

AIP Procurement Overview & Best Practices

Presented to: ARP National Consultant Workshop

By: Kay Ryder, Manager, AIP Finance Branch

Date: January 24, 2024



**Federal Aviation
Administration**

FAA Office of Airports Goals & Mission



Agenda

- Key Regulations & Guidance
 - Legislation & **2 CFR part 200**: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
- Procurement Best Practices & Selection Process
 - Competition
 - Bid protests
- Project Implementation
 - Contract Provisions
 - Alternative project delivery methods

Other Key Regulations & Guidance - 1

- **Statutes:**
 - 49 U.S. Code (U.S.C.) §§ 47101-47144
 - Title VI
 - DOT Order 1000.12c issued June 11, 2021
- **Executive Orders**
 - Existing EOs are reflected in grant assurances and Contract Provisions Guide

Other Key Regulations & Guidance - 2

- **Government-wide Regulations**

- 2 CFR Part 200

- **FAA Orders/AC Library**

- AIP Handbook – Order 5100.38
 - Formulation of the NPIAS-ACIP-Order 5090.5
 - Architectural, Engineering, and

Planning Consultant Services –
AC 150/51100-14E

Applicability of Guidance

Which federal procurement rules apply to federal Airports grants programs:

- **All** Office of Airports Grants fall under **2 CFR part 200**. Specific procurement section 200.320 – requirements are very specific to AIP.

If Sponsor has other procurements outside of AIP/BIL funding, Sponsor must recognize that **different rules may apply based on statute**.

- Notes:
 - The **FAR (Federal Acquisition Regulation)** does not apply to grants (FAR applies to direct federal procurement – e.g., direct acquisition/procurement by a federal agency such as DOD).
 - Note: The **AMS (Acquisition Management System)** also does not apply (AMS applies to FAA direct contracting – e.g., ATO & NextGen).

Key Documents & Resources

- **Grant Documents:**
 - [Grant Agreement](#): legal instrument between FAA and sponsor to carry out project
- **Federal procurement regulations that apply:**
 - Procurement under all federal financial assistance (“grants”) programs is governed by [2 CFR part 200](#)
 - [AIP Handbook](#) also covers procurement regulations
 - Chapter 3 - “Section 10 Project Procured Correctly”
 - Appendix U - Sponsor Procurement Requirements

What's New: OMB updates for 2024

- The Office of Management and Budget is currently revising sections of Title 2 of the CFR (including 2 CFR parts 25, 170, 180, and 200).
 - Update began December 2022
 - Several rounds of comments completed including final public comment window closed December 4, 2023
 - OMB aims to issue revised sections in Spring 2024
- Updates/guidance for FAA-ARP grant programs will follow OMB publication
- \$ Thresholds – Single Audit, Indirect Cost Rate %, Terms and Definitions.

Selection Process - Competition

Discuss:

- The importance of fair competition
- 2 CFR part 200 rules on competition for FAA and Sponsor
- The exceptions to competition
- Purchasing cooperatives
- Roles and responsibilities of Sponsor vs. FAA
- Potential sponsor errors/risks in procurement process
- Bid protests - rules, processes, best practices

Selection Process – Competition (2 CFR § 200.319 (a))

“All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing **full and open** competition consistent with the standards of this section and § 200.320.”

- Full and open competition is paramount
- The benefits include:
 - Best reasonable price for government public dollar
 - Helps minimize collusion
 - Fair treatment of applicants
 - Provide effective, economic and efficient acquiring of products and services for federally funded grant projects

Selection Process: Restrictive Competition

2 CFR § 200.319(b) - Some of the situations considered to be restrictive of competition include but are not limited to:

- (1) Placing **unreasonable requirements** on firms in order for them to qualify to do business; (examples: time to complete – unnecessary features)
- (2) Requiring unnecessary experience and excessive bonding
- (3) Noncompetitive pricing practices between firms or between affiliated companies
- (4) Noncompetitive contracts to consultants that are on retainer contracts
- (5) **Organizational conflicts of interest**
- (6) **Specifying only a “brand name”** product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.

Selection Process: Competition Must not Limit – Geographic Preference

2 CFR § 200.319(c) - Geographic preference: The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference....”

Note: There is an exception for certain project funding through the **Bipartisan Infrastructure Law**, which is detailed on a later slide.

Competition Exceptions

Per 2 CFR § 200.320(c): ***Noncompetitive procurement***. There are specific circumstances in which procurement can only be awarded if one or more of the following circumstances apply:

- (1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the **micro-purchase** threshold (see paragraph (a)(1) of this section);
- (2) The item is available only from a **single source**;
- (3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
- (4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity or
- (5) After solicitation of a number of sources, competition is determined inadequate.

