

CHANGE REQUEST COVER SHEET

Change Request Number: 10-64

Date Received: 6/10/2010

Title: Real Estate Guidance

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Policy OR Guidance: Guidance

Section/Text Location Affected: 2.0 Space Guidance

Summary of Change: Discourage the use of inappropriate acquisition of broker services.

Reason for Change: To ensure that Real Estate Contracting Officer is not acquiring broker services in appropriately.

Development, Review, and/or Concurrence: ALO-200, AGC-500, LSA

Target Audience: Real Estate Contracting Officer

Potential Links within FAST for the Change: N/A

Briefing Planned: No

ASAG Responsibilities: None

Potential Links within FAST for the Change: N/A

Links for New/Modified Forms (or) Documents (LINK 1) [null](#)

Links for New/Modified Forms (or) Documents (LINK 2) [null](#)

Links for New/Modified Forms (or) Documents (LINK 3) [null](#)

SECTIONS ADDED:

Real Estate Guidance :

Section 2.4.15 : Appendix P: Prohibited Real Estate Broker Services [\[New Content\]](#)

Real Estate Guidance :

Section 2.4.15.1 : Sample Prohibited Letters Attachment A: Hiring a Broker [\[New Content\]](#)

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Section 2.4.15.2 : Sample Prohibited Letters Attachment B: Broker Letter to potential lessor [\[New Content\]](#)

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Section 2.4.15.3 : Sample Prohibited Letters Attachment C: Letter of Termination with Broker [\[New Content\]](#)

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Section 2.4.15.4 : Sample Prohibited Letters Attachment D: Letter of Intent [\[New Content\]](#)

SECTIONS ADDED:

Real Estate Guidance :

Section 2.4.15 : Appendix P: Prohibited Real Estate Broker Services

A. Background:

Real Estate often has a need for the use of brokers in the acquisition of real property. Broker(s) represent the potential lessor during land and space acquisition. The agency is often approached by Broker(s) representing potential lessor(s) who have property to meet a current requirement or unsolicited offer for the FAA. However, the RECO is not authorized to accept broker services to represent the FAA, i.e. tenant representative without a formal agreement in place authorized by legal counsel, in accordance with legal coordination set forth in AMS Real Estate Guidance Section 7.4, and concurred by ALO-200 and AGC-500.

B. Prohibition of Using a Letter to Acquire Broker Services:

It often seems appealing to use a letter to acquire services from a broker service. Letter contracts for real estate broker services that fail to meet the requirements of AMS T3.2.4 and the requirements for legal coordination set forth in AMS Real Estate Guidance Section 7.4 are prohibited.

1. Excerpt of the definition of letter contracts as defined in AMS T3.2.4, subsection 7: Letters and Ceiling Price Contracts as follows:

a. General. A letter contract is a preliminary contractual instrument that authorizes a contractor to immediately begin work, subject to negotiating a definitive contract. A letter contract should not be used for contract modifications.

b. Letter Contract.

(1) Description:

(a) Provides a preliminary authorization for the contractor to immediately begin work.

(b) Includes a brief description of the work, performance period, and a limitation on the total funding amount that a contractor may expend and FAA will pay.

(c) Contractor agrees to be bound by the AMS termination, changes and disputes

provisions.

(2) Use When:

(a) The FAA's interests demand that the contractor be given a binding commitment so that work can start immediately and negotiating a definitive contract is not possible in sufficient time to meet the requirement.

(b) Emergency or other special situations for limited amounts.

(3) Considerations:

(a) Should not be used to commit the FAA to a definitive contract in excess of the funds available at the time the letter contract is executed.

(b) Should not be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

As noted above, a letter contract is used for an immediate purpose pending a negotiated contract and emergency services. The use of broker services does not fall under these definitions. Thus, the RECO is prohibited from entering into a broker service using a letter.

Additionally, the AMS establishes clearly those who may act to bind the United States under the AMS T3.1.4 (Delegations) item 6 (Limited Procurement Authority to Other qualified individuals). Thus, using the services of a broker without an approved (see above for approvals by legal counsel and concurrence by ALO-200 and AGC-500) contract is unauthorized delegation. To summarize, only Federal/FAA employees have the authority to enter into a binding commitment on behalf of the United States. Since broker contractors are not Federal/FAA Employees, they have no authority to do so, and any implication to the contrary is prohibited. Furthermore, the spending of appropriated monies is an "inherently governmental function" as established in OMB Circular A-76. As such, the RECO cannot contract this function to a real estate broker because the broker is not a Federal/FAA employee.

