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FAA-98-4379-5

November 19, 1998

DEPARTMENT OF TRANSPORTATION  
98 NOV 20 AM 11:14  
DOCKET SECTION

U.S. Department of Transportation Dockets  
Docket No. FAA-9829310  
400 Seventh Street, N.W., Room 401  
Washington, D.C. 20591

Re: Docket No. FAA-98-29310; Procedures for Protest and Contracts Disputes; Amendment of Equal Access to Justice Act Regulations, 63 Fed. Reg. 45371 (Aug. 25, 1998)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors and, therefore, should not be construed as representing the policy of the American Bar Association.

These comments address the Federal Aviation Administration's ("FAA") proposed 14 C.F.R. Part 17 procedures for resolving protests and

contract disputes arising in connection with FAA procurements. They do not address the conforming amendments proposed to 14 C.F.R. Part 14 that relate to recovery of attorneys fees under the Equal Access to Justice Act in connection with the proposed Part 17 procedures. For ease of reference, a table of contents is attached at the end of this letter.

Drafts of these comments were circulated and made available to all attendees at the public meeting of the Section's Council in Colorado Springs, CO on November 7, 1998. These final comments reflect the substance of that discussion. The Section is especially grateful that Anthony Palladino, appearing solely in his personal capacity, was able to participate and provide the Section some insight concerning what the FAA has accomplished in implementing its Acquisition Management System.

## **I. OVERVIEW**

The Section generally supports efforts to streamline procurement procedures and to provide opportunities for informal resolution of protests and contract disputes. Recently after extensive discussion, the Section adopted a set of governing principles for resolving controversies in public procurements the following of which most inform the Section's comments on the FAA's proposed regulations for resolving protests and contract disputes:

- The contracting process should be sufficiently open and well-articulated so as to permit review of both the process and reasonableness of decisions ("Controversy Principle 2");
- The parties have a responsibility to seek resolution of controversies informally by mutual agreement ("Controversy Principle 3");
- The parties may agree to resolve a controversy, at any time, through the use of an alternative dispute resolution ("ADR") process, through which differences may be resolved and doubtful questions settled according to such lawful terms as the parties may establish ("Controversy Principle 4"); and
- The parties must have available adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient and just resolution of controversies ("Controversy Principle 5").

The proposed FAA regulations have much to commend them when assessed against the benchmark of these Principles for Resolving Controversies. The proposed procedures encourage informal resolution and the use of ADR. They provide for an administrative adjudicative process the goal of which is a prompt and independent resolution of any protest or contract dispute. Had the FAA proposed these procedures as an alternative to and not as a substitute for the statutory guarantees of judicial review of procurement controversies, the Section would wholeheartedly endorse the concept and its comments would focus exclusively on making sure the rules were clear and consistent with the underlying goal of providing an informal alternative.

As drafted, however, the Section has serious concerns with the FAA's proposed rules, the most significant of which are summarized here:

- Under the Tucker Act, as amended, and the Contract Disputes Act, Congress has provided offerors and contractors with significant procedural rights, including direct access to courts. The proposed rules are contrary to law because they seek to substitute the FAA's own internal dispute resolution process (a formal adjudication process with limited appeal rights) for that guaranteed by statute, and the proposed rules abolish or significantly curtail rights guaranteed by the Tucker Act and CDA.
  - Consequently, the FAA should amend the rules to preserve direct access to judicial review in appropriate cases and to ensure that offerors and contractors are not misled into waiving their statutory rights.
  - Alternatively, if the FAA continues its endeavor to exempt itself from the statutory dispute resolution process, its own internal adjudication process must offer minimum procedural guarantees such as a right of access to relevant documents and testimony, an opportunity for a hearing and a reasonable time in which to bring a dispute before the appropriate forum.
- The Section endorses the FAA's emphasis on ADR, but the parties should be free to seek resolution of their disputes through ADR at any time, not only at the beginning of the process as apparently contemplated under the proposed rules.

- The specific protest procedures should be modified in a number of respects, including most significantly:
  - Removing the presumption against suspension of a challenged award and providing procedural safeguards to ensure that the Office of Disputes Resolution for Acquisition can make an informed and balanced decision on the appropriateness of suspension in individual cases.
  - Adding procedures for submissions, document production and other discovery, and hearings, to provide adequate due process in order that an aggrieved offeror may present its case adequately and obtain fair consideration of its protest.
  - Modifying the requirements for intervention and standing to recognize and permit participation by any offeror, or potential offeror, who has, or would, suffer a direct economic harm from the challenged award or Screening Information Request.
  
- The disputes procedures should be modified in a number of respects, including most significantly:
  - Incorporating the standard definition of “accrual” of a contract dispute, increasing the limitations period for submission of a contract dispute to the ODRA to six years, and making the limitations period equally applicable to contractor and government initiated contract disputes.
  - Providing for discovery and a hearing as a matter of right in adjudicated cases to the extent that the FAA’s rules seek to foreclose a contractor from seeking *de nouo* judicial review of contract claims.

## **II. THE FAA’S AUTHORITY IS LIMITED BY THE TUCKER ACT AND THE CONTRACT DISPUTES ACT**

The FAA has endeavored to replace completely the traditional protest and disputes resolution process guaranteed to contractors by the Tucker Act (28 U.S.C. § 1491) and the Contract Disputes Act (41 U.S.C. § 601, *et seq.*). The agency’s wholesale substitution of its own internal protest and dispute resolution processes in lieu of those afforded to contractors by statute is

contrary to law and unjustified as a matter of policy.<sup>1</sup> Accordingly, significant aspects of these rules may be unenforceable, and the promulgation of the rules will create traps that may jeopardize rights of the Government, contractors and protesters, if they unwittingly fail to preserve their rights or fail to comply with these statutory requirements for perfecting jurisdiction.

**A. The FAA's Limited Authority**

In proposing these regulations, the FAA relies primarily on Congress' direction that the FAA develop and implement an "acquisition management system." Section 348 of the FY 1996 Department of Transportation Appropriation Act, Pub. L. 104-50, 109 Stat. 436, 460 (1995) ("FY 96 DOT Appropriation Act"). Secondly, the FAA relies on the Air Traffic Management System Performance Improvement Act of 1996, Pub. L. 104-264, 110 Stat. 3213, 3227-50 (1996) ("ATM Improvement Act") which provided the FAA with a degree of autonomy from the Secretary of Transportation. These statutes, neither separately nor combined, provide the FAA with authority to divest the Court of Federal Claims and Boards of Contract Appeals of the jurisdiction provided under the Tucker Act and the CDA.

Section 348(b) expressly exempts the FAA's "acquisition management system" from seven listed statutes (or portions of statutes), and it further exempts the FAA from the Federal Acquisition Regulation and any laws that provide authority to promulgate regulations in the FAR.<sup>2</sup> Neither the Tucker

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The Section has previously expressed its disagreement with the FAA's claimed authority to exempt itself from Tucker Act and CDA jurisdiction. See June 26, 1996 Letter to Mr. David Hinson from Frank H. Menaker, Jr., Chair, ABA Section of Public Contracts Law.

Section 348(b) provides:

The following provisions of Federal acquisition law shall not apply to the new acquisition management system developed and implemented pursuant to subsection (a):

- (1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252-266).

*(Footnote cont'd on next page)*

Act nor the CDA is listed in Section 348, and neither act provides authority to promulgate regulations under the FAR. To the contrary, the jurisdiction under both statutes extends beyond federal contracts subject to the FAR.

Furthermore, an analysis of the language of Section 348 makes clear that Congress did not intend to provide the FAA a blanket exemption from the CDA or the Tucker Act. See Rand L. Allen, Christopher R. Yukins, "Bid Protest and Contract Disputes Under the FAA's New Procurement System" 26 Pub. Con. L.J. 135, 149-51 (1997). Under the basic legal principle *inclusio unius est exclusio alterius*, where – as here – a statute provides a list of specific exemptions, Congress is presumed to have intended only those exemptions, and not any others. See *Tang v. Reno*, 77 F.3d 1194 (9<sup>th</sup> Cir. 1996) (statute permitted the Attorney General to waive many, but not all, of the bases for exclusion under the immigration laws); cf. *Andres v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in absence of a contrary legislative intent").

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(Footnote cont'd from previous page.)

- (2) The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.)
- (3) The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).
- (4) The Small Business Act (15 USC. 631 et seq.), except that all reasonable opportunities to be awarded contracts shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.
- (5) The Competition in Contracting Act.
- (6) Subchapter V of chapter 35 of title 31, relating to the procurement protest system.
- (7) The Brooks Automatic Data Processing Act (40 U.S.C. 759).
- (8) The Federal Acquisition Regulation and any laws not listed in (a) through (e) [sic] of this section providing authority to promulgate regulations in the Federal Acquisition Regulation.

Here, nothing in the legislative history suggests Congress meant to exempt the FAA procurements from Tucker Act or CDA jurisdiction. Nor is jurisdiction to resolve bid protests and disputes inconsistent with the Congressional mandate to create a new “acquisition management system.” The Section recognizes that in some instances the FAA critical mission of ensuring aviation safety would justify exemption from generalized statutory requirements. However, FAA’s critical mission does not require abolishing or curtailing disputes resolution procedures which are completely ancillary to contract performance. Stated differently, contract performance of a mission critical contract is unaffected by the disputes process because under the CDA a contractor is required to continue performance irrespective of any pending claims or disputes. Thus, there is no logical reason to exempt a process from judicial review which is totally unrelated to the worthy goal of permitting FAA to fulfill its mission without disruption.

In the protest arena, the only impediment to continued performance is suspension, which the Section recognizes is not appropriate in all cases. A mission critical procurement would not be compromised by affording judicial review of procurement decisions. Indeed, such a review has been recognized by Congress and the Courts for many decades. See *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) (FAA procurement for instrument landing systems at airports); *Hayes Int’l Corp. v. McLucas*, 509 F.2d 247, 258 (5<sup>th</sup> Cir.), *cert. denied*, 423 U.S. 864 (1975) (“At the same time, we do not believe that denying review altogether is the proper way to temper judicial discretion in granting injunctions which may have harmful effects on military and Government procurement”).

Finally, subsequent Congressional actions do not support an inference that Congress intended to exempt the FAA from the Tucker Act or the CDA. For example, in extending Tucker Act jurisdiction to post-award protests in 1996, Congress did not exclude the FAA or otherwise alter the definition of “federal agency.” The Court of Federal Claims has recently held that the Postal Service is a “federal agency” under the Tucker Act, even though the Postal Service is exempted from any “Federal law dealing with public or Federal contracts” – a much broader exemption than provided to the FAA. See *Hewlett-Packard Co. v. United States*, 41 Fed. Cl. 99 (1998). The more limited list of exemptions to procurement related statutes provided the FAA

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<sup>3</sup> See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3874-75, § 12 (1996).

by Section 348(b) simply do not provide a basis for eliminating the bid protest and contract claim jurisdiction provided under the Tucker Act and CDA.

