



33<sup>rd</sup> Annual Basics of Airport Law Workshop and 2017 Legal Update

## Session #17

# GENERAL AVIATION AIRPORT AGREEMENTS

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# INTRODUCTION

aeronautical  
Joint FAIR Ground MARKET  
FBOS users EXCLUSIVE  
Leases Leases Leases  
DEVELOPMENT PROPERTIES POSITIONS  
ACREAGE fuel Management  
Non-Aeronautical exclusives sustaining  
farms Agreements THE FENCE  
Leases AGREEMENTS

# INTRODUCTION

- FBO Leases
- Ground Leases
- Hangar Leases
- Fuel Farms
- Non-Aeronautical Leases
- Through-the-Fence Agreements
- Development Agreements
- Joint Ventures
- Proprietary Exclusives
- Management Agreements
- Aeronautical Users
- Exclusive Rights
- Nondiscrimination
- Sponsor Assurances
- Self-Sustaining
- Fair Market Value

# TODAY'S TOPICS

- FAA Grant Assurances
- Business Factors
- Types of Agreements
- Challenges – Where They Come From
- Best Practices
- Resources – Where to Look for Answers

# FAA GRANT ASSURANCES

- Assurance 1: General Federal Requirements
  - Obligation to Comply with General Federal Requirements
- Assurance 5: Preserving Rights and Powers
  - Not Contracting Away Authority to Meet Sponsor Assurances
  - Subordination Clause
- Assurance 19: Operations
  - Duty to Maintain Aeronautical Facilities, including Pavement
  - Assign Responsibility

# FAA GRANT ASSURANCES

- Assurance 22: Economic Nondiscrimination
  - No Unjust Discrimination – 22(a)
  - Reasonable Access for Aeronautical Users – 22(a)
  - FBOs Subject to Same Rents, Rates, & Fees as are Uniformly Applicable to Other FBOs with Similar Facilities – 22(c)
  - Cannot Limit Right to Self-Service or Self-Fuel – 22(f)
  - Sponsor Subject to Same Terms and Conditions as Other Users – 22(g)
  - May Establish Reasonable and Not Unjustly Discriminatory Terms for All Users to Provide for Safe and Efficient Operation – 22(h)

# FAA GRANT ASSURANCES - STANDARD CONTRACT TERMS: ASSURANCE 22(B)

- “In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to
  - (1) Furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
  - (2) Charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.”

# FAA GRANT ASSURANCES AIP FUNDED PROJECTS

The screenshot shows the FAA website's navigation structure. At the top, the FAA logo and name are on the left, and navigation links for Home, Jobs, News, About FAA, A-Z Index, and a search bar are on the right. Below this is a blue horizontal menu with categories: Aircraft, Airports (selected), Air Traffic, Data & Research, Licenses & Certificates, Regulations & Policies, and Training & Testing. The main content area has a breadcrumb trail: FAA Home > Airports > Airport Improvement Program (AIP) > Procurement and Contracting Under AIP. On the left is a sidebar menu with links to various AIP-related topics, with 'Procurement and Contracting Under AIP' highlighted. The main content area features a title 'Procurement and Contracting Under AIP Federal Contract Provisions', a 'Print' and 'Share' button, a 'Contents' section with a list of links, a paragraph of introductory text, and a 'Top Tasks' sidebar with several action links.

FAA Home > Airports > Airport Improvement Program (AIP) > Procurement and Contracting Under AIP

## Procurement and Contracting Under AIP Federal Contract Provisions

Print Share

### Contents

- Main
- Micro-Purchase
- General Procurement
- Small Purchase Procurement
- Equipment Procurement
- Professional (A/E) Services Procurement
- **Federal Contract Provisions**
- Related Resources

The procurements a sponsor makes under the [AIP](#) must comply with all applicable federal contract provisions as established by various laws and regulations. The requirements for the provisions will vary depending on the type and size of the procurement action. Typically, procurement actions under the [AIP](#) fall within three categories:

1. Construction Development,
2. Equipment Acquisitions, and
3. Professional Services (A/E) Contracting.

Application of a certain provision also depends on established contract dollar thresholds and whether the contract is for construction or for another purpose.

