U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: Program Guidance Letter 97-2 Date:

From: Acting Manager, Airports Financial Assistance Division, APP-500 Reply to Attn. of:

To: PGL Distribution List

On October 9, 1996, the President signed into law the conference bill passed by Congress to reauthorize many FAA programs, including the Airport Improvement Program (AIP). The new law can be cited as the Federal Aviation Reauthorization Act of 1996 (Public Law 104-264), herein referred to as the 1996 Act. Several provisions of the 1996 Act amended Title 49 of the United States Code (49 U.S.C.) as it applies to the AIP and other programs administered by, or of interest to, Airports.

This program guidance letter (PGL) sets forth coordinated guidance on implementing the new provisions of the 1996 Act affecting Airports programs. Should you have a question on any item below, please contact the person whose name appears in the title for that PGL item. Additional PGLs will be issued as soon as they are finalized; if you have questions about any provisions not yet addressed in a PGL, please contact APP-500.

97-2.1. Eligibility of Hangars under the Military Airport Program - Jim Borsari (202)267-8822.

Section 124(c) of the 1996 Act amended 49 U.S.C. section 47118(f) to add hangars to the list of improvements which are eligible for AIP funds at an airport designated under the military airport program (MAP). As with other infrastructure (e.g., terminals) and equipment (e.g., ARFF vehicles), a sponsor should provide adequate justification for the use of grant funds for hangar construction. Such justification should include evaluation of other options such as the use of existing buildings, aprons or other facilities.

At a minimum, sponsors should provide evidence that one or more aeronautical users of the airport will use the hangar, that the size and number of aircraft to be accommodated justify the size of the structure, and that there will be no exclusive use of the facility. (Lease to a single FBO for sublease to other parties on a non exclusive basis will not be considered exclusive use.) Further, sponsors should be reminded of the requirement that no portion of the construction costs paid by AIP funds may be used as the basis for calculating hangar rental or lease fees.

Allowable costs in a hangar construction project include costs attributable to site preparation, foundations, erection of the basic structure (including aircraft access doors) and electrical, water and HVAC facilities. Costs for customized finishing for individual tenants, additional space for nonaeronautical activities or airport management functions and/or specialized equipment are not allowable. Note also that any amount of grant funds used for this purpose is subject to the limit of $4 million at any MAP location for projects authorized under section 47118(f).

The following special condition should be included in the grant agreement for construction, reconstruction or repair of a hangar:

> Any hangar constructed, reconstructed or repaired with funds provided by this grant shall be used only for aeronautical purposes. Any use of such facility for non aeronautical purposes shall be considered a violation of this grant agreement and may require the refund any amounts of Federal funds used in the construction, reconstruction or repair of such facility.

Please advise APP-510 of any proposed projects under this provision.

97-2.2. Special Rule For Privately Owned Reliever Airports - Don Samuels - (202) 267-8818

Background Prior to New Legislation

When the 1982 AIP legislation established the eligibility of private reliever airport owners for AIP grants, FAA did not apply the provision for reimbursement of prior land acquisition costs to privately owned airport sponsors. This, however, did not preclude the use of AIP grant funds to acquire additional development land where needed to expand or meet standards at a private reliever airport.

The distinction in the treatment of land reimbursement at public and private airports was the subject of a colloquy in the House of Representatives on May 19, 1992. The colloquy concluded that there should be no distinction, and that, although the FAA was treating them differently, from that time forward both types of sponsors should be treated equally.

Since that time and until new legislation discussed later changed the procedures, we have considered that, with respect to reimbursement for, or the use of, land previously acquired for airport development, sponsors of private reliever airports should be treated no differently than those of public airports. This has meant that AIP funds could be used to reimburse sponsors for the actual land acquisition costs incurred, without regard to whether the sponsor is a public or private entity. This policy has been based on applicable statutory language authorizing the FAA to pay a share of "costs incurred" and on the lack of clear statutory authority to use another basis to reimburse sponsors for land acquisition.

The 1994 conference report for AIP reauthorization directed FAA to determine whether to treat private reliever and public airport sponsors differently in regard to the valuation of land they used in a project. In reviewing this issue, we initially considered revising the policy of land valuation to adopt current market value as the basis for reimbursement to private relievers. We concluded, however, that statutory authority at the time did not permit us to do so.

Specifically, our policy on the use of previously acquired land was based on 49 U.S.C. section 47110(c) which outlines eligibility of certain prior costs, including costs incurred after May 13, 1946, to acquire interests in land, as allowable costs in a new grant.

This section provides no authority to base the grant amount on other than the actual costs incurred by the sponsor, or to reimburse any land acquisition costs incurred on or before May 13, 1946, and we have found no statutory basis for doing so.

