

## Procurement Guidance - (7/2021)

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### **T3.8.8 Real Property Special Categories of Contracting** Added 9/2020

#### **A Real Property Purchases** Added 9/2020

- 1 **Authority.** Pursuant to 49 USC § 106 (n), the FAA is authorized to purchase real property. Title to real property purchases shall be held by the Government of the United States.
- 2 **Lease versus Purchase Analysis.** A lease versus purchase analysis must be made for all real property purchases and lease renewals. The FAA should only purchase real property interests that are in the best interest of the FAA, and at fair and reasonable prices. The lease versus purchase analysis is used to determine the acquisition strategy that provides the best value to the FAA. If cost is not a determining factor for real property acquisitions and a landowner is unwilling to allow FAA use of the property or demands unreasonable lease terms that forces a condemnation proceeding, a lease versus purchase analysis is not required.

The FAA should only purchase real property when one or more of the following exist:

- 1) It is economically more beneficial to own and manage the property;
  - 2) There is a long-term need for the property; or
  - 3) When otherwise in the best interest of the FAA.
- 3 **Real Property Purchase Determination.** To determine whether the purchase is in the best interest of or most advantageous to the FAA, the following factors should be considered by the requiring service organization:
    - 1) Whether the site will contribute to economy and efficiency in construction, maintenance, and operation of the individual building;
    - 2) How the proposed site relates to the Government's total space needs in the community;
    - 3) Maximum utilization of Government-owned land (including excess land) whenever it is adequate, economically adaptable to requirements and properly located;
    - 4) A site adjacent to or in the proximity of an existing Federal building that is well located and is to be retained for long-term occupancy;
    - 5) The environmental condition of proposed sites prior to purchase. The sites must be free from contamination, unless it is otherwise determined to be in the best interest of the Government to purchase a contaminated site (e.g., reuse of a site

under an established “Brownfields” program).

- 6) Purchase options to secure the future availability of a site;
- 7) All applicable location policies in 41 CFR § 102-83; and
- 8) Availability of funding.

## **B Leases** Added 9/2020

### **1 Lease Authority** Added 9/2020

*General.* The Administrator of the Federal Aviation Administration is authorized by 49 U.S.C. Section 40110 (b)(2)(A) to lease an interest in real property for not more than 20 years, without regard to FAA annual appropriations. The Administrator’s authority to lease real property does not allow lease terms in excess of 20 years, including all renewal options. The Administrator has delegated leasing authority to the FAA Acquisition Executive, who further delegated the authority by issuing warrants to real estate COs.

The FAA has authority to enter into "firm-term" leases without violating the Anti-Deficiency Act. See AMS Guidance T3.8.8.1.A.3 for additional information on Firm Term Leases.

### **2 Types of Leases and Applicability** Added 9/2020

- a. ***New leases*** are defined as leases with new terms and conditions and new lease contract numbers, applicable for either a new requirement or to replace an existing expiring lease in a new location.
- b. ***Succeeding leases*** are secured to provide for the FAA continued occupancy of the current premises at the end of a lease term without a break in tenancy. They establish new terms and conditions and have new lease contract numbers. Such a lease would generally be used where acceptable new locations are not identified, or where acceptable locations are identified but a cost-benefit analysis indicates that award to an offeror other than the current Lessor will result in substantial relocation costs or duplication of costs to the FAA, and the FAA cannot expect to recover such costs through competition. A Single Source succeeding lease must be documented in accordance with AMS Guidance T3.2.2.4.
- c. ***Superseding leases*** are defined as new leases that replace existing leases prior to its expiration. The existing lease is terminated simultaneously, effective with the commencement of the superseding lease. The FAA executes superseding leases to replace existing leases when the FAA needs numerous or detailed modifications to the premises that would substantially change the existing lease, or where better terms are available in a

market. Superseding leases follow the non-competitive single-source procedures and are given new lease contract numbers. A Single Source succeeding lease must be documented in accordance with AMS Guidance T3.2.2.4.

- d. ***Renewal Options*** are pre-defined options within an existing lease that may be exercised by the CO prior to the expiration of the current lease in order to stay in the existing location. The lease contract number remains the same.

### **3 Firm Term Lease Approval** Added 9/2020

- a. ***General.*** Firm term lease approval is required when the FAA cannot terminate or cancel the lease for a period exceeding 365 days and is contractually committed to rental payments beyond that period. (For additional information on real property termination rights, see AMS Guidance T3.10.6.B Termination of Real Property Contracts). Generally, the FAA discourages the use of firm terms; however, the CO may award a lease with a firm term when it is in the agency's best interest. Situations where such use may be considered include, but are not limited to, space leases requiring funds for significant tenant improvements which must be amortized over the term of the lease, and instances of limited competition or single source procurements where, despite negotiations, the agency has no viable alternative to meet the agency's needs. Prior to awarding any lease with a firm term, the CO, in coordination with the requiring line of business, must obtain FAA Acquisition Executive (FAE) approval.
- b. ***Justification.*** If the CO determines that a firm term is the only option to secure FAA's real property needs, the CO must coordinate with the requiring line of business and request a justification to award a firm term lease. The justification must include the following:
  - Evidence that the acquisition team performed sufficient market research and analysis in accordance with AMS Guidance T3.2.1.2 for FAA's real property needs;
  - A rational basis, and the supporting evidence, as to why another site is not feasible and a firm term is the only option to meet real property needs; and
  - An analysis of potential lease costs and/or cost savings associated with awarding a firm term lease.
- c. ***Approval and Execution.*** Prior to executing the firm term lease, the firm term justification, including the award decision document (Negotiator's Report) and lease as supporting documentation, must be submitted for concurrence and approval. The firm term justification must have written concurrence from the Office of Chief Counsel, Chief of the Contracting Office, Director of Aviation Property Management, Director of Budgets and Programs, and final approval from the Federal Acquisition Executive (FAE). This approval acknowledges the agency's commitment to a firm term lease, including

future budget year requirements. The approval must be included in the real property lease file.

