

CHANGE REQUEST COVER SHEET

Change Request Number: 12-33

Date Received: 3/8/2012

Title: Edit to Reimbursable Agreement Guidance

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Policy OR Guidance: Guidance

Section/Text Location Affected: T3.8.1A.1

Summary of Change: Correction of typo re number of types of Agreements from "five" to "six"

Reason for Change: Accuracy of content

Development, Review, and/or Concurrence: Acquisition Policy Division

Target Audience: Procurement Workforce

Potential Links within FAST for the Change: None

Briefing Planned: No

ASAG Responsibilities: None

Potential Links within FAST for the Change: None

Links for New/Modified Forms (or) Documents (LINK 1)

Links for New/Modified Forms (or) Documents (LINK 2)

Links for New/Modified Forms (or) Documents (LINK 3)

SECTIONS EDITED:

Procurement Guidance:

*T3.8.1 Agreements, Cooperative Agreements, Gifts & Bequests
Agreements, Cooperative Agreements, Gifts and Bequests*

Section 1 : Agreements [\[Old Content\]](#) [\[New Content\]](#) [\[RedLine Content\]](#)

SECTIONS EDITED:

Section 1 : Agreements

Old Content: Procurement Guidance:

*T3.8.1 Agreements, Cooperative Agreements, Gifts & Bequests
Agreements, Cooperative Agreements, Gifts and Bequests*

Section 1 : Agreements

a. *Applicability.* This section applies to interagency agreements, intra-agency agreements, other transactions, cooperative agreements, and international agreements for services, supplies (including construction) and real property to the extent authorized by law. This section **does not** apply to Airport Improvement Program grants and cooperative research and development agreements, which are governed by other directives, as follows:

(1) Airport Improvement (AIP) Grants authorized under 49 U.S.C. 47101 et seq. are covered in FAA Order 5100.38A, AIP Handbook, October 24, 1989.

(2) Cooperative Research and Development Agreements (CRDA) authorized under 15 U.S.C. 3710a et seq. are covered under FAA Order 9550.6A "Technology Transfer Program."

b. *Types of Agreements.*

(1) *General.*

(a) As discussed above, FAA has broad general authority to use various agreements, other than procurement contracts, to obtain or provide services and supplies when necessary to accomplish the mission of FAA.

(b) Agreements may be made on such terms and conditions as the Administrator may consider appropriate –

(i) With or without reimbursement; *and*

(ii) With another Federal agency or instrumentality of the Federal government, a modal administration within the Department of Transportation, a state, local government, municipality, or other public entity, foreign governments, and private entities.

(c) Agreements are classified into five general categories as follows:

- (i) Interagency Agreements;
- (ii) Intra-agency Agreements;
- (iii) Other Transactions;
- (iv) Cooperative Agreements;
- (v) International Agreements; and
- (vi) Reimbursable Agreements and Other Transaction Reimbursable Agreements.

(2) *Interagency Agreements.* An interagency agreement is a written agreement between FAA and another Federal agency (as defined in Section 551(a) of Title 5 of the United States Code) where FAA agrees to receive from, or exchange supplies or services with, the other agency, and FAA funds are obligated. The requesting agency is the agency that needs the services, supplies or facilities; the servicing agency provides the services, supplies or facilities to the requesting agency. Interagency agreements under which FAA purchases services, supplies, or facilities through another Federal agency's contract is an interagency procurement, and AMS Guidance T3.8.1.A.4 "Interagency Procurement" must also be followed when placing this type of agreement.

(a) *OMB Circular A-76.* Where FAA requires the servicing agency to perform a commercial activity, the CO should conduct a cost comparison under OMB Circular A-76.

(b) *Joint Activities with Department of Defense (DOD).*

(i) DOD has the same exemptions from acquisition laws as are waived by the Administrator in the AMS when:

(A) The FAA and DOD are engaged in joint actions;

(B) DOD's contribution to the total cost of the activity is significant (more than ten (10) percent; and

(C) The purpose of the acquisition is to improve or replenish the national air traffic system. Joint actions include situations where both agencies share the same mission need and engage in joint activities to plan and implement the solution.

(ii) Where these three criteria are met, either FAA or DOD may conduct the acquisition using the policies of the AMS. (An example of a joint activity that meets these criteria is the STARS acquisition.)

(3) *Intra-agency Agreements.* An Intra-agency agreement is a written agreement between FAA and the Office of the Secretary of Transportation (OST) or another DOT operating administration. The FAA may use an Intra-agency agreement to provide services or supplies to, or receive services or supplies from or through OST or another DOT operating administration.

All Intra-agency agreements with OST and with the John A. Volpe Transportation Systems Center (Volpe Center) must use DOT Form 2300.1a. For Volpe Center Intra-agency agreements, the Statement of Work must be attached to the completed Form 2300.1a. Volpe Center Intra-agency agreements are otherwise processed in PRISM in accordance with detailed process instructions (*FAA only*).

(4) *Other Transactions.*

(a) An Other Transaction (OT) is typically an agreement between FAA and a non-Federal entity (either foreign or domestic) where FAA's purpose is to obtain a direct benefit that advances the agency's mission while also providing assistance to the general public. In some cases, including multi-party transactions, an OT provides the flexibility to develop partnering relationships with industry in meeting agency objectives. For example, FAA may enter into an OT agreement with another party to jointly develop a system, which FAA may eventually purchase through a procurement contract, but the system might also be purchased by airport authorities and foreign air traffic organizations. Another instance might be the construction of a fence, or the laying of cable that would benefit the airport authority (or the general public) and the FAA facility at the airport.

(b) In addition to joint funding agreements, in-kind contributions are allowed. The FAA is specifically authorized to use or accept the services, equipment, personnel, and facilities of non-Federal entities and to cooperate with them in the use of FAA's services, equipment, personnel, and facilities.

(c) OT agreements should be carefully drafted to avoid the inadvertent creation of a joint venture, which is separate legal entity formed to accomplish a discreet purpose. As a general rule, all parties to a joint venture agreement have joint and several liabilities for all claims arising under the agreement. In addition to other legal consequences, such agreements violate the Anti-deficiency Act and are prohibited.

