CONSTRUCTION AND PROFESSIONAL SERVICE CONTRACTS FOR AIP-FUNDED PROJECTS

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PROFESSIONAL SERVICE CONTRACTS

- Types of contracts involved
- Relevant laws and regulations
- Key issues
- Common mistakes to avoid
LEGAL AUTHORITY

- Brooks Act (40 U.S.C. § 1102)
  - Qualification-based selection procedures
  - Fees for services are negotiated after the selection is made

- Grant Assurances (49 U.S.C. § 47107)
  - Brooks Act applies to airport A/E and planning contracts

FAA GUIDANCE

- FAA Advisory Circular 150/5100-14E
  - (Architectural, Engineering, and Planning Consultant Services for Airport Grant Projects)
- FAA AIP Handbook
  - (ORDER 5100.38, Chapter 9 – Procurement and Contract Requirements)
QUALIFICATIONS-BASED SELECTION: HOW FAA VIEWS THE PROCESS

Preliminary scope of services
- Sponsor establishes selection board
- Determine selection policy
- Develop selection criteria & weights

Issue RFP
- Short list firms submit RFPs
- Evaluate RFPs
- Rank qualified consultants

Interview
- Review experience & qualification data
- Notify 1st Ranked Consultant

Notify unsuccessful consultants

Initiate Discussions
- Contractor submits Cost Estimate
- Notify 1st Ranked Consultant

Contract Negotiations
- Award Contract

Contractor performs Independent Fee Estimate
- Sponsor performs Independent Fee Estimate
HOW AIRPORT LAWYERS SHOULD APPROACH THE PROCESS

- Five key steps
  1. Use a qualifications-based selection process
  2. Define the scope of services
  3. Negotiate the fee
  4. Document the selection process
  5. Prepare a conforming contract
1. QUALIFICATIONS-BASED SELECTION

- Create a selection board
- Develop selection criteria
- Solicit interest
- Identify short-list of qualified teams
- Interviews
- Rank consultants

Different rules for an EIS!!
- FAA will provide scope of work
- FAA must concur with selection/evaluation criteria
- FAA will participate in interviews
- FAA ranks consultants
2. SCOPE OF WORK

- Early steps
  - Define the scope of services before creating selection criteria and issuing the RFQ

- Negotiation phase
  - Sponsor and first-ranked contractor develop a well-defined project description and scope of services
  - Scoping process must be complete prior to negotiating fee
3. FEE NEGOTIATIONS

- Sponsors must perform some form of fee analysis for every contract
  - Independent cost estimate (ICE) if contract > $100,000
  - Move to second ranked bidder if sponsor and first-ranked bidder cannot negotiate a fee
- FAA role
  - FAA does not participate in fee negotiations
  - FAA determines reasonableness of fee
4. DOCUMENTATION

- Prepare a record of cost negotiations
  - Address any changes in scope
  - Explain any significant differences between the sponsor’s ICE and the final agreed upon fee
  - Provide a detailed fee analysis
  - Include copy in contract file
  - If requested by FAA, submit the record to the agency for a reasonableness determination
5. MANDATORY CONTRACT PROVISIONS

- civil rights
- DBE
- breach of contract
- contract termination
- debarment certification
- rights to inventions
- lobbying
- trade restrictions

http://www.faa.gov/airports/aip/procurement/federal_contract_provisions/
PRACTICE TIPS

1. Educate airport staff and your board/approving authority
2. Understand and harmonize local/federal requirements
3. If in doubt, talk to FAA
4. Review and update contract templates
5. Remember that EIS contracts have different rules
CONSTRUCTION CONTRACTS

- Sources/types of legal requirements and limitations
- Delivery approaches/procurement approaches
- FAA review and approval requirements
- Tips
LEGAL REQUIREMENTS / LIMITATIONS

- 2 CFR Parts 200 and 1201
  - OMB and DOT, respectively
- Airport Improvement Program Handbook
- Grant Assurances
2 CFR § 200.318

Grantees:

- “must use its own documented procurement procedures”
- “maintain records sufficient to detail the history of procurement”
- “settle[] all contractual and administrative issues arising out of procurements . . . includ[ing] . . . protests, disputes, and claims”
2 CFR § 200.319

- Grantees:
- Procurement:
- Methods:
- Other Requirements:

- "provid[e] full and open competition"
- Include “clear and accurate description of the technical requirements”
- “identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals”
2 CFR § 200.320

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<th>Methods:</th>
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<tr>
<td>• Procurement by sealed bids</td>
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<tr>
<td>- “Preferred method for procuring construction”</td>
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<td>- Advertised invitation to bid</td>
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<td>- Invitations include sufficient description for response</td>
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<td>- Bids publicly opened at specified time and location</td>
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<td>- “lowest responsive and responsible bidder”</td>
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<td>• Procurement by competitive proposals</td>
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2 CFR §§ 200.321-26

Grantees:

- MBE/WBE requirements
- Cost and price analysis
- No pre-award reviews if:
  - Procurement systems comply with requirements
  - Grantee self-certifies

Procurement:

- Either approved or default bonding requirements
  - 5% bid guarantee
  - 100% performance and payment bonds

Methods:

Other Requirements:

- Specific contract provisions required
AIRPORT IMPROVEMENT HANDBOOK

- FAA review and approval requirements
- Procurement
- Substantive contract requirements
- “Alternative” delivery methods
- Change order/supplemental agreements
DELIVERY APPROACHES

- Design-bid-build
- Construction manager at risk
- Design-build
35TH ANNUAL AIRPORT LAW WORKSHOP

DESIGN-BID-BUILD

- Competitive proposal procurement required for design
- Competitive sealed bid for construction
  - Publicly advertised
  - Lowest responsible responsive bidder
  - FAA approval if selection of other than the apparent low bidder
- Engineers estimate and an abstract of bids submitted to FAA
CONSTRUCTION MANAGER AT RISK

- Competitive proposal procurement for the construction manager
- Competitive sealed bid for the construction typical
- Two-step procurement available
  - Technical proposal
  - Short list of offerors bid on technical approach and scope

Diagram:

- Owner
- CM at Risk
- Designer
- Trade Subs
DESIGN-BUILD

- State/local statutory authority required
- Advance FAA approval
  - Method of design-build
  - Schematic design
  - Analysis of cost and time savings
  - Safeguards to prevent conflicts of interest
  - 3 or more bidders
DESIGN-BUILD PROCUREMENT METHODS

- Qualification-based selection
  - Short-list interviews
  - Contractual requirement to set a guaranteed price and completion date
- Competitive proposal selection
  - Competitive proposal for qualification-based selection
  - Short-listed offerors propose on design package
    - Technical proposal
    - Price proposal
    - Low score wins
FEDERAL BID AND CONTRACT PROVISIONS

http://www.faa.gov/airports/aip/procurement/federal_contract_provisions
FAA REVIEW AND APPROVAL TIMELINE

Project Conception → RFP for Design/Build/CM/At-Risk → Final Plans & Specifications → RFB for Construction → Bid Opening → Bid Evaluation → Selection → Contract Negotiation/Protests → Contract → Construction → NTP → Final Completion

- FAA APPROVAL OF DESIGN-BUILD PROCUREMENT
- FAA PROCUREMENT SYSTEM/PROCUREMENT COMPLIANCE REVIEW
- FAA MAY REVIEW TECHNICAL SPECIFICATIONS
- NOTIFY FAA OF PROTESTS
- FAA APPROVAL FOR AWARD OF OTHER THAN LOW APPARENT BIDDER
- SUBMIT TO FAA ENGINEER'S ESTIMATE, ABSTRACT OF BIDS
- FAA PRE-AWARD REVIEW IF ANY
- NOTIFY FAA OF PROTESTS
- SUBMIT TO FAA PROCUREMENT DOCUMENTS AND EXECUTED CONTRACT UPON REQUEST
- FAA AUTHORIZES NOTICE TO PROCEED
- FAA APPROVAL OF CHANGE ORDERS SUPPLEMENTAL AGREEMENTS THAT RESULT IN GRANT AMENDMENT OR AS SPECIFIED BY REGION
- REPORTING AND FAA INSPECTIONS
- PRE-CONSTRUCTION CONFERENCE (FAA)
- PRE-BID CONFERENCE
- 35TH ANNUAL AIRPORT LAW WORKSHOP
Why do should you select a delivery method?

- Pressure of time
- Pressure of budget
- Pressure of quality

Design, bid, build has always been the preferred method to deliver projects by owners for one reason – quality and certainty.
CONSTRUCTION SERVICES (CONT.)

- Design, bid, build
  - Delivers the best quality construction – no question
  - *Usually* takes the most time
  - Delivers a defined cost, high quality = high cost
  - Requires the *least* sponsor management
CONSTRUCTION SERVICES (CONT.)

- CMAR or CM/GC (same thing, 14 variations)
  - Could deliver a *compromised* level of quality
  - *May* provide better schedule delivery
  - Cost can be controlled but often requires further compromise
  - To administer efficiently, requires greater sponsor involvement – especially in preconstruction
CONSTRUCTION SERVICES (CONT.)

- Design-build
  - Depending on sponsor involvement, delivers a varied level of quality
  - Will deliver best schedule performance – if…
  - About the same cost control as CMAR
  - For best results, sponsor should cover the DB team “like a blanket” – Rud Mueller, TPA
TIPS

- Construction services
  - Review and understand the pros and cons of construction delivery – consult material from CMAA or universities with CM programs. Stay away from contractor organizations!
- Head off disputes with:
  - Careful bid management
  - Well-integrated contracts
  - Careful construction management
  - Communication and team building
- Observe FAA requirements to keep funds flowing
- Don’t assume; when in doubt coordinate with your FAA officer
QUESTIONS?