



35th Annual Airport Law Workshop

Session #11

CONSTRUCTION AND PROFESSIONAL SERVICE CONTRACTS FOR AIP-FUNDED PROJECTS

Polly Jessen
Kaplan Kirsch & Rockwell

Katie van Heuven
Kaplan Kirsch & Rockwell

PROFESSIONAL SERVICE CONTRACTS

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

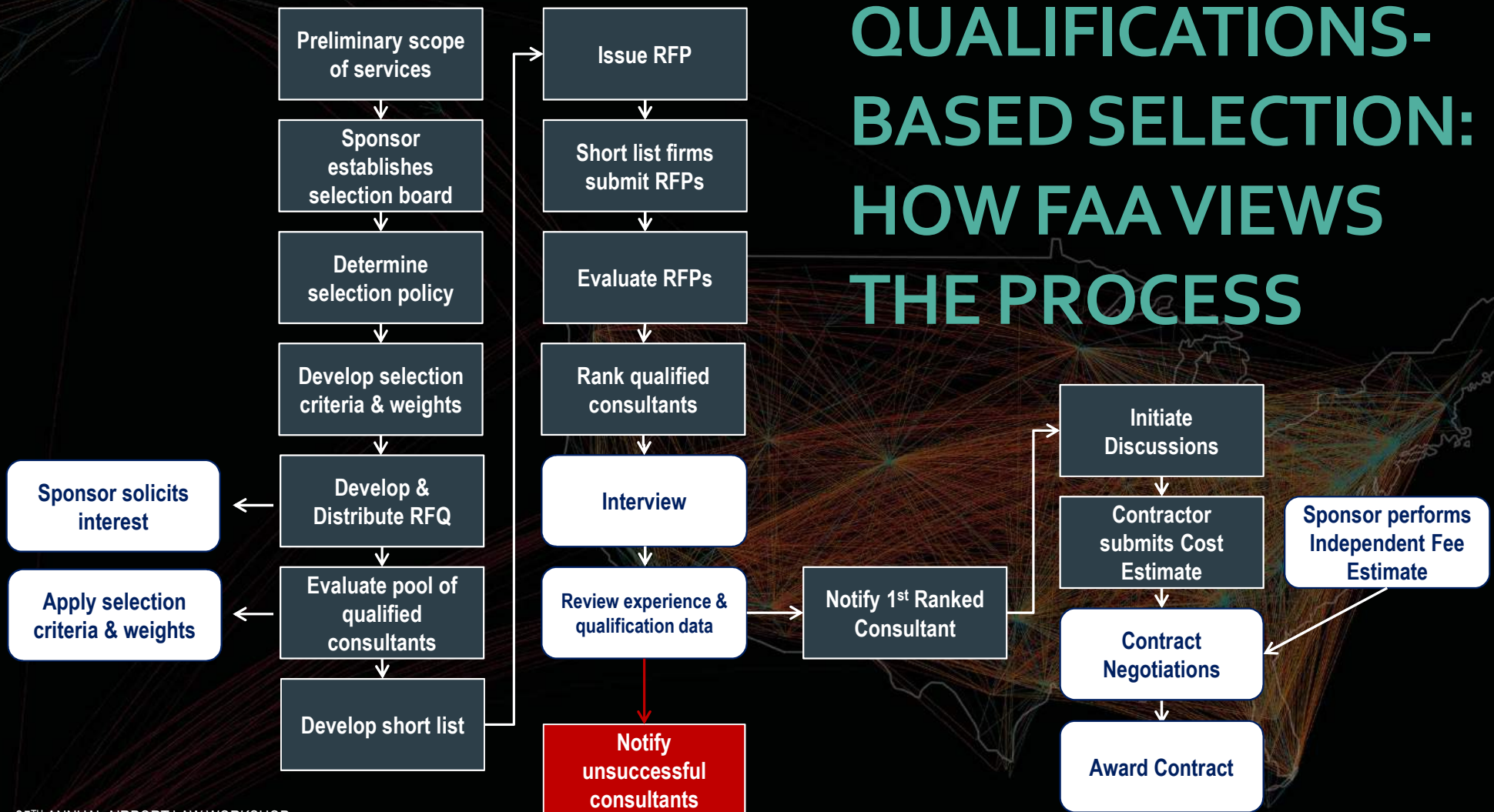
LEGAL AUTHORITY

- **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
- **OMB, *Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards* (2 C.F.R. Part 200)**