(5) *Section 106 Cooperative Agreements Distinguished.* FAA also has broad authority under 49 U.S.C 106 to enter into cooperative agreements with any Federal and non-Federal entity on such terms and conditions as the Administrator may deem appropriate.

These agreements are used to provide assistance to a recipient and are more fully covered in Section 2. below.

(6) *International Agreements.*

(a) Agreements with foreign governments, or quasi-governmental entities are most commonly used to establish a technical assistance or research and development relationship between FAA and the foreign entity. In such instances, FAA's interest is in encouraging aviation safety outside the United States pursuant to 49 U.S.C. 40113(e).

(b) When a foreign government is a party to the transaction, the agreement is a government-to-government agreement governed by international law. The FAA must obtain Department of State (DOS) clearance on the negotiation and final terms of such agreements.

(c) In negotiating agreements with foreign private civil aviation authorities and other quasi-governmental entities, FAA consults with DOS on foreign policy issues that might arise under such agreements.

(d) The service team lead or CO should coordinate with the Office of International Aviation (API), which has organizational responsibility for coordinating the agreement with the DOS and the responsible U.S. embassy, and for transmitting the agreement to the foreign entity for signature.

(e) Department of State clearance is not required for agreements with private contractors; however, the service team may consult with API in appropriate circumstances.

(f) *Approval of Administrator.* The FAA Administrator or designee must approve equipment purchases by a foreign government or quasi-governmental entity under any FAA prime contract.

(7) *Reimbursable Agreements and Other Transaction Reimbursable Agreements* Agreements under which the FAA provides services, supplies, or facilities to another Federal agency or non-Federal entity is a reimbursable agreement, and AMS Guidance T3.8.1A.5 must be followed in addition to FAA Order 2500.35D "Reimbursable Agreements Covering Goods and Services Provided by FAA" dated August 30, 2007. See the FAA Financial Manual (*FAA only*) for reimbursable agreements, and approved templates.

c. *Requirements.*

(1) All agreements must be in writing and should contain a clear statement of requirements, applicable terms and conditions, the legal authority for the agreement,

termination and dispute resolution provisions, and where appropriate, a fund citation and payment provision.

(2) There is no requirement for competition or public announcement.

(3) *Justification.* Each agreement should be supported by a written statement describing the technical, program, or business reasons justifying the agreement. The procurement or real property contracting officer (CO), acting within the warrant authority commensurate with the total estimated dollar value of the requirement, approves the written rationale. Agreements valued at \$10 million or more are also subject to Chief Financial Officer (CFO) approval as required by AMS Guidance T3.2.1.4, and the justification must be included in the business case submitted as part of the CFO review package.

(4) Agreements with private entities and public authorities, other than Federal agencies, may take the form of a memorandum of understanding or memorandum of agreement. A memorandum of understanding is not legally binding on the Government, while a memorandum of agreement creates a legally binding commitment.

(5) *Content.* All agreements must be in writing and at a minimum contain:

(a) A clear statement of requirements;

(b) The term of the agreement;

(c) Procedure for modifications;

(d) The legal authority for the agreement;

(e) Termination and dispute resolution provisions;

(f) A fund citation and payment provision, if appropriate, or description of in-kind contribution of both parties; and

(g) Other terms and conditions, as appropriate, addressing such matters as intellectual property and indemnification provisions, and restoration and disposition of Government property.

(6) *Requirements for Agreements with Federal organizations.* All FAA agreements (including interagency and intra-agency agreements (except as noted below)) with Federal departments, agencies, or entities must include:

(a) The common agreement number and the funding source;

(b) The Treasury Account Symbol (TAS), or appropriation code, for both parties;

- (c) The Business Event Type Code (BETC) for both parties;
- (d) The effective date and duration of the agreement, to include the expiration of the funding source;
- (e) The amount and method of payment;
- (f) The Business Partner Network (BPN) number for both parties (which is equivalent to the Data Universal Numbering System (DUNS) Number for civilian agencies and the Department of Defense Activity Addressing Code (DoDAAC) for Defense agencies);
- (g) The method and frequency of performance (revenue and expenses) reporting;
- (h) If applicable, provisions for advance payments and method of liquidating such advance;
- (i) The parties' right to modify, cancel, or terminate the agreement;
- (j) A dispute resolution provision specifying that disputes must be resolved pursuant to the procedures and standards of the Business Rules for Intergovernmental Transactions described in the Treasury Financial Manual, Volume 1, Bulletin 2007-03, Section VII;
- (k) A cancellation provision specifying that if a buyer, or requesting agency, cancels the order, the seller, or providing agency, is authorized to collect costs incurred before cancellation of the order plus any termination costs; and
- (l) Point of contact information for CO, Contracting Officer's Technical Representative (COTR), and accounting office.

All FAA Intra-agency agreements with the OST and with the Volpe Center must use DOT Form 2300.1a in accordance with (b)(3) above.

d. *Authority*

(1) *General Authority.* 49 U.S.C. 106(l) (6) and/or 106(m) should be cited as general authority for all agreements, except where DOD exception applies, or where the agreement is with a foreign government to provide technical assistance. In Sections 49 U.S.C. 106(l) (6) and 106(m), Congress provided FAA with specific authority to "enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary to carry out the functions of the Administrator and the Administration" with any Federal or non-Federal entity "on such terms and conditions as the Administrator may consider appropriate."

Section 106(m) also clarifies that FAA may use or accept the services, equipment, personnel, and facilities of another Federal agency, as well as a private or public entity and may do so with or without reimbursement. That section also provides specific authority to the head of another Federal agency to make the services, equipment, personnel, and facilities of the Federal agency available to the Administrator. Additionally, the head of another Federal agency is authorized, notwithstanding any other provision of law, to transfer to, or receive from the FAA non-administrative supplies or equipment without reimbursement.

(2) *Joint Activities with DOD.* For joint activities between DOD and FAA described in subparagraph b. (2) (b) above, the legal authority in 49 U.S.C. 40121(c) (2) may also be used.