Nor do the ATM Improvement Act amendments (§ 223) to 49 U.S.C. § 106 enhance the FAA's claim to an exemption from the CDA and the Tucker Act. Specifically, the FAA relies on the modification to 49 U.S.C. § 106(f) which provides the Administrator with "final authority" over "the acquisition and maintenance of property and equipment of the administration . . ." The purpose of this amendment and the other changes to § 106 was to carve out from the Secretary of the Department of Transportation ("DOT") certain specified functions over which the Administrator would have "final authority," *i.e.*, independence from DOT. Nothing in the statute suggested that the FAA was no longer a "federal agency" or "executive agency" subject to the Tucker Act and CDA.

## **B. Impact on Bid Protests**

In light of the FAA's exemption from GAO review of its procurement award decisions, the Section agrees that the FAA should maintain an agency level bid protest procedure to ensure adequate and impartial review of FAA pre-award and award decisions. As discussed more fully below, with some modest tinkering, the proposed rules should provide an effective process for resolving most protests related to FAA procurements. The Section does not believe that the FAA has authority to compel offerors, potential offerors or bidders to waive their statutory right to judicial review in appropriate cases.

Nor, as a matter of policy (see Section's Controversy Principles 2 and 5), should the FAA seek – through its regulations – to foster the perception that Tucker Act jurisdiction is unavailable to review bid protests. First, such regulations are likely to mislead the less sophisticated bidders and offerors who may not appreciate the availability of Tucker Act and Little Tucker Act (28 U.S.C. § 1346(a)(2)) jurisdiction. In addition, the proposed regulations are likely to generate litigation over the extent of the FAA's authority, which litigation is most likely to occur – and disrupt – a major competitive procurement.

Accordingly, the Section recommends that the proposed regulations be changed to make clear that the protest related provisions only apply to protests filed with the Office of Dispute Resolution for Acquisition ("ODRA").

### **C. Impact on the Efficient Resolution of Disputes**

The detrimental impact of the proposed regulations is perhaps more serious with respect to resolution of contract disputes than the impact on protests. First, by avoiding the use of “certified claims” and “final decisions” the regulations place contractors (and indeed the government) in legal jeopardy if their contract claims do not conform to the CDA requirements. Second, FAA’s proposal would eliminate a major reform of the CDA – permitting direct and *de nouo* judicial review of contract disputes.

The proposed rules create a significant risk for contractors (and the FAA Contracting Officers) that they will not take the steps necessary to perfect jurisdiction under the CDA over disputed contract claims. Given the Congressional intent to provide “a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims,”<sup>4</sup> neither the FAA’s standard Disputes clause (§ 3.9.1-1) nor these regulations will except contract claims from the CDA requirements. The Federal Circuit has made clear that the Government may not, by standard clause or regulation, compel contractors to waive *de nouo* review under the CDA. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997) (“Thus, the CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction unless the contract provision otherwise depriving jurisdiction is itself a matter of statute primacy”).

Here, as drafted, the proposed rules avoid all of the jurisdictional elements of the CDA. There is no process for submitting a certified claim to the contracting officer, nor is there a process for the contracting officer to issue a “final decision” on a government or contractor claim. Where the “contract dispute” is settled or favorably decided under the proposed procedures, the failure of a contractor to comply with the CDA will not be an issue. On significant claims, however, prudent contractors must necessarily request final decisions and preserve their options to seek independent *de nouo* review under the CDA. Indeed under the proposed rules, until the issue of jurisdiction is settled, there will likely be significant parallel, duplicative and wasteful litigation over specific contract claims.

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<sup>4</sup> See S. Rep. No. 1118, 95<sup>th</sup> Long., 2d Sess. at 1 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5235.

As noted above, even if the FAA had authority to exempt itself from CDA jurisdiction, the Section would be very troubled by the limited access to judicial remedies proposed for contracts with the FAA. The proposed approach fails to acknowledge a right of direct access to the courts, and the courts have only very limited authority to review the agency's findings and recommendations. These shortcomings are all the more pronounced in the context of FAA procurements because, under the proposed regulations (§ 17.23(f)), the contractor is required to continue performance. Consequently, the contractor is forced to expend additional sums even in the face of an FAA breach, but is not assured full judicial consideration of the facts and law underlying its dispute with the agency.

The Section understands and supports the FAA's goal of reducing the complexity and cost of the disputes process, but believes that the elimination of full judicial remedies is a step too far. In Controversy Principle 5, the Section recently endorsed the tenet that "parties must have available adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient, and just resolution of controversies." The core objectives of the Controversy Principles were to encourage expeditious and inexpensive resolution of disputes, "while preserving the parties' rights to the full range of legal process where necessary and appropriate."<sup>5</sup> Thus, the unavailability of *full* judicial process for those who contract with the FAA – in instances in which a party believes such full process is necessary and appropriate – is inconsistent with these principles and, therefore, unsupported by the Section.

The Section also believes it is a significant step backward into the pre-CDA days when *all* government contractors lacked the right to full judicial consideration of some categories of disputes. At that time, for disputes "arising under" a contract, contractors generally could appeal a contracting officer's decision only to the head of the agency or a designated board of contract appeals (with limited judicial review); the only claims that could be taken directly to the courts were "breach-of-contract" claims, for which the contract provided no administrative remedy. In addition, under the then-existing disputes process (as would be the case under the proposed regulations), the agency was essentially the final arbiter of all facts related to

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<sup>5</sup> See ABA Section of Public Contract Law, Report to Accompanying Principles for Resolving Controversies in Public Procurements at 2.

an appeal, because the reviewing court (*i.e.*, the Court of Claims) had limited review authority.

Notably, before Congress revamped that system through the CDA, it created the Commission on Government Procurement, which extensively analyzed, *inter alia*, the legal and administrative remedies available in federal contracts. After considerable deliberation, the Commission expressly recommended that contractors be provided direct access to the courts, explaining its recommendation as follows:

We conclude, however, that direct access to the courts should be restored to the contractor to assure it of a day in court, a fully judicialized, totally independent forum that historically has been the forum within which contract rights and duties have been adjudicated. The rationale of the Tucker Act, which ended to a great degree the doctrine of sovereign immunity, is that the Government acting as a buyer subjects itself to this judicial scrutiny when it enters the marketplace, and should not, in all cases be administratively the judge of its own mistakes, nor adjust with finality disputes to which it is a party. This recommendation does no more than reaffirm the intent of this statute. While most disputes will undoubtedly best be resolved in an administrative proceeding, the contractor should not be denied a full judicial hearing on a dispute it deems important enough to warrant the maximum due process available under our system. Direct' access to courts guarantees that, at the option of the contractor, the remedial process may extend from the contracting officer to the courthouse on all aspects of a dispute.

Report of the Commission on Government Procurement, Volume 4, at 23 (December 1972).

In testimony before Congress, this Section (with the approval of the ABA House of Delegates) endorsed the Procurement Commission's conclusion favoring direct access to the courts, in part because that "alternative

represents assurance to the contractor that the process is fair and not tilted in favor of the government? The Section also accepted a Wunderlich standard of review for judicial appeals of administrative hearings based in part on the availability of direct access as an alternative:

This means that if the contractor brought his appeal to the agency board, he would have one “bite at the apple” on the facts, subject to the limited review I just described. This appears to be fair, since the contractor had the opportunity to obtain a *de novo* review of the facts in a court proceeding had he chosen his right of direct access.<sup>7</sup>

The Section believes the rationale for providing an option for direct access to courts empowered to review, *de novo*, contract disputes is as persuasive today as it was over 20 years ago when it led to the CDA. Absent clear Congressional intent to deny contractors the right to full legal process when contracting with the FAA, the Section cannot endorse such a significant departure from the law. Accordingly, the proposed rules should be amended to provide contractors with the option to proceed with contract claims under the CDA. If that recommendation is not accepted, the contract dispute resolution procedures must be significantly enhanced, as discussed in the comments that follow, to ensure that a contractor’s “one bite” is a fair and complete one.

### **III. PROPOSED RULES OF GENERAL APPLICABILITY**

The proposed rules include provisions and definitions that are applicable to both protests and disputes as well as many that are specific to

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<sup>6</sup> *Contract Disputes Act of 1978: Joint Hearings Before the Subcomm. on Fed’l Spending Practices and Open Government of the Sen. Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Sen. Comm. on the Judiciary, 95th Cong., 2d Sess. 126 (1978) (statement of Allan J. Joseph).*

<sup>7</sup> *Contract Disputes: Hearings on H.R. 664 and Related Bills Before the Subcomm. on Admin. Law and Gov’t Relations of the House Comm. of the Judiciary, 95th Cong., 1st Sess. 134 (1977) (statement of Allan J. Joseph).*

one or the other process. The comments in this section address those provisions that are equally applicable to both protests and disputes. Provisions, such as the “default adjudicative procedure,” which present different concerns in the protest or disputes procedures are discussed separately in those sections.

**A. Definitions – Section 17.3**

**1. Compensated Neutral**

The Section recommends that § 17.3 of the FAA’s proposed rules be revised to provide:

The parties pay equally for the services of a Compensated Neutral, *unless the parties agree otherwise.*

(Proposed change shown by italics). The Section believes the rules should be flexible enough to permit the parties to negotiate how the costs of a compensated neutral should be allocated among them.

**2. Discovery**

As proposed, § 17.3(i) of the FAA’s rules provides:

*Discovery* in the Default Adjudicative Process is the procedure where opposing parties in a protest or contract dispute *may, when allowed,* obtain testimony from, or documents and information held by, other parties or non-parties.

63 Fed. Reg. 45383 (emphasis added).

The Section recommends striking this definition, or at the very least, removing the language “may, when allowed.” There is no need to define such well understood term as “discovery,” and the nature and extent of discovery will likely vary depending on whether it occurs in the context of a bid protest or contract dispute. Making discovery discretionary, as this proposed definition purports to do, would only be acceptable if the rules made clear that an alternative existed where access to relevant documents and witness testimony was available as a matter of right. Otherwise, due process requires sufficient discovery in each case to permit a party to prove its case and challenge the other party’s evidence.

### 3. **Office of Disputes Resolution for Acquisition**

In Section 17.3(n) of its proposed rules, the FAA provides a definition of ODRA:

ODRA, under the direction of the Director, acts on behalf of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to the Administrator on matters concerning protests or contract disputes.

63 Fed. Reg. 45383.

In its present form, this rule is overbroad; it purports to vest in the Director the authority to recommend action on all protests and contract disputes, arguably including those protests and contract disputes before the Court of Federal Claims and the Federal District Courts pursuant to the Tucker Act. The Section recommends striking this definition, or in the alternative defining the ODRA solely in terms of its authority with respect to bid protests or disputes filed with the ODRA under this new Part 17.

#### **B. Filing and Computation of Time – Section 17.7**

Section 17.7(b) of the FAA's proposed rules provides:

Submissions to the ODRA after the initial filing of the protest or contract dispute may be accomplished by any means available in paragraph (a) of this section.

63 Fed. Reg. 45383. Paragraph (a) of Section 17.7 authorizes parties to file protests or contract disputes “by mail, overnight delivery, hand delivery, or by facsimile.” Id. at (a).

Allowing parties to make submissions after the initial filing by mail (§ 17.7) is unworkable given the short time frames for resolving protests. The time sensitive nature of protests mandates that, after the initial filing of a protest complaint, overnight delivery, hand delivery, and facsimile are the only means of service permitted. Accordingly, the Section proposes the following language for Section 17.7(b):

Submissions to the ODRA after the initial filing of a contract dispute may be accomplished by any

means available in paragraph (a) of this section. Submissions to the ODRA after the initial filing of a protest may only be accomplished by overnight delivery, hand delivery or facsimile.