#### **4 Holdover Tenancy** Added 9/2020

##### **a. Holdover Tenancy**

A holdover tenancy is created when the FAA continues to occupy leased premises after the lease term has expired. It is the FAA's policy to avoid holdovers to the extent that it is possible and to limit the use of holdover clauses in leases.

##### **b. Holdover Clauses**

Holdover clauses are either limited or indefinite in duration. Holdover clauses of indefinite duration should be limited to mission critical land acquisitions or for space leases housing mission critical safety equipment. When using a holdover clause, the CO must document his or her rationale in the award decision document (Negotiator's Report).

###### **1. Land**

Due to the long service life of NAS facilities as well as the cost of installation and overall impact to other components of the NAS, the CO will incorporate and negotiate a holdover clause for land leases.

###### **2. Space**

The CO may negotiate a holdover clause for space leases when it is in the best interest of the FAA. In negotiating a space holdover clause, the CO will consider the following: (1) FAA's intent for the space lease (whether the space is determined to be "mission critical" (i.e., locations supporting the safety of the airspace)); (2) the competitive environment for the space; (3) FAA's space improvement needs; and (4) potential risks to FAA if the lease fails to include a holdover clause. If the CO determines that a holdover clause is necessary for the requisite space, the CO must document the justification in the award decision document (Negotiator's Report) and must have a rational basis.

##### **c. FAA Holdover Tenancy Obligations**

During the holdover period, the CO must continue to negotiate a new lease, or determine whether to compete the requirement, even when considering a condemnation action. The FAA must continue to make payments at the rate established in the expired lease while in holdover. Any difference in lease rental payments negotiated in the new lease will be settled and paid as part of the new lease consideration.

#### **5 Rent Payment Structure** Added 9/2020

- a. Set forth below is the order of Agency preference of rent structures for all new or succeeding cost leases to be negotiated by COs. COs shall negotiate the rent structure of leases, including any supplemental lease agreements that extend or modify the lease term or payment, as follows and will document his/her rationale within the award decision document (Negotiator Report):
  1. **Fixed Rent** means that the rent amount and the time at which it is required to be paid are fixed and determinable under the terms of the lease agreement as of the lease date. This is the FAA's preferred rent structure.
  2. **Step-up Rent** establishes clearly defined future rent increases at set times throughout the life of the lease. Step-up rents are meant to protect the landlord from the risks that inflation or a rising market present for a long-term lease.
  3. **FAA Standard Operating Costs Escalator (CPI)/Tax Rent Adjustment** requires changes in the rental amount in future years for space leases that cannot be calculated in advance because the CPI and property tax rates change annually. In order to avoid budget shortfalls, the CO shall insert an annual maximum "not-to-exceed" cap on any rent or lump sum increases. This can be stated as a not-to-exceed dollar amount or as a not-to-exceed percentage change. The annual maximum cap will be determined by the CO based on prevailing economic and market conditions and inserted in the standard Operating Costs Escalator clause and the Tax Adjustment clause. For real property contracts, the Cost of Living Index found in the U.S. Department of Labor Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, will be incorporated into the fixed price amount and paid in accordance with the terms of the contract. The National CPI must be used only. The tax increase is applied proportionally to the percentage of FAA's occupancy.
  4. **Other rent adjustment clause:** The CO may consider an alternate cost structure proposed by the offeror. Use of an alternate rent adjustment clause requires careful review to ensure:
    - 1) that the method proposed by the offeror to calculate adjustments in rent is readily understood;
    - 2) the proposed lease clause is clearly written and can be calculated in the future by the FAA;
    - 3) the rent adjustment clause will contain a not-to-exceed cap; and
    - 4) the rent adjustment clause cannot cause FAA to exceed budget limitations.

Prior to incorporating an alternate adjustment clause into the lease, the CO must obtain written approval, on a case-by-case basis, from the Real Estate Group Manager and from the appropriate Regional, Center, or Headquarters Counsel.

- b. If the lessor is unwilling to negotiate a fixed rent, then the CO, prior to lease award, must notify the service organization and the appropriate budget office, in writing, that the proposed lease will contain a cost structure that will result in rent adjustments in future years and receive concurrence from the budget office prior to execution of the lease agreement..