(3) *Technical Assistance Agreements with Foreign Governments.* For technical assistance agreements with foreign governments described in Section b. (6) above, the legal authority is 49 U.S.C. 40113(e).

(4) *Parallel Authorities.* The Federal Aviation Act contains other specific program authorities applicable to certain types of agreements, which may be cited as parallel authority where appropriate. Legal counsel should be consulted for additional guidance in selecting any of the listed authorities. (See Appendix Attachment 1, *Parallel Authorities.*)

e. *Format.*

(1) *Other Transaction - Memorandum of Agreement (MOA).* Where the FAA intends to create a legally binding commitment with a non-Federal entity through an “Other Transaction,” a Memorandum of Agreement should be executed by the parties. Appendix D of this section contains a sample format.

(2) *Other Transaction - Memorandum of Understanding (MOU).* A Memorandum of Understanding is an agreement to agree and is not legally binding on either party. MOUs are appropriate where the parties seek only to memorialize policies and procedures of mutual concern, or describe other relationships *that are not intended to create legally binding obligations.*

(3) *Interagency Agreement, Intra-agency Agreement, and Cooperative Agreement.* Appendix D of this section contains sample formats for these types of agreements (except for Intra-agency agreements with OST and with the Volpe Center that must use DOT Form 2300.1a as specified above in lieu of using the sample format for Intra-agency agreements).

(4) *Reimbursable Agreements (where FAA is the servicing agency)* AMS Guidance T3.8.1A.5 must be followed in addition to FAA Order 2500.35D "Reimbursable Agreements Covering Goods and Services Provided by FAA" dated August 30, 2007. See the FAA Financial Manual (**FAA only**) for reimbursable agreements, and approved templates.

f. *Funding.*

(1) *General.* Funds must be obligated to an agreement within the period of their availability consistent with the purposes of the appropriation. Additionally, when FAA funds are obligated under an agreement with a servicing agency, the obligation maintains the same impact and restrictions when it is transferred to the servicing agency. For example, funds from the FAA's Operations, RE&D and F&E accounts may be used only for the purposes of the appropriation and do not lose their character once transferred to the servicing agency. Likewise, when FAA is the servicing agency, an obligation against an appropriation of a requesting agency maintains the same impact and restrictions as the appropriation of origin.

(2) *Economy Act.* Where the Economy Act is cited, funds must be obligated by the servicing agency **prior to expiration**, i.e. if the servicing agency is to perform the work itself, performance of the work must begin prior to that date. If the agency is to acquire the product or service through contract, the contract must have been executed and funds obligated to the contract prior to their expiration date. Any funds not properly obligated by the servicing agency must be returned to the requesting agency prior to their expiration date.

(3) *Military Interdepartmental Purchase Request (MIPR).* The DOD uses MIPRs as the primary document to order goods or services from the FAA. The MIPR includes a description of the work or services DOD is requesting from the FAA, the unit price, the total price, and a fund cite. The FAA CO or other FAA official designated by their Directorate may accept the MIPR on behalf of the FAA. The person authorized to accept the MIPR should ensure the MIPR contains a clear statement of requirements before accepting the MIPR on behalf of the FAA. The DOD may use MIPR (DD Form 448) and Acceptance of MIPR (DD 448-2) to order goods from FAA. The Acceptance of MIPR Form specifies whether the identified work will be provided through reimbursement (Economy Act) or by the direct citation of funds (based on other authority) or a combination of both. Where FAA agrees to an MIPR based on reimbursement pursuant to the Economy Act, then the rules in subparagraph f.(2) above apply. If FAA accepts the funds on a direct cite basis, DOD will not record the funds as obligated until FAA provides DOD with a contract or other obligating document that cites the funds.

(4) *Other Situations.* Where the Economy Act is not cited as authority for FAA, funds are obligated at the time FAA signs the agreement and places funds on the agreement.

(5) *Disposition of Funds Received.* Funds received under an Agreement shall be credited to the appropriation from which the expenses were incurred, unless otherwise required by one of the specific program authorities cited in Paragraph D, Appendix Attachment 1, *Parallel Authorities*, or current and prior appropriation acts.

g. *Approval and Execution.*

(1) *Review and Approval.* The Administrator has delegated authority to award contracts, cooperative agreements and other transactions to the FAA Acquisition Executive (FAE); provided that the Administrator is given an opportunity to review any grant or cooperative agreement (other than those awarded under the preexisting authority contained in 49 U.S.C. 44912, 44505, and 47101, et seq.), or other transaction with a total cumulative value equal to, or greater than \$10 million, or which is of significant congressional interest.

The FAE subsequently redelegate this authority to the Chief of Contracting Office (COCO) for headquarters, service areas, and centers. The COCO may redelegate the authority to other qualified individuals, such as regional administrators, center directors, and purchase card program manager. Except for the purchase card program manager, the individuals receiving delegated authority from the COCO may not redelegate their authority.

The following factors, which are not all inclusive, typically indicate that the Administrator's review is required:

- (a) The total cumulative value equals or exceeds \$10 million; or
- (b) The total cumulative value is less than \$10 million, but the following conditions are present:
 - (i) The transaction is the subject of one or more congressional inquiries; or
 - (ii) The transaction is described in a statute, committee report, or agency budget; and
 - (iii) Either the schedule, performance, or estimated cost baseline will be significantly breached by 20% or more.

(2) *Execution of the Agreement.* The CO, or other employee who has been delegated such authority, executes the agreement on behalf of the FAA, provided that the estimated dollar value of the agreement does not exceed that individual's delegated authority.

h. *Legal Review.* All agreements require legal review prior to execution. Ideally, legal counsel should be involved at the early stages of the award process to assist with selection of the appropriate legal instrument, drafting appropriate terms and conditions, and other legal issues. AGC-7 in consultation with AGC-500 is responsible for providing legal review of all international government to government agreements and agreements with international quasi-governmental entities. In the Europe, Africa and Middle East (EAME) Region, AEU-7 provides legal review for agreements with foreign governments and quasi-governmental entities. AGC-500 and regional counsel are responsible for providing legal review on all other agreements and will consult with AGC-7 on any agreements that may have foreign policy implications.

i. *Chief Financial Officer Approval.* Agreements valued at \$10 Million or more must be approved by the Chief Financial Officer (CFO) as required by AMS Guidance T3.2.1.4. The package submitted for CFO approval must include a justification as described in paragraph (c)(3) above as part of the business case. The justification must include a market analysis and supporting documentation for all alternatives considered.

j. *Disputes.* Where possible, disputes will be resolved by informal discussion between the parties. In the event the parties are unable to resolve any disagreement through good faith negotiations, the dispute may be resolved by the FAA Administrator, or designee whose decision is not subject to further administrative review and, to the extent permitted by law, is final and binding (*see e.g.* 49 U.S.C. 46110).

