Contract Provisions Mandated by Grant Assurances

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Lives close by
Grant Assurances
- Goals
- Historical Information
- Review assurances and regulations mandating clauses
- Clauses which promote compliance

DBE Requirements

Questions
Goals of FAA through Grant Assurances

- Preserve Interstate air transportation system
- Protect investment of federal property and funding
- Provide Fair and Equitable system
  - Fair market pricing
  - Discrimination prohibited
- Promote private enterprise/competition

Grant Assurances require leases and agreements to fulfill these goals
AC 150/5100-15A (Page 63 herein) - Civil Rights Requirements For The Airport Improvement Program (AIP), addresses civil rights compliance clauses. Created in 1989, but recently cancelled. The cancellation notes indicate that it has been superseded by 49 Code of Federal Regulations Part 23 (Airport Concessions) and Part 26 (Federally Assisted Contracts), but neither of these parts have the scope of the AC.

Title VI Tool Kit (Page 2 herein), prepared in 2001, provides tools, including contract clauses.

Regional Policy and Procedures Memorandum (Great Lakes 5190.6 see appendix 1) “GUIDE FOR PREPARATION OF LEASES AND USE AGREEMENTS AT AIRPORTS AFFECTED BY GRANT AGREEMENTS AND SURPLUS PROPERTY INSTRUMENTS OF DISPOSAL.” (Stamp dated 1994)
Absence of current guidance

Review assurances and regulations mandating contractual requirements
- FAA Grant Assurances
- Selected Assurances and CFR Provisions Imposing Contractual Requirements
- Example Contract Clauses to Promote FAA Grant Assurances
- Procurement and Contract Clauses Under AIP (website link)
- Outdated Historical Documents
- FAA Airport Compliance Manual Draft
Grant Assurances

1. General Federal Requirements. It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

Federal Legislation [lists 24 of federal statutes]
Executive Orders [lists 6 Orders]
Federal Regulations [lists 17 CFR provisions]
Office of Management and Budget Circulars [lists 2 circulars]

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in this grant agreement.

34. Policies, Standards, and Specifications. It will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the Current FAA Advisory Circulars for AIP projects, dated ______ (the latest approved version as of this grant offer) and included in this grant, and in accordance with applicable state policies, standards, and specifications approved by the Secretary.
CFR’s

Code of Federal Regulations
Title 49. Transportation

• Part 21. Nondiscrimination in Federally–Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964

• Part 23. Participation of Disadvantaged Business Enterprise in Airport Concessions

• Part 26. Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

• Part 27. Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance
14 CFR Parts 152 and 382
Code of Federal Regulations
Title 14. Aeronautics and Space

Chapter I. Federal Aviation Administration, Department of Transportation

Subchapter I. Airports Part 152. Airport Aid Program
  • 14 C.F.R. § 152 Subpart E. Nondiscrimination in Airport Aid Program

Chapter II. Office of the Secretary, DOT (Aviation Proceedings)
  • Part 382. Nondiscrimination on the Basis of Disability in Air Travel
Panelists
Joelle Briggs
Rachel Gardunio
Mara Rosales

FAA
Kevin Willis, Manager, Office of Airport Compliance, ACO-100
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Airport Lawyers
Many airport lawyers who provided clauses for analysis
Questions

Thank You
GRANT ASSURANCES FOR DBE/ACDBE AND CIVIL RIGHTS COMPLIANCE
What it says

37. Disadvantaged Business Enterprises. The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non discrimination in the award and administration of DOT-assisted contracts. The recipient’s DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801).

Source: [http://www.faa.gov/airports/aip/grant_assurances/](http://www.faa.gov/airports/aip/grant_assurances/)
ACDBE Grant Assurance

What it says

1. General Federal Requirements. It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following...49 CFR R Part 23 - Participation by Disadvantage Business Enterprise in Airport Concessions.