## 6 Tenant Improvements Added 9/2020

### a) *Definitions*

1. ***Cold Shell*** is a building with an unfinished interior that lacks heating, ventilation and air conditioning (HVAC) and usually has no existing lighting, ceilings or walls included in the space but may have fully functioning core (electrical closets, mechanical rooms, elevator lobbies or restrooms).
2. ***Tenant Improvement*** refers to alterations to the interior of the building to meet the functional demands of the tenant. Tenant improvements (TIs) are the components, finishes, and fixtures that take leased real property from the “warm lit shell” condition to a finished, usable condition. The resulting space is complete, meets applicable building codes, and meets the service organization’s functional needs.
3. ***Tenant Improvement (TI) Allowance***. The TI allowance is the amount of money offered to the FAA by the Lessor to refresh or bring prospective space up to a finished usable condition which may be included in the offered rental rate. The amount depends on many factors, including, but not limited to, the length of the term of the lease and the total amount of square footage of the space. The TI allowance is typically a dollar amount, per square foot, paid entirely by the Lessor.
4. ***Warm Lit Shell*** is a commercial or residential building with a minimally finished interior, usually with ceilings, lighting, plumbing, heating and cooling (HVAC), interior walls (painted or unpainted), electrical outlets, elevators, rest rooms, and a concrete floor. A warm lit shell is considered ready to lease and ready for tenant improvements (TI's).

- b) *Tenant Improvements*. Some typical TIs include, but are not limited to, the following:

1. Electrical wiring and outlets;
2. Telephone and data jacks and wiring;
3. Carpeting or flooring;
4. Painting;

5. Plumbing fixtures;
  6. Doors;
  7. Window treatments; and
  8. Thermostats.
- c) *Usage of Tenant Improvement Allowance.* The FAA, at its sole discretion, will make all decisions as to the usage of the TI allowance. The FAA will use all or part of the tenant improvement allowance and return to the Lessor any unused portion of the tenant improvement allowance in exchange for a decrease in rent. For any build out costs above the TI allowance, the service organizations must pay for the overage in buildout costs with a lump-sum payment.
- d) *Tenant Improvement Payment Options.*
- 1) *Amortization of Tenant Improvements.* For occupancies where the FAA funds the TI allowance, the TI amount expended is amortized in Rent. Term adjustments may be made for a specific occupancy or service organization. There are two rules for limiting amortization terms for TIs:
    - a. The amortization term must not exceed the economic life of the improvements.
    - b. The amortization term must not exceed the term of the Lease.
  - 2) *Lump Sum.* The service organization may make a lump-sum payment for tenant improvements, in lieu of amortization. Lump-sum payments effectively lower or replace the TI allowance. If the service organization elects to pay for tenant improvements via lump sum payment, the service organization must confirm availability of funds prior to execution of the lease.
- e) *Tenant Improvement Associated Costs.* The TI allowance shall cover all or a portion of the cost of the design and build out of the leased real property in accordance with the FAA's approved Design Intent Drawings (DID). If the FAA build out costs exceed the TI allowance, the Lessor may recover such costs in accordance with AMS Clause 6.54 "Lessor's Recovery of Tenant Improvement Costs in Excess of the Allowance." Some TI costs include, but are not limited to:
- 1) Lessor's administrative costs;
  - 2) General contractor fees;
  - 3) Subcontractor's profit and overhead costs;
  - 4) Lessor's profit and overhead;
  - 5) Design costs; and
  - 6) Other associated project fees necessary to prepare construction documents and to complete the tenant improvements. (It is the Lessor's responsibility to prepare all



documentation (working/construction drawings, etc.) required to receive construction permits. No costs associated with the building shell shall be included in the tenant improvement price proposal.)

- f) *Tenant Improvements and Termination.* If the FAA determines that termination of the lease is in the best interest of the Government and the tenant improvement costs are amortized over the life of the lease, the FAA shall pay an amount based on the unamortized balance of the tenant improvement allowance as of the first day of the month the lease is terminated, as described in AMS Clause 6.55 "Lessor's Recovery of Tenant Improvement Allowance in the Event of Termination." (See T3.10.6.B "Termination of Real Property Contracts")

## **7 Alterations and Improvements** Added 9/2020

A lease may be modified for purposes of making alterations to or improvements of, real property. The Lessor's costs of alterations or improvements may be amortized over the term of the lease, paid by lump-sum payment, or other methods determined appropriate by the CO. All information related to the scope of alterations and improvements, associated costs, agreed upon timeline and any other necessary information must be outlined within the Supplemental Lease Agreement.

### *1.) Alterations*

In leased real property, to minimize potential liabilities and restoration costs, it is normally in the FAA's best interest to have the Lessor perform alterations on the property, thereby limiting any liability on the part of the FAA.

Alterations performed by the Lessor should be at fair and reasonable costs. The CO must make a fair and reasonable determination by obtaining 1) a formal appraisal, 2) construction data, 3) cost to build publications, and/or 4) an independent government cost estimate. The determination should be documented within the Negotiator's Report.

### *2.) Improvements*

The FAA can make permanent improvements to leased real property under the provisions of the lease agreement. The ability to make permanent improvements using a third party is governed by 1.) 49 USC Section 44502 (a)(5) and the decision by the Comptroller General B-239520 (8/16/90). Any permanent improvements to leased real property must comply with the requirements of the Davis- Bacon Act. (see AMS Guidance T3.6.2.A.5 Construction Contracts / Davis Bacon Act)

Like with alterations, it is normally in the FAA's best interest to have the Lessor perform improvements on the property, thereby limiting liability on the part of the FAA. Improvements

should be evaluated for their value using FAA accounting practices. The CO must make a fair and reasonable determination by obtaining 1) a formal appraisal, 2) construction data, 3) cost to build publications, and/or 4) an independent government estimate. The determination should be documented within the Award Decision Document (Negotiator's Report).