New Content: Procurement Guidance:

T3.8.1 Agreements, Cooperative Agreements, Gifts & Bequests

Agreements, Cooperative Agreements, Gifts and Bequests

Section 1 : Agreements

a. *Applicability.* This section applies to interagency agreements, intra-agency agreements, other transactions, cooperative agreements, and international agreements for services, supplies (including construction) and real property to the extent authorized by law. This section **does not** apply to Airport Improvement Program grants and cooperative research and development agreements, which are governed by other directives, as follows:

(1) Airport Improvement (AIP) Grants authorized under 49 U.S.C. 47101 et seq. are covered in FAA Order 5100.38A, AIP Handbook, October 24, 1989.

(2) Cooperative Research and Development Agreements (CRDA) authorized under 15 U.S.C. 3710a et seq. are covered under FAA Order 9550.6A "Technology Transfer Program."

b. *Types of Agreements.*

(1) *General.*

(a) As discussed above, FAA has broad general authority to use various agreements, other than procurement contracts, to obtain or provide services and supplies when necessary to accomplish the mission of FAA.

(b) Agreements may be made on such terms and conditions as the Administrator may consider appropriate

(i) With or without reimbursement; *and*

(ii) With another Federal agency or instrumentality of the Federal government, a modal administration within the Department of

Transportation, a state, local government, municipality, or other public entity, foreign governments, and private entities.

(c) Agreements are classified into six general categories as follows:

- (i) Interagency Agreements;
- (ii) Intra-agency Agreements;
- (iii) Other Transactions;
- (iv) Cooperative Agreements;
- (v) International Agreements; and
- (vi) Reimbursable Agreements and Other Transaction Reimbursable Agreements.

(2) *Interagency Agreements.* An interagency agreement is a written agreement between FAA and another Federal agency (as defined in Section 551(a) of Title 5 of the United States Code) where FAA agrees to receive from, or exchange supplies or services with, the other agency, and FAA funds are obligated. The requesting agency is the agency that needs the services, supplies or facilities; the servicing agency provides the services, supplies or facilities to the requesting agency. Interagency agreements under which FAA purchases services, supplies, or facilities through another Federal agency's contract is an interagency procurement, and AMS Guidance T3.8.1.A.4 "Interagency Procurement" must also be followed when placing this type of agreement.

(a) *OMB Circular A-76.* Where FAA requires the servicing agency to perform a commercial activity, the CO should conduct a cost comparison under OMB Circular A-76.

(b) *Joint Activities with Department of Defense (DOD).*

(i) DOD has the same exemptions from acquisition laws as are waived by the Administrator in the AMS when:

(A) The FAA and DOD are engaged in joint actions;

(B) DOD's contribution to the total cost of the activity is significant (more than ten (10) percent; and

(C) The purpose of the acquisition is to improve or replenish the national air traffic system. Joint actions include situations where both agencies share the same mission need and engage in joint activities to plan and implement the solution.

(ii) Where these three criteria are met, either FAA or DOD may conduct the acquisition using the policies of the AMS.

(3) *Intra-agency Agreements.* An Intra-agency agreement is a written agreement between FAA and the Office of the Secretary of Transportation (OST) or another DOT operating administration. The FAA may use an Intra-agency agreement to provide services or supplies to, or receive services or supplies from or through OST or another DOT operating administration.

All Intra-agency agreements with OST and with the John A. Volpe Transportation Systems Center (Volpe Center) must use DOT Form 2300.1a. For Volpe Center Intra-agency agreements, the statement of work must be attached to the completed Form 2300.1a. Volpe Center Intra-agency agreements are otherwise processed in PRISM in accordance with detailed business process instructions (*FAA only*).

(4) *Other Transactions.*

(a) An Other Transaction (OT) is typically an agreement between FAA and a non-Federal entity (either foreign or domestic) where FAA's purpose is to obtain a direct benefit that advances the agency's mission while also providing assistance to the general public. In some cases, including multi-party transactions, an OT provides the flexibility to develop partnering relationships with industry in meeting agency objectives. For example, FAA may enter into an OT agreement with another party to jointly develop a system, which FAA may eventually purchase through a procurement contract, but the system might also be purchased by airport authorities and foreign air traffic organizations. Another instance might be the construction of a fence, or the laying of cable that would benefit the airport authority (or the general public) and the FAA facility at the airport.

(b) In addition to joint funding agreements, in-kind contributions are allowed. The FAA is specifically authorized to use or accept the services, equipment, personnel, and facilities of non-Federal entities and to cooperate with them in the use of FAA's services, equipment, personnel, and facilities.

(c) OT agreements should be carefully drafted to avoid the inadvertent creation of a joint venture, which is separate legal entity formed to accomplish a discreet purpose. As a general rule, all parties to a joint venture agreement have joint and several liabilities for all claims arising under the agreement. In addition to other legal consequences, such agreements violate the Anti-deficiency Act and are prohibited.

(5) *Section 106 Cooperative Agreements Distinguished.* FAA also has broad authority under 49 U.S.C 106 to enter into cooperative agreements with any Federal and non-Federal entity on such terms and conditions as the Administrator may deem appropriate. These agreements are used to provide assistance to a recipient and are more fully covered in Section 2. below.

