s rules of procedure more than 10 years ago, the ODRA’s statutory and regulatory authorities for conducting a dispute resolution process evolved, along with the body of case law interpreting those rules. The ODRA’s implementation of these rules of procedure also resulted in the identification of procedural issues in need of clarification to provide uniform guidance. The ODRA further identified certain aspects of the rules that need revision to reflect evolving practices at the ODRA, as well as evolving dispute resolution practices in general. An example of such practices is the increased emphasis on early intervention and dispute avoidance efforts. In consideration of this changing environment, the FAA is proposing to amend part 17 to incorporate the evolving practices; reflect the availability of a pre-dispute process; reorganize and streamline the rules for ease of use; and harmonize the existing part 17 rules with current statutory and other authority.

#### **General Discussion of the Proposal**

The FAA’s review of current part 17 identified aspects of the regulations that would benefit from a reorganization and consolidation of certain sections. For example, the procedures that pertain to filing and adjudicating protests and contract disputes are scattered throughout several subparts. In today’s proposal, the procedures for filing and adjudicating protests and contract disputes are consolidated into subparts B and C, respectively. Also, the finality and review provisions are moved from current subpart F to proposed subpart E.

<sup>1</sup> Public Law 104–50, 109 Stat. 436 (November 15, 1995).

<sup>2</sup> 61 FR 24348; May 14, 1996.

<sup>3</sup> 63 FR 45372; August 25, 1998.

<sup>4</sup> 64 FR 32926; June 18, 1999.

<sup>5</sup> 64 FR 47361; August 31, 1999.

<sup>6</sup> The FAA published the text of the delegations set forth in the July 29, 1998 memorandum in the **Federal Register** (*see* 63 FR 49151; September 14, 1998).

<sup>7</sup> 65 FR 19958–01; April 13, 2000.

<sup>8</sup> 69 FR 17469–02; April 2, 2004.

<sup>9</sup> The 2010 Delegation was issued by the Administrator in a memorandum dated March 31, 2010. Although the FAA has not yet published the text of the memorandum in the **Federal Register**, the public can view the memorandum itself at [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/agc70/odra\\_process/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/odra_process/).

The FAA also found that the regulations could be improved by including streamlined procedures, as well as providing expanded coverage in those instances where guidance was lacking or a process has evolved over time. Examples of expanded coverage include the proposed addition of a section on the confidentiality of ADR (§ 17.39) and a section for filing requests for reconsideration (§ 17.47). In addition to these proposed revisions, new sections are added to proposed subpart F to address “other matters” like sanctions and professional conduct. Further, new subpart G is added to address procedures for filing pre-disputes.

### **Discussion of the Proposed Regulatory Requirements**

A discussion, organized by subpart, and excluding minor editorial revisions and clarifications, of proposed changes to 14 CFR part 17, follows.

#### **Subpart A—General**

Subpart A would be revised as noted below.

##### *Definitions (§ 17.3)*

The following new definitions would be added to this section: Adjudicative Process, Default Adjudicative Process, Counsel, Contractor, Legal Representative, and Pre-disputes.

##### *Filing and Computation of Time (§ 17.7)*

Paragraph (c) would be revised to clarify that “other days on which Federal Government offices in Washington, DC are not open” is an excluded timeframe in calculating time limits for filings. In addition, paragraph (d) would be added to allow the use of electronic filing where permitted by the ODRA.

##### *Protective Orders (§ 17.9)*

Paragraph (d) would be revised to explain the type of sanctions that could be imposed if a protective order is violated.

#### **Subpart B—Protests**

In subpart B, current § 17.21 (Protest remedies) would be renumbered as § 17.23, and the Adjudicative process for protests section that is currently in subpart E would be moved to proposed § 17.21.

##### *Filing a Protest (§ 17.15)*

Paragraph (d)(2) would be revised to make clear the standard of review for a request for a suspension or delay of the procurement. Also, paragraph (d)(3) would be added to explain the possible consequences of protesters’ failure to

provide appropriate supporting documentation in their requests to suspend a procurement or contract performance.

##### *Initial Protest Procedures (§ 17.17)*

In § 17.17(a), the timeframes for responding to a request for a suspension or delay of the procurement would be revised according to the established ODRA practice of granting an extension until the date of the initial status conference. In § 17.17(b), the purpose of the initial status conference would be clarified. In § 17.17(c), the requirement that parties file a joint statement about whether they are pursuing ADR, and the adjudication timeframes that automatically begin when no ADR is contemplated would be removed.

##### *Motions Practice and Dismissal or Summary Decision of Protests (§ 17.19)*

Paragraph (a) would be revised to clarify the use of appropriate motions for dismissal or summary decision of protests and the ODRA’s standard of review for such motions. Paragraph (d) would be revised to clarify when such a decision is construed as a final agency order.

##### *Adjudicative Process for Protests (§ 17.21)*

In addition to moving the procedures for the Adjudicative Process for protests (from current § 17.37 of subpart E) to proposed § 17.21 of subpart B, this section would be revised to more fully address the management of the discovery process and the type of discovery that is authorized. This section would be further revised to delineate the ODRA’s standard of review for protests, the development of the administrative record, and under what circumstances ex parte communications are permitted in protests. In addition, the revisions to this section would address the procedures for preparing and issuing the ODRA’s findings and recommendations and final FAA order.