Under this provision, a public or private sponsor may contribute the value of sufficient land toward the non Federal share of allowable project costs. A grant may then be issued, in effect, for a project in which land acquisition and construction costs are combined, and the grant amount is based on the Federal share of the combined allowable costs. When the cost basis of such land equals the sponsor's share of total project costs, the sponsor need contribute no cash toward the construction costs of the project. For example, in a project with construction costs of $90,000, the inclusion of $10,000 in previous land acquisition costs would result in combined project costs of $100,000. With the Federal share set at 90 percent of allowable project costs, the AIP grant would be $90,000 and the sponsor would not need to make any additional cash contribution.

In this regard, it should be noted that public sponsors have always been allowed reimbursement for the costs of previously acquired land based on the actual acquisition costs; we have applied this provision in the same manner for private sponsors. We also agreed with the point made in the 1992 colloquy that all airport sponsors should be treated equally, and that there was no statutory authority to do otherwise.

New Provision Instituted by Public Law 104-264

Section 1211 of the 1996 Act amends 49 U.S.C. section 47109 to change the way land value is treated when a privately owned reliever airport uses a portion of existing airport land for the non-Federal share of project costs. The current fair market value, instead of the cost or value at the time of acquisition, is now to be used to determine the value of the land included in the project at privately owned reliever airports.

Section 3 of the 1996 Act states that amendments made by the 1996 Act "apply only to fiscal years beginning after September 30, 1996…," and "[n]othing in this Act … shall be construed as affecting funds made available for a fiscal year ending before October 1, 1996." Therefore, this provision is applicable only to projects for which a grant is executed on or after October 9, 1996, the date of enactment of the 1996 Act. Private sponsors who have chosen to contribute land to a prior year project in lieu of cash

for the non Federal share of project costs may receive credit for only the actual cost or appraised value of the land at the time it was acquired for the airport.

The methodology for applying this provision is unchanged from that set forth in paragraphs 353 and 622 in FAA Order 5100.38A (the AIP Handbook), except that, for a project at a private reliever airport in which land is contributed in lieu of cash for the local share, the basis for the value of the land must be based on the current fair market value. Regions should ensure that such claims of valuation are supported by recent credible appraisals.

In the past, some Airports offices may have allowed some private reliever sponsors to credit the current fair market value to land they included in projects. In any such case, the facts should be documented in the project folder. We do not intend at this time to seek recovery of any excess funds or to pursue any adjustment in the amount of land included in the project. That fact also should be noted in the folder.

Finally, land contributed to a project, whether by a public or private sponsor, is subject to Assurance 31 should the sponsor propose to dispose of the land.

97-2.3 Eligibility Disparities between the AIP and PFC Program - Don Samuels (202) 267-8818 and Mark Beisse (202) 267-8826.

Section 142(b) of the 1996 Act amends 49 U.S.C. to eliminate certain eligibility differences between the AIP and PFC program. One provision amends section 47102(3) to redefine airport development by deleting language limiting PFC eligibility for relocation of airport traffic control towers and navigation aids (including radar) when necessary to carry out an approved AIP funded project. AIP or PFC funds may now be used for the relocation costs, regardless of which funding source is used for the project necessitating the relocation. The other provision deletes language in section 40117(a)(3) restricting use of PFC funds to comply with Federal mandates on air and water quality, as well as disabled facility requirements.

The original disparities were introduced into the law by the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, as explained in PGLs at the time. PGLs 93-3.3, 93-3.4, and 93-3.5 on water quality projects, air qualify projects, and projects to comply with the

Americans with Disabilities Act, respectively, indicate eligibility may not extend to PFCs. This aspect of those PGLs is now obsolete.

PGL 93-4.1 is later guidance on relocation of airport traffic control towers and navigation aids, including radar, under AIP. The PGL indicates PFC funds may be used to finance the relocation if the primary project was funded under AIP. However, it states that PFC revenue may not be used for relocations if needed for PFC-financed projects. This restriction has now been eliminated.

The above PGLs provide substantial guidance which is still current. Please make the following pen and ink changes in those PGLs to incorporate the new eligibility criteria:

a) PGL 93-3.3, paragraph 3; delete sentences 3 and 4;

b) PGL 93-3.4, paragraph 3; delete sentences 3 and 4;

c) PGL 93-3.5; delete all of paragraph 6; and

d) PGL 93-4.1, paragraph 7, sentence 2; delete the word "not."

No change in the PFC regulation (Title 14, Code of Federal Regulations, Part 158) is needed to incorporate these provisions since it was not changed when the disparities were first enacted.