(6) *International Agreements.*

(a) Agreements with foreign governments, or quasi-governmental entities are most commonly used to establish a technical assistance or research and development relationship between FAA and the foreign entity. In such instances, FAA's interest is in encouraging aviation safety outside the United States pursuant to 49 U.S.C. 40113(e).

(b) When a foreign government is a party to the transaction, the agreement is a government-to-government agreement governed by international law. The FAA must obtain Department of State (DOS) clearance on the negotiation and final terms of such agreements.

(c) In negotiating agreements with foreign private civil aviation authorities and other quasi-governmental entities, FAA consults with DOS on foreign policy issues that might arise under such agreements.

(d) The program office lead or CO should coordinate with the Office of International Aviation (API), which has organizational responsibility for coordinating the agreement with the DOS and the responsible U.S. embassy, and for transmitting the agreement to the foreign entity for signature.

(e) Department of State clearance is not required for agreements with private contractors; however, the program office lead may consult with API in appropriate circumstances.

(f) *Approval of Administrator.* The FAA Administrator or designee must approve equipment purchases by a foreign government or quasi-governmental entity under any FAA prime contract.

(7) *Reimbursable Agreements and Other Transaction Reimbursable Agreements.* Agreements under which FAA provides services, supplies, or facilities to another Federal agency or non-Federal entity is a reimbursable agreement, and AMS Guidance T3.8.1A.5 must be followed in addition to FAA Order 2500.35D "Reimbursable Agreements Covering Goods and Services Provided by FAA" dated August 30, 2007. See the FAA Financial Manual (*FAA only*) for reimbursable agreements, and approved templates.

c. *Requirements.*

(1) All agreements must be in writing and should contain a clear statement of requirements, applicable terms and conditions, the legal authority for the agreement, termination and dispute resolution provisions, and where appropriate, a fund citation and payment provision.

(2) There is no requirement for competition or public announcement.

(3) *Justification.* Each agreement should be supported by a written statement describing the technical, program, or business reasons justifying the agreement. The procurement or real property contracting officer (CO), acting within the warrant authority commensurate with the total estimated dollar value of the requirement, approves the written rationale. Agreements valued at \$10 million or more are also subject to Chief Financial Officer (CFO) approval as required by AMS Guidance T3.2.1.4, and the justification must be included in the business case submitted as part of the CFO review package.

(4) Agreements with private entities and public authorities, other than Federal agencies, may take the form of a memorandum of understanding or memorandum of agreement. A memorandum of understanding is not legally binding on the Government, while a memorandum of agreement creates a legally binding commitment.

(5) *Content.* All agreements must be in writing and at a minimum contain:

- (a) A clear statement of requirements;
- (b) The term of the agreement;
- (c) Procedure for modifications;
- (d) The legal authority for the agreement;
- (e) Termination and dispute resolution provisions;
- (f) A fund citation and payment provision, if appropriate, or description of in-kind contribution of both parties; and
- (g) Other terms and conditions, as appropriate, addressing such matters as intellectual property and indemnification provisions, and restoration and disposition of Government property.

(6) *Requirements for Agreements with Federal organizations.* All FAA agreements (including interagency and intra-agency agreements (except as noted below)) with Federal departments, agencies, or entities must include:

- (a) The common agreement number and the funding source;
- (b) The Treasury Account Symbol (TAS), or appropriation code, for both parties;
- (c) The Business Event Type Code (BETC) for both parties;
- (d) The effective date and duration of the agreement, to include the expiration of the funding source;
- (e) The amount and method of payment;

(f) The Business Partner Network (BPN) number for both parties (which is equivalent to the Data Universal Numbering System (DUNS) Number for civilian agencies and the Department of Defense Activity Addressing Code (DoDAAC) for Defense agencies);

(g) The method and frequency of performance (revenue and expenses) reporting;

(h) If applicable, provisions for advance payments and method of liquidating such advance;

(i) The parties' right to modify, cancel, or terminate the agreement;

(j) A dispute resolution provision specifying that disputes must be resolved pursuant to the procedures and standards of the Business Rules for Intergovernmental Transactions described in the Treasury Financial Manual, Volume 1, Bulletin 2007-03, Section VII;

(k) A cancellation provision specifying that if a buyer, or requesting agency, cancels the order, the seller, or providing agency, is authorized to collect costs incurred before cancellation of the order plus any termination costs; and

(l) Point of contact information for CO, Contracting Officer's Representative (COR), and accounting office.

All FAA Intra-agency agreements with the OST and with the Volpe Center must use DOT Form 2300.1a in accordance with (b)(3) above.

d. *Authority.*

(1) *General Authority.* 49 U.S.C. 106(l) (6) and/or 106(m) should be cited as general authority for all agreements, except where DOD exception applies, or where the agreement is with a foreign government to provide technical assistance. In Sections 49 U.S.C. 106(l) (6) and 106(m), Congress provided FAA with specific authority to "enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary to carry out the functions of the Administrator and the Administration" with any Federal or non-Federal entity "on such terms and conditions as the Administrator may consider appropriate."

Section 106(m) also clarifies that FAA may use or accept the services, equipment, personnel, and facilities of another Federal agency, as well as a private or public entity and may do so with or without reimbursement. That section also provides specific authority to the head of another Federal agency to make the services, equipment, personnel, and facilities of the Federal agency available to the Administrator. Additionally, the head of another Federal agency is authorized, notwithstanding any other provision of law, to transfer to, or receive from the FAA non-administrative supplies or equipment without reimbursement.

(2) *Joint Activities with DOD.* For joint activities between DOD and FAA described in subparagraph b.(2)(b) above, the legal authority in 49 U.S.C. 40121(c)(2) may also be used.

(3) *Technical Assistance Agreements with Foreign Governments.* For technical assistance agreements with foreign governments described in Section b.(6) above, the legal authority is 49 U.S.C. 40113(e).

(4) *Parallel Authorities.* The Federal Aviation Act contains other specific program authorities applicable to certain types of agreements, which may be cited as parallel authority where appropriate. Legal counsel should be consulted for additional guidance in selecting any of the listed authorities. (See Appendix Attachment 1, *Parallel Authorities.*)

e. *Format.*

(1) *Other Transaction - Memorandum of Agreement (MOA).* Where the FAA intends to create a legally binding commitment with a non-Federal entity through an “Other Transaction,” a Memorandum of Agreement should be executed by the parties. Appendix D of this section contains a sample format.