### Top Tasks

- View airport program statistics
- Search airport data
- Find an airport AC 🔍
- Read best practices for runway safety
- Learn about the Airport Improvement Program



# FAA GRANT ASSURANCES

- Assurance 23: No Exclusive Rights
  - Focus is On Sponsor Conduct that Excludes Some Aeronautic Users in Favor of Others
  - Can Be Express or Implied
  - NOT a Violation If Only One Entity Provides a Service, Provided Others Have an Opportunity
  - VERY Limited Exception to Exclude Other FBOs – 23(a) & (b)
  - Sponsor Can Exercise “Proprietary Exclusive” Right
    - Must Provide Service with Sponsor Personnel and Resources – CANNOT CONTRACT OUT

# FAA GRANT ASSURANCES

- Assurance 24: Self-Sustaining Rent and Fee Structure
  - FMV is Benchmark
    - Not necessary for aeronautical users
- Assurance 25: Airport Revenue
  - No Revenue Diversion
  - Airport Revenue Stays on Airport
  - No Less than FMV contracts with other divisions of Sponsor
  - Value for Services

# FAA GRANT ASSURANCES

- Assurance 29: Airport Layout Plan
  - Up to Date Map of Airport and Facilities
  - New Development May Require Amending ALP
- Assurances 30 & 37: Comply with Civil Rights, DBE, and Other Federal Laws
- State and Local Requirements

# BUSINESS FACTORS

- Define What You Need (Lessor)
  - Revenue Needs
  - Types of Tenants/Development
  - Size and Quality of Facilities
  - Degree of Control
  - Degree of Risk
  - Degree of Reward
  - Growth Needs or Fears
  - Political Factors
- Understand Lessee Needs
- Return on Investment
- Term/Duration
- Location
- Access to Airfield, Infrastructure, Utilities
- Financing Issues
- Business Model

# TYPES OF AGREEMENTS

## *FBO & FUEL CONCESSIONS*

- Non-Exclusive
- Types of Services Offered
- Hours of Operation
- Insurance Requirements
- Types of Fuel Offered and Rights Attached
- Fuel Tanks – Above Ground vs. Below Ground
- Public Use Aircraft Parking Ramps

# TYPES OF AGREEMENTS

## *GROUND LEASES*

- Non-Exclusive
- Term Should Not Exceed 50 Years
- Aeronautical Use Unless Approved Otherwise By FAA
- Boilerplate With Ability to Include Additional Provisions
- Include Items That Can Vary (Term, Rent, etc..) on First 2 Pages
- Include Only What You Are Able/Willing to Enforce
- Include Incremental Steps in Default Enforcement Provisions Before Terminating the Lease
- Right to Inspect INCLUDING Non-Commercial Use Hangars

# TYPES OF AGREEMENTS

## *AIRPORT-OWNED HANGAR & AIRCRAFT STORAGE*

- Short-Term, Non-Exclusive
- Boilerplate Agreement For All Users to Sign
- Identify Allowable Uses Per FAA and Fire/Building Codes
- Include Only What You Are Able/Willing to Enforce
- Enforce Through Other City/County Codes
- Right to Inspect INCLUDING Non-Commercial Use Hangars
- Explain What Will Happen If They Break the Rules

# TYPES OF AGREEMENTS

## *NON-AERONAUTICAL*

- Permitted Only On FAA-Approved Non-Aeronautical Parcels
- Must Charge Fair Market Value Rent
- Term Should Not Exceed 50 Years
- Cannot Interfere With Aeronautical Operations of the Airport
- May Need ALP Amendment or Release



# TYPES OF AGREEMENTS

## *THROUGH-THE-FENCE (TTF) AGREEMENTS*

- Off-Airport Operators with Direct Access to Airfield
  - Residential
  - Commercial
- TTF Agreements Raise Myriad Legal Issues
  - Security, Fee Structure, Control over Airfield, Competition with Incumbents, Maintenance, etc. ...
- Sponsors Are Not Required to, Or Prohibited from, Allowing TTF Operations
- Congress has Set Conditions for Residential TTF Agreements
  - FAA Modernization and Reform Act of 2012, P.L. 112-95, §136
  - TTF Agreements Must Also Comply with All Sponsor Assurances
- FAA Scrutinizes Commercial TTF Agreements Closely – Disfavored
- ACRP Report 114: Guidebook for Through-the-Fence Operations (2014)

# OTHER TYPES OF AGREEMENTS

- Joint Ventures
- Development Agreements
- Flight Schools and Skydiving
- Management Agreements
- FAA Letter of Agreement

# CHALLENGES

## *WHERE THEY COME FROM*

- Airport Users
  - Different Treatment
  - Different Terms and Conditions
  - Different Fees and Charges
  - Demands for Special Treatment
  - Bad Actors
- FAA
  - Questions About Compliance
  - Questions about Safety
  - Termination of Grant Eligibility
- Airport Sponsor Leadership
  - Changing Policy Direction
  - Changing Goals for Airport
  - Community Opposition
  - Economic

# BEST PRACTICES

## *GENERAL*

- Advance Planning and Preparation are Key
  - Published Standards
  - Use of Forms
  - Advance Consultation with Users, FAA, Airport Leadership
  - Develop Processes to Address Anticipated Requests
- Be Prepared to Explain and Justify Deviations from Past Practice