Regions should assign priorities and funding types as done in the past. In cases where the grants are justified based on PFC projects, the priority that would have been applied if the underlying work were an AIP project should be used. For instance, PFC terminal projects requiring a grant for relocation of the control tower would have the same priority as if the building were an AIP project.

Finally, a small, medium or large hub primary airport would need to use entitlements to move the tower if PFC terminal development justifies the grant. A non hub primary airport (which annually has more than 10,000, but less than 0.05 percent of total passenger boardings) may use entitlement, discretionary, or small airport funds for such a project. A non primary commercial service or reliever airport can use only discretionary funds for such a project.

97-2.4 Clarification of Passenger Facility Charge Revenue as Constituting Trust Funds - Joseph Hebert (202) 267-8902.

Section 1202 of the 1996 Act sets forth certain provisions concerning the status of passenger facility charges (PFC) collected by air carriers and their agents prior to remittance to public agencies. Specifically, section 1202 adds the following language to section 40117(g) of 49, U.S.C.:

> (4) Passenger facility revenues that are held by an air carrier or an agent of the carrier after collection of a passenger facility fee constitute a trust fund that is held by the air carrier or agent for the beneficial interest of the eligible agency imposing the fee. Such carrier or agent holds neither legal nor equitable interest in the passenger facility revenues except for any handling fee or retention of interest collected on unremitted proceeds as may be allowed by the Secretary.

This provision is specifically intended to protect PFC funds collected but not remitted from being used to pay the creditors of an air carrier undergoing bankruptcy. This language is similar to existing language in 14 CFR 158.49(b), the section of the PFC rule which addresses this issue.

Congress provided this language in response to concerns that the regulatory language alone did not provide the force of law necessary to persuade bankruptcy courts of the status of unremitted PFC funds held by the air carrier estate. The impact of this change is uncertain until it is tested in bankruptcy court. However, it provides the FAA and the airport community with clear Congressional intent of the status of PFC collections and may be persuasive on a case-by-case basis with individual air carriers.

97-2.5 Availability of Apportioned Funds - Ellis Ohnstad (202)267-3831.

Section 123(a) of the 1996 Act amends 49 U.S.C. 47117(b) to extend by one year the length of time that non hub primary airports may use funds apportioned on the basis of passenger boardings. As a result, sponsors of non hub primary airports may use primary entitlement funds in the year in which they are first apportioned and in the three succeeding fiscal years. (States and all other airport sponsors still must use apportioned funds no later than the end of the second fiscal year after which they are first

apportioned.) Regions and ADOs should ensure that sponsors of non hub primaries take this feature into account when preparing or revising their capital improvement plans.

97-2.6 Innovative Finance Demonstration Program - Joseph Hebert (202) 267-8902 and Mark Beisse (202) 267-8826.

Section 148 of the 1996 Act authorizes a demonstration program under which up to 10 AIP grants may be approved to implement innovative airport development financing techniques. The information obtained on innovative financing is to be provided to the Congress, as well as the National Civil Aviation Review Commission (NCARC) and the Aviation Funding Task Force (AFTF) established by section 274 of the 1996 Act.

The statute also requires by February 9, 1997, an independent assessment of FAA financial needs. Within 6 months of receiving the independent assessment, AFTF is to submit to the Secretary of Transportation a preliminary report setting forth a comprehensive analysis of the FAA's funding needs and alternative financing means through fiscal year 2002. AFTF's final recommendations are to be issued after allowing 30 days for the Secretary's review and another 30 days to complete the report. By October 1997, the Secretary is to report to Congress with recommendations on financing the aviation system.

The results of the AIP innovative finance demonstration program are to be considered by the Secretary and the AFTF in their reports. The law specifies that innovative techniques to be tested under the demonstration shall be limited to:

- Payment of interest;
- Commercial bond insurance and other credit enhancement associated with airport bonds for eligible airport development; and
- Flexible non-Federal matching requirements.

These areas, however, should allow considerable latitude for experimentation. Airport sponsors are encouraged to suggest creative approaches within the areas specified by the statute, including those that may entail substantive departure from standard AIP requirements and procedures.

A similar departmental innovative finance initiative is being tested under prior legislation for surface modes; a brochure prepared by the Federal Highway Administration describing that program has been sent under separate cover.

The underlying goal of the demonstration is more effective use of Federal airport financial assistance. We plan to select up to 10 proposals based on the criteria below.

- Applicants for projects under the demonstration program must be eligible to receive airport development grants; State sponsorship and other agency relationships will be considered.