##### *Protest Remedies (§ 17.23)*

Paragraph (b) of this section would be revised to identify the factors the ODRA would consider in determining an appropriate remedy.

#### **Subpart C—Contract Disputes**

In subpart C, current §§ 17.23, 17.25, 17.27, and 17.29 would be renumbered as §§ 17.25, 17.27, 17.29 and 17.31, respectively. Section 17.33 (Adjudicative process for contract disputes), which would be moved from current § 17.39 of subpart E, would be added to proposed subpart C. Also, the

requirement in current § 17.27 (Submission of joint or separate statements) would be deleted.

##### *Filing a Contract Dispute (§ 17.25)*

Paragraph (a) would be revised to provide additional guidance on the information to be included in the contract dispute. Paragraph (e) would be added to state the ODRA retains the discretion to modify any timeframe established by the regulations in connection to contract disputes.

##### *Informal Resolution Period (§ 17.29)*

This section would be revised to conform to current practice regarding the informal resolution process. This would include clarifications related to scheduling and assigning a potential neutral for ADR.

##### *Dismissal or Summary Decision of Contract Disputes (§ 17.31)*

Section 17.31 would be revised to clarify the standard for requesting a dismissal or summary decision, and the process for responding to and issuing a decision on a request for dismissal or summary decision. This section would also be revised to clarify when such a decision is to be construed as a final agency order.

##### *Adjudicative Process for Contract Disputes (§ 17.33)*

In addition to moving this section from current § 17.39 of subpart E, § 17.33 would be revised to clarify that the process for submitting the Dispute File applies to cases initiated by the contractor or alternatively by the FAA. Also, it would be revised to more fully explain what documents will be admitted into the administrative record and the timeframes for responding to written discovery. Further, the section would be revised to streamline the requirements for final submissions. Additionally, the proposed revisions would state that the ODRA must conduct a de novo review using the preponderance of the evidence standard, unless a different standard is required. The proposed revisions would also identify the circumstances under which ex parte communications are permitted in contract disputes.

#### **Subpart D—Alternative Dispute Resolution**

The current sections under subpart D would be renumbered from §§ 17.31 and 17.33 to §§ 17.35 and 17.37, respectively. Also, new § 17.39 (Confidentiality of ADR) would be added to provide the applicability of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 et seq., and to

clarify how ADR communications are treated. Further, current § 17.35 (Selection of neutrals for the alternative dispute resolution process) would be deleted.

#### **Subpart E—Finality and Review**

As noted previously, §§ 17.37 and 17.39 of current subpart E (Default Adjudicative Process) would be moved to subparts B (§ 17.21) and C (§ 17.33), respectively. In today's proposal, the requirements in current subpart F (Finality and Review—§§ 17.41, 17.43, and 17.45) would be moved to subpart E. Also, § 17.47 (Reconsideration) would be added to subpart E to provide the timeframe for filing requests for reconsideration and to state the standard for reconsideration according to ODR precedent.

#### **Subpart F—Other Matters**

Subpart F would be revised to add sections covering sanctions, decorum and professional conduct, the use of orders and subpoenas for testimony and document production, and Standing Orders of the ODR Director.

#### **Subpart G—Pre-Disputes**

A new subpart (subpart G) would be added. This subpart would make clear that the pre-dispute process applies to all potential disputes arising under contracts or solicitations with the FAA. Also, it would set forth the process for filing a pre-dispute. Further, it would clarify the non-binding voluntary nature of the pre-dispute process and that it is subject to the confidentiality requirements of proposed § 17.39.

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

Appendix A would be revised to eliminate the description of "Minitrial" and to add a provision that addresses and clarifies the use of binding arbitration.

#### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there is no new information collection requirement associated with this proposed rule.

#### **International Compatibility**

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA

has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

#### **IV. Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96-39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impact of the proposed rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the costs and benefits is not prepared. Such a determination has been made for this proposed rule.

The reasoning for this determination follows: Under the FAA's Acquisition Management System, the Office of Dispute Resolution for Acquisition (ODRA) manages the dispute resolution process, including administrative adjudication of all procurement protests and contract disputes. This proposed rule simplifies and clarifies the current part 17 regulations under which the ODRA operates, including clarifying language and definitions, reorganization and consolidation of certain sections,

and simplification and clarification of certain procedures such as filing requirements. These changes would be cost beneficial as they make it easier to use the dispute resolution process.

In addition, the proposed rule is updated to incorporate changes in statutory authority and additional authority delegated by the Administrator to the ODRA. These changes would have no effect on costs or benefits. The rulemaking would also codify a voluntary dispute avoidance and early resolution process that the ODRA is already using. The voluntary process is inherently less costly than the more formal dispute resolution process. The FAA expects that codification of the voluntary process will increase its use, thereby lowering the cost of the dispute resolution process.

Since the changes to the proposed rule would either be cost beneficial or have no cost effect, we expect the proposed rule to have a minimal impact with positive benefits. The FAA therefore has determined that this proposed rule does not warrant a full regulatory evaluation. The FAA requests comments regarding this determination.

The FAA has also determined that this proposed rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

#### **Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA 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 rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that

the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As noted above, the proposed changes to part 17 are either cost beneficial or have no effect on costs. Accordingly, the proposed rule would not have a significant impact on a substantial number of small entities. Therefore, the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The FAA requests comments regarding this determination.

#### Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of \$141.3 million.

This proposed rule does not contain such a mandate. The requirements of Title II do not apply.

#### Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect 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, and, therefore, would not have federalism implications.

#### Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this proposed rulemaking action qualifies for the categorical exclusion identified in paragraph 312d and involves no extraordinary circumstances.

#### Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM under Executive Order 13211, Actions

Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order, it is not a "significant regulatory action" under Executive Order 12866 and DOT's Regulatory Policies and Procedures, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### Additional Information

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

#### Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD-ROM, mark the outside of the disk or CD-ROM and identify electronically within the disk or CD-ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and we place a note in the

docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

#### Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visiting the FAA's Regulations and Policies Web page at [http://www.faa.gov/regulations\\_policies](http://www.faa.gov/regulations_policies) or
3. Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>.

You can also get a copy by sending 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. Make sure to identify the docket or notice number of this rulemaking.

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the Internet through the Federal eRulemaking Portal referenced in paragraph (1).

#### List of Subjects in 14 CFR Part 17

Administrative practice and procedure, Authority delegations (Government agencies), Government contracts.

#### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Chapter I of Title 14, Code of Federal Regulations by revising part 17 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 Motions practice and dismissal or summary decision of protests.
- 17.21 Adjudicative process for protests.
- 17.23 Protest remedies.

**Subpart C—Contract Disputes**

- 17.25 Dispute resolution process for contract disputes.
- 17.27 Filing a contract dispute.
- 17.29 Informal resolution period.
- 17.31 Dismissal or summary decision of contract disputes.
- 17.33 Adjudicative Process for contract disputes.

**Subpart D—Alternative Dispute Resolution**

- 17.35 Use of alternative dispute resolution.
- 17.37 Election of alternative dispute resolution process.
- 17.39 Confidentiality of ADR.

**Subpart E—Finality and Review**

- 17.41 Final orders.
- 17.43 Judicial review.
- 17.45 Conforming amendments.
- 17.47 Reconsideration.

**Subpart F—Other Matters**

- 17.49 Sanctions.
- 17.51 Decorum and professional conduct.
- 17.53 Orders and subpoenas for testimony and document production.
- 17.55 Standing orders of the ODRA director.

**Subpart G—Pre-Disputes**

- 17.57 Dispute resolution process for pre-disputes.
- 17.59 Filing a pre-dispute.
- 17.61 Use of alternative dispute resolution. 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 Acquisition Management System (AMS) bid protests and contract disputes involving the FAA that are filed at the Office of Dispute Resolution for Acquisition (ODRA) on or after the effective date of these regulations, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996, where such contracts have not been modified to be made subject to the FAA AMS. This part also applies to pre-disputes as described in subpart G hereof.

**§ 17.3 Definitions.**

- (a) *Accrual* means to come into existence as a legally enforceable claim.
- (b) *Accrual of a contract claim* means that all events relating to a claim have occurred, which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be

capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on equitable grounds, including but not limited to active concealment, fraud, or if the facts were inherently unknowable.

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

(d) *Adjudicative Process* is an administrative adjudicatory process used to decide protests and contract disputes where the parties have not achieved resolution through informal communication or the use of ADR. The Adjudicative Process is conducted by a Dispute Resolution Officer (DRO) or Special Master selected by the ODRA Director to preside over the case in accordance with Public Law 108–176, Section 224, Codified at 49 U.S.C. 40110(d)(4).

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

(f) *Alternative Dispute Resolution (ADR)* is the primary means of voluntary dispute resolution that is employed by the ODRA. See Appendix A of this part.

(g) *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, unless otherwise agreed to by the parties. An ODRA DRO or neutral cannot be a compensated neutral.

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

(i) *Counsel* refers to a Legal Representative who is an attorney licensed by a State, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that State or territory.

(j) *Contractor* is a party in contractual privity with the FAA and responsible for performance of a contract's requirements.

(k) *Discovery* is the procedure whereby opposing parties in a protest or contract dispute may, either voluntarily

or to the extent ordered by the ODRA, obtain testimony from, or documents and information held by, other parties or non-parties.

(l) *Dispute Resolution Officer (DRO)* is an attorney and member of the ODRA staff. The term DRO can include the Director of the ODRA.

(m) *Interested party*, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract. Proposed subcontractors are not “interested parties” within this definition and are not eligible to submit protests to the ODRA. Subcontractors not in privity with the FAA are not interested parties in the context of a contract dispute.

(n) *Intervenor* is an interested party other than the protester whose participation in a protest is allowed by the ODRA. For a post-award protest, the awardee of the contract that is the subject of the protest will be allowed, upon timely request, to participate as an intervenor in the protest. In such a protest, no other interested parties will be allowed to participate as intervenors.

(o) *Legal Representative* is an individual(s) designated to act on behalf of a party in matters before the ODRA. Unless otherwise provided under §§ 17.15(c)(2), 17.27(a)(1), or 17.59(a)(6), a Notice of Appearance must be filed with the ODRA containing the name, address, telephone and facsimile (Fax) numbers of a party's legal representative.

(p) *Neutral* refers to an impartial third party in the ADR process chosen by the parties to act as a facilitator, mediator, arbitrator, or otherwise to aid the parties in resolving a protest or contract dispute. A neutral can be a DRO or a person not an employee of the ODRA.

(q) *ODRA* is the FAA's exclusive forum acting on behalf of the Administrator, pursuant to the statutory authority granted by Public Law 108–176, Section 224, to provide dispute resolution services and to adjudicate matters within its jurisdiction. The ODRA may also provide non-binding dispute resolution services in matters outside of its jurisdiction where mutually requested to do so by the parties involved.