# BEST PRACTICES

## *GENERAL*

- Be Thoughtful In Decision-Making
  - Think About Downstream Consequences – It's a Chess Game
- Update and Revise Policies, Procedures, and Documents

# BEST PRACTICES

## *CONTRACTING PROCESS*

- FAA Does Not Dictate Process
  - First-Come/First-Serve
  - Solicitation/RFP
  - Hybrid
- Defined Process Reduces Risk of Challenges
- Defined Process Reduces Flexibility
- Keep People Informed

# BEST PRACTICES

## *MINIMUM STANDARDS*

- Provides Vehicle to Memorialize Development Policies
- Provides Specifications for Commercial Aeronautical Users (FBOs, SASOs)
  - Square Footage, Services, License and Certification, Qualifications, Hours of Operation, Personnel, Etc.
  - Set Uniform Standards for Each Class of Aeronautical User

# BEST PRACTICES

## *MINIMUM STANDARDS*

- Assures Nondiscriminatory Treatment
  - Reduces Questions and Issues
  - Requires Advance Thought and Planning
  - Requires Periodic Updating
- Not required, but FAA recommended



# BEST PRACTICES

## *MINIMUM STANDARDS*

- Other Alternatives – City/County Codes
- Should Not Adversely Restrict Business Opportunities
- Base Standards on Best Business Practices – Not Random & Arbitrary Criteria
- The Goal Is To Serve The Customer

# BEST PRACTICES

## *RULES AND REGULATIONS*

- Standards to provide for Safety and Rules of Conduct
  - Apply to all airport tenants and users (passengers, vendors, commercial operators)
  - Apply across the airport (airfield, terminal, roadways)
  - Enforceable by penalties, suspension of privileges
- Contracts need to incorporate Rules and Regulations and allow for changes

# BEST PRACTICES

## *RULES AND REGULATIONS*

- Other Alternatives – City/County Codes
- Some rules may not apply to all users
- Separate rules documents which only apply to specific users
- Easier to update, when needed
- More convenient for customers/may be less convenient for airport

# BEST PRACTICES

## *RENTS AND CHARGES*

- Must Be Nondiscriminatory, Fair, and Applied Equally
- Must Be Reasonable – FMV (or Lower For Aeronautical Users)
- Overall Rents, Charges, and Fees Designed to Make Airport Self-Sustaining
- GA Rents and Charges Do Not Need To Be Tied To Cost Recovery Or Allocation
- FAA Will Consider Fees Excessive If Airport Is Accumulating Surpluses
- Have a Solid Capital Improvement Program to Maintain Acceptable Fund Balance/Avoid Revenue Surplus

# BEST PRACTICES

## *RENTS AND CHARGES*

- Fees Should be Based on Transparent Methodology
  - Appraisal
  - Market Study
  - Negotiation
- Variations Must be Justified and Documented

# BEST PRACTICES

## *RENTS AND CHARGES*

- Standard Table of Rents, Fees, and Charges
  - Can Specify Rates or Establish Methodology
  - Reduces Risk of Discrimination Claims
  - But, Reduces Flexibility
  - Needs to Include Methodology for Revision Over Time
    - Appraisal, Market Study, Negotiation

# BEST PRACTICES

## *STANDARD FORM AGREEMENTS*

- Standard Form Agreements Can Reduce Legal Risks
  - Assures Similar Terms
  - Eliminates Scriveners Errors and Omissions
  - Limits Areas of Negotiation
  - Assures Required Terms
- But – Reduces Flexibility
  - Deviations Require Justification and Invite Challenges
  - Change to One Form May Have Ripple Effect to Other Forms

# BEST PRACTICES - STANDARD CONTRACT TERMS: SUBORDINATION CLAUSE

- Preserve Authority to Comply with Assurances
- Not Required, but Recommended in FAA Order 5190.6B ¶6.6
  - “This agreement shall be subordinate to the provisions of any existing or future agreement between the [Sponsor] and the United States, the execution of which has been or may be required as a condition precedent to the expenditure of federal funds for the development of the Airport. In the event that the [Designated Official] of the [Sponsor] reasonably determines that this Agreement or any provision contained herein causes or may cause a violation of any agreement between the [Sponsor] and the United States, the [Sponsor] shall have the unilateral right to modify or terminate this Agreement to ensure the [Sponsor]’s compliance with all such agreements with the United States.”



# RESOURCES

- Airport Compliance Handbook, Order 5190.6A (available at <http://www.faa.gov/arp/pdf/5190-6a.pdf>)
- Advisory Circular, AC 150/5190-5, Change 1, Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities
- Part 16 Decisions CITE TO ACRP and LEXIS
- Numerous ACRP publications: ADD WEBSITE

# Questions?