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U.S. Department
of Transportation

**FEDERAL AVIATION
ADMINISTRATION**

Washington, D.C. 20591

DEPT. OF TRANSPORTATION
REGULATORY BRANCH

FAA-98-4379-8

99 JUN 18 AM 11:40

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

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

**FINAL RULE
(14 CFR PARTS 14 and 17)**

OFFICE OF AVIATION POLICY AND PLANS
OPERATIONS REGULATORY ANALYSIS BRANCH, APO-3 10
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April 1999

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EXECUTIVE SUMMARY

This regulatory evaluation examines the potential cost-savings as well as the costs of a final rulemaking that will establish the process and procedures for resolving protests and contract disputes. The FAA concludes that the final rule will result in cost-savings to offerors and contractors ranging from \$1,000 to \$1 million per case. Costs for this final rule will be \$500 or less per case. The FAA, therefore, concludes that the final rule is cost-beneficial.

The final rule will not have a significant impact on a substantial number of small entities. In addition, it will not constitute a barrier to international trade. The final rule also does not contain a Federal intergovernmental or private sector mandate that exceeds \$100 million in any year.

I. INTRODUCTION

This regulatory evaluation is performed in accordance with Executive Order 12866, which requires analysis of each regulation to determine the relationship of its benefits to costs. This evaluation examines the economic impact of a rule to establish procedures for resolution of protests and contract disputes. This final rule will add a new part 17 to Title 14, Code of Federal Regulations (CFR). The final rule outlines the minimum dispute resolution procedures that will apply to all protests and contractual disputes arising under the Acquisition Management System (AMS). The AMS is a system through which the Federal Aviation Administration (FAA) acquires equipment and materials in a timely and cost-effective way. In addition to the regulatory evaluation, this document also contains an Initial Regulatory Flexibility Determination, which analyzes the economic impact of the final regulatory changes on small entities, as required by the Regulatory Flexibility Act of 1980, as amended. This document also contains an assessment of the effect of the final regulatory changes on international trade, as required by the Office of Management and Budget. Finally, this document contains an Unfunded Mandate Assessment, as required by the Unfunded Mandates Reform Act of 1995.

II. BACKGROUND

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

procuring goods and services for the agency's use. As a result, Public Law 104-50, Department of Transportation Appropriations Act (November 15, 1995), directed the FAA to design a system responsive to the Agency's needs. In response, the FAA developed the AMS.

The AMS is a system of policy guidance that maximizes the use of agency discretion in the interest of best business practice. As a part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to review protested procurements and contracts in dispute. Notice of establishment of the ODRA was published on May 14, 1996, in the Federal Register (61 FR 24348). Currently, Alternative Dispute Resolution (ADR) procedures are included in offerings and contracts, and these procedures are agreed to by both the contractor and the FAA. The final rule is designed to contain the minimum procedures necessary for efficient and orderly resolution of protests and contract disputes.

The ODRA promotes dispute resolution through agreement of the parties through ADR techniques including, but not limited to informal resolution, mediation, fact-finding, and binding or non-binding arbitration. Where ADR results in a settlement, the agreement between the parties will be final and no further action will be necessary. If agreement cannot be reached, a default adjudicative process is used which results in a final order by the Administrator that, under 49 U.S.C 44106, can be reviewed by the U.S. Courts of Appeals.

III. ANALYSIS OF BENEFITS AND COSTS

A. Benefits

This final rule will formalize by regulation a system of dispute resolution procedures under the AMS. This system will be more effective and efficient in resolving protests and disputes concerning Screening Information Requests (SIR) and contract awards than procedures used in the traditional Federal Acquisition System. The new dispute resolution system, which will be applicable to all protesters and contractors who wish to do business with the FAA, will provide a streamlined approach that emphasizes informality and flexibility for resolving these cases as early as possible and at the lowest possible level.

Protesters or contractors, after filing initial protests or claims, will seek informal resolution of their differences with the Contracting Officer. If that should fail, the parties will file their dispute with the ODRA and attempt to resolve their differences using various ADR techniques, such as informal communication, mediation, fact-finding, and arbitration. If that should fail as well, the parties could attempt to settle their differences through an informal adjudicative process known as the Default Administrative Process. This last procedure will result in a recommendation to the Administrator. The Administrator could accept or decline the recommendation and issue a final order. If the protester or contractor disagrees with the order, the parties can seek relief in the U.S. Courts of Appeals.

The FAA has been operating under the AMS since April 1, 1996, the ODRA has received a combined total of 124 protests and contract disputes. The ODRA has been following the procedures that will be established in the final rule through a contractual agreement with protesters and contractors. Following these procedures, the ODRA has processed or completed the following actions:

- Completed 111 cases; 13 cases remain active
- Of the 111 cases, 63 were settled or withdrawn and 48 cases were issued adjudicatory decisions.
- Of the 48 cases receiving adjudicatory decisions: 18 cases were denied relief, 13 cases were dismissed, 13 cases --relief granted, and in 2 cases Equal Access to Justice Act (EAJA) fees were awarded and in 2 other EAJA cases, they were denied.

The informality throughout the dispute resolution process will result in cost and time savings to the protesters and contractors. Under the traditional Federal Acquisition System, the dispute resolution process was more formal and adversarial. An aggrieved party must adjudicate its claims at either the Court of Claims, the U.S. General Accounting Office, or a U.S. District Court. That system required more time, up to an additional 2 years, than the less formal procedures of the ODRA.

Under the ODRA process, protesters and contractors have greater opportunities to resolve their disputes informally through ADR techniques, and to benefit from the expedited time frames and voluntary exchanges of information. Generally, the longer the time period to resolve the case, the higher the cost of the

case. Currently, disputes are being resolved under ODRA in 3 months or less.