Source: http://www.faa.gov/airports/aip/grant_assurances/
**WHAT DBE/ACDBE GRANT ASSURANCE REQUIREMENTS REALLY MEAN FOR AIRPORTS**

- **Do not** discriminate on the basis of race, national origin or gender
- **Do not** allow your prime contractors or prime concessionaires or their subs to discriminate
- Ensure a level playing field for DBE/ACDBEs
- Prepare a DBE and an ACDBE Program for your airport’s (1) federally assisted construction contracts and (2) airport concession opportunities
  - Example: Food Service
  - Retail
  - Advertising
  - Parking
  - Generally professional services are excluded from these requirements
  - The DBE and ACDBE Programs constitute the plan which guides agency discretion in contract award processes
- **Assist** DBE/ACDBEs gain access to contract opportunities so that they may grow, expand and enter the mainstream of their industries without long term support from DBE/ACDBE programs.
HOW DBE/ACDBE GRANT ASSURANCE REQUIREMENTS SHOULD BE IMPLEMENTED

• Ensure that the DBE and ACDBE plans are consistent with the requirements of the applicable federal regulations – 49 CFR Part 26 (construction) and 49 CFR Part 23 (concessions). For example for Part 26 DBE Programs, airports must include a SBE component which is largely left to the imagination of the airport with some boundaries, such as the SBE program cannot dilute the end goal of a DBE program by allowing non-DBEs to receive a significant portion of the opportunities over DBEs.

• Ensure that the DBE and ACDBE plans are followed on a contract by contract basis through proper verbiage in solicitation documents.

• Ensure that prime contractors and majority JV Partners comply with DBE/ACDBE contract conditions

• Ensure that the airports’ DBELO has the required authority and exercises it to meaningfully assist DBEs with grievances or complaints. These complaints may be about a prime contractor, a subcontractor, or a member of airport management.
ISSUES TO LOOK OUT FOR

Attorneys need to be vigilant on the following legal issues:

1. Regulatory compliance usually requires at least an availability study – *Western States Paving v. Washington DOT*
2. Equal protection constitutional compliance –
   Usually requires a disparity study, see e.g. *AGC v. Caltrans*
1. Contract compliance regarding solicitation & contract conditions
   – DBE substitutions
   – DBE listing for bids/proposals and dumping after contract award
   – RFP responsiveness evaluations
2. Airport management compliance with non-discrimination provisions
   – Cannot deny opportunities to certified firms
   – Must maximize opportunities to DBE/ACDBEs even when administratively inconvenient
   – Noncompliance can trigger audits, claims, and administrative and legal complaints
ISSUES THAT HAVE BEEN RAISED IN LITIGATION
Matters concerning DBE/ACDBE Matters

1. Legal challenges to the validity of implementing regulations – mostly settled
2. Legal challenges to constitutional validity of race/gender-conscious DBE/ACDBE programs, eg. AGC v. Caltrans (most recent)
3. Legal challenge to denial or revocation of DBE/ACDBE certification status (most active area)
4. Claims of race/gender based discrimination
5. Claims of equal protection violations against individual businesses
6. RFP related protests and breach of contract claims
CIVIL RIGHTS

What it says

30. Civil Rights. It will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon in which case the assurance obligates the sponsor or any transferee for the longer of the following periods:

(a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or
(b) the period during which the sponsor retains ownership or possession of the property.

Source: http://www.faa.gov/airports/aip/grant_assurances/
CIVIL RIGHTS

How is it different from the DBE Grant Assurance?

1. Broader scope than the DBE grant assurance.
2. The obligations under the Civil Rights grant assurance continues without limit as long as the airport is used as a public use airport.
3. Civil Rights grant assurance applies to all types of airport sponsor projects (development, noise and planning). DBE grant assurance is not necessary for planning projects.
Remedies for Violations

Remedies “for the violation of a grant assurance are generally prospective in nature – the withholding of future grants or future payments under outstanding grants.”