1. Professional Service Contracts

- Professional Services Contracts
  - What types of contract are involved?
  - What are the relevant laws and regulations?
  - What do I really need to know?
  - What are the 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

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

• **DOT Common Rule** *(49 CFR § 18.36)*
  - Fair and open competition
FAA Guidance

• FAA Advisory Circular 150/5100-14D (Architectural, Engineering, and Planning Consultant Services for Airport Grant Projects)

• FAA AIP Handbook (Order 5100.38, Chapter 9 – Procurement and Contract Requirements)
Guidance (cont.)

ACRP REPORT 87

Procuring and Managing Professional Services for Airports

Practice tip!
Qualifications-Based Selection: How FAA Views the Process

1. Preliminary scope of services
2. Sponsor establishes selection board
3. Determine selection policy
4. Develop selection criteria & weights
5. Sponsor solicits interest
6. Evaluate pool of qualified consultants
7. Develop short list
8. Apply selection criteria & weights
9. Notify unsuccessful consultants
10. Interview
11. Evaluate RFPs
12. Rank qualified consultants
13. Review experience & qualification data
14. Issue RFP
15. Short list firms submit RFPs
How Airport Lawyers Should Approach the Process

Five Key Steps:
1. Use a Qualifications-Based Selection Process
2. Define Scope of Services
3. Negotiate Fee
4. Document the Selection Process
5. Prepare a Conforming Contract
Step One: Qualifications-Based Selection

- Create selection board
- Develop selection criteria
- Solicit interest
- Identify short-list of qualified teams
- Interviews
- Rank consultants
• Informal Procedures if Contract < $100,000
  – Call at least three firms to discuss qualifications to perform work
  – Negotiate with best-qualified firm
  – Statement to FAA explaining methods for selection and determining reasonable fee
  – Must consult with FAA before using informal procedures
Selection (cont.)

• **Different rules when selecting an EIS Contractor**
  – FAA will provide scope of work
  – FAA must concur with selection/evaluation criteria
  – FAA will participate in interviews
  – FAA ultimately ranks contractors

**Don’t forget!**
Step Two: 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
Step Three: 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’s Role
  – FAA does not participate in fee negotiations
  – FAA determines reasonableness of fee
Step Four: Documentation

• **Prepare a Record of Cost Negotiations**
  – Address any changes in scope
  – Explain any significant differences between the sponsor’s ICE and the final fee agreed upon
  – Provide a detailed fee analysis
  – Include copy in contract file
  – If requested by FAA, submit the Record to the agency for a reasonableness determination
Documentation (cont.)

• Prepare a report for the sponsor’s administrator / governing body
  – Document the basis for recommending the selected contractor
Step Five: The Contract

The Contract (cont.)

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

Practice Tip!
Tips to Avoid Common Legal Issues

1. Educate airport staff about federal contracting requirements.
2. Understand and harmonize local and federal requirements.
3. When in doubt, coordinate with your FAA officer.
4. Review and understand contract templates and forms; update as necessary.
5. You can use local preference as a selection criterion, but it must be carefully crafted.
6. Remember that EIS contracts have very different rules.

7. Don’t seek AIP funding for attorney fees unless they are attributable to State or local project issues.

8. Make certain that you have and correctly follow an approved DBE program.

9. Don’t offer a bonus payment for early completion of work. That is prohibited.

10. Educate your board / approving authority.
2. Construction Contracts

• Contracting Objectives
  – Quality project
  – Within budget
  – On schedule
This presentation will cover:

• Sources and types of legal requirements and limitations
• Delivery approaches/procurement approaches
• FAA review and approval requirements
• Tips
Legal Requirements and Limitations

- 49 C.F.R. 18.36
- Airport Improvement Program Handbook
- Grant Assurances
Grantees:

Procurement:

Methods:

Other Requirements:

- “use their own procurement procedures”
- “maintain records sufficient to detail the significant history of a procurement”
- “settle[] all contractual and administrative issues arising out of procurements . . . includ[ing] . . . protests, disputes, and claims”
- “have protest procedures to handle and resolve disputes relating to their procurements”
Grantees:

Procurement:

Methods:

Other Requirements:

- “provide 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”
Grantees:

Procurement:

Methods:

Other Requirements:

- Procurement by sealed bids
  - 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
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
  – Approved methods
  – Accommodation of life-cycle costs
  – Alternate bids
  – Responsible/responsive bids
  – Bid protests
Airport Improvement Handbook

- Substantive contract requirements
  - Cost plus prohibited
  - No reimbursement for bonuses
  - No escalation clauses
  - Required federal provisions
- “Alternative” delivery methods
  - Design-build
  - Construction Manager at Risk
- Change Order/Supplemental Agreements
Delivery Approaches

• Design-Bid-Build
• Construction Manager at Risk
• Design-Build
Design-Bid-Build

- Owner
- Designer
- Builder
Design-Bid-Build Procurement

• 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

- Owner
- CM at Risk
  - Designer
  - Trade Subs
Construction Manager at Risk Procurement

- 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

Owner

Design-Builder

Designer

Builder
Design-Build Procurement

• 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
Design-Build Procurement Methods

• 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
Part 1 – General Provisions

Section 10 Definition of Terms

Whenever the following terms are used in these specifications, in the contract, or in any documents or other instruments pertaining to construction where these specifications govern, the intent and meaning shall be interpreted as follows:

10-01 AASHTO. The American Association of State Highway and Transportation Officials, the successor association to AASHO.