Selection Process – Competition Exceptions

Section 25019 of the **BIL** (P.L. 117-58) creates a Local Hiring Preference exception:

- Sponsors may implement local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by a grant, including prehire agreements, subject to State and local laws, policies, and procedures
- Applies to Airport Infrastructure Grants (AIG), Airport Terminal Program (ATP) grants, and FAA Contract Tower (FCT) Program grants
- More information is available here at Q-U44: [Bipartisan Infrastructure Law FAQs](#).

What about Purchasing Cooperatives?

- Sponsor purchases via Cooperative Purchasing Programs (CPP) (e.g., Sourcwell) or purchasing schedules (e.g., GSA Advantage) are **rarely and in limited circumstances allowable** under AIP and BIL
- The procurement and award must meet **all FAA grant programs and 2 CFR Part 200 requirements**, which they rarely do
- Sponsor must **demonstrate and document** that requirements have been met
 - If requested, sponsor must provide all procurement documents to the FAA ADO (see AIP Handbook, paragraph 3-31)
- Referring to statements from a CPP is insufficient documentation
 - For example: “Sourcwell said they comply with 2 CFR 200”

Successful use of a Purchasing Cooperative

1. Sponsor must be in **same state** as the cooperative
2. Procurement must follow **sealed bidding** requirements
3. Solicitation must meet requirements of **FAA Advisory Circulars** and technical specifications and not include additional requirements that would unduly restrict competition
4. Solicitation must include a **minimum and maximum quantity** of equipment/services needed
5. Bid solicitation must be **publicly advertised to all interested vendors**
6. Contract or purchase order must be awarded to **one successful bidder (no blanket contracts)**
7. Bid solicitation and award contract must contain necessary **AIP contract provisions**

Selection Process: Standards & Procurement Methods

Must follow FAA standards and specifications for products and services

- [Advisory Circular \(AC\) checklist](#) (Grant Assurance #34),
(Updated on 11/17/2022)
- Sponsors must not change any of these specifications, except where explicitly allowed per the AC/specification or approved by the FAA.

In addition, for **construction contracts** we recommend reviewing FAA [AC 150/5370-10H](#), Standard Specifications for Construction of Airports

- Part 1 includes detailed guidance on proposals/bids, etc.

Selection Process: Procurement Methods - 1

(note: this table applies to products and construction)

Procurement Method	Description	Current limits (based on 2 CFR 200 and FAR) – with some AIP examples
Micro-purchase	Equitable Distributions. Supplies or services where aggregate does not exceed limit. Reasonable price	Up to \$10,000 without approval.
Small purchase	Competition occurs through rate quotations. While no cost or price analysis is required, quotes should be from an adequate number of sources .	Up to \$250,000 (procurement which exceeds the micro-threshold established above – but does not exceed \$250,000). 2 CFR 200.320 (a)(2). AIP: Should have at least 2-3 quotes. Small projects.

Selection Process: Procurement Methods - 2

(note: this table applies to products and construction)

Procurement Method	Description	Current limits (based on 2 CFR 200 and FAR) – with some AIP examples
Sealed Bids (formal method)	Construction Projects Competition by Price . Price is Major Factor	Exceeds \$250,000 200.320 (b)(1)



Selection Process: Procurement Methods - 3

(note: this table applies to products and construction)

Procurement Method	Description	Current limits (based on 2 CFR 200 and FAR) – with some AIP examples
Competitive Proposals (formal method)	Competition based on several factors. Fixed price or cost reimbursement. RFP with evaluation methods . Compared to sealed bid – these are more complex and generally higher dollar values.	Exceeds \$250,000 200.320 (b)(2)

Selection Process: Procurement Methods - 4

(note: this table applies to products and construction)

Procurement Method	Description	Current limits (based on 2 CFR 200 and FAR) – with some AIP examples
Sole Source	Noncompetitive procurement. Only permitted under specific circumstances per the AIP Handbook Section 3-35. Must be well documented.	Increased emphasis on limited circumstances: Noncompetitive procurements can only be awarded under circumstances per 2 CFR 200.320 (c)

Selection Process: Professional Services

- Procurement for Professional Services must be the method of **Qualification Based Selection**
- Included in Grant Assurances: Grant Assurance #32, pertaining to Engineering and Design Services
- Guidance in AIP Handbook [Table U-9, (3)(a) and (8)]
- Must use FAA Advisory Circular:
[AC 150/5100-14E - Architectural, Engineering, and Planning Consultant Services for Airport Grant Projects](#)

Selection Process: Sponsor Procurement Responsibilities

- Before selection process even begins, sponsor must have established:
- Own documented procurement procedures
- Processes to oversee & monitor contractor performance
- Written standards of conduct
 - Conflict of interest and employee performance
 - Contractor must have clearly documented roles and responsibilities for board members, legal representation, bid reviewers, etc. to avoid any apparent or implied conflict of interest.