If the Lessor is unwilling or unable to complete the improvements, and the property is leased for no or nominal consideration, then the FAA can exercise its authority under 49 USC Section 44502(a)(5) provided the statutory criteria are met to make the required improvements on the leased real property.

## **8 Capitalization of Leases and Leasehold Improvements** Added 9/2020

Capitalization is the classification of fixed assets as long-term investments rather than current operating expenses. The purpose of capitalization is to match incurred costs related to the acquisition, development, or construction of Property, Plant & Equipment (PP&E) with the accounting period in which assets were used. Therefore, capitalized asset and improvement costs are not expensed when incurred, but instead are deferred (capitalized) and allocated over the asset's estimated useful life through depreciation expense (for tangible capitalized assets) or amortization expense (for intangible capitalized assets). For more information on FAA capitalization requirements related to leases and leasehold improvements, please see the FAA Financial Manual Vol. 8, Property, Plant and Equipment, Chapter 8.6 Leases and Leasehold Improvements.

## **C No Cost Land On-Airport Memorandum of Agreement (MOA)** Added 9/2020

The On-Airport Land MOA template in Appendix 1 **must** be used for the acquisition of land on an airport only when the airport sponsor has a current Airport Improvements Project (AIP) Grant. The Contracting Officer can obtain a list of airports that have current AIP grants through the [FAA Regional Airport Division online Grant History Look Up](#) tool at [faa.gov](#).

If facilities need to be added or deleted from the MOA, the CO will modify the contract to incorporate the revised list ensuring that the effective date of the change is listed on the updated list of facilities. The CO will provide written notice to the airport sponsor and retain the latest copy of the list of facilities in the contract file. See also AMS Guidance T3.8.1 Agreements, Cooperative Agreements, Gifts & Bequests for additional information on MOAs.

## **D Utilities** Added 9/2020

### **1 General** Added 9/2020

The FAA acquires utility services, (electric, gas, and water), in support of facilities constructed, operated, and maintained by the FAA. The Contracting Officer (CO) will procure utility services.

Utility services should be obtained from sources of supply, which are most advantageous to the Government in terms of economy, efficiency, reliability or service. Although single source is generally the method used to acquire utility services, the FAA will acquire utilities competitively whenever practical and reasonable. Competition can only occur within designated areas that are deregulated and open to competition. There is a potential possibility for substantial savings when acquiring utilities competitively, since the Government has ability to select lowest cost provider.

The utility acquisition process will be conducted following the best commercial business practices, in a fair and equitable manner, while complying with all applicable regulations. A primary factor to consider when acquiring utility services competitively is the reliability of the service, as interruptions to utility service would result in serious losses to the FAA and threatens the safety of the NAS.

## **2 Energy Cooperative Programs** Added 9/2020

Large FAA facilities, such as Air Route Traffic Control Centers, may qualify for energy cooperative programs. Under these cooperative programs, the energy supplier requests the FAA to utilize its own generators, during peak demand periods, instead of utility company supplied power. The FAA then receives a rebate for assisting the power company. Generally, two types of energy cooperative programs exist:

1. Peak-shaving agreement refers to leveling out peaks in electricity use by industrial and commercial power consumers. These are financially motivated, and are generally discouraged for FAA contracts. Environmental Protection Agency rules stringently regulate engine generators (E/G)s that operate under peak-shaving agreements or other non-emergency uses. The CO will ensure new or renewed utility contracts do not include provisions for peak-shaving agreements unless approved by an FAA environmental professional.
2. Demand response agreements serve to prevent interruptions due to extreme demand (rolling blackouts). These agreements are allowable and do not affect the emergency status of an E/G as long as the hours of operation are limited to no more than 15 hours per year.

## **3 Utility Energy Service Contracts** Added 9/2020

Under a Utility Energy Service Contract (UESC), FAA may contract with a local servicing utility for technical services and/or up-front project financing for energy efficiency, water conservation, and renewable energy investments at one or more FAA facilities. For additional information on UESC, please refer to AMS Guidance T3.6.3.A.15.

## **E Other Real Property Acquisitions** Added 9/2020

## **1 Right of Entry** Added 9/2020

“Right of Entry” is a form of license, typically granted to perform surveys and/or exploration work prior to acquisition or lease of land. The CO will ensure that a "right of entry" permit to the property for any purpose has been obtained from the land owner prior to ingress by an FAA employee or any of its agents. Legal counsel will be consulted for the proper action to take if the landowner refuses to grant a "right of entry" permit. Entry onto private property without appropriate rights may constitute trespass.

## **2 Easements** Added 9/2020

The FAA may acquire other real property interests such as easements in order to meet the agency's needs. An easement is an interest in real property that affords the FAA the right of limited use of another person's real property. An easement may be exclusive or non-exclusive and may be perpetual or expressly limited in duration. Some of examples of easements that the FAA may obtain are (1) a right-of-way, (2) a right of entry for a stated purpose, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to place or keep utilities on another person's property, (6) a right to the perpetual maintenance of drainage structures, (7) a right to allow reconstruction of a driveway during construction, and (8) a right to do some act that would otherwise constitute a nuisance.