**C. Protective Orders – Section 17.9**

Section 17.9, as proposed provides:

The terms of protective orders can be negotiated by the parties, subject to the approval of the ODRA. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information.

63 Fed. Reg. at 45384.

The Section supports the proposed rule to the extent that it permits the parties to negotiate the terms of protective orders. However, the Section is concerned that, without any limitation, the parties to a protest may agree to an order that does not adequately protect procurement sensitive or proprietary information of non-parties. Consequently, the Section recommends that the FAA develop a model protective order and associated applications for access by attorneys and consultants, that would contain the mandatory provisions needed to protect sensitive and non-party proprietary information. The GAO Guide to GAO Protective Orders could provide a blueprint for the FAA guidelines concerning protective orders in bid protests.

**D. Alternative Dispute Resolution – Subpart D**

This Section endorses the FAA's emphasis on use of ADR techniques to resolve both bid protest and contract disputes. This Section has three suggestions for improving the regulations and further encouraging the use of ADR by those contracting, or desiring to contract, with the FAA.

First, the Section understands that it is ODRA's current practice to pursue resolution of bid protests and contract disputes through ADR (most frequently through mediation) *at the same time* that it conducts the formal adjudication process for such protests or disputes. Recent experience at the FAA suggests that simultaneous pursuit of ADR and adjudication has led to a

relatively expeditious resolution in most instances. This result is not surprising. Often the pressures and risks of an imminent adjudication, bring the parties to a resolution that might not otherwise be reached. Additionally, on-going discovery provides more realistic assessments of the merits of a particular matter and may create incentives to find a mediated or other business solution.

The proposed rules, § 17.13 (protests), § 17.27 (disputes) and § 17.31(c) (ADR), however, appear to contemplate a sequential process where ADR is an option only at the beginning. Only if the parties opt out of ADR or it proves unsuccessful do the parties proceed to the adjudicative process. Not only would this sequential process unnecessarily and perhaps detrimentally (see comments *infra* at IV.C.1 and IV.D.4) lengthen the resolution of the protest or dispute, but also it would reduce the incentives for a creative resolution that simultaneous adjudication would bring. Accordingly, the Section recommends modifying these provisions to make clear that ADR can be initiated by the parties at any time prior to formal adjudication (including judicial review).

Second, § 17.33(f) purports to authorize “binding arbitration,” but then suggests that the Administrator would retain the “right to approve or disapprove the arbitrator’s decision.” By giving the FAA two bites at the apple, this “escape clause” will undoubtedly deter parties from using arbitration. As Congress recognized when in 1996 it enacted the Administrative Dispute Resolution Act (“ADRA”) of 1996, Pub. L. 104-320, 110 Stat. 3870 and made permanent the statutory authorization for agencies to use ADR and arbitration:

Since the constitutional objection to binding arbitration has been removed, there is no longer any reason to reauthorize the agency “escape” clause. Over the past five years, the clause has never been invoked. More importantly, its unilateral nature has, understandably, deterred private parties from entering into binding arbitration with the government. As Charles Pou, Jr., the former Director of ACUS’ ADR Program concluded, unless the “escape clause” is eliminated, “arbitration likely will never become a viable alternative for the federal government.”

This would be unfortunate. Throughout the private sector, companies are saving money and reducing

litigation costs by using arbitration to resolve commercial disputes instead of resorting to litigation. If we want the government to enjoy the efficiencies of the private sector, it must have the flexibility to operate as a private business, especially when the government is acting as a commercial entity.

S. Rep No. 245, 104th Cong., 2d Sess. 5-6 (1996). Accordingly, the Section recommends deletion of the second sentence of § 17.33(f).

Third, the Section endorses the proposed Appendix A to Part 17. It provides a useful description of the kinds of ADR techniques available while retaining in the regulations flexibility for the parties to craft procedures fitting individual circumstances. This Section recommends that the Appendix would be further enhanced by providing as much information as possible concerning the ADR experience at the FAA including the procedures used and the results achieved (redacted in such a way as to protect proprietary information). Such information would be particularly helpful in encouraging the use of ADR by contractors with little prior experience with the FAA protest or disputes resolution procedures.

#### **E. Distribution of Decisions**

Although the FAA generally provides public access to most of its decisions via the Internet ([www.faa.gov/agc/casefile.htm](http://www.faa.gov/agc/casefile.htm)), there is nothing in the proposed regulations as drafted that requires it to do so. The FAA's decisions have great value as precedent, particularly for counsel seeking to provide guidance to their clients. Accordingly, public access to agency decisions should be guaranteed in the text of the rules themselves.

With respect to bid protests, the Section proposes that the FAA adopt the language from the GAO's rule regarding distribution of decisions. See 4 C.F.R. § 21.12. Specifically, the FAA should add a new rule, Section 17.37(n) that provides as follows:

A copy of a decision containing protected information shall be provided only to the contracting agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible. If the decision does

not contain any protected information, copies of the decision shall be provided to the Program Office, the protester(s), any intervenors and to the public.

With respect to decisions resolving contract disputes, the Section recommends § 17.39(k) be modified as follows:

A DRO or Special Master's findings and recommendations shall be submitted only to the Director of the ODRA. *The Director shall release the findings and recommendations to the parties and to the public upon issuance of the final agency order for the contract dispute.*

(Proposed change shown in italics).

#### **F. Retroactivity**

Proposed §17.1 states simply that these rules will apply to "all protests and contract disputes" with the FAA. The rule thus fails to address the issue of retroactivity, *i.e.*, whether it applies to contracts and disputes already in existence as of the effective date of the regulations. This omission is of particular concern in connection with the proposed regulation at §17.25(c), which purports to impose a time limitation for submission of "contract disputes." Current contractors will need to know whether or not these procedures apply to their present contracts. Furthermore, a number of the provisions differ from the current clauses and guidance contained in the "Acquisition Management System," which will lead to confusion over what rules apply.

Accordingly, the Section recommends that the proposed regulations expressly identify the contracts to which the new regulations apply. Presumably, the protest procedures should apply only to "Screening Information Requests" issued after the effective date of the final regulation. Likewise, the contract disputes procedures (and particularly the time limits in § 17.25(c)) should apply only to contracts entered into after the effective date of the final regulations.

#### **IV. RULES APPLICABLE TO AGENCY PROTESTS**

##### **A. Definitions – Section 17.3**

###### **1. Interested Party**

The proposed rule in Section 17.3(k) defines interested party as follows:

An interested party is designated as such at the discretion of the ODRA, and in the context of a bid protest is one who: (1) prior to the closing date for responding to a Screening Information Request (SIR), is an actual or prospective participant in the procurement, excluding prospective subcontractors; or (2) after the closing date for responding to a SIR, is (a) an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful, or (b) is an actual participant who is not next in line for award under the SIR's selection criteria but who alleges specific improper actions or inaction's by the Program Office that caused the party to be other than next in line for award. Proposed subcontractors are not eligible to protest. The awardee of the contract may be allowed to participate in the protest as an intervenor.

63 Fed. Reg. at 45383. This definition is far more complicated than the GAO definition with little apparent benefit, particularly because it creates an opportunity for mischief. For example, in the post award protest context, an interested party is “an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful.”

The use of the “next in line for award’ standard creates a number of problems. First, it requires the FAA to rank offerors rather than simply select the awardee in all procurements. Second, it creates an ambiguity as to who is an interested party in the case of protests filed after the closing date for responding to a SIR but prior to award. For example, it is unclear under this definition whether an offeror that is excluded from competitive range prior to award can ever be an interested party.

In addition, this provision also addresses whether an awardee should be permitted to intervene. This issue is more appropriately addressed under the definition of “intervenor.”

Accordingly, we recommend that the FAA modify § 17.3(k) of its proposed rules to adopt the GAO standard for “interested party” which uses the “offeror with a direct economic interest” standard instead of the proposed “next in line for award” rule. To these ends, the Section suggests that the FAA strike proposed § 17.3(k) and substitute in its place the following:

(k) *An interested party* is an actual or prospective participant in the procurement, excluding prospective subcontractors, whose direct economic interest would be affected by the award of a contract or the failure to award a contract.

## 2. **Intervention**

Section 17.3(l) of the proposed rules provides:

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

This definition provides no criteria for the intervention determination other than the discretion of the ODRA. At a minimum, this rule should: (1) permit intervention as a matter of right in the case of awardees; and (2) establish a deadline for requests for intervention.

### a. **Standing to Intervene**

Section 17.3(k) of the proposed rules provides that “[t]he awardee of the contract *may* be allowed to participate in the protest as an intervenor.” In post-award protests awardees should always be afforded the opportunity to intervene. Generally, an awardee’s interest in defending the award is closely aligned with the agency’s. Thus, an awardee is uniquely situated to assist the Program Office in defending the award while simultaneously protecting its own interests. As a result, at least one court has deemed the awardee an indispensable party in a bid protest. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 730-32 (2d Cir. 1983). Of course, most courts and administrative fora routinely permit intervention of the awardee as a matter of right, but one court has recently refused to permit the awardee to

participate formally in a protest. See *Advanced Data Concepts v. United States*, No. 98-495C (Fed. Cl. June 18, 1998) (unpublished order).

Accordingly, to ensure that the awardee may participate in defending the protest, the Section proposes that the FAA add the following to Section 17.3(l):

The awardee of the contract *shall* be allowed to participate in the protest as an intervenor.

In addition, the proposed rule does not state whether a party may intervene on behalf of the protester. If a potential party is not allowed to do so, then the only means for having two parties protest the same or similar issues is to require the filing of two separate protests. The ODR would then face the issue of whether or not to consolidate the two protests. These extra procedural steps are unnecessary. It would be far more efficient and straightforward for the FAA to simply permit intervention by any "interested party." Accordingly, the Section proposes that the FAA add the following to Section 17.3(l):

An interested party may intervene on behalf of either the Program Office or the protester.

**b. Time to Intervene**

The FAA should further amend Section 17.3(l) of its proposed rules by imposing a limit on the time for intervention. The rules as drafted contain no such limit, and therefore, permit parties to seek intervention at any phase of the protest. Without a time limit, offerors could use intervention as a tool for frustrating or interfering with the efforts of the FAA and protesters to resolve protests, particularly where the solution is adverse to the interests of prospective intervenors. Moreover, from a practical standpoint, early intervention is a necessary ingredient of expedited dispute resolution.

Specifically, we recommend that the FAA require that prospective intervenors request intervention by the end of the fifth business day after the protest is filed. The Section suggests that the FAA add as the last sentence of §17.3(l) the following:

Unless otherwise permitted by the ODR after consultation with the parties, a prospective intervenor must request intervention within five (5)

business days of the filing of the protest in order for such a request to be considered.