Selection Process: Sponsor Procurement Responsibilities – Cont.

- Documentation of procurement transactions
- Established procedures for resolution of contractual and administrative matters
- States must follow state procurement procedures (further details for states per 2 CFR § 200.317)

Selection Process: Sponsor Requirements

- To ensure fair competition, **Sponsor's written procedures for procurement transactions** should be:
 - Clear and accurate description of all requirements
 - Establish minimum essential characteristics and standards
 - Follow FAA's ACs where required

Selection Process: Sponsor Requirements – Cont.

- Emphasis should be on **objective contractor performance** and eliminating unfair competitive advantage
 - Exclusion of entities that assist with development of requirements documents
- Procurement **must not unduly restrict competition!**
- Having and following clear procurement procedures can help preempt procurement challenges and risks down the road, such as **bid protests**

Selection Process: Sponsor Procurement Risks

Potential consequences of errors in procurement process:

- Bid Protests
 - Legal challenges, delays, ineligibility determination
- Unreasonable Costs
 - Unfair price for goods and services

Selection Process: Sponsor Procurement Risks – Cont.

Potential consequences of errors in procurement process:

- Non-standard development/equipment
 - Ineligible cost determination by FAA when equipment is non-standard per FAA Advisory Circulars and sponsor has not received FAA approval
- Audit Findings → Improper Payments
 - Non-compliant procurement actions
 - Failure to document and monitor
 - Repayment to the AIP

Selection Process: Bid protests

“Bid protest: a challenge to the award or proposed award of a contract for the procurement of goods and services or a challenge to the terms of a solicitation for such a contract.”

-- Government Accountability Office (GAO)

- A bid protest can result whenever a bidder perceives a compromised procurement action.
- Risk for sponsor: A bid protest could compromise the AIP eligibility of a project and/or delay project.
- Types: Pre-award, post award

Selection Process: Bid protests – Sponsor responsibility

For bid protests originating from AIP and other Airports grant programs awards a sponsor must:

- Follow their own written established processes and procedures for addressing bid protests and appeals.
- Submit **copies of all bid protests and appeals** to the ADO to include:
 - The solicitation package;
 - Copy of the specifications;
 - Disclosure of any changes to FAA standards; and
 - State the specific matter is under protest.

Selection Process: Bid protests – Sponsor responsibility – Cont.

For bid protests originating from AIP and other Airports grant programs awards a sponsor must:

- **Advise the ADO in writing of the resolution of the protest.**
- Retain all documentation pertaining to grant-related bid protests and appeals for 3 years after submission of the final expenditure report per 2 CFR § 200.334.

Impact of Sponsor Failure to Resolve Bid Protest

A sponsor's failure to correctly resolve a bid protest **may result in a loss of AIP funding.**



Selection Process: Best Practices to avoid bid protests

... and to avoid **potential errors in the procurement process**:

- Follow 2 CFR part 200 procurement requirements
- Follow documented procurement procedures
- Avoid any arbitrary actions and awards
- Inadequate solicitation
- Conflicts of interest

Selection Process: Best Practices to avoid bid protests – Cont.

... and to avoid **potential errors in the procurement process:**

- Faulty instructions to bidders
- Project scope limits competition
- Faulty contract terms and conditions (missing mandatory contract clauses)
- Technical specifications which limit competition, or which modify FAA standards without express approval from FAA
- See [AIP Handbook Chapter 3](#) Section 3-32 Bid Protests and Appeals

Project Implementation

- Project implementation
 - Engage Sponsor Procurement Specialists
 - Period of Performance (PoP)
 - Contract provisions (including Buy American)
 - Alternative project delivery methods
- Project closeout
 - Performance Period Expiration & Extensions
 - Audits

Audience Participation

- 1) How many participate in annual Capital planning meetings with airport sponsor and FAA?
- 2) How many include the procurement professional or POC for the project?
- 3) How many think it would be an efficient use of time to include the sponsors procurement professional or POC in future planning meetings?
- 4) How many of you have heard of the [Airports Purchasing Group \(APG\)](#)?

Implementation: Period of Performance (PoP)

When issuing contracts, keep in mind regulations for the grant Period of Performance. All work must be completed within the PoP timeframe.

