

AMS CHANGE REQUEST (CR) COVERSHEET

Change Request Number: 16-66

Date Received: 9/23/16

Title: Voluntary Waiver of Protest Policy

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Initiator Organization Name / Routing Code: Acquisition Policy AAP-100

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Policy and Guidance: (check all that apply)

- Policy
- Procurement Guidance
- Real Estate Guidance
- Other Guidance

Summary of Change: Clarifies Procurement Policy 3.9 Resolution of Protests and Contract Disputes policy that the FAE may approve the voluntary waiver of offeror protest rights.

Reason for Change: To clarify that the FAA has the acquisition authority to enter into contracts that contain provisions which limit an offeror's ability to protest award decisions

Development, Review, and Concurrence: ACQ-1, AAP-1, AAP-100, AGC-500

Target Audience: Contracting personnel and contractors

Briefing Planned: No

ASAG Responsibilities: N/A

Section / Text Location: Acquisition Management Policy 3.9

The redline version must be a comparison with the current published FAST version.

- I confirm I used the latest published version to create this change / redline
- or
- This is new content

Links:

<http://fast.faa.gov/docs/acquisitionManagementPolicy/AcquisitionManagementPolicy3.9.pdf>

Attachments: Redline and Final documents.

Other Files: None.

Redline(s):

Section(s) Revised:

3.9.3 Voluntary Waiver of Protest

3.9.8 Matters Not Subject to Protest

Acquisition Management Policy - (~~7/2016~~ 10/2016)

[3.9 Resolution of Protests and Contract Disputes](#)

[3.9.1 Applicability](#)

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3.9 Resolution of Protests and Contract Disputes

3.9.1 Applicability

Protest and contract disputes guidance and principles outlined herein apply to all FAA Screening Information Requests (SIRs), contract awards, and contracts.

3.9.2 Policy

The FAA is committed to the early and expeditious resolution of controversy using mediation, fact-finding and other techniques collectively known as "alternative dispute resolution". The FAA has pledged to utilize ADR techniques to the maximum extent practicable when such voluntary techniques will produce a fair and expeditious disposition of a controversy.

Protests concerning FAA SIRs or awards of contracts, and contract disputes arising under or related to FAA contracts, shall be resolved at the agency level through the FAA Dispute Resolution System. Judicial review, where available, will be in accordance with 49 U.S.C. 46110 and shall apply only to final agency decisions. The decision of the FAA shall be considered a final agency decision only after an offeror or contractor has exhausted its administrative remedies for a protest or a contract dispute under the FAA Dispute Resolution System

3.9.3 ~~Reserved~~ Voluntary Waiver of Protest

FAA may determine that it is in the Government's best interest to include a voluntary waiver of protest provision or clause into a Screening Information Request (SIR), contract or class of SIRs or contracts. A provision or clause in such SIRs or contracts prohibiting protests is enforceable provided that:

(a) FAA documents the rational basis detailing the factors considered in the determination that prohibiting protests is in the Government's best interest;

(b) The FAA Acquisition Executive (FAE) approves the written rational basis;

(c) The FAA Office of Chief Counsel is provided notice of the rational basis; and

(d) Prior notice is given to the Office of the FAA Administrator that the FAE intends to include a provision or clause that allows for the voluntary waiver protests in a SIR, contract or class of SIRs or contracts.

3.9.4 FAA Dispute Resolution System

The FAA Office of Dispute Resolution for Acquisition (ODRA) is established as an organization that is independent of agency organizations responsible for procurement actions. Pursuant to a delegation of authority by the Administrator, the Director of the ODRA manages the FAA dispute resolution process, promotes ADR, conducts dispute resolution proceedings and recommends action to the Administrator on matters concerning protests or contract disputes. The ODRA is authorized, among other things, to:

- ☐ Adjudicate protests and contract disputes on behalf of the FAA Administrator;
- ☐ Promulgate rules of procedure;
- ☐ Issue orders and decisions;
- ☐ Exercise broad discretion to resolve protests and contract disputes;
- ☐ Use ADR to settle protests and contract disputes; and
- ☐ Provide fair and impartial "Findings and Recommendations", supported by the case record and law.
- ☐ Recommend changes to the FAA acquisition system based on matters brought before the office.

The Director of the ODRA may redelegate to Special Masters and Dispute Resolution Officers (DROs) such delegated authority as is necessary for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions or other disciplinary actions.

The applicable ODRA rules of procedure are set forth in 14 CFR Parts 14 and 17, Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations, effective June 28, 1999. These ODRA Rules are incorporated by reference into this section. Further information and guidance concerning the ODRA dispute resolution process for contract disputes and protests can be found on the ~~ODRA Website~~. [ODRA Website](#).

3.9.5 Initial Dispute Resolution at the Contracting Officer Level

Offerors and contractors initially should seek resolution of any concerns or controversies at the Contracting Officer level. Contracting Officers should make reasonable efforts to promptly and completely resolve such concerns or controversies, where possible, and will coordinate their dispute resolution efforts with the FAA Procurement Legal Division or their regional or center Assistant Chief Counsel's office.

3.9.6 Dispute Resolution at the ODRA

ADR is the primary means of dispute resolution that is employed by the ODRA. Upon request, the Office of Dispute Resolution for Acquisition will make available FAA DROs or appropriately qualified persons from outside the FAA to serve as neutrals in ADR proceedings involving protests and contract disputes. The parties may also employ a neutral of their own choosing. With the agreement of the interested parties, the ODRA may provide ADR services in advance of the filing of a contract dispute or bid protest with the ODRA.

The parties may use any ADR technique proposed by the parties that is deemed by the DRO or neutral to be fair, reasonable, and in the best interest of the parties, including, but not limited to, informal communication, mediation, fact-finding, and binding or nonbinding arbitration. Binding arbitration may be employed only if the protester or contractor and the FAA agree to use this method to resolve the merits of the protest or contract dispute. If binding arbitration is agreed to, the decision of the DRO or neutral arbiter will become a final agency decision, unless the FAA Administrator indicates non-concurrence with the decision, in writing, within seven business days after the date that the decision is issued. If the FAA Administrator non-concurs with the decision and issues a contrary determination, then that determination becomes the final agency decision concerning the merits of the protest or contract dispute. If the parties have not agreed to binding arbitration and are unable otherwise to reach an agreement on the merits of the protest or contract dispute through ADR, then the ODRA will employ its Default Adjudicative Process to resolve the protest or contract dispute.

3.9.7 Obligation to Continue Performance

The FAA requires continued performance with respect to contract disputes arising under or related to a contract, in accordance with the provisions of the contract, pending resolution of the contract dispute.

3.9.8 Matters Not Subject to Protest

The following matters may not be protested before the Office of Dispute Resolution for Acquisition:

- (a) FAA purchases from or through, state, local, and tribal governments and public authorities;
- (b) FAA purchases from or through other federal agencies;
- (c) Grants;
- (d) Cooperative agreements;
- ~~(e)~~ FAA transactions containing a voluntary waiver of protest provision or clause pursuant to paragraph 3.9.3 Voluntary Waiver of Protest; or
- (f) Other transactions that do not fall into the category of procurement contracts subject to the AMS.

3.9.9 Confidentiality of the ADR Process

Settlement discussions and documentation provided to facilitate settlement of the issues will be protected and confidential, to the extent provided by law, ADR agreements and ODRA Protective Orders.