### **3. Parties**

Section 17.3(n) of the FAA's proposed rules state:

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

63 Fed. Reg. 45383. As drafted, proposed § 17.3(n) arguably restricts to one the number of protesters and intervenors that can be parties to a protest. It is entirely possible that more than one offeror may protest and/or more than one offeror may intervene, particularly in the case of protests of the terms of SIRs. Accordingly, we recommend that the FAA amend Section 17.3(n) of its rules to state as follows:

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

### **4. Screening Information Request**

The FAA in Section 17.3(q) of its proposed rule provides that:

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

63 Fed. Reg. 45383. As crafted, the proposed definition of a SIR is vague, and fails to convey the purpose for which SIRs are intended. Furthermore, it fails to ensure that the SIR will set forth the criteria by which offers are evaluated.

Under the FAA's Acquisition Management System ("AMS"), the SIR fulfills the role of a request for proposal. The stated purpose of the SIR:

is to obtain information which will ultimately allow the FAA to identify the offeror that provides the best value, make a selection decision and award the contract to conclude the competitive process.

AMS ¶ 3.2.2.3.1.2.1. The SIR process is purposefully flexible to permit a selection after one SIR or after a series of SIRs. Under either scenario, the

goal is to make a “screening decision” after each SIR, and accordingly, the AMS provides that “[e]ach SIR *shall* contain the specific evaluation criteria to be used to evaluate offeror submittals for that specific SIR.” AMS ¶ 3.2.2.3.1.2.3 (emphasis added).

The Section endorses the flexibility permitted under the described SIR process, but believes that the regulatory definition should be expanded to reflect the policy goals and the minimum requirements set forth in the AMS. Accordingly, the Section recommends modifying the § 17.3(q) definition as follows:

*Screening Information Request (SIR)* means a request by the FAA for information, including but not limited to, documentation, presentations, proposals, or binding offers with the purpose of obtaining information that will ultimately allow the FAA to identify the offeror that provides the best value to the Government, and to make a selection decision accordingly. The SIR shall identify the evaluation criteria to be used to make the screening decision, including the source selection decision from a final SIR.

**B. Matters Not Subject to Protest**

Proposed § 17.11 provides:

The following matters may not be protested:

- (a) FAA purchases from or through federal, state, local and tribal governments and public authorities;
- (b) Grants;
- (c) Cooperative agreements;
- (d) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

63 Fed. Reg. 45384. As proposed, § 17.11 is over broad because it purports to prohibit parties, regardless of the forum, from protesting the matters referred

to in subsections (a) through (d). As noted above, the FAA, however, lacks the authority to restrict the jurisdiction of the Court of Federal Claims and the Federal District Courts.

The FAA should narrow the scope of § 17.11 so that protesters are only precluded from protesting before the ODRA the matters specified therein. Specifically, the ABA proposes that the FAA adopt the following language:

The following matters may not be protested *before the ODRA*:

- (a) FAA purchases from or through federal, state, local, and tribal governments and public authorities;
- (b) Grants;
- (c) Cooperative agreements;
- (d) Other transactions *that* do not fall into the category of procurement contracts subject to the AMS.

(Proposed changes shown in italics).

## **C. The General Protest Process**

### **5. Commencement of Protest – Section 17.13**

Section 17.13(d) of the FAA's proposed rules provides, in part:

. . . . If a conference is called, the parties will have five (5) business days after the status conference to inform the ODRA whether the parties agree to use ADR pursuant to Subpart D of this part; or to state why they *cannot* use ADR and must resort to the Default Adjudicative Process, pursuant to Subpart E of this part.

63 Fed. Reg. 45384 (emphasis added)). As proposed, this rule suggests that parties can only resort to the "default adjudicative process" where they *cannot* use ADR. Section 17.17(d)(2) of the proposed rules suffers from the same shortcoming.

The FAA's rules should provide parties with more flexibility to utilize the default adjudicative process. For example, in the absence of a suspension, a protester may want to proceed to the merits of its protest as quickly as possible before its position is substantially undermined by contract award or performance. Accordingly, the Section proposes that the parties need only state why they will not presently use ADR, and suggests that the second sentence of § 17.13(d) be reworded to state:

If a status conference is called, the parties will have five (5) business days after the ~~status~~ conference to inform the ODRA whether the parties agree to use ADR pursuant to Subpart D of this part; or to state why they *will not presently use ADR and choose* the Default Adjudicative Process, pursuant to Subpart E of this part.

(Proposed changes shown by italics and strike through)

For the same reasons, the Section proposes that the FAA replace the word "cannot" in the second line of § 17.17(d)(2) with "will not."

## **6. Suspension of Procurement**

The FAA's proposed rules mandate a presumption against suspension of a procurement or contract performance during a bid protest. Specifically, proposed § 17.13(g) provides:

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

Proposed § 17.15(d) further handicaps the protester by requiring it to put forth its entire suspension case with the submission of its protest complaint:

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

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

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

63 Fed. Reg. 45385. Not only is this requirement very unusual, but also it places an extreme burden on the protester at a time when the protester may have little information about the FAA's alleged exigencies that would justify proceeding with award and performance.

Under proposed § 17.17(b), the Program Office then has an opportunity to rebut the protester's suspension arguments; nevertheless, the rules do not afford the protester the opportunity to respond to the Program Office arguments:

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

63 Fed. Reg. 45385.

In order to be fair and effective and to encourage resolution of protest disputes within the FAA rather than in court, the FAA's protest process must

provide the prospect of a realistic remedy. Often where an awardee is permitted to proceed with performance, even if the protester prevails in demonstrating the award was improper, the protest forum will not require the termination of the illegally awarded contract because of the adverse impact on the agency. In fact, the proposed rules expressly provide that the ODRA should consider, among other things, "the extent of performance completed" in making its award determination. 63 Fed. Reg. 45386.

This problem is exacerbated by the fact that: (i) the protester bears the burden of demonstrating that a compelling reason exists for suspension; (ii) the protester must set forth its entire suspension case with its protest complaint; (iii) the Program Office is allowed to respond to the protester's arguments but the protester is not allowed an opportunity to reply to the Program Office's position against suspension; (iv) the suspension decision is unnecessarily elevated to the level of the Administrator or his designee; (v) the suspension decision may not be subject to judicial review. In light of the expedited schedule for resolution of bid protests – through either ADR (20 days) or the default adjudicative process (30 days) – the virtually unassailable presumption against suspension is both unnecessary to protect the FAA's interests and unfair to protesters.

The FAA should drop this regulatory presumption altogether and leave it to the ODRA to decide on a full record whether or not a presumption is warranted on a protest-by-protest basis. If the protester makes the more compelling case, the suspension would be entered. If the Program Office is able to demonstrate exigencies which require the procurement or contract performance to proceed, the request would be denied. Such an approach would place incentives on the parties to bring forth the relevant information in their possession on this issue, and allow the ODRA to make an informed decision. The ODRA can thereby assure that the acquisition management process remains timely and cost effective, while at the same time, protecting the protest process.

The rules should also permit the ODRA to tailor the suspension to the specific exigencies of the protest by providing for consideration of limited or partial suspensions. Furthermore, the rule should allow the Program Office to avoid the suspension issue altogether by stipulating that the continuation of the procurement or performance would not be considered for the purposes of deciding a remedy in the event that the protester prevailed. See, e.g., *Candle Corp. v. United States*, 40 Fed. Cl. 658 (1998).

Furthermore, these proposed regulations should be revised to correct the additional procedural handicaps imposed on the protesters seeking

suspensions. The protester may be required to present its suspension case in its initial protest filing, but then afforded the opportunity to respond in writing to the agency's position before a suspension decision is made. This approach would provide the ODRA with a more complete understanding of the merits of each party's position regarding suspension, and allow for a more fair adjudication of the suspension issue.

Finally, proposed § 17.13(g) requires that any suspension decision must be made "in writing by the FAA Administrator or the Administrator's delegee for that purpose." 63 Fed. Reg. 45384. There is no reason to elevate the suspension decision to that level and, in fact, a number of compelling reasons not to. First, requiring the Administrator or his or her designee to make the suspension decision may unnecessarily delay this determination to the detriment of all involved. Requiring the ODRA to refer suspension decisions to the Administrator would not only compromise ODRA's ability to process protests expeditiously, but would also cause protests to be resolved piecemeal by the Administrator or his delegee or ODRA, forcing two entities to become familiar with the full record in a protest at the time the suspension decision is made. Because the suspension decision is such a critical part of preserving ODRA's ability to fashion a remedy (if appropriate), that decision should not be removed from ODRA's purview. Third, the ODRA is likely to be better qualified, based on its depth and breadth of experience with protests generally, and better informed with regard to the specific protest at issue to make this determination.

To address these issues we recommend the following changes to the proposed rules. First, proposed Section 17.13(g) should be rewritten as follows:

Pursuant to §§ 17.15(d) and 17.17(b), the ODRA shall decide on a protest by protest basis whether a suspension or delay of procurement activities, and, where applicable, contractor performance pending resolution of a protest is warranted. The ODRA may consider, among other options, a limited or partial suspension. The ODRA shall not direct the suspension of procurement activities or contract performance if the Program Office stipulates that the continuation of such procurement activities or contract performance shall not be a factor in the determination of the remedy in the event the protest is sustained.

Second, proposed § 17.15(d) should be rewritten to provide as follows:

If the protester wishes to request a suspension or delay of the procurement, it must include that request in its protest complaint and set forth in the complaint all known compelling reasons to justify the suspension or delay, all known facts which would support its position, the identity of each person it believes to have knowledge of the facts which support its position and the identity and location of all known documents which support the requested suspension or delay.

Finally, proposed § 17.17(b) should be rewritten to provide as follows:

If the protester requests a suspension or delay of procurement pursuant to § 17.15(d), the Program Office shall submit a response to the request to the ODRA within two (2) business days of receipt of the protest. If the Program Office opposes the suspension, the ODRA shall afford the protester the opportunity to review and respond to any Program Office response prior to the ODRA suspension determination. The ODRA shall decide whether a suspension or delay is warranted based on a balancing of the equities presented.

7. **Program Office Report – Section 17.17(f)**

Section 17.17(f) of the FAA's proposed rules provides:

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

proceed under the Default Adjudicative Process pursuant to § 17.37.

63 Fed. Reg. 45385.

As an initial matter, rather than providing an objective standard for the identification of documents to be produced by the Program Office, this proposed rule, as worded, only requires the Program Office to produce "all documents deemed relevant by the Program Office." Thus it is the Program Office's unilateral subjective determination that defines the scope of its document production obligation under this rule. The Section recommends that the rule simply state the objective standard, *i.e.*, relevance, and let the ODRA assess whether the Program Office has complied with that standard in making its document production determinations.

Furthermore, the proposed rules provide no procedure for the protester or the ODRA to assess the adequacy of the Program Office's initial determination as to what documents are relevant and that therefore must be included with its response to the protest. Historically, disputes over which documents are relevant to the protest and therefore must be produced have contributed to delay in getting to the merits of a protest. It was for this reason that the GAO added a process to allow for early resolution of such document disputes prior to the submission of the agency report. 4 C.F.R. § 21.3(c). To avoid similar problems before the ODRA, the Section recommends that the rules provide for early identification of the documents to be produced by the Program Office in order that any objections can be addressed before the Program Office files its response.

An additional problem is presented because the proposed rule directs the Program Office to prepare a response where the parties elect to forgo the ADR process, but it does not provide for a Program Office response where the ADR process is unsuccessfully pursued. In both cases, the proceeding would shift to the Default Adjudication Process, and therefore a Program Office response to the protest is necessary to properly join the issues.

