



RECENT DEVELOPMENTS: FAA GUIDANCE AND DIRECTIVES

FAC Webinar
June 29, 2016

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PFC Usage

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PFC Funding for Ground Access Projects

- AIP Handbook, FAA Order 5100.38 sets out FAA's longstanding policy that to be AIP and/or PFC eligible, an airport ground access transportation project (includes both road and rail access) must meet the following conditions:
 1. The road or facility may only extend to the nearest public highway or facility of sufficient capacity to accommodate airport traffic;
 2. The access road or facility must be located on the airport or within a right-of-way acquired by the public agency; and
 3. The access road or facility must exclusively serve airport traffic



PFC Funding for Ground Access Projects

- FAA requested comments on proposed change that would permit on-airport, rail access projects to be funded with PFC revenue, even if do not exclusively serve airport traffic
 - Enhances FAA statutory obligation to encourage the “development of intermodal connections at airports” - 49 U.S.C. §47101(a)(5)
- 3 possible alternatives: 1) Incremental Cost Comparison, 2) Separate System Comparison, and 3) Prorated Costs



Incremental Cost Comparison

- Any additional cost associated with constructing track that runs through an airport, as opposed to an alignment which bypasses an airport, would be eligible for PFC funding
- Benefits no one but airport passengers and employees
- Public agency demonstrates that rail line would be built from Point A to Point B regardless of whether airport station is added
- Compares actual cost needed to serve airport passengers and employees against cost of PFC project (airport station)
- If not for service to airport, track alignment (Section C-D) would typically be shorter, straighter, and less expensive than that of design that includes airport station (C-A1-Airport Station-B1-D)
- Approximate incremental cost to serve airport is difference between track cost to serve airport (C-A1-Station-B1-D) and cost if track did not deviate to serve the airport (C-D)
- Incremental cost represents costs needed to directly benefit airport passengers and employees and forms basis of PFC eligibility
- **Key:** only trackage on airport property (A1-Airport Station-B1) is eligible for PFC funding

Separate System Comparison

- Where costs of a through-track solution are less expensive than a stand-alone people-mover bringing passengers in from an off-airport station, cost of on-airport trackage would be eligible for PFC funding
- Full costs of a hypothetical people mover system including costs of airport station, the transport vehicles, and full costs of rail line between airport station and A1 (theoretical airport property line) would typically be eligible for PFC funding
- If airport can demonstrate that costs to be funded through PFC revenues would be less than cost of building a separate system, costs to be funded through PFC revenues would be eligible

Prorated Costs

- Prorates costs of the trackage on airport property based on ridership forecast
- If airport can demonstrate that costs to be funded through PFC revenues would be no more than the prorated costs of trackage on airport property, based on ridership forecasts and percentage representing passengers and employees utilizing airport, then those costs could be considered eligible

Required Contract Provisions

Debra Braga
Chief Legal Officer



FAA Guidance on Required Contract Provisions for Obligated Sponsors

- Federal laws and regulations require that recipients of federal assistance (Sponsors) include specific contract provisions in certain contracts, requests for proposals, or invitations to bid
- Requirement established when Sponsor accepts AIP grant assurances
- Contract includes subcontracts

Sponsor Requirements

- In general, Sponsor must:
 - 1) Incorporate applicable contract provisions in each contract funded under AIP
 - a. Sponsor must physically incorporate text of provision within procurement documents
 - b. Exception allows Sponsor to incorporate select provisions by reference provided Sponsor indicates reference has same force and effect as if given in full text
 - 2) Require contractor (including all subcontractors) to insert required contract provisions in lower tier contracts
 - 3) Require contractor (or subcontractor) to incorporate applicable requirements of required contract provisions by reference for work done under purchase orders, rental agreements and other agreements for supplies or services
 - 4) Require prime contractor be responsible for compliance with contract provisions by any subcontractor, lower-tier subcontractor or service provider
 - 5) Verify that required local or State provision does not conflict with or alter Federal law or regulation.

Incorporation of Provisions

- Appendix A of FAA Guidance provides information on when provision has mandatory language that Sponsor must apply
- If provision has mandatory text, Sponsor must incorporate text without change
- Any modification is not permitted and may invalidate provision
- For provisions that do not have mandatory language, FAA Guidance provides model language acceptable to FAA in meeting intent and purpose
- Sponsors may also use existing provisions provided text meets intent and purpose of Federal law or regulation

Requests for Bids and Notice to Bidders

- Sponsor may incorporate certain provisions by reference in Request for Bids or Notice to Bidders rather than including entire text of provision
- Provisions that can be incorporated by reference are:
 - 1) Buy American Preference
 - 2) Foreign Trade Restriction
 - 3) Davis Bacon
 - 4) Affirmative Action
 - 5) Government-wide Debarment and Suspension
 - 6) Government-wide Requirements for Drug-free Workplace

Failure to Comply

- Failure to incorporate required provisions will jeopardize AIP eligibility of Sponsor's project
- Contractor failure to comply with required provisions may be sufficient grounds to:
 - 1) Withhold progress payments or final payment;
 - 2) Terminate the contract for cause;
 - 3) Seek suspension/debarment; or
 - 4) Take other action determined to be appropriate by Sponsor or FAA

Recent Changes

- FAA Guidance revised on January 29, 2016 to enhance user understanding of use and applicability and add suggested provisions for “Termination for Cause”, “Recovered Materials”, and “Seismic Safety”

Sample Provisions

- *Do we want to include some sample provisions or a list of provisions from the Guidance?*

Restrictions on Certain Aeronautical Activities

Peter Kirsch
Partner



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Compliance Guidance Letter

- Airport restrictions on banner towing, gliders, light sport aircraft, parachute, and ultralight operations
- CGL – 2016 (4/25/16)

Grant assurance obligation

“The sponsor of an airport developed with federal financial assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. . . .

“. . . sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is reasonable and necessary for the safe operation of the airport”

All restrictions

- Must be adequately supported and justified
- Final determination made by FAA
Airports, Flight Standards, Air Traffic, *not by sponsor*

Questions to be answered

- Can the proposed operations be safely accommodated? (no hazard to fixed wing)
- Is there an appropriate location on the airport?
- What reasonable time periods?
- Are fees similar to comparable activities?
- What are views of FSDO? ATO?
- Effects on IFR operations?

Request for approval

- Formal written justification (answer previous questions)
- Restrictions may be in effect during FAA review (contrast to FAR Part 161)
- Document review and approval process

FAA review

- Determination on safety and efficiency
- Obstruction Evaluation/ Airport Airspace Analysis (OE/AAA)
- Risk assessment
- Coordinate FAA offices

Final Policy on Hangar Use

- Draft policy – 2014
- Thousands of comments from airports, users
- Final policy – June 15 (effective 7-1-17)
- Made revisions to address concerns by users and sponsors

Hangar use

- Changed standard from *incidental or de minimis use* to *interference*:

If the presence of non-aeronautical items in a hangar does not interfere with [obligations to use aeronautical facilities for aeronautical purposes], then the FAA will generally not consider the presence of those items to constitute a violation of the sponsor's obligations

Interference standard

- Displace aeronautical contents
- Impede access to aeronautical use
- Non-aeronautical business
- Violation of building and other codes

Hangar use

- *Interim* non aeronautical use OK if no demand; month-to-month only
- Rules apply to privately constructed hangars
- Interim plan *requires* FAA approval
- “Interference” standard for leisure items

Questions/Discussion

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