Definitions from 2 CFR § 200.1:

- *Period of performance* means the total estimated time interval between the start of an initial Federal award and the planned end date
- *Budget period* means the time interval from the **start date of a funded portion of an award to the end date of that funded portion** during which recipients are authorized to expend the funds awarded, including any funds carried forward
- What is the significance of the budget period for expenditures? Cost **must be incurred during the approved budget period** unless authorized by the FAA (§ 200.403(h)).
- 2 CFR § 200.458: reimbursable pre-award costs (AIP Handbook Table 3-60).
- Standard AIP grants have a budget period that mirrors the PoP, while multi-year grants have multiple budget periods included in the PoP.

Implementation: Contract Provisions

- All contracts using grant funds must include appropriate and current contract provisions that comply with federal statutes and regulations
- FAA has a convenient resource for Sponsors that consolidates [federal contract provisions](#) and clauses into one document, updated 5/24/2023
- Sponsors:
 - Must not include any local/state clauses that conflict with AIP clauses
 - Should review source material in addition to the Contract Provisions Guide because requirements can change at any time
- Examples of contract provisions:
 - Buy American Preference
 - Davis Bacon Requirements
 - Disadvantaged Business Enterprise Program Requirements

Implementation: Contract Provisions – Cont.

- **Table 1**

- Lists AIP Contract Provisions and serves as a consolidated resource
- Identifies dollar thresholds for applicability
- Contains links to the narrative sections, which should be reviewed in conjunction with Table 1

- **Narrative**

- Provides greater detail and statutory and regulatory citations
- Identifies when language is mandatory
- Provides model language whenever mandatory language is not prescribed

Table 1 – Applicability of Provisions

Provision	Dollar Threshold	Professional Services	Construction	Equipment	Property (Land)	Non-AIP Contracts
a. Access to Records and Reports	\$ 0	REQD	REQD	REQD	REQD	n/a
b. Buy American Preferences	\$ 0	Limited	REQD	REQD	Limited	n/a
(1) Buy American Statement	\$ 0	Limited	REQD	REQD	Limited	n/a
(2) Buy American – Total Facility	\$ 0	Limited	REQD	REQD	Limited	n/a
(3) Buy American – Manufactured Product	\$ 0	Limited	REQD	REQD	Limited	n/a
c. Civil Rights – General	\$ 0	REQD	REQD	REQD	REQD	REQD
d. Civil Rights - Title VI Assurances	\$ 0	REQD	REQD	REQD	REQD	REQD
(1) Notice - Solicitation	\$ 0	REQD	REQD	REQD	REQD	REQD
(2) Clause - Contracts	\$ 0	REQD	REQD	REQD	REQD	REQD
(3) Clause – Transfer of U.S. Property	\$ 0	n/a	n/a	n/a	REQD	REQD
(4) Clause – Transfer of Real Property	\$ 0	n/a	n/a	n/a	REQD	REQD
(5) Clause - Construct/Use/Access to Real Property	\$ 0	n/a	n/a	n/a	REQD	REQD
(6) List – Pertinent Authorities	\$0	REQD	REQD	REQD	REQD	REQD
e. Disadvantaged Business Enterprise	\$ 0	REQD	REQD	REQD	REQD	n/a
f. Energy Conservation Requirements	\$ 0	REQD	REQD	REQD	REQD	n/a
g. Federal Fair Labor Standards Act	\$ 0	REQD	REQD	REQD	REQD	REQD
h. Occupational Safety and Health Act	\$ 0	REQD	REQD	REQD	REQD	REQD
i. Rights to Inventions	\$ 0	Limited	Limited	Limited	n/a	n/a
j. Trade Restriction Certification	\$ 0	REQD	REQD	REQD	REQD	n/a
k. Veteran's Preference	\$ 0	REQD	REQD	REQD	REQD	n/a
l. Seismic Safety	\$ 0	Limited	Limited	n/a	n/a	n/a
m. Copeland Anti-Kickback	\$ 2,000	Limited	REQD	Limited	Limited	n/a
n. Davis Bacon Requirements	\$ 2,000	Limited	REQD	Limited	Limited	n/a
o. Distracted Driving	\$3,000	REQD	REQD	REQD	REQD	n/a
p. Affirmative Action Requirement	\$10,000	Limited	REQD	Limited	Limited	n/a
q. Equal Employment Opportunity	\$10,000	Limited	REQD	Limited	Limited	n/a
(1) EEO Contract Clause	\$10,000	Limited	REQD	Limited	Limited	n/a

General Updates to Contract Provisions

- Updated outdated 2 CFR part 200 citations (e.g., updated Access to Records and Reports, which was moved to 2 CFR § 200.334)
- Updated outdated citations to specific Contract Provisions (e.g., added U.S. Code sections to Contract Workhours and Safety Standards Act Requirements)
- Edited the simplified acquisition threshold to reflect the increase to \$250,000 (see A3)
- Edited the micro-purchase threshold to reflect the increase to \$10,000 (see A13)

General Updates to Contract Provisions – Cont.