To address these concerns with (and an apparent misprint in) the proposed rule, the Section would redraft § 17.17(f) as follows:

Should the parties indicate at the status conference that ADR will not be used or either party requests that the default adjudicative process commence simultaneously with ADR, or the ADR process concludes without resolution of the protest, then

within five (5) business days following the status conference or the conclusion of the ADR process, the Program Office will file with the ODRA a list of the relevant documents that it will produce. Within ten (10) business days following the status conference or the conclusion of the ADR process, the Program Office will file with the ODRA its response to the protest. The Program Office response shall consist of a statement of pertinent facts, applicable legal or other defenses, and shall be accompanied by all documents relevant to the protest allegations or the Program Office defenses. A copy of the list of relevant documents and the Program Office response shall be furnished to the protester at the same time, and by the same means, as it is filed with the ODRA. At that point the protest will proceed under the Default Adjudicative Process pursuant to § 17.37, unless the parties jointly agree to renew efforts at ADR.

#### **8. Dismissal or Summary Decision of Protests – Opportunity to Respond**

Section 17.19(c) of the FAA's proposed rules provides that the ODRA, "[e]ither upon motion by a party or on its own initiative" may enter a dismissal or a summary decision. 63 Fed. Reg. **45385**. The proposed rules, however, fail to provide the party against whom the dismissal or summary decision may be entered with an opportunity to respond.

Such a response is crucial to providing the adjudicator with a more complete understanding of the material facts, specifically, whether there are any material facts in dispute. Accordingly, the Section recommends that the FAA add a new §17.19(e) which provides as follows:

Prior to 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.

**D. Default Adjudicative Procedure – Protests**

**1. Discovery**

The FAA's proposed default adjudicative procedures permit the DRO or Special Master to authorize discovery. In this regard, the proposed regulation § 17.37(f) states as follows:

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

63 Fed. Reg. 45387. Noticeably absent from this proposed rule is any guidance on what standard should be employed by the DRO or Special Master when considering the necessity for and scope of discovery in protests. Moreover, the rule is silent regarding the type of information that is discoverable and who can seek discovery from whom. Without this guidance, the rule lacks predictability as to the procedure and methodology of the discovery process and will deter parties from using the FAA protest mechanism.

The Section proposes that the FAA reword § 17.37(f) of the proposed rules to state as follows:

The DRO or Special Master shall permit the parties to obtain discovery from each other, and if justified, from non-parties, of all information relevant to the allegations of the protest. At a minimum, the parties shall exchange, in an expedited manner, all relevant, non-privileged documents. Where justified by a party, the DRO or Special Master may authorize additional written discovery and/or deposition testimony. The DRO or Special Master shall establish schedules and deadlines for discovery consistent with time frames established in this part.

## 2. **Comments on Program Office Report**

As discussed above, § 17.17(f) of the FAA's proposed rules provide that, if the ADR option is not used, the Program Office shall submit a response to the protest to include "a statement of pertinent facts, applicable legal or other defenses, and shall be accompanied by all documents deemed relevant by the Program Office." 63 Fed. Reg. 45385. Although the proposed rules state that protesters "shall be furnished" with a copy of the Program Office response, the rules neglect to provide protesters, or for that matter all interested parties, an opportunity to comment on the response.

Protesters must have the opportunity to respond on the record to the positions taken by the Program Office and the documents produced by the parties. The comments of protesters are crucial to providing the adjudicator with a more complete understanding of the merits of each party's position, and allowing for a more informed and therefore fairer disposition of the protest. The FAA should amend its proposed rules to afford protesters and intervenors the opportunity to submit comments on the Program Office report. The rules should also permit the parties to supplement the record to address new information relevant to the protest that comes to light through discovery or in the course of a hearing.

The Section proposes that the FAA adopt language similar to that employed by the GAO in its rule governing comments on the agency report. See 4 C.F.R. § 21.3(h)(i). Specifically, the FAA should insert the following as a separate section after proposed § 17.37(f):

Protesters and Intervenors shall file with DRO or Special Master comments on the Program Office report within ten (10) calendar days after receipt and shall provide copies of such comments to all parties. The protest shall be dismissed unless the protester files comments or a written statement requesting that the case be decided on the existing record, or requests an extension of time within the 10-day period. Upon a showing that the specific circumstances of a protest require a period longer than 10 days for submission of comments, the DRO or Special Master may set a new date for the submission of comments. Extensions will be granted on a case-by-case basis. If the factual record is supplemented either through discovery or as a result of a hearing, the DRO or Special Master

shall permit all of the parties to supplement their comments to address these additional facts.

### **3. Hearings**

As proposed, § 17.37(g) states that:

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

The proposed rules employ the term “oral presentation” which does not distinguish between hearings and oral argument. Furthermore, proposed § 17.37(g) provides no guidance as to when an evidentiary hearing is appropriate or what procedures shall be used. The Section recommends § 17.37(g) be substantially rewritten to provide some predictability concerning the availability of hearings for protesters who proceed before the ODRA:

At the request of a party or on his or her own initiative the Special Master or DRO may authorize a hearing or oral argument.

(1) A hearing may be conducted if there is a material fact at issue that cannot be resolved without oral examination, or an issue as to a witness’s credibility, or an issue that is so complex that proceedings with supplemental written submissions would be less efficient and more burdensome than developing a record through a hearing. If a hearing is to be conducted, the Special Master or DRO shall conduct a prehearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify. After the conclusion of the hearing, the Special Master or DRO shall permit the parties to file post-hearing comments.

(2) Unless the DRO or Special Master decides otherwise, oral argument should be permitted where no hearing is to be conducted. Oral argument shall be conducted only after the

submission of all written comments or other submissions. Prior to oral argument the DRO or Special Master shall conduct a conference to discuss and resolve matters such as the procedures to be followed and the issues to be discussed.

This recommendation generally adopts the GAO standards and procedures for hearings. 4 C.F.R. § 21.7; *See Town Development, Inc*, B-257585, 94-2 C.P.D. ¶ 155.

#### 4. **Commencement of Default Adjudicative Process**

Proposed § 17.37(a) provides:

The Default Adjudicative Process for protests will commence on the *Latter of*:

\* \* \*

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

63 Fed. Reg. 45387 (emphasis added).

This proposed rule creates a significant disincentive for any protester to elect to proceed with the ADR process. If the parties agree to participation in the ADR process, under this rule the Default Adjudicative Process cannot start for at least 20 business days. A protester must then wait for four weeks after award to begin pursuing the merits of its protest. Given the FAA's current presumption against suspensions, this process would effectively deprive a successful protester of any meaningful remedy. Also, as discussed above, the Section favors what appears to be ODRA's current practice of employing ADR techniques concurrently with the default adjudicative process.

Furthermore, even if the four week minimum is a result of a drafting error, and the FAA had actually intended for the Default Adjudicative Process to be triggered by the earlier of the "[t]he parties submission of joint written notification" or the expiration of the 20 business-day period allotted

for ADR, this proposed rule is still problematic. The requirement for a joint notification would permit one party keep the matter hostage in the ADR process for the entire four weeks by refusing to agree to the joint notification. For this ADR process to be effective, the Section believes that both the protester(s) and the Program Office must be permitted to retain the option of triggering the Default Adjudicative Process at any time during the ADR process.

Finally, since the agency must first file a Program Office response to the protest to begin the Default Adjudicative Process, regardless of whether the ADR process is pursued, we recommend that the filing of this response serve as the common demarcation for the Default Adjudicative Process.

In this regard, we propose changing Section 17.37(a) as follows:

(a) The Default Adjudicative Process for protests will commence upon submission of the Program Office response to the ODRA pursuant to § 17.17(f), within ten (10) business days following either:

(1) the status conference held pursuant to § 17.17(c) if the parties decide not to use the ADR process; or

(2) the earlier of: (i) the submission of written notification to the ODRA by either the protester(s) or the Program Office that the ADR process has not or may not resolve all outstanding issues, or (ii) the expiration of the period allotted for ADR pursuant to § 17.13, if the parties decide to use the ADR process.

## **V. RULES APPLICABLE TO DISPUTES**

In evaluating FAA's proposed regulations governing the disputes process, the Section has been guided by two principles. First, the Section believes that the rules should seek to promote clarity and predictability, and to minimize time-consuming and expensive litigation of procedural issues. These goals are best achieved by setting forth the requirements imposed on the parties as clearly and unambiguously as possible. Second, the Section believes that the rules governing dispute resolution should be fair and consistent with the requirements of due process, and should apply to the same extent and in the same manner to both contractor and government

claims. As discussed in Section II above, the extent of the procedural guarantees that need to be provided in the proposed contract dispute resolution process is a function of whether the FAA will seek to compel all contractors to use these procedures or whether it will recognize the availability of alternative procedures under the CDA.

#### **A. Definitions – Section 17.3**

This portion of the comments address the definitions that are applicable predominately or solely to the resolution of disputes under the proposed regulations.

##### **1. Use of the Term “Contract Dispute”**

Throughout Section 17 of these proposed regulations, the FAA uses the term “contract dispute” to refer both to (i) matters that are clearly in dispute between the Government and a contractor, and to (ii) matters that may not yet have ripened into a dispute but which, under regulations applicable to all other federal government contracts, are deemed to be “claims.” For example, at §17.31, the proposed regulation states that the ODRA “shall encourage the parties to utilize ADR as their primary means to resolve protests and contract disputes.” In this context, the term “contract dispute” apparently refers to a matter that the parties have not yet been able to resolve and is actually in dispute. Nevertheless, proposed §17.25(c) states that “a contract dispute against the FAA shall be filed with the ODRA within six months of the accrual of the contract dispute. . . .” In this context, the term “contract dispute” appears to refer to a claim that may or may not be disputed.<sup>8</sup>

It appears that the FAA has proposed to use the term “contract dispute” rather than “contract claim” in any effort to distance itself from the mandatory “claim” submission requirements of the CDA. In doing so, however, it has chosen to reintroduce and emphasize the very word that led to substantial and wasteful litigation of over whether a matter was in “dispute.” A line of decisions beginning with *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991) held that in order to constitute a

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<sup>8</sup> This interpretation is bolstered by the proposed definition of “contract dispute,” §17.3 (g), which closely follows the definition of “claim” found in FAR 33.201. For purposes of the FAR, a “claim” need not be in dispute when it is submitted.

“claim” for jurisdictional purposes under the CDA, there had to be a pre-existing dispute between the parties. *Dawco* resulted in protracted, vexatious litigation for four years, until it was overruled by an *en banc* decision of the Federal Circuit in *Reflectone v. Dalton*, 60 F.3d 1572 (1995).

To avoid a repetition of the wasteful litigation engendered by *Dawco*, the Section believes that it would be more effective to:

- create a new definition of “contract dispute”, and
- define “contract claim” using a slight modification of the current definition of “contract dispute.”