2. Excerpt of a definition of who has delegated authority under AMS T3.1.4 Delegations, subsection 6: Limited Procurement Authority to Other Qualified Individuals:

a. General. The COCO may delegate a limited form of procurement authority to qualified individuals who are not warranted COs. This limited authority may be granted to individuals within or outside of the contracting office when supported by a demonstrated need. Managers of non-contracting offices that require limited purchasing authority may request a Delegation of Procurement Authority (DPA) from the COCO. The COCO evaluates the request and delegates authority to the individual needing the authority. The delegation must be in writing and state specific limitations governing the limited procurement authority, such as dollar thresholds or types of procurement (i.e. supply, services, construction, etc). Guidance in this section does not apply to the purchase card program, as it is addressed in AMS Procurement Guidance T3.2.6, Purchase Card Program.

Furthermore, a letter to a broker acquiring services is not only misleading it implies an employer - employee relationship which does not exist. Personal Services are characterized by an implied employer - employee relationship between the agency and the contractor. Thus, a letter acquiring broker service would fall under personal service which is prohibited. Personal Services are characterized by an implied employer - employee relationship between the agency and the contractor.

3. Excerpts of Personal Services in AMS Section 3.8.2.3.2S on 3.8.2.3: Personal Services Contracts and 3.8.2.3.2: Determination:

The FAA may award personal services contracts when the head of a line of business determines that a personal service contract is in the best interest of the agency after thorough evaluation, which includes, but is not limited to the following factors:

1. Worker's compensation payments and other tax implications;
2. Government's potential liability for services performed;
3. Availability of temporary hires to perform the desired services;
4. Demonstration of tangible benefits to the agency;
5. Detailed cost comparison demonstrating a financial advantage to the Government from such contract;
6. Potential post-employment restrictions applicable to former employees;
7. Legal determination that the work to be performed is not inherently governmental; and
8. Potential post-employment restrictions pursuant to Federal Workforce Restructuring Act of 1994 Public Law 103-226.

Although personal service contracts are permitted, they should be used only when there is a clear demonstrated financial and program benefit to the FAA. The determination required herein is non-delegable and shall be reviewed for legal sufficiency by the Office of the Chief Counsel.

C. Exhibits of Prohibited Letters with Broker(s)

Attached are four sample letters sent to potential broker(s) which are prohibited. These letters are misleading the broker and potential lessor. These sample letters also are prohibited due to the conflict with the sections of the AMS cited above.

Additional reasons for these letters being prohibited are detailed below.

- a. Attachment Letter A- is misleading in that the Real Estate Broker Company has been designated as the agent for the FAA. Only the Real Estate Contracting Officer can be the agent for the FAA.
- b. Attachment Letter B - Real Estate Broker Company states they have the authority to be the exclusive agent for the FAA. As stated above, the only agent in the FAA is the RECO.
- c. Attachment Letter C - States that we terminated an agreement with the broker who was our exclusive agent. First we did not have an official agreement. And second the last sentence of the letter thanks the broker for negotiating; the broker does not have authority to negotiate on behalf of the FAA.
- d. Attachment Letter D - Letter of intent - The Broker has no authority to bind the government prior to the award of a lease by a RECO. As mentioned above, they are not the agent for the FAA.

D. Acceptable Acquisition of Broker Services

There are several options to find an acceptable format to acquire broker services:

- 1.) Conduct a full and open competition either on a National or Service Area level.
 - a. Develop a team to include at a minimum real estate subject matter experts including

RECOs, National SME and headquarters and/or regional council.

i. The team can look into developing SIR to acquire broker services.

ii. Investigate how GSA and other agencies developed broker contracts.

2.) Data gathering, i.e. market survey information can be contracted using a purchase card. Please follow the purchase card requirements. AMS Procurement Guidance T3.2.6, Purchase Card Program.

Any attempts to acquire such services must be submitted for approval to ALO-200/AGC-500 for review and concurrence.

Real Estate Guidance :

Section 2.4.15.1 : Sample Prohibited Letters Attachment A: Hiring a Broker

Attachment Letter A- is misleading in that the Real Estate Broker Company has been designated as the agent for the FAA. Only the Real Estate Contracting Officer can be the agent for the FAA.