(2) *Other Transaction - Memorandum of Understanding (MOU).* A Memorandum of Understanding is an agreement to agree and is not legally binding on either party. MOUs are appropriate where the parties seek only to memorialize policies and procedures of mutual concern, or describe other relationships *that are not intended to create legally binding obligations.*

(3) *Interagency Agreement, Intra-agency Agreement, and Cooperative Agreement.* Appendix D of this section contains sample formats for these types of agreements (except for Intra-agency agreements with OST and with the Volpe Center that must use DOT Form 2300.1a as specified above in lieu of using the sample format for Intra-agency agreements).

(4) *Reimbursable Agreements (where FAA is the servicing agency)* AMS Guidance T3.8.1A.5 must be followed in addition to FAA Order 2500.35D "Reimbursable Agreements Covering Goods and Services Provided by FAA" dated August 30, 2007. See the FAA Financial Manual (*FAA only*) for reimbursable agreements, and approved templates.

f. *Funding.*

(1) *General.* Funds must be obligated to an agreement within the period of their availability consistent with the purposes of the appropriation. Additionally, when FAA funds are obligated under an agreement with a servicing agency, the obligation maintains the same impact and restrictions when it is transferred to the servicing agency. For example, funds from the FAA's Operations, RE&D and F&E accounts may be used only for the purposes of the appropriation and do not lose their character once transferred to

the servicing agency. Likewise, when FAA is the servicing agency, an obligation against an appropriation of a requesting agency maintains the same impact and restrictions as the appropriation of origin.

(2) *Economy Act*. Where the Economy Act is cited, funds must be obligated by the servicing agency **prior to expiration**, i.e. if the servicing agency is to perform the work itself, performance of the work must begin prior to that date. If the agency is to acquire the product or service through contract, the contract must have been executed and funds obligated to the contract prior to their expiration date. Any funds not properly obligated by the servicing agency must be returned to the requesting agency prior to their expiration date.

(3) *Military Interdepartmental Purchase Request (MIPR)*. The DOD uses MIPRs as the primary document to order goods or services from the FAA. The MIPR includes a description of the work or services DOD is requesting from the FAA, the unit price, the total price, and a fund cite. The FAA CO or other FAA official designated by their Directorate may accept the MIPR on behalf of the FAA. The person authorized to accept the MIPR should ensure the MIPR contains a clear statement of requirements before accepting the MIPR on behalf of the FAA. The DOD may use MIPR (DD Form 448) and Acceptance of MIPR (DD 448-2) to order goods from FAA. The Acceptance of MIPR Form specifies whether the identified work will be provided through reimbursement (Economy Act) or by the direct citation of funds (based on other authority) or a combination of both. Where FAA agrees to an MIPR based on reimbursement pursuant to the Economy Act, then the rules in subparagraph f.(2) above apply. If FAA accepts the funds on a direct cite basis, DOD will not record the funds as obligated until FAA provides DOD with a contract or other obligating document that cites the funds.

(4) *Other Situations*. Where the Economy Act is not cited as authority for FAA, funds are obligated at the time FAA signs the agreement and places funds on the agreement.

(5) *Disposition of Funds Received*. Funds received under an Agreement shall be credited to the appropriation from which the expenses were incurred, unless otherwise required by one of the specific program authorities cited in Paragraph D, Appendix Attachment 1, *Parallel Authorities*, or current and prior appropriation acts.

g. Approval and Execution.

(1) *Review and Approval*. The Administrator has delegated authority to award contracts, cooperative agreements and other transactions to the FAA Acquisition Executive (FAE); provided that the Administrator is given an opportunity to review any grant or cooperative agreement (other than those awarded under the preexisting authority contained in 49 U.S.C. 44912, 44505, and 47101, et seq.), or other transaction with a total cumulative value equal to, or greater than \$10 million, or which is of significant congressional interest.

The FAE subsequently redelegate this authority to the Chief of Contracting Office (COCO) for headquarters, service areas, and centers. The COCO may redelegate the authority to other qualified individuals, such as regional administrators, center directors, and purchase card program manager. Except for the purchase card program manager, the individuals receiving delegated authority from the COCO may not redelegate their authority.

The following factors, which are not all inclusive, typically indicate that the Administrator's review is required:

- (a) The total cumulative value equals or exceeds \$10 million; or
- (b) The total cumulative value is less than \$10 million, but the following conditions are present:
 - (i) The transaction is the subject of one or more congressional inquiries; or
 - (ii) The transaction is described in a statute, committee report, or agency budget; and
 - (iii) Either the schedule, performance, or estimated cost baseline will be significantly breached by 20% or more.

(2) *Execution of the Agreement.* The CO, or other employee who has been delegated such authority, executes the agreement on behalf of the FAA, provided that the estimated dollar value of the agreement does not exceed that individual's delegated authority.

h. *Legal Review.* All agreements require legal review prior to execution. Ideally, legal counsel should be involved at the early stages of the award process to assist with selection of the appropriate legal instrument, drafting appropriate terms and conditions, and other legal issues. AGC-7 in consultation with AGC-500 is responsible for providing legal review of all international government to government agreements and agreements with international quasi-governmental entities. In the Europe, Africa and Middle East (EAME) Region, AEU-7 provides legal review for agreements with foreign governments and quasi-governmental entities. AGC-500 and regional counsel are responsible for providing legal review on all other agreements and will consult with AGC-7 on any agreements that may have foreign policy implications.

i. *Chief Financial Officer Approval.* Agreements valued at \$10 Million or more must be approved by the Chief Financial Officer (CFO) as required by AMS Guidance T3.2.1.4. The package submitted for CFO approval must include a justification as described in paragraph (c)(3) above as part of the business case. The justification must include a market analysis and supporting documentation for all alternatives considered.

j. *Disputes.* Where possible, disputes will be resolved by informal discussion between the parties. In the event the parties are unable to resolve any disagreement through good faith negotiations, the dispute may be resolved by the FAA Administrator, or designee whose decision is not subject to further administrative review and, to the extent permitted by law, is final and binding (see e.g. 49 U.S.C. 46110).