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



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
lobbying
rights to inventions
trade restrictions

The screenshot shows the FAA website's 'Procurement and Contracting Under AIP' page. The page title is 'Procurement and Contracting Under AIP Federal Contract Provisions'. The main content area is titled 'Federal Contract Provisions' and includes a 'Contents' section with links to 'Main', 'General Procurement', 'Grant Purchase Procurement', 'Equipment Procurement', 'Professional (A/E) Services Procurement', 'Federal Contract Provisions', and 'Related Resources'. Below this, there is a section for 'Construction Contracts' and 'Provisions for all Construction Contracts', which lists specific regulations such as 'Buy American Preferences - Title 49 U.S.C., Chapter 501', 'Civil Rights Act of 1964, Title VI (us wavy) - Contractor Contractual Requirements - Title 49 CFR Part 21', and 'Airport and Airway Improvement Act of 1982, Section 529 (us wavy) - Title 49 U.S.C. 47123'. A sidebar on the right contains a 'Do You Want To...?' section with links to 'View airport program statistics', 'Search airport data', 'Find an airport AC', and 'Read best practices for runway safety'. The left sidebar contains a navigation menu with categories like 'Airport Compliance', 'Airport Safety', 'Engineering, Design, & Construction', 'Environmental Program', 'Major Airport Development', 'News & Information', 'Passenger Facility Charge (PFC) Program', 'Planning & Capacity', and 'Resources'.

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:

Procurement:

Methods:

Other Requirements:

- “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

Grantees:

Procurement:

Methods:

Other Requirements:

- Procurement by sealed bids
 - “Preferred method for procuring construction”
 - Advertised invitation to bid
 - Invitations include sufficient description for response
 - Bids publicly opened at specified time and location
 - “lowest responsive and responsible bidder”
- Procurement by competitive proposals

2 CFR §§ 200.321-26

Grantees:

Procurement:

Methods:

Other Requirements:

- MBE/WBE requirements
- Cost and price analysis
- No pre-award reviews if:
 - Procurement systems comply with requirements
 - Grantee self-certifies
- Either approved or default bonding requirements
 - 5% bid guarantee
 - 100% performance and payment bonds
- Specific contract provisions required

