

Real Estate Guidance - (10/2013)

7 LEGAL COORDINATION Added 10/2009

7.1 Legal Review of Real Property Actions Added 10/2009

7.2 Introduction Added 10/2009

7.3 Definitions Added 10/2009

7.4 Real Property Actions Coordinated with the Office of Chief Counsel (AGC-500) or Region or Center Counsel Revised 7/2012

7.5 Coordination between the Service Organization and Agency Counsel Added 10/2009

7.6 Real Property Acquisition: Documentation Required to be Submitted for Legal Review Revised 7/2012

7.7 Representation Added 10/2009

7.8 Exceptions and Waivers Added 10/2009

7 LEGAL COORDINATION Added 10/2009

7.1 Legal Review of Real Property Actions Added 10/2009

As stated in AMS policy, legal coordination is required for: 1) all **non-competitive acquisitions of real property** having a total value exceeding \$10,000; or 2) **all competitive real property acquisitions, including, but not limited to, new or succeeding leases, lease renewals, and lease modifications** having a total value over \$100,000; 3) all condemnations, purchases and disposals of interests in real property; and 4) all additions and revisions, other than those revisions to correct typographical errors, to the published real property document provisions/clauses.

7.2 Introduction Added 10/2009

a. FAA acquisition actions can raise significant legal issues. For example, although pursuant to 49 U.S.C. §40110, Federal acquisition statutes and regulations are not applicable to FAA, other legal authorities require FAA to demonstrate a rational basis, supported by substantial evidence, for acquisition actions. In addition, FAA acquisitions are subject to the requirements of other statutes and regulations not directly related to procurement, such as certain labor, and historic preservation statutes and regulatory provisions.

b. Therefore, the responsible logistics service organization will coordinate real property actions with FAA Region or Center Counsel on an ongoing basis throughout the real property acquisition lifecycle. It is the responsibility of agency counsel to represent FAA's legal interests within the service organization and, exercising independent professional judgment, advise the service organization concerning legal issues, including the legality and integrity of acquisition actions, and to represent the service organization in litigation and other legal matters.

c. This Guidance establishes legal coordination as the agency practice for real property acquisition, disposal, condemnation or other real property matters.

7.3 Definitions Added 10/2009

a. As used in this Guidance, the term "agency counsel" means:

1. For real property acquisition matters arising at, or referred to, Headquarters, the Assistant Chief Counsel, Acquisition and Commercial Law Division, (AGC-520).
2. For real property life cycle matters arising at, or referred to, a Logistics Service Area (LSA) or Center, the responsible Regional or Center Counsel.

b. As used in this Guidance, the term "coordinates" means: soliciting the opinion and recommendations of agency legal counsel prior to awarding real property actions, and providing

agency counsel accurate and complete information in sufficient time for thorough review and comment.

c. As used in this policy, the term "represent" means: stating the appropriate legal position with respect to a real property matter to the RECO and to the service organization, and, as appropriate, presenting this position to other parties, such as in administrative or judicial proceedings, or in communications, discussions, or negotiations with the RECO with another party.

7.4 Real Property Actions Coordinated with the Office of Chief Counsel (AGC-500) or Region or Center Counsel Revised 7/2012

The following actions will be reviewed in accordance with the legal coordination policy as set forth in 1.2.15 and 4.2.3.1 of AMS policy. Legal coordination is required for all non-competitive real property acquisitions exceeding a total value of \$10,000 and for all other real property acquisitions, including, but not limited to, new or succeeding leases, lease renewals, and lease modifications having a total value over \$100,000; all condemnations, purchases and disposals of interests in real property, regardless of total value; and all additions and revisions, other than those revisions to correct typographical errors, to the published real property document provisions/clauses.

a. For purposes of this policy, the following would be considered "competitive real property acquisitions;" however, this list is not all-inclusive, and RECOs are advised to consult with Counsel if they are uncertain whether a real property acquisition (e.g., lease for land or space) is competitive:

- The RECO and/or Engineering Section and/or Program Office conducts a site-selection process with initial consideration of multiple (at least 2) sites owned by different entities that are then compared to the requirements of the Program Office and are eliminated from consideration for failing to meet one or more of those requirements ("down-selected"); provided that the RECO receives a written statement from a Source Selection Authority (SSA) or Engineer in the Program Office that includes a discussion of the site needs; the sites surveyed; and the reasons why a site was selected, or conversely, eliminated from consideration; See Single Source Justification Template.
- The RECO conducts a Market Survey for either land or space, completes a cost analysis (including a cost estimate to move a facility and/or equipment), obtains a Business Case, if appropriate, and determines it is in the best interest of the government to renew at an existing location; or
- All land leases with federal entities.

b. If the Real Estate acquisition is considered non-competitive, the RECO must provide a completed Single Source Justification Form for Regional or Center Counsel to review in order to determine whether the decision has a rational basis, and is otherwise legally supportable.

