

44790



U.S. Department  
of Transportation

FEDERAL AVIATION  
ADMINISTRATION

Washington, D.C. 20591

DEPT. OF TRANSPORTATION  
DOCKET SECTION

98 OCT -7 AM 11:00

EHH-1998-4379-2

---

**PRELIMINARY REGULATORY EVALUATION,  
INITIAL REGULATORY FLEXIBILITY DETERMINATION,  
INTERNATIONAL TRADE IMPACT ASSESSMENT, AND  
UNFUNDED MANDATES ANALYSIS**

**Office of Dispute Resolution for Acquisition  
Procedures for Protests and Contract Disputes  
And  
Equal Access to Justice Act**

**NOTICE OF PROPOSED RULEMAKING  
(14 CFR PARTS 14 and 17)**

OFFICE OF AVIATION POLICY AND PLANS  
OPERATIONS REGULATORY ANALYSIS BRANCH, APO-3 10  
Hazel L. Robinson  
July 1998

**TABLE OF CONTEXTS**

<u>Section</u>	<u>Page</u>
EXECUTIVE SUMMARY . . . . .	i
I.    INTRODUCTION . . . . .	1
II.   BACKGROUND . . . . .	..1
III.  ANALYSIS OF BENEFITS AND COSTS . . . . .	3
A.  Benefits . . . . .	3
B.  costs . . . . .	.
C.  Comparison of Benefits and Costs . . . . .	.
IV.  INITIAL REGULATORY FLEXIBILITY DETERMINATION.....	..9
V.   INTERNATIONAL TRADE IMPACT ASSESSMENT . . . . .	..10
VI.  UNFUNDED MANDATE . . . . .	..11

## EXECUTIVE SUMMARY

This regulatory evaluation examines the potential cost-savings as well as the costs of a notice of proposed rulemaking that would establish the process and procedures for resolving protests and contract disputes through the use of Alternative Dispute Resolution (ADR) techniques. The FAA concludes that the proposed rule would result in cost-savings to offerors and contractors ranging from \$1,000 to \$1 million per case. costs for this proposed rule would be \$1,000 or less per case. The FAA, therefore, concludes that the proposed rule is cost-beneficial.

The proposed rule would not have a significant impact on a substantial number of small entities. In addition, it would not constitute a barrier to international trade. The proposed rule also does not contain a federal intergovernmental or private sector mandate that exceeds \$100 million in any year, therefore the requirements of the act do not apply.

## **I. INTRODUCTION**

This regulatory evaluation is performed in accordance with Executive Order 12866, which requires analysis of each regulation to determine the relationship of its benefits to costs. This evaluation examines the economic impact of a proposal for a congressionally mandated rule to establish procedures for resolution of protests and contract disputes. This proposed rule would add a new part 17 to Title 14, Code of Federal Regulations. The proposed rule outlines the minimum dispute resolution procedures that would apply to all protests and contractual disputes arising under the Acquisition Management System (AMS). The AMS is a system through which the Federal Aviation Administration (FAA) acquires equipment and materials in a timely and cost-effective way. In addition to the regulatory evaluation, this document also contains an Initial Regulatory Flexibility Determination, which analyzes the economic impact of the proposed regulatory changes on small entities, as required by the Regulatory Flexibility Act of 1980, as amended. This document also contains an assessment of the effect of the proposed regulatory changes on international trade, as required by the Office of Management and Budget. Finally, this document contains an Unfunded Mandate Assessment.

## **II. BACKGROUND**

Due to the FAA's unique mission of assuring and maintaining safety standards for all aspects of civil aviation, both the Administration and Congress agreed that the agency needed an acquisition system that was responsive, flexible, and accountable in procuring goods and

services for the agency's use. As a result, Public Law 104-50 (November 15, 1995), directed the FAA to design a system responsive to the Agency's needs. In response, the FAA developed the Acquisition Management System (AMS). The AMS is a system of policy guidance that maximizes the use of agency discretion in the interest of best business practice. As a part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to review protested procurements and contracts in dispute. Notice of establishment of the ODRA was published on May 14, 1996, in the Federal Register (61 FR 24348). Currently, alternative dispute resolution procedures are included in offerings and contracts, and these procedures are agreed to by both the protester, contractor, and FAA. The FAA will publish dispute resolution procedures that apply to all protests concerning Screening Information Requests (SIR) and contract awards, and to all disputes arising from established contracts. The proposed rule is designed to contain the minimum procedures necessary for efficient and orderly resolution of protests and contract disputes.