Costs of protests and disputes also vary with the value of the contract, the complexity of the issues, and the nature of the differences between the FAA and other parties. For example, for high value contract disputes (usually over \$5 million), which often involve large law firms, attorney fees can reach \$300 - \$500 an hour. For contracts valued less than \$5 million legal fees typically range between \$125 and \$300 per hour. Legal fees (including filing fees) to be paid by a protester or contractor often range between \$1,000 and \$1 million per case depending on the complexity of the case and the legal fees charged.' Where a party prevails over the FAA, the party could apply for reimbursable attorney fees of \$125 per hour and other expenses under the EAJA, 5 U.S.C. §504.

In addition, the agency will realize a cost savings from implementing the final rule. For processing a protest, the agency will save an estimated 65 hours and \$2,300 per case under the ODRA. Similarly, for processing contract disputes, the agency will realize an estimated time and cost savings of 125 hours and \$4,400 per case.²

¹ The FAA is aware of the legal fees for four EAJA applications that were adjudicated using dispute resolution procedures. The average legal costs for the plaintiffs were \$7,000.

² Average FAA salaries used in the calculations were: GS-14, Step 5 Attorney-- \$37 per hour; GS-13 Step 5 Contracting Officer--\$31 per hour; and GS-9, Step 5 Administrative Specialist--\$19 per hour.

Another cost-saving advantage of the final rule is that all submissions, after the initial filing, could be performed by facsimile machine. This should result in a time savings. It will take only a few minutes to correspond, file, or submit documentation to the FAA by facsimile, rather than the 3-7 days for the documents to be delivered to the FAA by mail.

Also, the new procedures established under this rule will promote the efficient resolution of disputes by promoting settlement at the lowest level possible. Once a protester or contractor has a basis for filing a protest or claim, the protester may file immediately with the ODRA, without any prerequisite filings with the Contracting Officer. The right to immediately file a protest or dispute alleviates any unnecessary time delays or costs associated with formally requesting a "Contracting Officer's final decision." Upon filing with the ODRA, the parties still are encouraged to seek resolution at the Contracting Officer level through informal discussions and exchanges of information. Even if a negotiated resolution is unlikely, the default adjudicative procedures contain expedited time frames. Moreover, the chance of an expeditious resolution is further enhanced by the fact that ADR efforts may be conducted concurrently along with and in parallel to adjudication.

Other advantages of this rule include procedures that will be more flexible than current procedures. The intent is to provide every opportunity to reach an informal resolution. To promote a

streamlined approach, the final rule allows the ODRA to combine multiple actions concerning the same SIR or contract in the interest of efficient case resolution. The ODRA could also waive the time requirements for any particular dispute, in the interest of fairness or efficient case management. If during the course of the resolution of a protest or contract dispute, when time is about to expire, the Contracting Officer, the protester, or contractor may request the ODRA for an extension of time, if they believe a resolution is probable.

B. Costs

The FAA estimates direct cost of utilizing the procedures of the final rule will be about \$500 or less per case. Unless private counsel is retained, these costs basically will be the cost of filing by facsimile, postage, courier service, and overnight delivery service; communicating with FAA officials to resolve issues; and preparing and participating in a hearing, if required or requested³.

In addition to direct costs, implementing the new dispute resolution procedures for protests and contract disputes, could result in a potential cost to a protester or contractor of \$200 to \$300 to purchase a facsimile machine. These costs are minimal and in most cases, the protester or contractor already owns a facsimile machine or has access to one.

³ Generally, hearings will be conducted only to resolve complex factual issues or upon request by any of the parties to the protest or dispute.

There is also the potential for a protester incurring the expense of a courier service and overnight delivery service to deliver documents to the FAA. The protester or contractor may deliver the documents in person to avoid cost; however, if they should choose to use a courier or overnight delivery service, the cost of such service will be no more than \$25 per delivery, and in most instances, the protester or contractor already has a contract with the courier or overnight delivery service to provide deliveries for a period of time.

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

C. Comparison of Benefits and costs

Protesters and contractors could realize cost savings of \$1,000 to \$1 million per case (primarily in legal fees) if they participate in the new dispute resolution procedures per case. The cost of resolving a protest or contractual issue under the new dispute resolution system will be \$500 or less per case. There is the potential cost of \$200 - \$300 to procure a facsimile machine to file electronically, but most protesters or contractors already own one or have access to one. The FAA concludes that this final rule is cost-beneficial, the estimated cost savings (\$1,000 to \$1 million per case) exceed the estimated costs (\$500 or less per case).

Iv. FINAL REGULATORY FLEXIBILITY DETERMINATION

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

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

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

The FAA conducted the required review of this rule **and** determined that it will not have a significant economic impact on a substantial

number of small protesters and contractors. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605 (b), the FAA certifies that this rule will not have a significant economic impact on a substantial number of small entities for the following reason: the final rule will provide an estimated cost savings of \$1,000 to \$1 million per case in resolving protests and disputes with the FAA, while requiring about \$500 or less per case per entity to resolve the issue. For small entities, the FAA estimates that cost savings per case will be closer to \$1,000 than \$1 million and concludes there will be no significant economic impact on small entities. In the Notice of Proposed Rulemaking, the FAA solicited comments from affected entities with respect to this finding and determination and received no comments.

V. FINAL INTERNATIONAL TRADE IMPACT ASSESSMENT

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

VI. FINAL UNFUNDED MANDATES REFORM ASSESSMENT

Title II of the Unfunded Mandates Reform Act of 1995 (the Reform Act), enacted as Pub. L. 104-4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a final agency rule that may result in the expenditure by State, Local, and Tribal governments, in the aggregate, or by the

private sector, of \$100 million or more (adjusted annually for inflation) in any one year.

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

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

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