- Legal review is not required when exercising an option to renew or executing a succeeding lease at the same location where the RECO is either establishing a new lease term and/or a new the rental price (as agreed in the previously negotiated option or negotiated new price in the succeeding lease) and no material (impact on price, delivery, performance, or scope of the lease) provision is changed. In such instances, the RECO is not required to complete the Single Source Justification Form. Examples of material change include adding more land to the lease, modifications to rental rates, and changes to access rights. For additional clarification, please consult Regional Counsel.

c. The following types of real property transactions will be submitted for legal review and concurrence in accordance with the thresholds stated in Section 7.1.

1. Land Acquisition

- All Purchases of land, regardless of dollar value
- Quit Claim Deeds or Warranty Deed-In general, the United States does not accept Quit Claim Deeds, since a Quit Claim Deed does not guarantee that the owner has good and marketable title to the real property being conveyed. However, under certain circumstances; e.g., the Owner is another government entity and has no legal authority to convey real property other than by Quit Claim Deed, FAA may consider accepting a conveyance of real property by Quit Claim Deed.
- Off-airport leases (if the acquisition is non-competitive and valued at more than \$10,000 or is valued at more than \$100,000 and has been acquired competitively)
- On-airport cost leases (if the acquisition is non-competitive and valued at more than \$10,000 or is valued at more than \$100,000 and has been acquired competitively)
- Renewals for both Off and On airport leases
- Space Acquisitions (subject to the thresholds mentioned in Section 7.1)
- Standard leases
- Small leases

2. Other Real Property Actions

All Condemnation actions, regardless of dollar value

- Acquisition of Eminent Domain
- Declaration of Taking

All Disposal actions, regardless of dollar value

- All disposal actions where FAA will be selling real property assets to a non-governmental entity and/or transfer agreements.

3. Supplemental Lease Agreements ("SLA") that meet the review thresholds are required to be submitted for legal review, unless the SLA is solely for the purpose of implementing rental increases that were negotiated during the initial acquisition, or to exercise an option to extend the term of lease that was negotiated during the initial acquisition. However, no option to extend

the lease term may be exercised that would result in a term in excess of 20 years. In addition, if the SLA, although primarily executed to implement a previously negotiated rental increase or term extension, includes an amendment or modification to any other provisions or requirements of the underlying lease, the SLA must be submitted for legal review and concurrence.

4. **In addition**, any proposed deviations from, or additions to, the printed templates, including, but not limited to, the MOA, Outgrant, Antenna and Rack Space Lease, Utility Contracts and the Lease forms shall be approved by the Regional or Center Counsel prior to execution by the RECO. Please note for all Utility contracts, the RECO will use discretion in requesting reviews if the deviation would clearly impact the rights and responsibilities of the parties.

- A determination to renew a lease for land if the RECO documents that no suitable alternative exists for this site and/or the facility and/or equipment cannot be relocated without an expense to the FAA that would outweigh the benefits of relocation

Any permanent, or universal, changes to the real estate clauses or forms will require the approval of the Assistant Chief Counsel for Acquisition and Commercial Law, AGC-520 and Planning, Policy and Budget Division, ALO-200.

7.5 Coordination between the Service Organization and Agency Counsel Added 10/2009

1. Each RECO must notify the appropriate Region or Center Counsel when he/she receives a PR or other formal request to initiate a real property action. As the project proceeds, the RECO will work with the Region or Center Counsel to determine if the project is a competitive action or a non-competitive action and the type of review that is required. During the transaction process, the Realty Specialist/RECO shall keep in regular contact with the appropriate Region or Center Counsel in order to ensure that all legal issues that arise are addressed as they occur.

2. It is recommended that the RECO use the same Region or Center Counsel throughout the real estate action to ensure continuity and consistency of legal support. However, in the event that unique legal or other questions arise during a real property action, the RECO may contact ALO-200 and/or AGC-520 for advice; provided that the RECO first informs the pertinent Region or Center Counsel of his/her intent to contact AGC-520 and the Region or Center Counsel concurs in the request. Concurrence to such request shall not be withheld unreasonably.