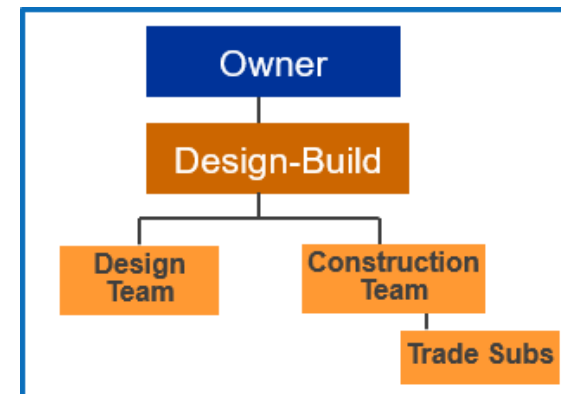
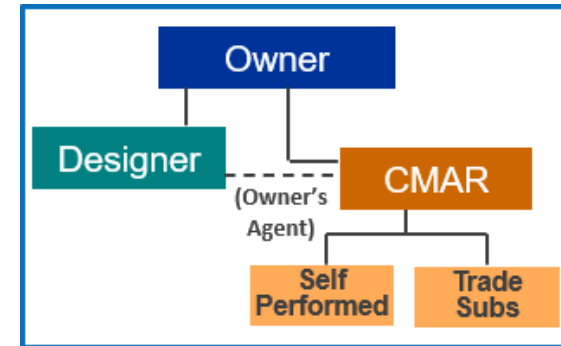
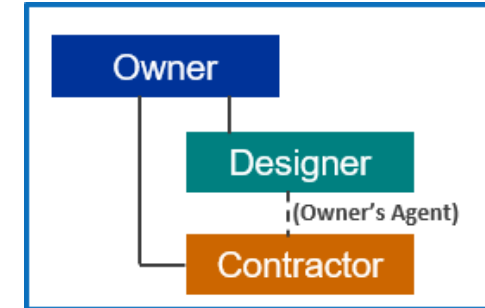
- **Changed headings to reflect where clauses or certification language is “mandatory” or “model”**
- Removed outdated Energy Conservation Requirements section
- Updated the Davis-Bacon Requirements to reflect updated contract clause language (see A10)
- Updated the EEO mandatory clause language to reflect regulatory changes (see A16)
- Edited the Termination of Contract section to reflect updated termination for cause language (see A25)

Implementation: Alternative Project Delivery Method vs. Procurement

- Project delivery method (PDM) and procurement method are two different things
- PDM is the approach an owner selects to design, procure, contract and construct a capital project
- How many use Alternative PDM?
- What PDMs are used?

Three Main Project Delivery Methods

- **Design-Bid-Build (DBB)**,
E.g., Non – complex Apron
- **Construction-Manager-at-Risk (CMaR)**
 - Vertical Terminal
 - Complex
- **Design-Build (D-B)**
E.g., Horizontal (Runway)



Implementation: Alternative Project Delivery Methods

Considerations for choosing:

- Type of project – size, complexity, length
- Procurement method
- Owner level of influence versus contractor influence
- Where risk resides
- Potential price fluctuations
- Oversight of costs
- AIP Handbook Appendix U-9 & Sections 3-42 and 43

Project Delivery Methods - 1

Project Delivery Method	Design Bid Build	Construction Manager at Risk	Design Build – Must comply with 49 U.S.C. § 47142.
Project Size & Complexity (move this to first row)	<ul style="list-style-type: none"> Well defined project scope and requirements. Short to medium duration projects. 	<ul style="list-style-type: none"> Medium to large projects Complex phasing Projects subject to price fluctuation risks. 	Can be small projects as well as medium/large projects
Procurement Method	<ul style="list-style-type: none"> Competitive sealed bid Selection: lowest price 	<ul style="list-style-type: none"> Competitive proposal. Selection: price and other factors. May be one or two step (if included explain the steps) 	<ul style="list-style-type: none"> Small projects: sealed bid. Medium to Large: Competitive proposal method Selection: price and other factors. May be one or two step

Project Delivery Methods - 2

Project Delivery Method	Design Bid Build	Construction Manager at Risk	Design Build – Must comply with 49 U.S.C. § 47142.
Schedule Constraints	Linear workflow – longer project delivery time.	Allows for complex phasing and sequencing	Integrated process that can reduce project delivery schedule
Price (includes profit) And Costs	<ul style="list-style-type: none"> Firm fixed price Less transparency on costs (within the total price) 	<ul style="list-style-type: none"> Guaranteed Maximum Price (actual cost not exceeding GMP). Fee (profit and overhead) is competed. Open book accounting of actual costs. 	<ul style="list-style-type: none"> Guaranteed Maximum Price (actual cost not exceeding GMP) Contingency included in GMP.