The CO will negotiate the appropriate type of easement with the landowner to obtain the necessary real property interest to meet the agency's need. Legal will advise the CO for the proper action to take if the landowner refuses to grant the easement. Entry onto private property without appropriate rights may constitute trespass.

## **3 Surveys/Appraisals/Title** Added 9/2020

### **a. General**

Simplified purchase methods apply real property related services to include surveys, title, and appraisal services that are established market prices or where prices can be determined fair and reasonable. (See AMS Guidance 3.2.2.5 Commercial and/or Simplified Purchase Methods for additional information on how to acquire real property related services.)

### **b. Surveys**

For any real property acquisition, it is necessary to obtain an up-to-date survey that accurately describes the area of each property interest that the agency seeks to acquire. An accurate survey should define all the property the FAA needs to operate the facility to include the site (plot), access right-of-way (ROW), building restrictions easement, tree cutting easement, metal fencing easement, etc. It will be essential for negotiations with the landowner (to depict the exact area of the interests the agency seeks to acquire), and is also a necessary part of the condemnation assembly that will be sent to the Department of Justice if the agency chooses to acquire by condemnation. The CO will refer to

Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016), for additional information concerning surveys. In cases involving multiple or overlapping property interests, (i.e. land, access, air rights, mineral, etc.), it is advised that the CO obtain separate legal descriptions for each interest, and that all the interests should then be depicted on one single plat. The service organization (SO) should review and approve the estates, property descriptions and plats for technical accuracy and to ensure that operational requirements are being met by the proposed acquisition.

### **c. Appraisals**

1. *General.* An appraisal is a formal, usually written, statement that a qualified appraiser prepares independently and impartially, giving an opinion, as of a specified date, of the defined value of a described parcel of real property, supported by the presentation and analysis of relevant market information. An appraisal is an estimate of the current value based upon, and supported by, an analysis of all the factors, physical, economic, and social which influence the present and future benefits to be derived from the ownership of the appraised property.
2. *Just Compensation.* Just compensation is the full and fair monetary equivalent for the property taken for public use. An appraisal is used to determine the fair market rent, and value or just compensation for purchase of a specific property. The just compensation amount for the real property must not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property.
3. *Certifications/Standards.* The CO will use a State Licensed or Certified appraiser with a Member Appraisal Institute (MAI) or Senior Real Property Appraiser (SRPA) national designation. Appraisals must comply with the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions. Appraisals should be performed in accordance with generally accepted appraisal standards as set by the Appraisal Standards Board of the Appraisal Foundation.
4. *Appraisal Statement of Work (SOW).* The CO sends the appraiser an appraisal request letter along with an Appraisal SOW. The Appraisal SOW provides property information needed for the appraisal, such as:
  - 1) Legal description of property;
  - 2) Ownership data/title information ;
  - 3) Results of the EDDA;
  - 4) Results of the EIS, EA or FONSI, for new real property; and

- 5) Any other data that could affect the property's value.

Note: Attached to the SOW is a certification for the appraiser to sign regarding his/her service to the FAA.

5. *Appraisal Thresholds.* The CO will determine the appropriate type of appraisal method to be used. An appraisal should be accomplished for each land procurement where costs are involved, with the following exceptions:

- 1) Real property, where the CO estimated "just compensation" is less than \$2,500.00; or
- 2) A real property donation, where the owner releases the FAA from its obligation to appraise the property.

A value finding appraisal (opinion of value) can be used for properties estimated to be \$2,500.00 to \$5,000.00.

6. *Review appraiser.* The review appraiser is a separate specialty and not just an appraiser who reviews an appraisal. The review appraiser should possess both appraisal technical abilities and the ability to be the two-way bridge between the FAA's real property valuation needs and the appraiser. The review appraiser is responsible for ensuring that the appraisal report and its conclusions are reasonably supported by market information and complies with agency regulations, as well as with Federal and professional appraisal standards. The review appraiser has the same licensing/certification requirements as an appraiser. Appraisal review reports must comply with the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions.

#### **d. Title**

At the outset of the acquisition process, the CO will obtain and review current title evidence of the property, generally in form of a title insurance commitment. The CO will refer to the Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016), for additional information concerning title matters.

The title evidence should identify all interests such as leases, easements, liens and other recorded documents that affect the property. These interests will be listed as exceptions on the title insurance policy, and must be further researched to determine their impact on the conveyance of good title to the United States. Some title exceptions, such as the rights of a mortgage holder, can usually be extinguished at, or prior to, closing.

Researching, clearing title defects, and providing an opinion as to the sufficiency of title are generally the CO's responsibility. The CO will discuss any title problems that are discovered with the title company as well as with the appropriate Regional or Center

Counsel or Headquarters Counsel. The Chief Counsel has been delegated authority from the Department of Justice to pass on the sufficiency of title to lands being acquired by the agency, by issuing a preliminary opinion of title prior to the acquisition and a final opinion of title afterwards. If title cannot be satisfactorily cleared, condemnation to clear title may prove to be the only recourse. (See AMS T3.8.8.F Condemnation.)

## **F Condemnation** Revised 4/2021

Condemnation is the legal process of acquiring private property for public use or purpose through the government's power of eminent domain. There are two types of condemnation actions that the FAA may file: (1) declaration of taking (DT) cases, and (2) "straight," or complaint-only cases.