3.a. Region and Center Counsel will respond to the requesting RECO in a timely manner, with accurate and effective legal advice that is consistent with legal mandates and consistent with the agency's business discretion. Prior to award, the RECO must submit the project package (as described below in Section 7.6) to the appropriate Regional, or Center Counsel for legal review and concurrence if it meets the criteria stated in Section 7.1 or is one of the types of real property actions described in Section 7.4. C.2.

b. Region and Center Counsel will work with the RECO to establish a deadline for the receipt of legal review and comments and/or concurrence or non-concurrence. Unless otherwise determined necessary by the appropriate Region and/or Center Counsel due to their extent or

depth, comments and/or concurrence shall be provided on the Legal Review and Concurrence form.

i.) The deadline for receipt of comments and/or concurrence or non-concurrence will not exceed a total of ten (10) working days, unless otherwise agreed to by the RECO and the appropriate Region or Center Counsel. Counsel will describe and interpret legal issues involved in the matter; identify and assess the legal risk of a particular proposed decision; evaluate alternative courses of action; and identify potential illegal or improper actions. In those instances where the appropriate Regional or Center Counsel is unable to meet the established review deadline, the Region or Center Counsel in conjunction with the RECO may seek review and concurrence from the Assistant Chief Counsel for Acquisition and Commercial Law (AGC-520).

c. If the RECO receives a concurrence with comments from the Region or Center Counsel, the RECO does not have to resubmit the review package to the Region or Center Counsel. Rather, the RECO should address the comments provided and proceed with the acquisition, disposal or condemnation.

d. If reviewing Counsel non-concurs in the proposed action, the RECO shall address the issues raised by Counsel and resubmit the matter for review and concurrence within two (2) working days from the receipt of the non-concurrence. Reviewing Counsel will have three (3) working days from the date of submission of the revised documentation to review and provide written comments and/ or concurrence and return the submission to the RECO. Once the RECO has received the concurrence from the Region or Center Counsel, he/she may proceed with the real property action.

4. Upon the receipt of legal counsel review and concurrence, the RECO will place the Legal Review and Concurrence Form in the real property action file with agency counsel's written opinion and recommendations.

7.6 Real Property Acquisition: Documentation Required to be Submitted for Legal Review

Revised 7/2012

The acquisition package submitted for legal review should demonstrate and establish that the acquisition has a legal and rational basis, and, at a minimum, must include the following:

- a. A copy of the Lease versus Purchase Analysis, if applicable;
- b. A copy of the Market Survey analysis or Solicitation for Offers (SFO) evaluation data, if applicable;
- c. A copy of the Chief Financial Officer (CFO) review and approval if estimated value of lease is over \$10,000,000 or more;
- d. A current appraisal report, land survey and title report, if applicable;
- e. A detailed description of the requirement;
- f. The draft, or executed final version, of the Negotiator's Report; and
- g. The final draft of the Lease document, with an explanation of any revisions to the standard clauses, if applicable.

The Legal Review and Concurrence Form shall be submitted with the other review documentation. The RECO may e-mail a scanned copy of the above-referenced documents to Region and Center Counsel for review.

7.7 Representation Added 10/2009

1. Agency counsel will represent the logistics service organization in any protest of an award or other procurement action, and in contract claims, disputes, or controversies by and against the FAA, including all meetings, negotiations with the RECO, discussions, or communications on the matter after an action has been filed in an administrative, judicial, or FAA forum.
2. Agency counsel will represent the logistics service organization on behalf of the FAA in communications, negotiations, and meetings with other parties touching upon the legal rights and obligations of the parties, or where another party, including a government party, is expected to be represented by legal counsel.

7.8 Exceptions and Waivers Added 10/2009

At Headquarters, the Assistant Chief Counsel for Acquisition and Commercial Law (AGC-520), and at Regions and Centers, the Region or Center Counsel, may make **written** exceptions to this coordination policy described in Section I, adjust dollar minimums, or in appropriate cases, waive the coordination. All blanket exceptions shall be coordinated with ALO-200 and AGC-520. All other case by case or Logistics Service Area issues shall be coordinated between the Logistics Service Area Real Estate Manager and Regional or Center Counsel.