Project Delivery Methods - 3

Project Delivery Method	Design Bid Build	Construction Manager at Risk	Design Build – Must comply with 49 U.S.C. § 47142.
Contractor fee	Built into price (profit is there for linked to costs – contractor has little control)	Contractor contingency is permitted (for fuel, material, labor cost)	Contractor contingency is permitted (for fuel, material, labor cost)
Contractor contingency			
Main advantage	Owner retains design decisions & risk.	<ul style="list-style-type: none"> Contractor input on design and construction. Cost savings potential Flexibility for construction challenges 	<ul style="list-style-type: none"> Potential fast tracking. Owner transfers design risks to D-B firm. Improved cost controls.
Disadvantage	Little opportunity for contractor input.	<ul style="list-style-type: none"> Lack of understanding of this method. Project cost not established at time of contract award. 	<ul style="list-style-type: none"> Little opportunity for input on design after GMP established. Owner has no agent representing its interest of verifying quality.

Questions?

Contact Information

- General questions answered by your [FAA Regional Office](#)
- Kay.Ryder@faa.gov, Manager AIP Finance Branch

Appendix - Resources



CFR Resources – Where to find?

- [Code of Federal Regulations](#)
(A continuously updated system. Can see any “point in time” version).
 - **Tip:** The CFR website has useful navigation for searching CFR in various ways. [Using eCFR – Getting Started](#).
- **OMB Federal Register** “[Guidance for Grants and Agreements](#)”
publication dated 8/13/20 (includes reasons for revisions, etc.).
- [Redline version of 8/13/20](#) (Chief Financial Officers Council).

Applicability of Guidance: Content Overview

Overview of Contents of 2 CFR Title 2 Grants and Agreements, Subtitle A, Chapter II, part 200 or “2 CFR 200”):

- A. Acronyms and Definitions: 200.0-200.1
- B. General Provisions 200.100-200.113
- C. Pre-Federal Award Requirements and Contents of Awards: 200.200-200.216
- D. Post Federal Award Requirements: 200.300-200.346
Includes section on Procurement: 200.317-200.327
- E. Cost Principles: 200.400-200.476
- F. Audit Requirements: 200.500-200.521
- G. Appendix I through XII, includes:
 - Appendix I: Full Text of Notice of Funding Opportunity
 - Appendix VII: States and Local Government and Indian Tribe Indirect Cost Proposals

AIP Procurement: Guided by 2 CFR 200

Code of Federal Regulations (CFR) contains:

- Titles 1-50
- **Title 2: Grants and Agreements**
 - 2 CFR 200; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
Part D: Post Federal Award Requirements”
(includes a procurement section)
- **Title 14: Aeronautics and Space**
- **Title 49: Transportation**

Legal Entity Terms in CFR 200

Understand Legal entity terminology used in the CFR:

- **Contract as used in 2 CFR 200:** *Contract* means, for the purpose of Federal financial assistance, a legal instrument by which a recipient or subrecipient **purchases property or services** needed to carry out the project or program under a Federal award.
- 200.331 (b): “**Contractors.** A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a **procurement relationship** with the contractor.”

Legal Entity Terms in CFR 200: Subrecipient

- **Subrecipient** is not same as contractor.
- **Subrecipient in 2 CFR 200** generally means an entity that receives a subaward from a pass-through entity to carry out part of a Federal award.
- The term “**Subrecipient**” in 2 CFR 200
 - Equals “**Subgrantee**” for AIP SBG States
 - Equals **Sponsor** that is under SBG program

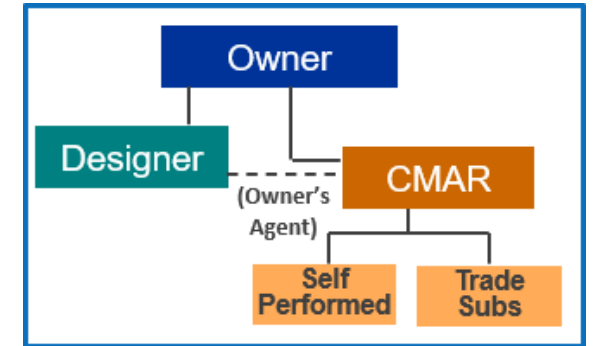
Legal Entity Terms in CFR 200: Contractors

- 200.331 (b): “**Contractors**. A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a **procurement relationship** with the contractor....Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:
 - (1) Provides the goods and services within normal business operations;
 - (2) Provides similar goods or services to many different purchasers;
 - (3) Normally operates in a competitive environment;
 - (4) Provides goods or services that are ancillary to the operation of the Federal program; and
 - (5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