- a. *Declaration of Taking.* In most cases, the FAA uses a DT when it acquires property by eminent domain since the majority of FAA acquisitions involve property that the FAA currently leases and which already supports FAA facilities. In a DT case, the FAA takes title to the estate as soon as the case is filed and deposits an estimated amount of just compensation is deposited in the registry of the court. Once a DT case is filed, the FAA is committed to the condemnation, and the land cannot be given back to the landowner without the landowner's consent. Moreover, the FAA is committed to paying whatever amount of just compensation the court awards for the taking.
- b. *Straight.* In a "straight" or complaint-only condemnation case, the FAA does not take title until after the condemnation case is fully adjudicated and the court determines the amount of just compensation owed for the estate. At that point, the FAA can decide based on the price whether it wants to acquire the estate, or whether it wants to abandon the condemnation because the price is too high.

Condemnation usually is not used until all attempts to reach a mutually satisfactory agreement through negotiations have failed. If the CO determines that initiating condemnation proceedings is in the best interest of the FAA, the CO must coordinate with Legal counsel and follow Appendix 2 - Acquisition of Real Property by Eminent Domain - Procedure Guide for the FAA.

## **G Disposal of Real Property** Added 9/2020

The FAA is responsible for promoting effective use of FAA real property assets, as well as the disposal of real property that is no longer mission-critical to the FAA. There are two sources of authority under which the FAA may dispose of real property:

1. Pursuant to 49 USC 40110, the FAA has the authority to dispose of airport and airway property and technical equipment used for the special purposes of the FAA for adequate compensation and the amount so received shall:

- a. be credited to the appropriation current when the amount is received;
  - b. be merged with and available for the purposes of such appropriation; and
  - c. remain available until expended.
2. The second source of authority is through the General Services Administration (GSA) and is governed by the Federal Property Administrative Services Act of 1949, as amended. This Act authorizes the Administrator of GSA to dispose of real property at all federal agencies unless a specific agency has independent statutory authority to dispose of their own properties.

## **H Conveyance of Real Property** Added 9/2020

### **1 Conveyance by Transfer Agreement** Added 9/2020

Conveyance is the transfer of ownership for direct or indirect consideration. The real property assets to be conveyed must be screened for any environmental or safety issues that may require mitigation prior to conveyance.

### **2 Conveyance Obligated by Lease Clauses** Added 9/2020

- a. To satisfy the terms of a restoration clause in a lease, a CO may negotiate a transfer of property ownership to the lessor in lieu of restoring the premises to its original condition.
- b. A conveyance under these circumstances may also include negotiated fair and reasonable payments by either party to the other in order to reach an equitable settlement.
- c. If the CO decides to invoke the non-restoration clause contained in a standard lease, the government is under no obligation to restore the premises to its original condition and ownership is passed to the lessor at the time the site is abandoned.

### **3 Abandonment of Leasehold Improvements** Added 9/2020

1. FAA-owned improvements to buildings or building space held under lease are frequently made to promote the health, welfare and security of government employees or to enhance NAS operations carried out at the site.
2. Such improvements may be abandoned upon final termination of the lease in accordance with non-restoration clause contained therein only if removal of the improvements is impractical and abandonment poses no risk to the public.



3. The CO will advise the appropriate service organization of the lease termination and any leasehold improvements that have been retired and recorded in the automated property systems.

Any improvements being considered for abandonment must be screened for environmental or safety issues that may require mitigation prior to abandonment.

## **I Outgrants** Added 9/2020

### **1 General** Added 9/2020

In accordance with to 49 U.S.C. 106(n), the FAA may grant written permission to another government agency, or to a third party, to utilize its underutilized real property. This grant of permission is referred to as an outgrant. The FAA may utilize its outgrant authority for unutilized or underutilized FAA leased or owned real property assets. The service organization that is responsible for the property must affirm that the proposed outgrant (1) is aligned with Agency policy, strategic plan, and mission and (2) it will not have a negative impact on FAA's mission. Prior to issuing a new outgrant, revising an existing outgrant, or issuing a succeeding outgrant, the CO must obtain, from the service organization a written statement that the outgrant will not interfere with FAA's primary use of the property and that the benefits from the secondary use outweigh the cost and potential for increased FAA liability. The service organization also will provide the CO with any required approvals from the Outgrant Approval Workflow (ATP NPI, ATO Spectrum, ATO SSC, ATO EOSH, APM-200) and any supporting documentation and required stipulations that are necessary to be included in the outgrant agreement. Prior to awarding an outgrant, the CO will coordinate the outgrant agreement and any supporting documentation for Legal review.

The FAA issues outgrants to the following types of entities:

1. *Outgrant with Other Federal Entities (Permits).* Outgrant agreements with other Federal entities include non-permanent granting by FAA of the use of FAA real property assets to other Federal agencies by means of a permit. The FAA real property asset is not transferred but is retained in FAA's real property inventory. The purpose is to satisfy another Federal entity's requirement to use an existing FAA-owned building, land, or structure.
2. *Outgrant with Private Sector and Public Entities (Licenses).* The FAA may issue an outgrant to private or public entities for a specified period of years. The outgrant allows the FAA to enter into an agreement with a private or public entity to use an underutilized asset, which leverages the asset into a more productive asset, maximizing asset utilization. Private or public entities will invest its own capital to construct, renovate, or improve the real property and to operate the asset in a manner consistent with the outgrant agreement.