RE Company
Address

Dear Sir:

Subject: Flight Standards District Office (FSDO)
Location:

Company as our Exclusive Agent to assist us in locating new office facilities in the location XXX.

It is understood that RE company has the authority to act as our agent to identify and evaluate various office opportunities, which may satisfy the needs for our FSDO. Information derived from your efforts will be provided to the RECO in our office for consideration and approval.

It is also understood that RE Company will receive compensation through earned commissions paid by the building owner as part of the transaction. The FAA will not incur any financial obligation to you under this agreement. Likewise, the FAA is not assuming any responsibility or liability for any of your actions. The FAA does not extend to you any legal authority that will encumber the Federal Government. All options, determinations, or final decisions will be subject to approval by the FAA Contracting Officer.

We will operate under this arrangement until such time as your services are no longer required or deemed to be unsatisfactory by the FAA. You will be notified at that time.

We look forward to working with your firm in our search for office space and trust that you will be able to located space for our FSDO requirements.

Sincerely,

RECO

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Real Estate Guidance :

Section 2.4.15.2 : Sample Prohibited Letters Attachment B: Broker Letter to potential lessor

Attachment Letter B - Real Estate Broker Company states they have the authority to be the exclusive agent for the FAA. As stated above, the only agent in the FAA is the RECO.

RE Estate Lessor

RE: Request for Proposal

Dear Sir:

I have been retained by the FAA ("Tenant"), as their exclusive agent in identifying and evaluating various opportunities for a new office location in the location. In that regard, I would appreciate receiving a response to this Request for Proposal.

In order to determine if it will satisfy our needs, I am furnishing specific information describing their requirements, objectives, and time schedule to enable you to provide a detailed and informed response. Your response will serve as the basis for comparative analysis and subsequent negotiations with the successful landlord by Tenant and representatives of RE Company.

Proposed RFP

Please respond to the RFP in writing no later than date. The above terms and conditions of any lease and/or related documents are subject to approval by FAA.

On behalf of the FAA, I look forward to your favorable response and to further discussions concerning all of these points. Please call me at your convenience if you and/or other representatives of your building have any questions regarding this inquiry.

Sincerely,

RE Company

Real Estate Guidance :

Section 2.4.15.3 : Sample Prohibited Letters Attachment C: Letter of Termination with Broker

Attachment Letter C - States that we terminated an agreement with the broker who was our exclusive agent. First we did not have an official agreement. And second the last sentence of the letter thanks the broker for negotiating; the broker does not have authority to negotiate on behalf of the FAA.

RE: Company

Dear Sir:

Subject: Lease of FSDO

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This letter will officially terminate the exclusive agency agreement that was previously entered into between the FAA and RE Company to assist with locating office facilities in the location or renewing our existing lease at location.

The FAA has determined that a lease renewal at location is not in the best of interest of the Government and the existing lease should not be renewed. The Government is no longer in need of services from RE Company.

You can inform the property owner that the FAA will not be renewing our lease at the current location and that they should direct all future correspondence on this matter to the RECO.

We thank you for your efforts in lease negotiations with Lessor.

Sincerely,

RECO

Real Estate Guidance :

Section 2.4.15.4 : Sample Prohibited Letters Attachment D: Letter of Intent

Attachment Letter D - Letter of intent - The Broker has no authority to bind the government prior to the award of a lease by a RECO. As mentioned above, they are not the agent for the FAA.

Real Estate Lessor

Re: Letter of Intent for Flight Standards District Officer (FSDO)

Dear Sir:

As exclusive broker, RE Company is pleased to submit the following Letter of Intent for which the Federal Aviation Administration (FSDO) is willing to prepare a Lease for your review.

Lease clauses included.

Upon agreement of the Terms within this Letter of Intent, the Government is prepared to provide a Lease of the Premises will occur.

If the foregoing Terms are acceptable, please have the Landlord sign below and we will proceed with preparation of a Lease Agreement for Landlord's review. Please feel free to call me with any questions or comments regarding this proposal number. Thank you for your efforts.

Best regards,

RE Company

AGREED AND ACCEPTED this ___day of _____, 20__.

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Agreed to by Landlord:

By: _____

Name: _____

Title: _____