Specifically, the Section recommends: (1) that the term “contract dispute” be changed to “contract claim” in the sections of the proposed regulation set out in the footnote<sup>9</sup>; (2) that a new term (“contract dispute”) be added to the listing of definitions in 517.3; and (3) that the term “contract dispute” in §17.3(g) be referred to as “contract claim” and its definition amended as follows:

*Contract claim*, as used in this part, means a written request to the ODRA seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under, relating to, or involving an alleged breach of contract, entered into pursuant to the AMS. A contract claim need not be in dispute when it is filed in accordance with §17.25.

*Contract dispute* means a contract claim that the parties are unable to resolve informally prior to submission of their joint statement as required by §17.27(a).

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<sup>9</sup> The term “claim” should be substituted for the term dispute” in the following sections of the proposed regulation: 17.1; 17.3(b); 17.3(g); 17.3(h); 17.3(n); 17.3(p); 17.7(a); 17.7(b); 17.23(a); 17.23(b); 17.23(c); 17.23(c)(1); 17.23(c)(2); 17.23(d); 17.25 (heading); 17.25(a); 17.25(a)(3); 17.25(a)(4); 17.25(b); 17.25(c); 17.27(a); 17.29(a); 17.29(b); 17.29(c); 17.29(d).

## 2. “Accrual” of a Contract Dispute

The proposed regulations, § 17.3(a) and (b), contain the following two definitions, which relate to the proposed limitations period for submission of claims:

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

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

This particular phraseology is new; to the best of the Section’s knowledge, it does not appear in any other federal regulations or statutes of limitations, and, accordingly, its meaning has not been adjudicated in the federal courts. Precisely because it is new and undeveloped, the Section believes that this definition is likely to lead to confusion and litigation over a period of years while contractors, the Government, and the courts struggle to explicate its meaning.

Consistent with the goal of maximizing clarity and predictability, and minimizing litigation over procedural issues, the Section recommends that the FAA adopt a definition of “accrual of a contract dispute [claim]” that follows the test developed by the Court of Federal Claims under the Tucker Act for accrual of contract claims against the United States, or, at a minimum, that the FAA adopt the definition of accrual that has been incorporated into FAR 33.201.

### a. **The FAA’s Proposed Definition Is Unnecessarily Imprecise**

The FAA’s definition of “accrual of a contract dispute” creates not one, but two ambiguities, and thus two areas for potential disagreement. First, “accrual” is defined in referenced to “all events underlying the dispute” without further elaboration or explication. The term is not defined, and there is no history or body of case law to assist in interpreting it. As more fully explained below, the Tucker Act definition (as well as the FAR definition) illustrate and circumscribe the term “event,” limiting it to those occurrences that “fix the liability” of the party in question and “entitle the claimant to institute an action.” The Section believes that the added specificity provided by this judicial gloss on the meaning of “accrual” is desirable, and its use here would avoid some of the imprecision of the term “underlying events.”

Second, the FAA definition does not tie the trigger date to the occurrence of the relevant events. Instead, the trigger date for the limitations period is keyed to when someone – undefined in the proposed definition – “knew or should have known” about the events. Thus even if the parties could agree on what the “underlying events” were, they would then be required to agree on when someone “knew or should have known” of those events. The Section believes that this scienter requirement adds an unnecessary layer of uncertainty, and will likely result in substantial disagreement as to when someone “knew or should have known” about “all underlying events.” As further explained below, these difficulties would be avoided by use of the judicially crafted “all events” test employed under the Tucker Act.

**b. The Tucker Act “All Events” Test**

Under the Tucker Act, 28 U.S.C. §1491, the Court of Federal Claims (formerly the Court of Claims) has jurisdiction over contract claims against the United States. Such claims are generally subject to the six-year statute of limitations at 28 U.S.C. §2501. Pursuant to the “all events” test that courts typically apply to determine the commencement of this six-year time period, a claim first accrues and the statute of limitations begins to run “when all the events have occurred to fix the liability of the government and entitle the claimant to institute an action.” *Japanese War Notes Claimants Association v. United States*, 373 F.2d 356 (Ct. Cl. 1966), *cert. denied*, 389 U.S. 971 (1967); *see also*, *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1570 (Fed. Cir.), *cert. denied*, 509 U.S. 904, (1993); *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed.Cir.), *cert. denied*, 502 U.S. 855 (1991) (cause of action accrues when all events necessary to state a claim have occurred).

The “all events” test is well understood and has been applied in contract disputes with the federal government for more than 40 years. Although this test does not eliminate all disagreement about when the limitation period begins to run, judicial development has narrowed the potential areas of dispute, and the existing case law provides an extensive source of guidance as to its applicability in various factual scenarios. Accordingly, the Section recommends adoption of this “all events” test to define when a contract claim involving the FAA “accrues.”

This recommendation does have one potential shortcoming. The Court of Claims developed the “all events” (and its successor courts have continued to apply it) at a time when the jurisdiction of that court was limited to claims

for monetary damages. Accordingly' in order for a claimant to institute an action, the plaintiff had to have incurred some monetary damages.<sup>10</sup> The FAA's proposed definition of "contract dispute" however, includes not only requests for the payment of money, but also requests for "adjustment or interpretation of contract terms, or other relief." Thus under the FAA regulations a dispute need not involve money damages; but the Tucker Act "all events" test as developed by the courts does not directly address those situations.

In order to address this issue, the Section recommends that the definition of accrual include a requirement that some injury have occurred regardless of whether monetary damages have been incurred. To eliminate the need for any injury at all as a prerequisite to submitting a claim would create ripeness issues and encourage assertion of claims/disputes while the harm remained only threatened or theoretical.<sup>11</sup> For example, many non-monetary claims result because the contracting officer has couched some contract direction or termination in the form of a final decision. See, e.g., *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656 (unilateral price determination). If accrual of non-monetary claims were to occur as soon as such claims were ripe, needless protective appeals would likely result. On the other hand, to require all damages to be incurred before a claim accrued would in many cases unnecessarily prolong the limitations period.

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<sup>10</sup> Under the Tucker Act, the law is not entirely clear whether a cause of action accrued only after all damages had been incurred' or whether it accrued once any monetary damage was ascertainable. Compare, *Terteling v. United States*, 167 Ct. Cl. 331 (1964) with *Chippis v. United States*, 19 Cl. Ct. 201, 205 (1990).

<sup>11</sup> Whether a non-monetary claim is ripe generally requires a balancing between the need for present adjudication and the hardship of withholding judicial intervention. See Charles A. Wright, Arthur R. Miller & Edwin H. Cooper, *Fed. Prac. & Proc. Juris. 2d* § 3532, "Ripeness" (1984) . For a claim to be ripe, the petitioner must be suffering from an "onerous legal uncertainty." *Continental Airlines v. CAB*, 522 F.2d 107, 128 (D.C. Cir. 1975). A claim may be ripe where there is a "realistic danger of sustaining direct injury." *Mass. Bay Transp. Authority v. United States*, 21 Cl. Ct. 252, 258 (1990).

The Section's recommendation is an intermediate approach that would avoid both these problems and is consistent with federal practice generally. *See Lowy v. Bay Terrace Cooperative*, 698 F.Supp. 1058, 1065 (E.D.N.Y. 1988), *aff'd* 869 F.2d 173 (2d Cir. 1989)(declaratory judgment claim did not accrue at time Co-op's resale policy was enacted, but rather when policy was applied to plaintiffs attempt to sell Co-op). It is also consistent with the dictionary definition of "event" which makes clear that the term contemplates both cause and effect.<sup>12</sup> A non-monetary claim would not accrue (and thus would not need to be filed with the ODRA) until a direct harm resulted from the offending action. A monetary claim would accrue when the damages could reasonably be estimated' thus permitting assertion of a claim for "payment of money in a sum certain" as required by FAA's proposed definition of "contract dispute."

The Section thus recommends the following definition:

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

As noted above, the principal advantage of using this test lies in its well-established and well-understood meaning within the jurisprudence of federal contract claims. Its use by the FAA would maximize clarity and predictability, and minimize unnecessary procedural litigation.

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<sup>12</sup> The Blacks Law Dictionary (6th Ed. 1990) definition of "event" states: The consequence of anything; the issue of outcome of an action as finally determined; that in which an action, operation, or series of operations, terminates. Noteworthy happening of occurrence. Something that happens.

**c. The FAR Definition of Accrual**

One alternative to adopting the Tucker Act “all-events” test would be for the FAA to adopt the definition of ‘accrual’ that has been included in FAR 33.201 since 1995. That definition states:

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

This definition is a slight modification of the Tucker Act test, in that it substitutes the “known or should have been known” standard for determining the trigger date for the limitations period instead of employing the principle of equitable tolling. As explained above, the Section believes that the language “known or should have been known” adds an unnecessary layer of uncertainty concerning when the limitation period starts. The preferred approach’ adopted in the commercial law, is to have a fixed accrual date subject to tolling under equitable circumstances. See Uniform Commercial Code §§ 2-725 (2) and (4). Nonetheless’ adoption of the FAR definition by the FAA would provide contractors who deal with both the FAA and other federal agencies consistency in the standards being applied to their claims.<sup>13</sup>

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<sup>13</sup> In this regard, the Section notes that during debate on FY 1996 DOT Appropriations Act (Pub. L. No. 104-50, §348, 109 Stat. 436 (1995)) that resulted in promulgation of these rules, a number of Congressmen expressed concern that allowing FAA to utilize a system different from the system used by other contractors and other agencies’ would create unnecessary uncertainty and ambiguity for the contracting community.

Senator Cohen, for example, remarked that “If Congress acquiesces to these piecemeal approaches’ the Federal Government will be plagued by conflicting and contradictory procurement laws . . . which will make it harder -- not easier -- to do business with the Government. *Industry will have to learn literally hundreds of procurement systems.*” CONG. REC. S16361-62 (daily ed. Oct. 31, 1995) (emphasis added). The

(Footnote cont'd on next page)

**B. The Contract Dispute Resolution Process – Section 17.23**

The process outlined for resolving disputes appears unnecessarily cumbersome for what are intended to be streamlined procedures. Furthermore, the obligation to continue performance creates significant uncertainty when combined with the proposed regulations apparent elimination of a contracting officer's final decision.

**1. Informal Resolution**

The entire § 17.23 appears unnecessarily complex and could be eliminated in its entirety. Its apparent purpose is to promote informal resolution of disputes before the commencement of ADR or the more formal default adjudicative process. This is a laudable goal and could be easily achieved by adding a short paragraph (perhaps § 17.23(c)(2)) to § 17.25.

If the FAA elects to keep this introductory section, it should take care to eliminate potential ambiguity and conflict between this section and the following sections. For example, § 17.23 contemplates the filing of a "contract dispute" with the ODRA followed by thirty (30) business days in which the parties (a) "should seek" to resolve the matter informally and (b) must prepare a joint statement for filing under § 17.27. However, § 17.23(d) states that "the contractor and the CO may jointly request one extension" of the 30-day period for informal resolution, whereas § 17.27(a) states the "ODRA may extend this time for good cause."

The language of these two provisions creates unnecessary confusion concerning whether the joint request for an extension is a matter of right and whether the parties are really limited to one extension. Accordingly, the Section recommends the following change to § 17.23:

(d) If informal resolution of the contract disputes appears probable, the ODRA shall, upon joint request of the CO and contractor, extend for an

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*(Footnote cont'd from previous page.)*

Section agrees that differing regulations for claims resolution will add complexity and inefficiency to the overall procurement system, and will particularly impact the many contractors who do business not only with the FAA, but with other agencies as well.

additional 30 business days the time for filing the joint statement under § 17.27.