CMaR Guaranteed Maximum Price (GMP)

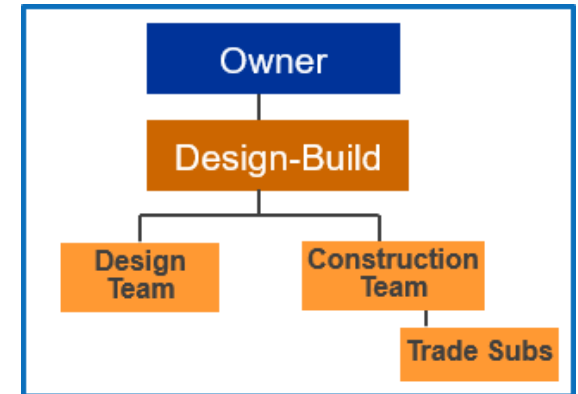
Represents a ceiling project price

- An owner negotiated value including construction management fees, general conditions and estimated construction costs
- GMP excludes design fee and preconstruction services
- Final estimate of probable costs includes contractor contingency
- Modified for equitable adjustments due to approved change orders



Design-Build Guaranteed Maximum Price (GMP)

- Represents a ceiling project price
- Owner negotiated value incorporating proposal prices with estimated construction costs
 - Final estimate of probable costs includes contractor contingency
 - Modified for equitable adjustments due to approved change orders



What is Joint Procurement?

- A method of contracting in which two or more purchasers agree from the outset to use a single solicitation and enter into a single contract or agreement with a vendor for the delivery of goods and/or services.
- Joint procurement under 2 CFR Part 200 is not the same as a purchasing cooperative
- 2 CFR § 200.318 (e) encourages the use of **state and local intergovernmental or inter-entity agreements** for procurement to foster greater economy and efficiency.
 - An **airport sponsor can partner** with their **state or county, or with other local sponsors** to leverage purchasing power by conducting a joint-procurement action that has a defined quantity of items.
 - 2 CFR § 200.318(d) establishes that procurement procedures must avoid acquisition of unnecessary or duplicative items (i.e., limit to actual need).

What is Joint Procurement? (AIP Handbook)

- Per the AIP Handbook (Table U-5(#5)):
 - All procurements that will result in an Indefinite Quantity/Indefinite Delivery Contract or Blanket Purchase Order must include the minimum and maximum quantity of supplies/services needed over a specified period.
 - Agreement cannot exceed 5 years.

Joint Procurement Benefits

- **Maximize savings** in the procurement process
- Obtain better pricing through larger purchase commitments
- May better manage supply chain issues
- **One entity in can take the lead** on work (e.g., compiling needs, conducting the market research, drafting the solicitation, and issuing the contract and task orders if applicable)
 - But each entity must have contract rights in the final agreement to utilize and benefit from it

Joint Procurement Eligibility

- **Eligible:** a procurement issued by sponsor and state for specific amount of equipment (or minimum and maximum within a certain time frame), provided the procurement follows all 2 CFR Part 200 procurement rules for solicitation and bid process.
- **Not eligible:** §200.318 does not extend to **interstate joint procurements or third-party organizations** (e.g., use of cooperative purchasing company like Sourcewell)

Joint Procurement “Piggybacking”

- “Piggybacking”:
 - Is only appropriate on a contract when parties to the initial procurement **purchased a lesser amount or decided to postpone their procurements, leaving an unfulfilled quantity that could be reassigned to a new party.**
 - Is only permitted when the initial contract award:
 - Meets all AIP/BIL purchasing requirements,
 - Has an “assignability” clause that provides for the assignment of all or part of the specified deliverables, and
 - The piggybacking quantity/need was included in the original solicitation/evaluation.

Selection Process: FAA vs. Sponsor Responsibilities

Important to understand the responsibilities of FAA versus sponsor in the procurement process, including bid protests.

FAA: In AIP Handbook see “Table 3-21 Summary Table of Mandatory/Optional ADO Procurement Review” (lists 26 items)

Examples of **FAA responsibilities**:

- ADO review mandatory: Non-competitive proposals
- See AIP Handbook – Table 3-21 “Summary Table of Mandatory/Optional ADO Procurement Review”
- ADO review mandatory but limited: Bid protests and appeals, procurement protests
- Resource - for details and additional examples: see AIP Handbook – Table 3-21 “Summary Table of Mandatory/Optional ADO Procurement Review” and AIP Handbook Table 3-22 “ADO Review Requirements for Bid Protest and Appeals”.