## **2 Maximum Term** Added 9/2020

Outgrants, new or succeeding, may not have a term in excess of 5-years. If the FAA does not own the underlying land or building/structure but is leasing it from another party, the term of an outgrant cannot exceed the remaining term of the underlying FAA contract or 5 years, whichever is less.

## **3 Cost Structure** Added 9/2020

The CO will structure the cost of outgrants in the following order of preference:

1. Based upon fair market value along with any additional services and overhead provided to grantee;
2. Based upon the FAA cost and overhead only; or
3. A no cost outgrant that specifies the non-monetary consideration of both parties (requires the appropriate service organization approval). The value of the non-monetary consideration will be of equivalent or greater value than the fair market value waived. The CO will not waive the services and related overhead costs of the outgrant if the FAA is providing more than minimal services to the grantee.

## **4 Termination Rights** Added 9/2020

Outgrants, new or succeeding, must contain the FAA's right to terminate at-will. Termination rights by the grantee are allowed but should require sufficient notice to the FAA to inspect the property and to determine if any restoration is required by the grantee.

## **5 Transferability** Added 9/2020

Outgrants are not transferable. Outgrants are issued exclusively to the grantee for a limited time and for a specific purpose.

## **6 Proceeds from Outgrants** Added 9/2020

Pursuant to 49 USC 40110(a)(3), proceeds collected by the FAA from outgrants are required to be credited to the Treasury which shall be:

1. credited to a separate account established in the Treasury and made available for FAA activities;
2. available immediately for expenditure but only for congressionally authorized and intended purposes; and
3. remain available until expended.

## **J Housing** Added 9/2020

The FAA Housing program provides housing for FAA employees supporting the National Airspace System (NAS) who are working in remotely located areas where commercial housing is not available. The FAA must follow OMB Circular A-45 for the acquisition, management and disposal of FAA owned or leased housing facilities. This is applicable to all Lines of Businesses (LOB) and organizational elements having a requirement for and using FAA housing quarters.

## **K Appendices** Added 9/2020

### **1 Appendix – On-Airport Land Memorandum of Agreement (MOA) Template** Added 9/2020

**ON-AIRPORT LAND  
MEMORANDUM OF AGREEMENT  
Between  
UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
And**

**[INSERT AIRPORT(S) NAME]**

#### **SECTION 6.1: OPENING**

##### **6.1.1-1 Agreement Preamble**

This Agreement is made and entered into by the **<insert Airport's Sponsor official name>**, hereinafter referred to as "Airport", for itself, its successors and assigns, and the Federal Aviation Administration, hereinafter referred to as the "FAA" or "the Government".

For purposes of this MOA, the terms “contractor,” “airport,” and “lessor” are interchangeable. Also, the terms “contract,” “agreement, and “lease” are interchangeable.

##### **6.1.3-1 MOA Witnesseth**

Whereas, the parties listed above have entered into an Airport Improvement Grant Agreement; and

Whereas, the parties listed above have entered into an agreement providing for the construction, operation, and maintenance of FAA owned navigation, communication and weather aids for the support of Air Traffic Operations; and

Whereas, the parties consider it desirable to work in cooperation with each other in the technical installation and operation of air navigational aids; and

Whereas, both parties agreed the establishment, operation, and maintenance of systems for air traffic control, navigation, communication, and weather reporting is in the primary interest of safety and direct support of the ongoing operation of the <insert Airport's official name> Airport.

<Whereas, this agreement supersedes or succeeds <Lease No. DTFAXX-XX-L-XXXXXX> and all other previous agreements between the parties for the property described in this document.>

Now, therefore, the parties mutually agree as follows:

## **SECTION 6.2: TERMS**

### **6.2.1-1 MOA Purpose**

It is understood and agreed that the use of the herein described premises, known as <insert Airport's official name> Airport, shall be related to the FAA's activities in support of Air Traffic Operations.

### **6.2.5-4 Terms and Conditions**

It is mutually understood and agreed that the Airport requires FAA navigation aid facilities in order to operate their business and that the FAA requires navigation, communication and weather aid facilities at the Airport in order to support Air Traffic Operations. Thus, in the interest of both parties it is hereby agreed that the Airport will allow the FAA to construct, operate, and maintain FAA owned navigation, communication and weather aid facilities in areas on the Airport that have been mutually determined and agreed upon for the term commencing on [insert start date] and continuing through [insert expiration date]. The FAA can terminate this agreement, in whole or part at any time by giving at least thirty (30) days' notice in writing.

A. Together with a right-of-way for ingress to and egress from the premises; a right-of-way for establishing and maintaining pole lines or underground lines for extending electrical power and/or telecommunications lines to the premises; including a right-of-way for subsurface power, communication and/or water lines to the premises; all rights-of-way to be over the area referred to as [insert Airport's official name], to be routed reasonably determined to be the most convenient to the FAA and as not to interfere with Airport operations. The Airport shall have the right to review and comment on plans covering access and utility rights-of-way under this paragraph.

B. And the right to grading, conditioning, and installing drainage facilities, seeding the soil of the premises, and removing all obstructions from the premises that may constitute a hindrance to the establishment and maintenance of navigational aid systems. The Airport shall have the right to review and comment on plans covering work permitted under this paragraph.