## **2. Continued Performance**

Proposed §17.23(f) would require contractors to continue performance of their contracts pending resolution of any contract disputes:

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

Although this regulation is similar to regulations that have been in place for many years under the CDA, the Section has two recommendations enhancing the FAA's goals while protecting the legitimate interests of contractors.

### **a. FAA Should Clarify What Performance Must Be Continued Pending Resolution of the Dispute**

FAA's proposed regulations encourage informal resolution of claims and disputes' and do not require a contracting officer's final decision. As noted above, the Section endorses FAA's emphasis on informal resolution. Nevertheless' because the proposed regulations would require continued performance of the contract pending resolution of a dispute (whether that is informal or formal), it is important for contractors to know what performance they must continue.

Many contract disputes involve disagreements over the scope or type of performance required by the contract. Without a final contracting officer's decision or some other written direction from the contracting officer, contractors may be unable to determine just what performance they must continue pending resolution of the dispute. In order to provide maximum clarity, the Section believes that §17.23(f) should be amended to read:

(f) The FAA will require continued performance in accordance with the provisions of a contract *and the contracting officer's written directions* pending resolution of a contract dispute, arising under or related to that contract.

(italics shows the added language).

**b. FAA Should Consider Financing the Continued Performance Pending Resolution of the Dispute**

FAA's proposed regulations appear to require continued performance for claims and disputes that "arise under" the contract as well as those that "relate to" the contract.<sup>14</sup> Claims that "arise under" the contract are those which are based on one of the specific remedy-granting clauses that are included in the contract, such as the Changes clause. Claims that "relate to" a contract are generally claims for breach of the contract by the other party, where the remedy is established by common law. As noted in FAR 33.213(a), prior to passage of the CDA, contractors were not required to continue performance when their claims "related to" the contract, *i.e.*, when they alleged a breach by the Government. Since passage of the CDA, agencies have been permitted to require continued performance even when the Government is in breach, provided that this requirement is specifically authorized in accordance with agency procedures?

When such authorization occurs, however, the FAR suggests that agencies should consider financing the continued performance pending outcome of the dispute:

(b) In all contracts that [require continued performance even where there is a breach by the Government]...' the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government's interest is secured.

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<sup>14</sup> There remains some ambiguity in this regard in that the definition of "contract dispute" encompasses breach claims, but § 17.23(a) addresses "contract disputes arising under contracts . . ."

<sup>15</sup> Those agencies that have, in fact, authorized this requirement have done so only in limited circumstances, primarily where national security or public health are involved. *Compare*, e.g., FAR 33.213 and 52.233-1(i) with DFARS 233.215 and NFS 18-33.215.

FAR 33.213(b). This provision strikes a balance between the risks to the contractor and the risks to the Government' and is particularly important where the parties are unable to settle their disputes promptly.

Proposed § 17.23(f) would impose a blanket requirement on contractors to continue performance in any and all circumstances even where the Government has failed to comply with the material terms of the contract (e.g. , directed a cardinal change); the rule makes no provision for financing the work pending resolution. The Section believes that contractors faced with this requirement are likely to include contingent factors in their pricing proposals for all FAA contracts, in order to protect themselves in the event of a dispute. The Section expresses no opinion on whether, as a policy matter, those additional hidden costs are justified from FAA's point of view. Nevertheless' it would appear that they should be considered and balanced against the benefits that would accrue to the FAA from inclusion of this provision in its proposed regulations.

### 3. **Filing Contract Disputes – Sections 17.25(a) and (b)**

The FAA's proposed regulations §17.25(a) and (b), address how a contract dispute is to be "filed." Subpart (a) lists the information that is to be included in the written document; and subpart (b) states that it is to be filed at the ODRA. Clearly, this portion of the regulation was written to address only claims submitted by contractors. It should be amended to address claims submitted by the Government as well, and to make clear that no Government claim is "filed' until the contractor receives a copy of it from the Contracting Officer.

The Section recommends that §17.25(b) be amended to read as follows:

- (b) Contract disputes shall be filed by mail, in person, by overnight delivery or by facsimile. A contract dispute will be deemed "filed' for purposes of the subpart (c) below when it is actually received.
- (i) in the case of contractor claims, at the office of Dispute Resolution for Acquisition' AGC-70, Federal Aviation Administration' 400 7th Street, SW., Room 8332, Washington' D.C. 20590, Telephone: (202) 366-6400, Facsimile: (202) 366-7400; or such other address

as shall be published from time to time in the Federal Register; or

- (ii) in the case of government claims, at the contractor's principal place of business or the address listed in the contract as the place of performance.

If this amended version of §17.25(b) is used, §17.25(d) should be deleted; and §17.7(a) should be conformed.

4. **The Six Months' Time Limit – Section 17.25(c)**

As currently written, Section 17.25(c) would provide:

A contract dispute against the FAA shall be filed with the ODRA within six months of the accrual of the contract dispute. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise may be filed within six months after the accrual of the contract dispute. If the contract underlying [sic] provides for time limitations for filing of contract disputes with the ODRA, the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the ODRA a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA claims related to warranty issues, fraud or latent defects.

The Section recommends three modifications to §17.25(c): (a) to change the six month time period to six years; (b) to make the requirement for filing within the limitation period identical for both contractor and government claims; and (c) to impose a reasonable limitation period on FAA claims for warranty issues, fraud or latent defects.

**a. The Limitation Period Should Be Six Years**

Until 1994, claims against the government that arose under or related to procurement contracts covered by the CDA were not subject to any statute

of limitations. See *Farmers Grain Co. of Esmond v. United States*, 29 Fed. Cl. 684, 687 (1993); *Pathman Const. Co., Inc. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987). Except in circumstances where a contractor had already accepted final payment, contractor claims could be submitted at any time subject only to the equitable doctrine of laches, which courts rarely applied. The same situation existed in connection with Government claims.

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, 108 Stat. 3243 (1994) ("FASA") amended the CDA to establish a six-year statute of limitation for both contractor and Government claims.<sup>16</sup> Other claims against the United States sounding in contract are generally governed by the six-year statute of limitations at 28 U.S.C. § 2501.<sup>17</sup> In the commercial world, Section 2-725 of the U.C.C. provides a four year statute of limitation for contracts for the sale of goods (although some states have opted for periods ranging between three and six years).

The six month period proposed in § 17.25(c) is an unreasonably short amount of time even for an alternative dispute resolution process and it is wholly unworkable if the FAA were to prevail in its view that its contracts are exempt from the CDA. Setting aside the clear advantage to litigants of using a time period that is identical to other comparable statutes of limitation' the Section is concerned that imposing such a short deadline will make it difficult for both contractors and the Government to initiate their claims in a timely manner. Particularly in complex multi-year procurements, where all parties are focused on accomplishing the work within the contractual performance period, a six-month time period would require the filing of many potentially undeveloped, incomplete protective claims by both parties in order to avoid waiving or losing entitlement.

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<sup>16</sup> 41 U.S.C. § 605, as amended.

<sup>17</sup> Six years is a typical limitations period for causes of action involving the United States. See, e.g., 28 U.S.C. § 2401(a) (general six-year statute of limitation governing civil actions against the United States); 28 U.S.C. § 2415(a) (general six-year statute of limitations governing contract suits by the United States); but see 28 U.S.C. § 2461 (five-year statute of limitation on actions for civil fines, penalties and forfeitures).

Furthermore' the Section does not believe that a six-month requirement is necessary to encourage contractors and Contracting Officers to assert their claims in a timely fashion. As a practical matter, very few claims are or will be filed near the six-year deadline; most are filed much sooner because it is in the contractors' best interests to be paid, and it is in the Government's best interest to recoup whatever monies it believes are owing to it. Although the Section endorses the early submission and resolution of claims neither the Government nor its Contractors should be barred from recovering on legitimate claims – or forced to waste resources filing protective claims – by imposition of a too-short limitations period. Accordingly' the Section recommends adoption of the standard 6 year limitation period.

**b. The Limitation Period Should Be Identical for Both Contractor and Government Claims**

FAA's proposed §17.25(c) states that contractor claims "shall" be filed within six months, but it states that FAA claims against a contractor "may" be filed within six months. Whatever limitation period is chosen for use of the FAA's alternative dispute resolution procedures, it should apply equally to Government and contractor claims. There is simply no basis for granting the Government more leniency in this regard, and exempting the Government from this submission requirement effectively promotes the perception that the rules are unfair and one-sided. This perception will have the natural tendency to deter contractors with processing claims (or "contract disputes") through the ODRA.

Accordingly' the Section recommends that the word "may" in the second sentence of proposed § 17.25(c) be changed to "shall".

**c. Other Limitations Period Contained in FAA Contracts**

Proposed § 17.25(c) contemplates that some FAA contracts may contain clauses establishing a limitations period for the filing of claims different from that established by these proposed rules. Specifically, that proposed regulation includes a sentence stating that:

If the contract underlying [sic] provides for time limitations for filing of contract disputes with the ODRA, the limitation periods in the contract shall control over the limitation period of this section.

Although the Section generally favors consistency and uniformity, it also supports flexibility. Consequently, the Section does not oppose granting the parties to an FAA contract authority to select a unique limitations period, and voluntarily to depart from the mandatory statute of limitations established by these proposed regulations.

Nonetheless' the Section is concerned with fairness and unequal bargaining power. Contractors who respond to government solicitations typically have little or no input as to the specific terms and conditions of the resulting contracts. In order to avoid situations in which contractors are presented with a contract provision establishing a limitations period that departs from the period established by these regulations – to which, as a practical matter, they would not be entitled to object – the Section recommends that this sentence be amended to make clear that the parties may expressly negotiate a different limitations period. Absent agreement, a contractor should be able to insist on the limitation period provided by the regulation without fear of being held ineligible for an award.

Accordingly' the Section recommends that the quoted sentence in § 17.25(c) be amended to state:

If the contract provides for time limitations for filing of contract claims with the ODRA, the limitation periods in the contract shall control over the limitation period of this section; provided, that any such limitation period, if less than six years, must be agreed to by both parties and a contractor's refusal to accept such a shorter limitation period shall not be grounds for denying award of the contract.

**d. Warranty, Fraud and Latent Defects**

Finally, proposed Section 17.25(c) excepts FAA claims related to warranty issues, fraud or latent defects from the six-month statute of limitations. The Section is concerned that the FAA's proposal would effectively mean that there was no limitation period any time the Government couched its claim in terms of warranty, fraud or latent defects. Furthermore' the proposed rule does not adequately distinguish between warranty disputes on the one hand and claims involving fraud or latent defects on the other

The Section agrees that fraud or latent defect claims should be treated differently for statute of limitations purposes, because by their nature they involve information that is unknown to, or in the case of fraud, possibly concealed from, the Government. If the FAA were to adopt the Section's recommended definition of "accrual of a contract claim" (see discussion in Section V.A.2, *supra*), the principles of equitable tolling would be sufficient to ensure that the Government could obtain relief in situations of fraud or latent defects. Likewise' the "knew or should have known" language in the FAR 33.201 definition of "accrual of a claim", would adequately address situations where the Government could not, with reasonable diligence' have learned of the fraud or latent defect. In any event, there appears to be no reason not to impose a reasonable time limit for such claims after they become known to the Government; and accordingly the Section recommends that such claims should be filed within six years of the date on which the Government knew or should have known about the fraud, or latent defect.