(r) *Parties* include the protester(s) or the contractor, the FAA, and any intervenor(s).

(s) *Pre-Disputes* mean an issue(s) in controversy concerning an FAA contract or solicitation of the parties that, by mutual agreement, is filed with the ODRA. See subpart G, hereof.

(t) *Product Team*, as used in these rules, refers to the FAA organization(s) responsible for the procurement or

contracting activity, without regard to funding source, and includes the Contracting Officer (CO). The Product Team, acting through assigned FAA counsel, is responsible for all communications with and submissions to the ODRA in pending matters.

(u) *Screening Information Request* (SIR) or Solicitation means a request by the FAA for documentation, information, presentations, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA.

(v) A *Special Master* is a non-FAA attorney or judge 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 Adjudicative Process.

#### § 17.5 Delegation of authority.

(a) The authority of the Administrator to conduct dispute resolution and adjudicative proceedings concerning acquisition matters, is delegated to the Director of the ODRA.

(b) The Director of the ODRA may redelegate to Special Masters and DROs such delegated authority in paragraph (a) of this section as deemed necessary by the Director for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions for the filing of frivolous pleadings, making false statements, or other disciplinary actions. See subpart F hereof.

#### § 17.7 Filing and computation of time.

(a) Filing of a protest or contract dispute may be accomplished by overnight delivery, by hand delivery, by Fax, or, if permitted by Order of the ODRA, by electronic filing. 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 p.m. Eastern Time. A protest or contract dispute received after the time period prescribed for filing, shall not be considered timely filed. Service shall also be made on the CO pursuant to §§ 17.15(e) and 17.27(d).

(b) Submissions to the ODRA after the initial filing of a protest or contract dispute may be accomplished by any means available in paragraph (a) of this section. Copies of all such submissions shall be served on the opposing party or parties.

(c) The time limits stated in this part are calculated in business days, which exclude weekends, Federal holidays and other days on which Federal Government offices in Washington, DC are not open. 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) *Electronic Filing.* Procedures for electronic filing may be utilized where permitted by Order of the ODRA on a case-by-case basis or pursuant to a Standing Order of the ODRA permitting electronic filing.

#### § 17.9 Protective orders.

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

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

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the ODRA, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision making 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, including but not limited to removal of the violator from the protective order and reporting of the violator to his or her bar association(s), and the taking of other actions as the ODRA deems appropriate. Additional civil or criminal penalties may apply.

## Subpart B—Protests

### § 17.11 Matters not subject to protest.

The following matters may not be protested before the ODRA, except for review of compliance with the AMS:

(a) FAA purchases from or through, State, local, and Tribal governments and public authorities;

(b) FAA purchases from or through other Federal agencies;

(c) Grants;

(d) Cooperative agreements;

(e) Other transactions.

### § 17.13 Dispute resolution process for protests.

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

(b) Potential protestors should, where possible, attempt to resolve any issues concerning potential protests with the CO. Such attempts are not a prerequisite to filing a protest with the ODRA.

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

(d) In accordance with § 17.17(b), the ODRA shall convene an initial status conference for the purpose of scheduling proceedings in the protest and to encourage the parties to consider using the ODRA's ADR process to attempt to resolve the protest, pursuant to subpart D of this part. It is the Agency's policy to use voluntary ADR to the maximum extent practicable. If the parties elect not to attempt ADR, or if ADR efforts do not completely resolve the protest, the protest will proceed under the ODRA Adjudicative Process set forth in subpart E of this part. Informal ADR techniques may be utilized simultaneously with ongoing adjudication.

(e) The ODRA Director shall designate DROs, outside neutrals or Special Masters as potential neutrals for the resolution of protests through ADR. The ultimate choice of an ADR neutral is made by the parties participating in the ADR. The ODRA Director also shall, at his or her sole discretion, designate an adjudicating DRO or Special Master for each matter. A person serving as a neutral in an ADR effort in a matter, shall not serve as an adjudicating DRO or Special Master for that matter.

(f) Multiple protests concerning the same SIR, solicitation, or contract award

may be consolidated at the discretion of the ODR Director, and assigned to a single DRO or Special Master for adjudication.

(g) Procurement activities, and, where applicable, contractor performance pending resolution of a protest, shall continue during the pendency of a protest, unless there is a compelling reason to suspend all or part of the procurement activities or contractor performance. Pursuant to §§ 17.15(d) and 17.17(a), the ODR may impose a temporary suspension and recommend suspension of award or contract performance, in whole or in part, for a compelling reason. A decision to suspend procurement activities or contractor performance is made in writing by the Administrator or the Administrator's delegatee upon recommendation of the ODR.

#### § 17.15 Filing a protest.

(a) An interested party may initiate a protest by filing with the ODR in accordance with § 17.7(a) within the timeframes set forth in this Section. Protests that are not timely filed shall be dismissed. The timeframes applicable to the filing of protests are as follows:

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

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

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

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

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

(b) Protests shall be filed at: (1) ODR, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591. Telephone: (202) 267-3290. Fax: (202) 267-3720; 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 FAX number;

(2) The name, address, telephone number, and FAX number of the protester's legal representative, 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 § 17.23;

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

(d) If the protester wishes to request a suspension of the procurement or contract performance, in whole or in part, and believes that a compelling reason(s) exists to suspend the procurement or contract performance because of the protested action, the protester shall, in its initial filing:

(1) Set forth such compelling reason(s), supply all facts and documents supporting the protester's position; and

(2) Demonstrate—(i) The protester has alleged a substantial case; (ii) The lack of a suspension would be likely to cause irreparable injury; (iii) The relative hardships on the parties favor a suspension; and (iv) Whether a suspension is in the public interest.