AIRPORT IMPROVEMENT HANDBOOK



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

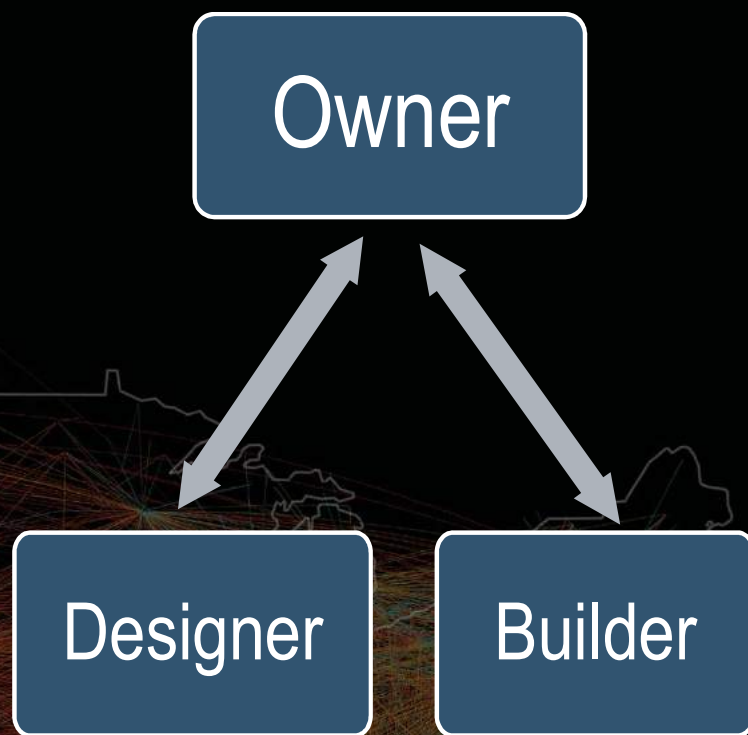
DELIVERY APPROACHES

- Design-bid-build
- Construction manager at risk
- Design-build



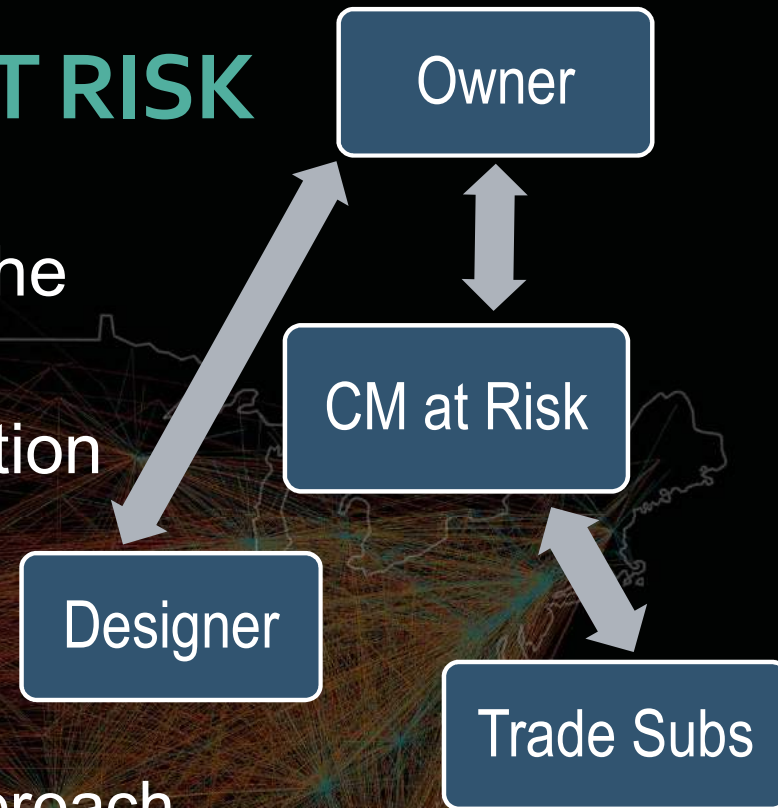
DESIGN-BID-BUILD

- 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



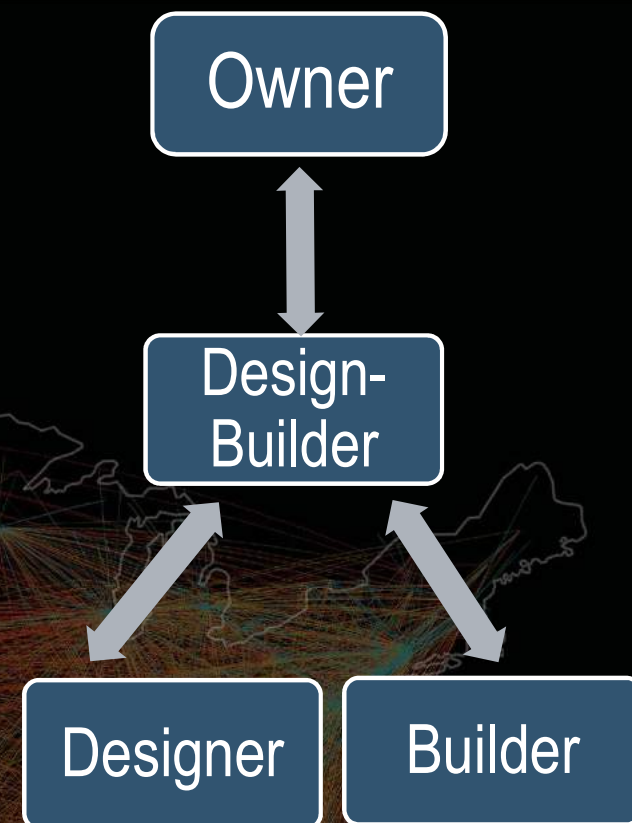
CONSTRUCTION MANAGER AT RISK

- 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



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

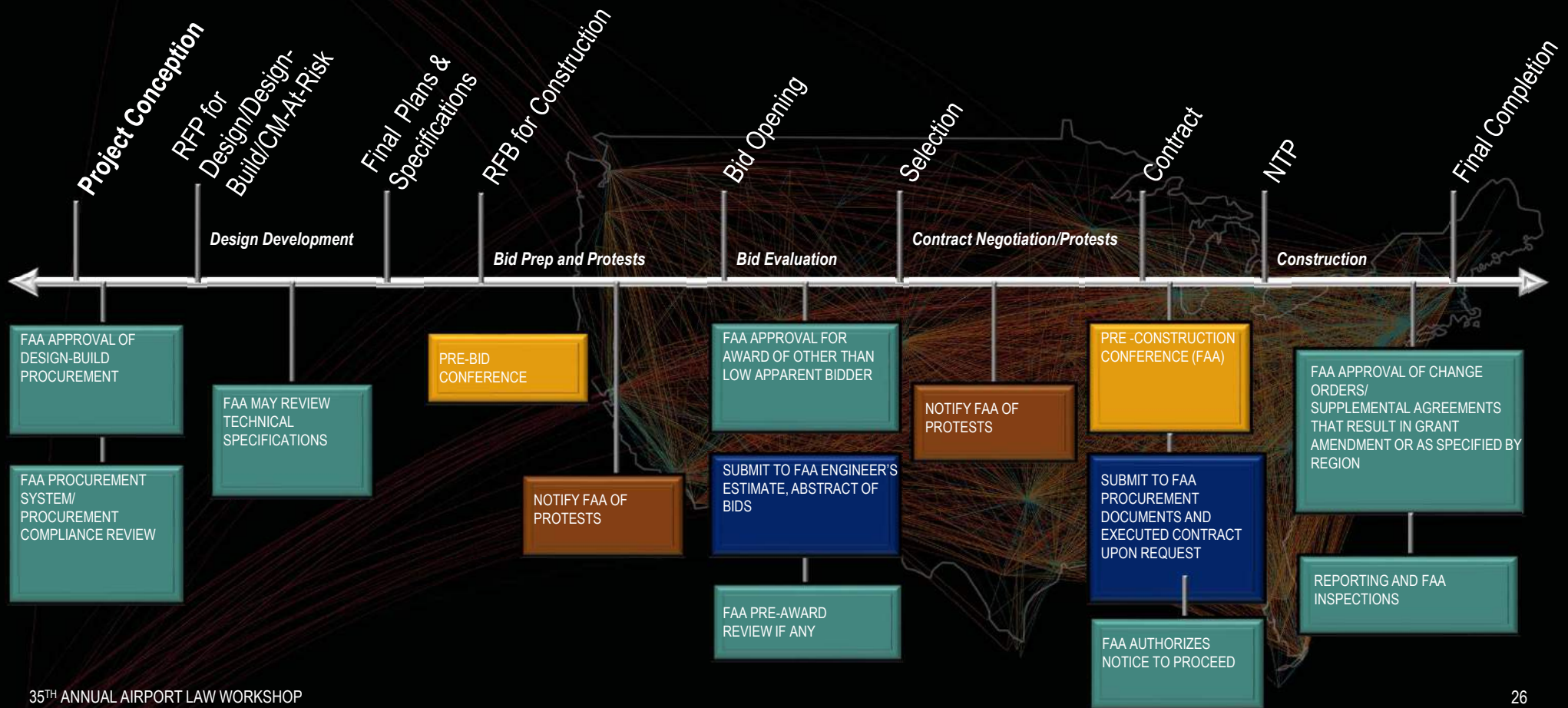
- Qualification-based selection
 - Short-list interviews
 - Contractual requirement to set a guaranteed price and completion date
- Competitive proposal selection
 - Competitive proposal for qualification-based selection
 - Short-listed offerors propose on design package
 - Technical proposal
 - Price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

FEDERAL BID AND CONTRACT PROVISIONS

The screenshot shows a web browser window displaying the FAA website. The page title is "Procurement and Contracting Under AIP - Federal Contract Provisions". The URL in the address bar is "http://www.faa.gov/airports/aip/procurement/federal_contract_provisions/professional". The page features the FAA logo and navigation menus for "Aircraft", "Airports", "Air Traffic", "Data & Research", "Licenses & Certificates", "Regulations & Policies", and "Training & Testing". The main content area is titled "Procurement and Contracting Under AIP" and "Federal Contract Provisions". It includes a "Contents" section with links to "Main", "General Procurement", "Small Purchase Procurement", "Equipment Procurement", "Professional (A/E) Services Procurement", and "Federal Contract Provisions". A "Do You Want To...?" sidebar offers links to "View airport program statistics", "Search airport data", "Find an airport AC", "Read best practices for runway safety", and "Learn about the Airport Improvement Program". The main text explains that procurements under the AIP must comply with Federal provisions established by various laws and statutes, and lists categories like Construction Development, Equipment Acquisitions, and Professional Services (A/E) Contracting.

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

FAA REVIEW AND APPROVAL TIMELINE



CONSTRUCTION SERVICES



- Why ~~de~~ 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?