The ODRA promotes dispute resolution through agreement of the parties through Alternative Dispute Resolution techniques including, but not limited to informal resolution, mediation, fact-finding, and binding or non-binding arbitration. Where the goal of agreement is met, the resolution between the parties would be final and no further action would be necessary. A final order by the Administrator would be necessary only where the process does not result in an agreement. In the absence of an agreement, the administrative process is complete

only when a final order is issued by the Administrator that, under Title 49, can only be reviewed by the U.S. courts of appeals

### **III. ANALYSIS OF BENEFITS AND COSTS**

#### **A. Benefits**

The proposed rule would formalize by regulation an existing system of dispute resolution procedures under the AMS. This system would be more effective and efficient in resolving protests and disputes concerning SIRs and contract awards than procedures used in the traditional federal acquisition system. The new dispute resolution system, which would be applicable to all protesters and contractors who wish to do business with the FAA would provide a streamlined approach that emphasizes informality and flexibility for resolving these cases as early as possible and at the lowest level possible.

Protesters or contractors, after filing initial protests or claims, could seek informal resolution of their differences with the Contracting Officer. If that should fail, the parties could attempt to resolve their differences by applying to the ODRA to use various Alternative Dispute Resolution techniques, such as informal communication, mediation, fact-finding, and arbitration. If that should fail as well, the parties could attempt to settle their differences through an informal adjudicative process known as the Default Administrative Process. This last procedure would result in a recommendation to the Administrator. The Administrator could accept or decline

the recommendation and issue a final order. If the protester or contractor disagrees with the order, the parties could seek relief in U.S. circuit court.

The FAA has been operating under the AMS since April 1, 1996, the ODRA has received 70 protests and 11 contract disputes. The ODRA has been following the procedures that would be established in the proposed rule through a contractual agreement with protesters and contractors. Following these procedures, the ODRA has processed or completed the following actions:

- Completed 73 cases; 8 cases remain active
- Of the 73 cases, 42 were settled or withdrawn and 31 cases were issued adjudicatory decisions.
- Of the 31 cases receiving adjudicatory decisions: 16 cases were denied relief, 8 cases were dismissed, 6 cases-- protests sustained, and in 1 case Equal Access to Justice Act (EAJA) fees were awarded.

The informality throughout the dispute resolution process would result in cost and time savings to the protesters and contractors. Without the ODRA process, protesters and contractors would have to work within a more formal process, often requiring an attorney. Under the traditional federal acquisition system, the dispute resolution process is more formal and adversarial. An aggrieved party must adjudicate its claims at either the court of claims, the U.S. General Accounting Office, or a U.S. District Court. Such process would require more time, up to 2 years, than the less formal

procedures of the ODRA. Currently, disputes are being resolved under ODRA in 3 months or less. The longer the time period to resolve the case, the higher the legal fees.

Legal fees can vary with the value of the contract, the complexity of the issues, and the nature of the differences between the FAA and other parties. For high value contract disputes (usually over \$5 million), which often involve large law firms, attorney fees can reach \$1,000 an hour. For contracts valued less than \$5 million legal fees typically range between \$125 and \$300 per hour. Legal fees (including filing fees) to be paid by a protester or contractor often range between \$1,000 and \$1 million per case depending on the complexity of the case and the legal fees charged.' Where a party prevails over the FAA, the party could apply for reimbursable attorney fees of \$125 per hour under the EAJA, 5 U.S.C. 504.

In addition, the agency would realize a cost savings from implementing the proposed rule. For processing a protest, the agency would save an estimated 65 hours and \$2,200 per case under the ODRA. Similarly, for processing contract disputes, the agency would realize an estimated time and cost savings of 125 hours and \$4,200 per case.'

---

<sup>1</sup> The FAA is aware of the legal fees for two protest cases that were recently adjudicated using dispute resolution procedures. The average legal costs for the plaintiffs were \$18,000.