(3) Failure of a protester to provide information or documents in support of a requested suspension or failure to address the elements of paragraph (d)(2) of this section may result in the summary rejection of the request for suspension, or a requirement that the protester supplement its request prior to the scheduling of a Product Team response to the request under § 17.17(a).

(e) Concurrently with the filing of a protest with the ODR, 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 ODR. The protest shall include a signed statement from the protester, certifying to the ODR 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 notify the awardee of a challenged contract award in writing of the existence of the protest. The awardee and/or interested parties shall notify the ODR 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 ODR.

(g) The ODR has discretion to designate the parties who shall participate in the protest as intervenors. In protests of awarded contracts, only the awardee may participate as an intervenor as a matter of right.

#### § 17.17 Initial protest procedures.

(a) If, as part of its initial protest filing, the protester requests a suspension of procurement activities or contractor performance in whole or in part, in accordance with § 17.15(d), the Product Team shall submit a response to the request to the ODR by no later than the close of business on the date of the initial scheduling conference or on such other date as is established by the ODR. Copies of the response shall be furnished to the protester and any intervenor(s) so as to be received within the same timeframe. The protester and any intervenor(s) shall have the opportunity of providing additional comments on the response within two (2) business days of receiving it. Based on its review of such submissions, the ODR, in its discretion, may:

(1) Decline the suspension request; or

(2) Recommend such suspension to the Administrator or the Administrator's designee. The ODR also may impose a temporary suspension of no more than ten (10) business days, where it is recommending that the Administrator impose a suspension.

(b) Within five (5) business days of the filing of a protest, or as soon thereafter as practicable, the ODR shall convene an initial status conference for purposes of:

(1) Reviewing the ODR's ADR and adjudication procedures and establishing a preliminary schedule;

(2) Identifying legal or other preliminary or potentially dispositive issues and answering the parties' questions regarding the ODR process;

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

(4) Encouraging the parties to consider using ADR;

(5) Appointing a DRO as a potential ADR neutral to assist the parties in

considering ADR options and developing an ADR agreement; and

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

(c) The Product Team and protester will have five (5) business days from the date of the initial status conference to decide whether they will attempt to use an ADR process in the case. With the agreement of the ODRA, ADR may be used concurrently with the adjudication of a protest. *See* § 17.37(e).

(d) Should the Product Team and protester elect to use ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an ODRA DRO or a compensated neutral of their own choosing) pursuant to § 17.37, and shall execute and file with the ODRA a written ADR agreement. Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.

(e) Should the Product Team or protester indicate that ADR proceedings will not be used, or if ADR is not successful in resolving the entire protest, the ODRA Director upon being informed of the situation, will schedule an adjudication of the protest.

**§ 17.19 Motions practice and dismissal or summary decision of protests.**

(a) Separate motions generally are discouraged in ODRA bid protests. Counsel and parties are encouraged to incorporate any such motions in their respective agency responses or comments. Parties and counsel are encouraged to attempt to resolve typical motions issues through the ODRA ADR process. The ODRA may rule on any non-dispositive motion, where appropriate and necessary, after providing an opportunity for briefing on the motion by all affected parties. Unjustifiable, inappropriate use of motions may result in the imposition of sanctions. Where appropriate, a party may request by dispositive motion to the ODRA, or the ODRA may recommend or order, that:

(1) The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, timeliness, or standing to pursue the protest;

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

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

(i) There are no material facts in dispute and the undisputed material facts demonstrate that the Product Team

decision, action or inaction in question, was consistent with the requirements of the AMS, had a rational basis, and was not arbitrary, capricious or an abuse of discretion; or

(ii) There are no material facts in dispute and the undisputed material facts demonstrate, that the Product Team decision, action or inaction in question, was inconsistent with the requirements of the AMS, lacked a rational basis or was arbitrary, capricious or an abuse of discretion.

(b) In connection with consideration of possible dismissal or summary decision, the ODRA shall consider any material facts in dispute, in a light most favorable to the party against whom the dismissal or summary decision would operate and draw all factual inferences in favor of the non-moving party.

(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.

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

**§ 17.21 Adjudicative Process for protests.**

(a) Other than for the resolution of preliminary or dispositive matters, the Adjudicative Process for protests will be commenced by the ODRA Director pursuant to § 17.17(e).

(b) The Director of the ODRA shall appoint a DRO or a Special Master to conduct the adjudication proceedings, develop the administrative record, and prepare findings and recommendations for review of the ODRA Director.

(c) The DRO or Special Master may conduct such proceedings and prepare procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties.

(d) The Product Team response to the protest will be due to be filed and served ten (10) business days from the commencement of the ODRA Adjudication process. The Product Team response shall consist of a written chronological, supported statement of proposed facts, and a written presentation of applicable legal or other defenses. The Product Team response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed, individually tabbed, and certified as authentic and complete. A copy of the response shall be furnished so as to be received by the protester and any intervenor(s) on the same date it is filed with the ODRA. In all cases, the Product Team shall indicate the method of service used.