Red Line Content: Procurement Guidance:

*T3.8.1 Agreements, Cooperative Agreements, Gifts & Bequests
Agreements, Cooperative Agreements, Gifts and Bequests*

Section 1 : Agreements

a. *Applicability.* This section applies to interagency agreements, intra-agency agreements, other transactions, cooperative agreements, and international agreements for services, supplies (including construction) and real property to the extent authorized by law. This section **does not** apply to Airport Improvement Program grants and cooperative research and development agreements, which are governed by other directives, as follows:

(1) Airport Improvement (AIP) Grants authorized under 49 U.S.C. 47101 et seq. are covered in FAA Order 5100.38A, AIP Handbook, October 24, 1989.

(2) Cooperative Research and Development Agreements (CRDA) authorized under 15 U.S.C. 3710a et seq. are covered under FAA Order 9550.6A "Technology Transfer Program."

b. *Types of Agreements.*

(1) *General.*

(a) As discussed above, FAA has broad general authority to use various agreements, other than procurement contracts, to obtain or provide services and supplies when necessary to accomplish the mission of FAA.

(b) Agreements may be made on such terms and conditions as the Administrator may consider appropriate—

(i) With or without reimbursement; *and*

(ii) With another Federal agency or instrumentality of the Federal government, a modal administration within the Department of Transportation, a state, local government, municipality, or other public entity, foreign governments, and private entities.

(c) Agreements are classified into ~~five~~ six general categories as follows:

(i) Interagency Agreements;

- (ii) Intra-agency Agreements;
- (iii) Other Transactions;
- (iv) Cooperative Agreements;
- (v) International Agreements; and
- (vi) Reimbursable Agreements and Other Transaction Reimbursable Agreements.

(2) *Interagency Agreements.* An interagency agreement is a written agreement between FAA and another Federal agency (as defined in Section 551(a) of Title 5 of the United States Code) where FAA agrees to receive from, or exchange supplies or services with, the other agency, and FAA funds are obligated. The requesting agency is the agency that needs the services, supplies or facilities; the servicing agency provides the services, supplies or facilities to the requesting agency. Interagency agreements under which FAA purchases services, supplies, or facilities through another Federal agency's contract is an interagency procurement, and AMS Guidance T3.8.1.A.4 "Interagency Procurement" must also be followed when placing this type of agreement.

(a) *OMB Circular A-76.* Where FAA requires the servicing agency to perform a commercial activity, the CO should conduct a cost comparison under OMB Circular A-76.

(b) *Joint Activities with Department of Defense (DOD).*

(i) DOD has the same exemptions from acquisition laws as are waived by the Administrator in the AMS when:

(A) The FAA and DOD are engaged in joint actions;

(B) DOD's contribution to the total cost of the activity is significant (more than ten (10) percent; and

(C) The purpose of the acquisition is to improve or replenish the national air traffic system. Joint actions include situations where both agencies share the same mission need and engage in joint activities to plan and implement the solution.

(ii) Where these three criteria are met, either FAA or DOD may conduct the acquisition using the policies of the AMS. ~~(An example of a joint activity that meets these criteria is the STARS acquisition.)~~

(3) *Intra-agency Agreements.* An Intra-agency agreement is a written agreement between FAA and the Office of the Secretary of Transportation (OST) or another DOT

operating administration. The FAA may use an Intra-agency agreement to provide services or supplies to, or receive services or supplies from or through OST or another DOT operating administration.

All Intra-agency agreements with OST and with the John A. Volpe Transportation Systems Center (Volpe Center) must use DOT Form 2300.1a. For Volpe Center Intra-agency agreements, the ~~Statement~~*statement* of ~~Work~~*work* must be attached to the completed Form 2300.1a. Volpe Center Intra-agency agreements are otherwise processed in PRISM in accordance with detailed *business* process instructions (*FAA only*).

(4) *Other Transactions.*

(a) An Other Transaction (OT) is typically an agreement between FAA and a non-Federal entity (either foreign or domestic) where FAA's purpose is to obtain a direct benefit that advances the agency's mission while also providing assistance to the general public. In some cases, including multi-party transactions, an OT provides the flexibility to develop partnering relationships with industry in meeting agency objectives. For example, FAA may enter into an OT agreement with another party to jointly develop a system, which FAA may eventually purchase through a procurement contract, but the system might also be purchased by airport authorities and foreign air traffic organizations. Another instance might be the construction of a fence, or the laying of cable that would benefit the airport authority (or the general public) and the FAA facility at the airport.

(b) In addition to joint funding agreements, in-kind contributions are allowed. The FAA is specifically authorized to use or accept the services, equipment, personnel, and facilities of non-Federal entities and to cooperate with them in the use of FAA's services, equipment, personnel, and facilities.

(c) OT agreements should be carefully drafted to avoid the inadvertent creation of a joint venture, which is separate legal entity formed to accomplish a discreet purpose. As a general rule, all parties to a joint venture agreement have joint and several liabilities for all claims arising under the agreement. In addition to other legal consequences, such agreements violate the Anti-deficiency Act and are prohibited.

(5) *Section 106 Cooperative Agreements Distinguished.* FAA also has broad authority under 49 U.S.C 106 to enter into cooperative agreements with any Federal and non-Federal entity on such terms and conditions as the Administrator may deem appropriate. These agreements are used to provide assistance to a recipient and are more fully covered in Section 2. below.

(6) *International Agreements.*

(a) Agreements with foreign governments, or quasi-governmental entities are most commonly used to establish a technical assistance or research and development relationship between FAA and the foreign entity. In such instances, FAA's interest is in encouraging aviation safety outside the United States pursuant to 49 U.S.C. 40113(e).

(b) When a foreign government is a party to the transaction, the agreement is a government-to-government agreement governed by international law. The FAA must obtain Department of State (DOS) clearance on the negotiation and final terms of such agreements.