Selection Process: Sponsor Responsibilities vs. FAA

- **Important to understand Sponsor Responsibilities:**
 - 2 CFR § 200.318(k) – Sponsor is responsible for settlement of all contractual and administrative issues & must have established procedures which address these
 - **Includes dispute and bid protest resolution**
- Essential that **airports sponsors understand their role versus the FAA role** when a bid protest arises *and* **potential consequences** of a bid protest.
- The Federal awarding agency will not substitute its judgement for that of the non-Federal entity unless the matter is primarily a **Federal concern**.

Selection Process: Bid protests – FAA responsibility

FAA's role in resolving a bid protest:

- The FAA determines **if** the protest involves matters of **Federal concern**:
 - If **no**, the FAA takes no formal action
 - If **yes**, the FAA formally responds to the Federal concerns

Selection Process: Bid protests – Federal Concerns - 1

- 1) Violations of Federal law or regulations
 - a. Bayh-Dole Act [35 U.S.C. § 200 et seq.; 37 CFR part 401]
 - b. Byrd Anti-Lobbying Amendment [31 U.S.C. § 1352 et seq.]
 - c. Clean Air Act [42 U.S.C. § 7401 et seq.]
 - d. Clean Water Act [33 U.S.C. § 1251 et seq.]
 - e. Davis-Bacon Act [40 U.S.C. § 3141 et seq.; 29 CFR part 5]
 - f. Debarment and Suspension [EOs 12549, 12689; 2 CFR part 180; 2 CFR § 200.213; DOT Order 4200.5G]
 - g. Equal Employment Opportunity Act [EOs 11246, 11375; 42 U.S.C. § 2000e et seq.]
 - h. Fair Labor Standards Act [29 U.S.C. § 201 et seq.]
 - i. OSHA violations [29 CFR part 1926]
 - j. **Failure to comply with 2 CFR part 200**

Selection Process: Bid protests – Federal Concerns - 2

- 2) Limiting competition through alterations of plans or specifications or by other means
- 3) Modifying specifications without receipt of FAA Modification of Standards (MOS) – must coordinate MOS with your FAA ADO contact then ADO will process through the FAA Office of Airports Safety and Standards
- 4) Violation of the sponsor's protest procedures

Selection Process: Bid Protests – What FAA Will Do

During a bid protest:

- The FAA will ensure protestor has exhausted all remedies through the sponsor first and obtain copy of sponsor's proposed resolution
- The FAA conducts an independent review
- The **FAA will not issue AIP funding until receiving:**
 - The sponsor's written notification of the resolution **and**
 - The issue has been addressed to the ADO's satisfaction
- If the funding has already been issued:
 - The ADO will notify the sponsor that the FAA will not honor payment requests for the costs in dispute and possibly request return of federal funds.

Updates to Contract Provisions - 1

- Updated outdated 2 CFR part 200 citations (e.g., updated **Access to Records and Reports**, which was moved to 2 CFR § 200.334)
- Updated outdated citations to specific Contract Provisions (e.g., added U.S. Code sections to Contract Workhours and Safety Standards Act Requirements)
- Edited the simplified acquisition threshold to reflect the increase to \$250,000 (see A3)
- Edited the micro-purchase threshold to reflect the increase to \$10,000 (see A13)

Updates to Contract Provisions - 2

- **Changed headings to reflect where clauses or certification language is “mandatory” or “model”**
- Removed outdated Energy Conservation Requirements section
- Updated the Davis-Bacon Requirements to reflect updated contract clause language (see A10)
- Updated the EEO mandatory clause language to reflect regulatory changes (see A16)
- Edited the Termination of Contract section to reflect updated termination for cause language (see A25)

Prohibited Telecommunications: 2 CFR § 200.216

Per 2 CFR § 200.216 (implemented as of August 13, 2020):

- **Recipients and subrecipients** are prohibited from obligating or expending loan or grant funds to:
 - **Procure** or obtain;
 - **Extend or renew a contract to procure** or obtain; or

Prohibited Telecommunications - 2

- **Enter into a contract (or extend or renew a contract) to procure or obtain** equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.
- As described in P.L. [115-232](#), section 889, covered telecommunications equipment is telecommunications equipment produced by **Huawei Technologies Company or ZTE Corporation** (or any subsidiary or affiliate of such entities).

Contract Provisions

- Added section on Domestic Preference for Procurements
 - Per 2 CFR § 200.322 (implemented as of August 13, 2020)
 - (a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products).
 - The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award including SBGP grants.

Typical airport project planning and funding process

- AIP is *single-year* funding.
- Must be obligated by September 30 each year
- Not intended to be a hard-and-fast schedule
- Grant awards reliant on numerous local decisions