(e) Comments of the protester and the intervenor on the Product Team response will be due to be filed and served five (5) business days after their receipt of the response. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the ODRA. Comments may include any supplemental relevant documents.

(f) The ODRA may alter the schedule for filing of the Product Team response and the comments for good cause or to accommodate the circumstances of a particular protest.

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

(h) 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.

(i) The parties may engage in limited, focused discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest.

(1) The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with timeframes established in this part and with the FAA policy of providing fair and expeditious dispute resolution.

(2) The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents.

(3) Where justified, the DRO or Special Master may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery.

(4) The use of interrogatories and requests for admission is not permitted in ODRA bid protests.

(5) Where parties cannot voluntarily reach agreement on a discovery-related issue, they may timely seek assistance from an ODRA ADR neutral or may file an appropriate motion with the ODRA. Parties may request a subpoena.

(6) Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing.

(7) Unless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record.

(k) Hearings are not typically held in bid protests. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted:

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

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

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

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

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

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

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

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

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

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

#### § 17.23 Protest remedies.

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

- (1) Amend the SIR;
- (2) Refrain from exercising options under the contract;
- (3) Issue a new SIR;
- (4) Require a recompetition or reevaluation;

(5) Terminate an existing contract for the FAA's convenience;

(6) Direct an award to the protester;

(7) Award bid and proposal costs; or

(8) Any other remedy consistent with the AMS that is appropriate under the circumstances.

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

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

#### Subpart C—Contract Disputes

##### § 17.25 Dispute resolution process for contract disputes.

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

(b) Contract disputes shall be filed with the ODRA pursuant to § 17.27.

(c) The ODRA has broad discretion to recommend remedies for a contract dispute that are consistent with the AMS and applicable law, including such equitable remedies or other remedies as it deems appropriate.

##### § 17.27 Filing a contract dispute.

(a) Contract disputes must be in writing and should contain:

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

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

(3) A detailed chronological statement of the facts and of the legal grounds underlying the contract dispute, broken down by individual claim item, citing to relevant contract provisions and attaching copies of the contract and other relevant documents;

(4) Information establishing the ODRA's jurisdiction and the timeliness of the contract dispute;

(5) A request for a specific remedy, and the amount, if known, of any monetary remedy requested, together with pertinent cost information and

documentation (e.g., invoices and cancelled checks). Supporting documentation should be broken down by individual claim item and summarized; and

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

(b) Contract disputes shall be filed at the following address: ODRA, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591. Telephone: (202) 267-3290. Fax: (202) 267-3720.

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

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

(e) With the exception of the time limitations established herein for the filing of contract disputes, the ODRA retains the discretion to modify any timeframe established herein in connection with contract disputes.

#### § 17.29 Informal resolution period.

(a) The ODRA process for contract disputes includes an informal resolution period of twenty (20) business days from the date of filing in order for the parties to attempt to informally resolve the contract dispute either through

direct negotiation or with the assistance of the ODRA. The CO, with the advice of FAA legal counsel, has full discretion to settle contract disputes, except where the matter involves fraud.

(b) During the informal resolution period, if the parties request it, the ODRA will appoint a DRO for ADR who will discuss ADR options with the parties, offer his or her services as a potential neutral, and assist the parties to enter into an agreement for a formal ADR process. A person serving as a neutral in an ADR effort in a matter shall not serve as an adjudicating DRO or Special Master for that matter.

(c) The informal resolution period may be extended at the request of the parties for good cause.

(d) If the matter has not been resolved informally, the parties shall file joint or separate statements with the ODRA no later than twenty (20) business days after the filing of the contract dispute. The ODRA may extend this time, pursuant to § 17.27(e). The statement(s) shall include either:

(1) A joint request for ADR, or an executed ADR agreement, pursuant to § 17.37(d), specifying which ADR techniques will be employed; or

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

(e) If the contract dispute is not completely resolved during the informal resolution period, the ODRA's Adjudicative Process will commence unless the parties have reached an agreement to attempt a formal ADR effort. As part of such an ADR agreement the parties, with the concurrence of the ODRA, may agree to defer commencement of the adjudication process pending completion of the ADR or that the ADR and adjudication process will run concurrently. If a formal ADR is attempted but does not completely resolve the contract dispute, the Adjudicative Process will commence.

(f) The ODRA shall hold a status conference with the parties within ten (10) business days, or as soon thereafter as is practicable, of the ODRA's receipt of a written notification that ADR proceedings will not be used, or have not fully resolved the Contract Dispute. The purpose of the status conference will be to commence the Adjudicative Process and establish the schedule for adjudication.

(g) The submission of a statement which indicates that ADR will not be utilized will not in any way preclude the parties from engaging in non-binding ADR techniques during the

Adjudicative Process, pursuant to subpart D.

#### § 17.31 Dismissal or summary decision of contract disputes.

(a) Any party may request by motion, or the ODRA on its own initiative may recommend or direct, that a contract dispute be dismissed, or that a count or portion thereof be stricken, if:

- (1) It was not timely filed;
- (2) It was filed by a subcontractor or other person or entity lacking standing;
- (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) Any party may request by motion, or the ODRA on its own initiative may recommend or direct, that a summary decision be issued with respect to a contract dispute, or any count or portion thereof if there are no material facts in dispute and a party is entitled to a summary decision as a matter of law.