(c) In negotiating agreements with foreign private civil aviation authorities and other quasi-governmental entities, FAA consults with DOS on foreign policy issues that might arise under such agreements.

(d) The ~~service team~~ program office lead or CO should coordinate with the Office of International Aviation (API), which has organizational responsibility for coordinating the agreement with the DOS and the responsible U.S. embassy, and for transmitting the agreement to the foreign entity for signature.

(e) Department of State clearance is not required for agreements with private contractors; however, the ~~service~~program ~~team~~office lead may consult with API in appropriate circumstances.

(f) *Approval of Administrator.* The FAA Administrator or designee must approve equipment purchases by a foreign government or quasi-governmental entity under any FAA prime contract.

(7) *Reimbursable Agreements and Other Transaction Reimbursable Agreements.* Agreements under which ~~the~~ FAA provides services, supplies, or facilities to another Federal agency or non-Federal entity is a reimbursable agreement, and AMS Guidance T3.8.1A.5 must be followed in addition to FAA Order 2500.35D "Reimbursable Agreements Covering Goods and Services Provided by FAA" dated August 30, 2007. See the FAA Financial Manual (*FAA only*) for reimbursable agreements, and approved templates.

c. Requirements.

(1) All agreements must be in writing and should contain a clear statement of requirements, applicable terms and conditions, the legal authority for the agreement, termination and dispute resolution provisions, and where appropriate, a fund citation and payment provision.

(2) There is no requirement for competition or public announcement.

(3) *Justification.* Each agreement should be supported by a written statement describing the technical, program, or business reasons justifying the agreement. -- The procurement or real property contracting officer (CO), acting within the warrant authority commensurate with the total estimated dollar value of the requirement, approves the written rationale. Agreements valued at \$10 million or more are also subject to Chief Financial Officer (CFO) approval as required by AMS Guidance T3.2.1.4, and the justification must be included in the business case submitted as part of the CFO review package.

(4) Agreements with private entities and public authorities, other than Federal agencies, may take the form of a memorandum of understanding or memorandum of agreement. A memorandum of understanding is not legally binding on the Government, while a memorandum of agreement creates a legally binding commitment.

(5) *Content.* All agreements must be in writing and at a minimum contain:

- (a) A clear statement of requirements;
- (b) The term of the agreement;
- (c) Procedure for modifications;
- (d) The legal authority for the agreement;
- (e) Termination and dispute resolution provisions;
- (f) A fund citation and payment provision, if appropriate, or description of in-kind contribution of both parties; and
- (g) Other terms and conditions, as appropriate, addressing such matters as intellectual property and indemnification provisions, and restoration and disposition of Government property.

(6) *Requirements for Agreements with Federal organizations.* All FAA agreements (including interagency and intra-agency agreements (except as noted below)) with Federal departments, agencies, or entities must include:

- (a) The common agreement number and the funding source;
- (b) The Treasury Account Symbol (TAS), or appropriation code, for both parties;
- (c) The Business Event Type Code (BETC) for both parties;
- (d) The effective date and duration of the agreement, to include the expiration of the funding source;

- (e) The amount and method of payment;
- (f) The Business Partner Network (BPN) number for both parties (which is equivalent to the Data Universal Numbering System (DUNS) Number for civilian agencies and the Department of Defense Activity Addressing Code (DoDAAC) for Defense agencies);
- (g) The method and frequency of performance (revenue and expenses) reporting;
- (h) If applicable, provisions for advance payments and method of liquidating such advance;
- (i) The parties' right to modify, cancel, or terminate the agreement;
- (j) A dispute resolution provision specifying that disputes must be resolved pursuant to the procedures and standards of the Business Rules for Intergovernmental Transactions described in the Treasury Financial Manual, Volume 1, Bulletin 2007-03, Section VII;
- (k) A cancellation provision specifying that if a buyer, or requesting agency, cancels the order, the seller, or providing agency, is authorized to collect costs incurred before cancellation of the order plus any termination costs; and
- (l) Point of contact information for CO, Contracting Officer's ~~Technical~~ Representative (~~COTR~~**COR**), and accounting office.

All FAA Intra-agency agreements with the OST and with the Volpe Center must use DOT Form 2300.1a in accordance with (b)(3) above.

d. *Authority.*

(1) *General Authority.* 49 U.S.C. 106(l) (6) and/or 106(m) should be cited as general authority for all agreements, except where DOD exception applies, or where the agreement is with a foreign government to provide technical assistance. In Sections 49 U.S.C. 106(l) (6) and 106(m), Congress provided FAA with specific authority to "enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary to carry out the functions of the Administrator and the Administration" with any Federal or non-Federal entity "on such terms and conditions as the Administrator may consider appropriate."

Section 106(m) also clarifies that FAA may use or accept the services, equipment, personnel, and facilities of another Federal agency, as well as a private or public entity and may do so with or without reimbursement. That section also provides specific authority to the head of another Federal agency to make the services, equipment, personnel, and facilities of the Federal agency available to the Administrator. Additionally, the head of another Federal agency is authorized, notwithstanding any other

provision of law, to transfer to, or receive from the FAA non-administrative supplies or equipment without reimbursement.

(2) *Joint Activities with DOD.* For joint activities between DOD and FAA described in subparagraph b.-(2)-(b) above, the legal authority in 49 U.S.C. 40121(c) (2) may also be used.

(3) *Technical Assistance Agreements with Foreign Governments.* For technical assistance agreements with foreign governments described in Section b.-(6) above, the legal authority is 49 U.S.C. 40113(e).

(4) *Parallel Authorities.* The Federal Aviation Act contains other specific program authorities applicable to certain types of agreements, which may be cited as parallel authority where appropriate. Legal counsel should be consulted for additional guidance in selecting any of the listed authorities. (See Appendix Attachment 1, *Parallel Authorities.*)

e. *Format.*

(1) *Other Transaction - Memorandum of Agreement (MOA).* Where the FAA intends to create a legally binding commitment with a non-Federal entity through an “Other Transaction,” a Memorandum of Agreement should be executed by the parties. Appendix D of this section contains a sample format.

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