Claims involving warranty obligations do not raise any special statute of limitations issues and treating them differently may create problems. Generally' a warranty provision imposes a duty to repair or replace items that are defective (*i.e.*, fail to meet the contract specifications in some material way). The parties negotiate the period for which the warranty obligation will remain open, and the period in which the buyer must provide notice to the seller. These conditions on the warranty obligation affect the cost and a buyer must always balance this cost against the benefit of obtaining repair or replacement of items whose useful life is shorter than expected.

By suggesting that no limitation period is appropriate for warranty claims, the proposed regulation may dramatically increase the costs at which contractors are willing to offer warranties to the FAA. The events that fix warranty liability are readily ascertainable; e.g., the defect existed during the contractually defined period and the notice was given and the election of remedies occurred in accordance with the contract. If anything' because warranties tend to be post-contract remedies the regulations should place an incentive on the FAA to raise and resolve these matters promptly. Warranty claims should not be exempted from any statute of limitations' and the regulations should avoid any implication that the FAA need not comply with the time restrictions negotiated in the warranty clause of a contract. Accordingly' the Section recommends striking the word "warranty" in the second sentence of proposed § 17.25(c), even if the FAA elects to exempt FAA claims relating to latent defects or fraud from the applicable statute of limitations.

**e. Summary Recommendation**

In summary, the Section recommends that §17.25(c) be amended to read as follows:

(c) A contractor claim against the FAA shall be filed with the ODRA within six years of the accrual of the contract claim. A contract claim by the FAA against a contractor shall be filed with the contractor within six years after the accrual of the contract claim. If the underlying contract provides for time limitations for filing of contract claims with the ODRA, the limitation periods in the contract shall control over the limitation period of this section; provided, that any such limitation period, if less than six years, must be agreed to by both parties and a contractor's refusal to accept such a shorter limitation period shall not be grounds for denying award of the contract. In no event will either party be permitted to file with the other a contract claim seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FM claims related to warranty issues, fraud or latent defects. [FAA claims based on fraud or latent defects shall be filed with the contractor within six years of the date on which the FAA knew or should have known of the alleged fraud or latent defect.]

The bracketed language in this recommendation would only be necessary if the FAA rejects the Section's recommendations with respect to the definition of "accrual of a contract claim."

**C. Default Adjudicative Process – Disputes**

As discussed extensively above, the Section would have little concern with the proposed adjudicative procedures contained in § 17.39, if the regulations openly acknowledged that contractors could opt, under the CDA, for procedures that ensured essential due process rights of discovery' a hearing and cross-examination of witnesses. Because the proposed regulation purports to provide an exclusive means for resolving contract

disputes that cannot be resolved through ADR, however, the Section believes that the proposed regulations must be substantially rewritten to ensure due process is provided.

1. **Lack of the Right to an Adjudicative Hearing**

As part of the “default adjudicative process for contract disputes” the parties are to make written submissions to the DRO or Special Master, in which they detail the factual and legal bases for their positions. Proposed § 17.39(f). The DRO or Special Master may decide the dispute on the basis of the written submissions or may, “*in the DRO or Special Master’s discretion*” allow the parties to make additional presentations at a hearing, and/or in writing.” (emphasis added); see *also* FAA AMS, ¶ 3.9.3.2.3.2 (“The DRO or Special Master may permit or request oral presentations, if the DRO or Special Master determines that this will facilitate the efficient’ effective’ and fair resolution of the matter. The DRO or Special Master may limit the presentations to specific witnesses and/or issues”).

Thus, the proposed regulations provide neither party with the right to elect an evidentiary hearing; rather, the decision to conduct a hearing is solely within the discretion of the DRO or Special Master. In addition, the “hearing” contemplated by the proposed regulations appears to be something less than an evidentiary-type hearing; instead, the regulations contemplate “presentations” by the parties, with issues and witnesses potentially limited to those selected by the DRO or Special Master. In short, the proposed regulations provide no assurance of certain “due process” rights that contracting parties traditionally enjoy, such as the rights to be heard, to present evidence, and to cross-examine witnesses on matters in dispute.

Again, the Section understands the FAA’s goal of providing an inexpensive and speedy process for the resolution of disputes’ but believes that the proposed regulations move too far toward those goals, at the expense of assuring a “just” process. See FED. R. CIV. P. 1 (rules should be “construed and administered to secure the just, speedy, and inexpensive determination of every action”). The right to an evidentiary hearing is often critical in fact-intensive contract disputes, and federal contractors have enjoyed such a right, by contract, long before the passage of the CDA. See, e.g., ASPR 7-103.12 (1955) (“In connection with any appeal proceeding under this clause, the Contractor shall be afforded the opportunity to be heard and to offer evidence in support of its appeal”).

Indeed, the lack of the right to an adjudicative hearing – and the lack of procedural due process that comes with such a proceeding – would

arguably invalidate the proposed regulations. Again, pre-CDA practice, and the deliberations of the Commission on Government Procurement, are illuminating:

A more serious problem often raised in connection with board proceedings today is a conflict between a speedy and economical resolution of disputes and the amount of due process available at the board level.

While the present boards began after World War II as expeditious, economical forums with relatively little due process, Supreme Court decisions and pressure from the bar have forced the boards in the past 20 years to make more due process available in their proceedings.

\* \* \*

The effect of these decisions [*Bianchi*, Utah, and Grace] is to require that the parties before a board be given maximum due process under the system, since the board findings on the facts are virtually conclusive. On review, the court will only set aside those findings if they are fraudulent, capricious, arbitrary, so grossly erroneous that they imply bad faith, or are not supported by substantial evidence. Such requirements on the boards to increase their due process safeguards led to increased formalization of board proceedings.

Report of the Commission on Government Procurement, Volume 4, at 17 (December 1972).<sup>18</sup>

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<sup>18</sup> The Commission went on to consider two approaches to the boards of contract appeals: (i)

This background is instructive because the Supreme Court precedent -- and subsequent board practice -- suggest that, where an agency's findings on the facts are virtually conclusive due to limited judicial review (as is the case under the FAA's proposed regulations), the parties appearing before an agency in a contract dispute should be assured of maximum due process. Thus, the FAA's proposed regulations, which neither assure the parties of a hearing nor provide the right to present and challenge evidence, are arguably deficient for an admittedly adjudicatory process. *See also Alaska Airlines, Inc. v. Civil Aeronautics Board*, 545 F.2d 194 (D.C. Cir. 1976) (holding that the due process requirements of the 5<sup>th</sup> Amendment required an evidentiary hearing with respect to the scope of an airline's exemption authority: "Where adjudicative, rather than legislative, facts are involved, the parties must be afforded a hearing to allow them an opportunity to meet and present evidence").

The Section recommends that the proposed regulations be modified to reflect the importance of adequate procedures to ensure due process in the resolution of a contract dispute, including the right to elect an evidentiary hearing. Such modifications are necessary to ensure that the FAA's dispute resolution process is just.

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(Footnote cont'd from previous page.)

treat them as "tools of management designed more to produce negotiated settlements of disputes rather than to adjudicate disputes in a court-like proceeding"; and (ii) treat the boards as "essentially independent, quasi-judicial tribunals," with strengthened procedural safeguards to improve the quality of the record and ensure the board members' independence and objectivity. *Id.* at 19. The latter approach was ultimately recommended, in conjunction with direct access to the courts, to provide maximum flexibility. *Id.* at 19-20. Notably, even under the first, more informal approach, "[b]oth parties before the board would be permitted to submit evidence, examine and cross-examine witnesses, and submit written arguments. . . ." *Id.* at 19.

## 2. **Lack of the Right to Full Discovery**

As part of the default adjudicative process, the DRO or Special Master determines the “minimum amount of discovery required to resolve the dispute.” Proposed § 17.39(e)(l). Thus, the parties are not free to decide for themselves the discovery that is necessary and appropriate in a particular case, nor are they assured of being able to do more than the “minimum” discovery in a given case. Indeed, they are not assured of a “minimum.”

Again, the Section believes that such arbitrary restrictions on discovery are unnecessary and inappropriate in a contract case. There certainly are cases in which only “minimum” discovery is appropriate, but there are other cases – particularly cases involving significant damages – where restricting a party to minimum discovery may be prejudicial. For example, it is often the case in government procurement that information about a critical issue in dispute is in the possession or control of numerous witnesses. If the contractor is limited in that situation to a Rule 30(b)(6) deposition, for example, it may never learn information that is essential to the claim. Each party should control such discovery decisions for itself, subject only to the long-established rules of reasonableness and relevance.

In short, the lack of the right to full discovery may deny a party the due process to which it is entitled in a contract dispute. The Section recommends that the proposed regulations be modified to ensure that parties have full discovery rights in contract disputes, including use of subpoenas to obtain documents and testimony from non-parties, subject to control by the DRO or Special Master.

## 3. **Interest**

Section 17.34(m) provides in part:

. . . If required by contract or applicable law, the FAA will pay interest on the amount found due the contractor, if any.

Currently, the standard FAA “Disputes” clause (§ 3.9.1-1) provides for the payment of interest on contractor claims, although on terms different from the CDA.

As discussed above, the Section does not believe the FAA is exempt from the CDA. Under the CDA interest runs from the date the certified claim is submitted to the contracting officer regardless of when the costs are actually incurred. *See Caldera v. J.S. Alberici Construction Co.* 153 F.3d

1381 (Fed. Cir. 1998). Under the FAA clause, interest is payable from the later of "(1) the date the Contracting Officer receives the contract dispute, or (2) the date payment otherwise would be due . . ." Clause 3.9.1-1(l).

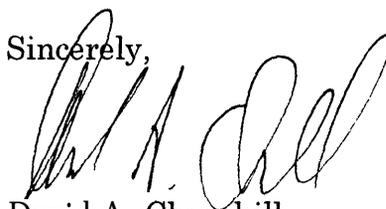
The Section recommends that, at a minimum, the FAA provide, by regulation, entitlement to interest. Even if the FAA is correct that its procurements are not subject to the CDA, the ability to obtain interest on claims should not be matter of negotiation on individual contracts. Under the current proposal, uncertainty concerning the availability of interest will provide further incentive for contractors to bypass the FAA's dispute procedures and challenge their legal validity.

Furthermore, the Section's longstanding position (going back at least to its 1977 and 1978 testimony before Congress on the CDA) is that interest should be payable on contractor claims on the same basis as it is recoverable by the government on its claims. Accordingly, if the FAA seeks by regulation or contract term to modify the CDA's bright line test (requiring payment of interest from the date of claim submission), it should make interest payable from the date the costs were incurred, whether before or after the claim is submitted.

## **VI. CONCLUSION**

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



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Bid Protest Committee  
Chair and Vice Chair(s) of the  
Judicial Remedies Committee  
Chair and Vice Chair(s) of the  
Federal Claims & Remedies Committee  
Chair and Vice Chair(s) of the  
Experimental Procurement Processes Committee  
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