(c) In connection with any potential dismissal of a contract dispute, or summary decision, the ODRA will consider any material facts in dispute in a light most favorable to the party against whom the dismissal or summary decision would be entered, and draw all factual inferences in favor of that party.

(d) At any time, whether pursuant to a motion or on its own initiative and at its discretion, the ODRA may:

- (1) Dismiss or strike a count or portion of a contract dispute or enter a partial summary decision;
- (2) Recommend to the Administrator that the entire contract dispute be dismissed or that a summary decision be entered; or
- (3) With a delegation from the Administrator, dismiss the entire contract dispute or enter a summary decision with respect to the entire contract dispute.

(e) An order of dismissal of the entire contract dispute or summary decision with respect to the entire contract dispute, issued either by the Administrator or by the ODRA, 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 or entering a partial summary judgment shall not constitute a final agency order, unless and until such ODRA order is incorporated or otherwise adopted in a final agency decision of the Administrator or the Administrator's delegatee regarding the remainder of the dispute.

(f) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against

whom the dismissal or summary decision would be entered the opportunity to respond to a proposed dismissal or summary decision.

**§ 17.33 Adjudicative Process for contract disputes.**

(a) The Adjudicative Process for contract disputes will be commenced by the ODRA Director upon being notified by the ADR neutral or by any party that either:

(1) The parties will not be attempting ADR; or

(2) The parties have not settled all of the dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) In cases initiated by a contractor against the FAA, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the Product Team shall prepare and submit to the ODRA, with a copy to the contractor, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The contractor will be entitled, at a specified time, to supplement the record with additional documents.

(c) In cases initiated by the FAA against a contractor, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the contractor shall prepare and submit to the ODRA, with a copy to the Product Team counsel, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The Product Team will be entitled, at a specified time, to supplement the record with additional documents.

(d) Unless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record. Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing. Designated, relevant portions of such documents may be filed, with the permission of the ODRA.

(e) The Director of the ODRA shall assign a DRO or a Special Master to conduct adjudicatory proceedings, develop the administrative adjudication record and prepare findings and recommendations for the review of the ODRA Director or the Director's designee.

(f) The DRO or Special Master may conduct a status conference(s) as necessary and issue such orders or decisions as are necessary to promote the efficient resolution of the contract dispute.

(g) At any such status conference, or as necessary during the Adjudicative Process, the DRO or Special Master will:

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

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

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

(4) Prepare necessary procedural orders for the proceedings.

(h) Unless otherwise provided by the DRO or Special Master, or by agreement of the parties with the concurrence of the DRO or Special Master, responses to written discovery shall be due within thirty (30) business days from the date received.

(i) 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 individual final submissions to the ODRA and to the DRO or Special Master, which submissions shall include the following:

(1) A statement of the issues;

(2) A proposed statement of undisputed facts related to each issue together with citations to the administrative record or other supporting materials;

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

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

(j) Each party shall serve a copy of its final submission on the other party by means reasonably calculated so that the other party receives such submissions on the same day it is received by the ODRA.

(k) The DRO or Special Master may decide the contract dispute on the basis of the administrative record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, direct the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and

extent of any testimony. Evidentiary hearings on the record shall be conducted by the ODRA:

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

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

(l) The DRO or Special Master shall prepare findings and recommendations, which will 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.

(m) The DRO or Special Master shall conduct a de novo review using the preponderance of the evidence standard, unless a different standard is prescribed for a particular issue. Notwithstanding the above, allegations that government officials acted with bias or in bad faith must be established by clear and convincing evidence.

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

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

(p) Attorneys' fees of a qualified prevailing contractor are allowable to

the extent permitted by the EAJA, 5 U.S.C. 504(a)(1). See 14 CFR part 14.

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

#### **Subpart D—Alternative Dispute Resolution**

##### **§ 17.35 Use of alternative dispute resolution.**

(a) By statutory mandate, it is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA. The ODRA therefore uses voluntary ADR as its primary means of resolving all factual, legal, and procedural controversies.

(b) The parties are encouraged to make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The ODRA uses ADR techniques such as mediation, neutral evaluation, binding arbitration or variations of these techniques as agreed by the parties and approved by the ODRA. At the beginning of each case, the ODRA assigns a DRO as a potential neutral to explore ADR options with the parties and to convene an ADR process. See § 17.35(b).

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

##### **§ 17.37 Election of alternative dispute resolution process.**

(a) The ODRA will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually acceptable compensated neutral at their expense.

(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 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 pursuant to § 17.29.

(d) The parties to a protest or contract dispute who elect to use ADR must submit to the ODRA an ADR agreement setting forth:

(1) The agreed ADR procedures to be used; and

(2) The name of the neutral. If a compensated neutral is to be used, the agreement must address how the cost of the neutral's services will be reimbursed.

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

(f) Binding arbitration is available through the ODRA, subject to the provisions of applicable law and the ODRA Binding Arbitration Guidance dated October 2001 as developed in consultation with the Department of Justice.

(g) The parties may, where appropriate in a given case, submit to the ODRA a negotiated protective order for use in ADR in accordance with the requirements of § 17.9.

##### **§ 17.39 Confidentiality of ADR.**

(a) The provisions of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571, *et seq.*, shall apply to ODRA ADR proceedings.