<sup>2</sup> Average FAA salaries used in the calculations were: GS-14, Step 5 Attorney-- \$36 per hour; GS-13 Step 5 Contracting Officer--\$30 per hour; and GS-9, Step 5 Administrative Specialist--\$18 per hour.

Other cost-saving advantages of the proposed rule is that all submissions, after the initial filing, can be performed by electronic means. This could result in a time savings. It would take only a few minutes to correspond, file, or submit documentation to the FAA electronically, rather than the 3- 7 days for the documents to be delivered to the FAA by mail.

The new procedures established under this proposed rule would establish standardized documents. The availability of standard documents for the dispute resolution process could result in cost savings. For example, a party could request a protective order, or the ODRA on its own initiative could request one. A protective order protects proprietary, confidential, or source-selection-sensitive material, and other information which could result in a competitive advantage to another person. The protective order would be a standardized document that could be accessed electronically. This action could save the protester or contractor legal fees, because under the traditional federal acquisition system, the party would probably need an attorney to draft such a document.

Other ways in which the ODRA could resolve protest cases and contract disputes efficiently is by promoting resolution at the lowest level possible. Once a protester or contractor has filed a protest or claim, during the first 7 to 12 days thereafter, the party can seek resolution at the Contracting Officer level. At this level, the protest or contract dispute could be settled, withdrawn, dismissed,

or denied, which would save the protester or contractor future expenditures. In contrast, under the Federal Acquisition system, the protester or contractor must enter the court system to resolve the dispute.

The ODRA procedures would be more flexible than current procedures. The intent is to provide every opportunity to reach an informal resolution. To promote a streamlined approach, in terms of protests, the proposed rule would allow the ODRA to combine multiple protests concerning the same SIR or contract award in the interest of efficient case resolution. The ODRA could also waive the time requirements for any particular protest, in the interest of fairness or efficient case management. If during the course of the resolution of a protest or contract dispute, when time is about to expire, the Contracting Officer, the protester, or contractor may request the ODRA for an extension of time, if they believe a resolution is probable.

#### B. Costs

The FAA estimates direct cost of utilizing the procedures of the proposed rule would be about \$1,000 or less per case. These costs are basically the cost of filing electronically, meeting with FAA officials to resolve issues, and the time to make telephone calls.

In addition to direct costs, implementing the new dispute resolution procedures for protests and contract disputes, could result in a potential cost to a protester or contractor of \$2,000 to \$5,000 to purchase a computer (including all peripherals) and to become a subscriber with an internet provider in order to file electronically. These costs are minimal and in most cases, the protester or contractor already owns a computer or has access to a computer and to the internet.

There is also the potential for a protester incurring the expense of a courier service to deliver documents to the FAA. The protester or contractor may deliver the documents in person to avoid cost; however, if they should choose to use a courier service, the cost of such service would be no more than \$100 per delivery, and in most instances, the protester or contractor already has a contract with the courier service to provide delivery service for a period of time.

The protester or contractor may incur cost if he decides to use an attorney for any reason during the process. However, unlike the traditional federal acquisition system in resolving protests and contractual disputes, attorneys are not necessary for resolving such matters under the ODRA. Last, the FAA believes that there are no additional costs to the FAA for implementing the ODRA procedures.

C. Comparison of Benefits and costs

If the proposed rule becomes effective, protesters and contractors could often realize some cost savings of \$1,000 to \$1 million per

case (primarily in legal fees) if they participate in the new dispute resolution procedures per case. The cost of resolving a protest or contractual issue under the new dispute resolution system would be \$1,000 or less per case. There is the potential cost of \$2,000 - \$5,000 to procure a computer to file electronically, but most protesters or contractors already own one or have access to one. The FAA concludes that this proposed rule is cost-beneficial, the estimated cost savings (\$1,000 to \$1 million per case) exceed the estimated costs (\$1,000 or less per case).

#### IV. INITIAL REGULATORY FLEXIBILITY DETERMINATION

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

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

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

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

#### **V. INTERNATIONAL TRADE IMPACT ASSESSMENT**

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

## VI. UNFUNDED MANDATES

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104-4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed "significant intergovernmental mandate." A "significant intergovernmental mandate" under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

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