10-02 ACCESS ROAD. The right-of-way, the roadway and all improvements constructed thereon connecting the airport to a public highway.

10-03 ADVERTISEMENT. A public announcement, as required by local law, inviting bids for work to be performed and materials to be furnished.

10-04 AIP. The Airport Improvement Program, a grant-in-aid program, administered by the Federal Aviation Administration.

10-05 AIR OPERATIONS AREA. For the purpose of these specifications, the term air operations area shall mean any area of the airport used or intended to be used for the landing, takeoff, or surface maneuvering of aircraft. An air operations area shall include such paved or unpaved areas that are used or intended to be used for the unobstructed movement of aircraft in addition to its associated runway, taxiway, or apron.

10-06 AIRPORT. Airport means an area of land or water which is used or intended to be used for the landing and takeoff of aircraft; an appurtenant area used or intended to be used for airport buildings or other airport facilities or rights of way; and airport buildings and facilities located in any of these areas, and includes a heliport.


10-08 AWARD. The acceptance, by the Owner, of the successful bidder’s proposal.

10-09 BIDDER. Any individual, partnership, firm, or corporation, acting directly or through a duly authorized representative, who submits a proposal for the work contemplated.

10-10 BUILDING AREA. An area on the airport to be used, considered, or intended to be used for airport buildings or other airport facilities or rights-of-way together with all airport buildings and facilities located thereon.

10-11 CALENDAR DAY. Every day shown on the calendar.

10-12 CHANGE ORDER. A written order to the Contractor covering changes in the plans, specifications, or proposal quantities and establishing the basis of payment and contract time adjustment, if any, for the work affected by such changes. The work, covered by a change order, shall be within the scope of the contract.

10-13 CONTRACT. The written agreement covering the work to be performed. The awarded contract shall include, but is not limited to: The Advertisement; The Contract Form; The Proposal; The Performance Bond; The Payment Bond; any required insurance certificates; The Specifications; The Plans, and any addenda issued to bidders.
FAA Review and Approval Timeline

- Project Conception
  - FAA Approval of Design-Build Procurement ¶ 931
  - FAA May Review Technical Specifications ¶ 901
- Design Development
  - FAA Procurement System/Procurement Compliance Review ¶ 901
  - Pre-Bid Conference
- Bid Prep and Protests
  - FAA Approval for Award of Other Than Low Apparent Bidder ¶ 901/912
  - Notify FAA of Protests ¶ 914
- Bid Evaluation
  - Submit to FAA Engineer’s Estimate, Abstract of Bids ¶ 1052
  - FAA Pre-Award Review if Any ¶ 901
- Selection
  - FAA Approvals for Change Orders/Supplemental Agreements That Result in Grant Amendment or as Specified by Region ¶ 1234
- Contract Negotiation/Protests
  - Notify FAA of Protests ¶ 1206
- Contract
  - Pre-Construction Conference (FAA) ¶ 1204
  - Submit to FAA Procurement Documents and Executed Contract Upon Request ¶ 902
- Construction
  - FAA Authorizes Notice to Proceed ¶ 1221
  - Reporting and FAA Inspections ¶ 1206

Paragraph numbers refer to AIP Handbook paragraphs

29th Annual AAAE Basics of Airport Law Workshop and 2013 Legal Update November 3-5, 2013
FAA Action on Review

• Withhold funds

• Seek compliance

“The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. . . . Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations.”

Tips

• Head off disputes with:
  – Careful bid management
  – Well-integrated contracts
  – Careful construction management
  – Communication and team building

• Have clear protest procedures in place
• Observe FAA requirements to keep funds flowing
• Don’t assume; when in doubt coordinate with your FAA officer
3. Continuing the Conversation

• Professional Services
  – Begin with the End in Mind
  – End with the Grant in Mind

• Construction Services
  – Construction Delivery
  – Delivering the Contracting Options
Professional Services Agreements

• **Begin with the End in Mind**
  
  – What is the airport hoping to accomplish?
  
  – Is the construction delivery method a consideration in the selection process?
  
  – Is the contract sufficient to enforce new technology and asset management requirements?
  
  – Is the Standard of Care for technology deliverables well understood?
Professional Services Agreements

• End with the Grant in Mind
  – For design contracts, eligible deliverables are entirely dependent on construction delivery
  – For planning contracts, especially master plan updates, beware the deadly use of data terminology
    • Data schema
    • Spatial data
    • Data standards
    • Database design

Do you understand the differences, does the Sponsor?
Professional Services Agreements

• Why things are different...
  – Advertising, scope of services, deliverables and therefore selection criteria are all now influenced by new technology requirements from the FAA
  – Airport sponsors need to consider how these requirements fit in their respective purchasing of these types of services, even as part of traditional services
Construction Services

• Construction Delivery
  – Design, Bid, Build
  – CMAR
  – Design-Build

• Delivering the Contracting Objectives
  – Quality project
  – Within budget
  – On schedule
Construction Services

• Why do 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

• Quality = Control or does Control = Quality?

• A lack of planning = emergencies & risk
Construction Services

• 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

• 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

• 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
• Professional Services
  – Become familiar with the Sponsor’s policy on procurement of data systems
  – Determine how the technology elements should integrate with existing contract procurement documents
  – Discuss standard of care issues with spatial data experts familiar with FAA AC 150/5300-18B
  – Discuss minimum data quality standards in all deliverables
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!
  – Educate airport staff about all the issues involved in each contracting delivery method
  – Educate your board or approving authority
Questions?
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