(b) The ODRA looks to the principles of the Federal Rule of Evidence 408 in deciding admissibility issues related to ADR communications.

(c) ADR communications are not part of the administrative record.

#### **Subpart E—Finality and Review**

##### **§ 17.41 Final orders.**

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

##### **§ 17.43 Judicial review.**

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

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

##### **§ 17.45 Conforming amendments.**

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

##### **§ 17.47 Reconsideration.**

The ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments. A party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision. In order to be considered, requests for reconsideration must be filed within ten (10) business days of the date of issuance of the public version of the subject decision or order.

#### **Subpart F—Other Matters**

##### **§ 17.49 Sanctions.**

If any party or its representative fails to comply with an Order or Directive of the ODRA, the ODRA may enter such orders and take such other actions as it deems necessary and in the interest of justice.

##### **§ 17.51 Decorum and professional conduct.**

Legal representatives are expected to conduct themselves at all times in a civil and respectful manner appropriate to an administrative forum. Additionally, counsel are expected to conduct themselves at all times in a professional manner and in accordance with all applicable rules of professional conduct.

##### **§ 17.53 Orders and subpoenas for testimony and document production.**

(a) Parties are encouraged to seek cooperative and voluntary production of

documents and witnesses prior to requesting a subpoena or an order under this section.

(b) Upon request by a party, or on his or her own initiative, a DRO or Special Master may, for good cause shown, order a person to give testimony by deposition and to produce records. Section 46104(c) of Title 49 of the United States Code governs the conduct of depositions or document production.

(c) Upon request by a party, or on his or her own initiative, a DRO or Special Master may, for good cause shown, subpoena witnesses or records related to a hearing from any place in the United States to the designated place of a hearing.

(d) A subpoena or order under this section may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Product Team, money payments need not be tendered in advance of attendance. The person serving the subpoena or order shall file a declaration of service with the ODRA, executed in the form required by 28 U.S.C. 1746. The declaration of service shall be filed promptly with the ODRA, and before the date on which the person served must respond to the subpoena or order.

(e) Upon written motion by the person subpoenaed or ordered under this section, or by a party, made within ten (10) business days after service, but in any event not later than the time specified in the subpoena or order for compliance, the DRO may:

(1) Rescind or modify the subpoena or order if it is unreasonable and oppressive or for other good cause shown, or

(2) Require the party in whose behalf the subpoena or order was issued to advance the reasonable cost of producing documentary evidence. Where circumstances require, the DRO may act upon such a motion at any time after a copy has been served upon all parties.

(f) The party that requests the DRO to issue a subpoena or order under this section shall be responsible for the payment of fees and mileage, as required by 49 U.S.C. 46104(d), for witnesses, officers who serve the order, and the officer before whom a deposition is taken.

(g) Subpoenas and orders issued under this section may be enforced in a judicial proceeding under 49 U.S.C. 46104(b).

#### **§ 17.55 Standing orders of the ODRA director.**

The Director may issue such Standing Orders as necessary for the orderly conduct of business before the ODRA.

#### **Subpart G—Pre-Disputes**

##### **§ 17.57 Pre-dispute resolution process.**

(a) All potential disputes arising under contracts or solicitations with the FAA may be resolved with the consent of the parties to the dispute under this subpart.

(b) Pre-disputes shall be filed with the ODRA pursuant to § 17.59.

(c) The time limitations for the filing of Protests and Contract Disputes established in §§ 17.15(a) and 17.27(c) will not be extended by efforts to resolve the dispute under this subpart.

##### **§ 17.59 Filing a pre-dispute.**

(a) A Pre-dispute must be in writing, affirmatively state that it is a Pre-dispute pursuant to this subpart, and shall contain:

(1) The party's name, address, telephone and Fax numbers and the name, address, telephone and Fax numbers of the contractor's legal representative(s) (if any);

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

(3) A chronological statement of the facts and of the legal grounds for the party's positions regarding the dispute citing to relevant contract or solicitation provisions and documents and attaching copies of those provisions and documents; and

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

(b) Pre-disputes shall be filed at the following address: ODRA, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591. *Telephone:* (202) 267-3290, *Fax:* (202) 267-3720.

(c) Upon the filing of a Pre-dispute with the ODRA, the ODRA will contact the opposing party to offer its services pursuant to § 17.57. If the opposing party agrees, the ODRA will provide Pre-dispute services. If the opposing party does not agree, the ODRA Pre-dispute file will be closed and no service will be provided.

#### **§ 17.61 Use of alternative dispute resolution.**

(a) Only non-binding, voluntary ADR will be used to attempt to resolve a Pre-dispute pursuant to § 17.37.

(b) ADR conducted under this subpart is subject to the confidentiality requirements of § 17.39.

#### **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, Public Law 104-320, 5 U.S.C. 570-579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the ODRA encourages 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) *Binding Arbitration*. The ODRA, after consultation with the United States Department of Justice in accordance with the provisions of the Administrative Disputes Resolution Act to offer true binding arbitration in cases within its jurisdiction. The ODRA's Guidance for the Use of Binding Arbitration may be found on its Web site at: <http://www.faa.gov/go/odra>.

Issued in Washington, DC, on January 4, 2011.

**Anthony N. Palladino,**

*Director, Office of Dispute Resolution for Acquisition.*

[FR Doc. 2011-397 Filed 1-11-11; 8:45 am]

**BILLING CODE 4910-13-P**