- The airport development must meet AIP programming and project selection criteria and be included in the Airport Capital Improvement Plan. There are no predetermined limits on project cost, but projects should be based on FAA review of airport requirements. The proposal may anticipate using either entitlements, discretionary funding, or both.

- The innovative finance proposal must be likely to demonstrate cost savings or improved performance of the national aviation system. For example, a project might demonstrate earlier availability of a facility and the associated benefits, or it could involve airport development that would not be built without the innovative finance program. The focus should be on the probable successful demonstration of a financing mechanism not otherwise permitted.

- The innovative financing demonstration may include Federally-approved retirement of airport bond principal and interest payments when savings might be realized by design-build methods or other accelerated construction alternatives. Such costs would be allowed for any AIP eligible development.

- The demonstration project may include Federal participation in financing costs associated with bond issues for eligible airport development. These costs could involve underwriting fees, commercial bond insurance, and other credit enhancements.

- The proposal may include flexible non-Federal matching requirements, such as increased local and State shares using contributions from private sources. This could include

varying the percentage of local and State matching shares during different phases of a project as cash flow permits. It could also include innovative contingency options for paying unforeseen cost overruns.

- Anticipated financial completion of the projects must occur by September 30, 1999. Financial completion for bonding projects will be considered to be the date by which the bonds have been issued; in all other respects, the same financial completion criteria will apply as in a similar AIP project.

- Proposals to change Federal airport development standards will not be considered under this program.

- In no case shall the implementation of an innovative financing technique under the demonstration result in a direct or indirect Federal guarantee of any airport debt instrument.

Each airport benefiting from a grant would be required to prepare a project application. A status report would be required when innovative financing mechanisms are in place. In addition, a sponsor's "findings" report would be required upon project completion. Quarterly reports may be required by regions, and we expect to undertake an evaluation of the reports. Our report of preliminary results, based on the probability selected mechanisms will succeed, must be made available to Congress and NCARC as they contemplate FAA financing alternatives. We also expect the General Accounting Office will request information by April 1997 for their assessment required under the new provision.

Please send by December 15 the letter in Attachment A inviting potential demonstration sponsors to express their interest in the innovative finance provision. The letter should be sent to a wide range of airports so as to encourage experimentation with the techniques at airports of various sizes.

Forward your recommended candidates for the demonstration projects based on the strength of a sponsor's proposal and prospectus no later than February 15, 1997. Do not disclose your recommendation to sponsors or request project applications pending formal notification by APP-500 that a selection has been made.

Robert B. Chapman

Robert B. Chapman

Attachment

Attachment A

Dear ___:

I invite the [sponsor name] to express its interest in being selected to implement one of up to ten projects in an Innovative Finance Demonstration Program established by the Federal Aviation Reauthorization Act of 1996. Your agency has experience with airport capital financing which could assist us test this program to reduce the cost of your projects or improve performance of the national aviation system. Because no new funding was provided for the demonstration, we encourage the use of entitlements in the program.

The demonstration program will continue 3 years for airport development projects under the Airport Improvement Program (AIP). In no case shall the implementation of an innovative financing technique under the demonstration program result in a direct or indirect guarantee of any airport debt instrument by the Federal Government. The innovative finance techniques are limited by the statute to the following:

- Payment of interest;
- Commercial bond insurance and other credit enhancement associated with airport bonds for eligible airport development; and
- Flexible non-Federal matching requirements.

Within the areas prescribed by the legislation, creative proposals are encouraged. The National Civil Aviation Review Commission (NCARC) is to review demonstration projects. Note that our initial evaluation must be made available to the Congress and NCARC during April 1997. We are focusing on making a successful demonstration of features not presently allowed under the AIP.

Should you wish to be considered for this demonstration program, please reply in writing identifying your strategy and explaining how you intend to use the new flexibility. Proposals should be short, but you need to conceptually explain the anticipated beneficial effects of the innovative financing mechanism to be implemented. Your proposal should include a 1-2 page prospectus with the project description, innovative finance techniques, anticipated start/completion of the project, and anticipated benefits.

Projections of time or cost savings in the prospectus should be as detailed as possible. Innovative financing costs, if attributable to eligible and ineligible work, must be limited to those related to only the eligible portion. You should identify methods by which such costs are derived, although please do not prepare a complete project application until we have determined the concept meets statutory criteria.

Your letter and prospectus should be addressed to me for receipt by January 31, 1997. We intend to request, evaluate, and begin approving applications shortly thereafter.

Participating airports would be required to prepare a status report when innovative financing mechanisms are in place and a sponsor's "findings" report would also be necessary upon project completion.

You may telephone me directly at ___ with any questions you may have about this program.

Sincerely,

Airports Division [or District Office] Manager