C. And the rights to make alterations, attach fixtures, and erect additions, structures or signs, in direct support of the Airport. The Airport shall have the right to review and comment on plans covering work permitted under this paragraph.

D. And the right to park, without cost, all official and privately owned vehicles used for the maintenance and operation of the air navigational facilities. Parking shall be provided adjacent to the navigational aid facility or as near as possible without interfering with the operation of the Airport.

#### **6.2.6-1 Consideration (No Cost)**

The Government shall pay the Airport no monetary consideration in the form of rental. It is mutually agreed that the rights extended to the Government herein are in consideration of the obligations assumed by the Government in its establishment, operation and maintenance of facilities upon the premises hereby leased.

#### **6.2.9 FAA Facilities**

The FAA facilities covered by this agreement are identified on the most current approved Airport Layout Plan (ALP) and/or other pertinent drawings that are made part of this Agreement by reference and shown on the attached FAA “List of Facilities”.

### **SECTION 6.3: GENERAL CLAUSES**

#### **3.2.5-1 Officials Not To Benefit**

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit arising from it. However, this clause does not apply to this contract to the extent that this contract is made with a corporation for the corporation's general benefit.

#### **3.10.1-22 Contracting Officer's Representative**

(a) The Contracting Officer may designate other Government personnel (known as the Contracting Officer's Representative) to act as his or her authorized representative for contract administration functions which do not involve changes to the scope, price, schedule, or terms and conditions of the contract. The designation will be in writing, signed by the Contracting Officer, and will set forth the authorities and limitations of the representative(s) under the contract. Such designation will not contain authority to sign contractual documents, order contract changes, modify contract terms, or create any commitment or liability on the part of the Government different from that set forth in the contract.

(b) The Contractor shall immediately contact the Contracting Officer if there is any question regarding the authority of an individual to act on behalf of the Contracting Officer under this contract.

#### **6.3.5 Title To Improvements**

Title to the improvements constructed for use by the FAA during the life of this Agreement shall be in the name of the FAA.

### **6.3.6 Funding Responsibility for FAA Facilities**

The Airport agrees that any and all Airport requested relocation(s), replacement(s), or modification(s) of any existing or future FAA navigational aid or communication system(s) necessitated by Airport improvements or changes will be at the expense of the Airport. In the event that the Airport requested changes or improvements interferes with the technical and/or operational characteristics of the FAA's facility, the Airport will immediately correct the interference issues at the Airport's expense. Any FAA requested relocation, replacement, or modifications shall be at the FAA's expense. In the event such relocations, replacements, or modifications are necessary due to causes not attributable to either the Airport or the FAA, funding responsibility shall be determined by mutual agreement between the parties, and memorialized in a Supplemental Lease Agreement.

### **6.3.18 Non-Restoration**

It is hereby agreed between the parties that, upon termination of its occupancy (due to termination or expiration of the Lease), the Government shall have no obligation to restore and/or rehabilitate, either wholly or partially, the property that is the subject of this Lease, including any holdover period. It is further agreed that the Government may abandon in place any or all of the structures and equipment installed in or located upon said property by the Government during its tenure. Such abandoned equipment shall become the property of the Lessor.

### **6.3.18-2 Restoration**

1. The Government shall surrender possession of the premises upon the date of expiration or termination of this Lease. If the Lessor provides written notice, prior to the date of expiration or termination, requesting restoration of the premises, the Government at its option shall within ninety (90) days after such expiration or termination, or within such additional time as may be mutually agreed upon, either:

A. Restore the premises to as good condition as that existing at the time of the Government's initial entry upon the premises under this Lease or any preceding lease (ordinary wear and tear, damage by natural elements and by circumstances over which the Government has no control, excepted) or,

B. The FAA may also elect to Offer abandonment of installed real property improvements in lieu of restoration or some combination of abandonment and restoration as determined by mutual agreement with the owner, so long as it is determined by the RECO to be in the best interests of the Government.

2. In the event that the Government has to make payment under this clause, such payments will not exceed appropriations available at the time of the restoration in violation of the Anti-Deficiency Act.

3. Nothing in this Lease may be considered as implying that Congress will, at a later date, appropriate funds sufficient to meet the deficiencies."

### **6.3.25 Quiet Enjoyment**

The Lessor warrants that they have good and valid title to the premises, and rights of ingress and egress, and warrants and covenants to defend the Government's use and enjoyment of said premises against third party claims.

### **6.3.28-2 Interference with FAA Operations**

The Airport agrees not to erect or allow to be erected any structure or obstruction of any kind or nature within the Airport's boundaries that the FAA determines may interfere with the proper operation of the facilities installed by the FAA. The FAA and the Airport agree that such action(s) would not be in the best interest of the Airport or the FAA.

### **6.3.33-2 Covenant Against Contingent Fees (MOA)**

The Airport warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover the full amount of the contingent fee.

### **6.3.34 RE Anti-Kickback**

The Anti-Kickback Act of 1986 (41 U.S.C. 51-58), prohibits any person from (1) Providing or attempting to provide or offering to provide any kickback; (2) Soliciting, accepting, or attempting to accept any kickback; or (3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

### **6.3.36 Subordination, Nondisturbance and Attornment**

A. The Government agrees, in consideration of the warranties and conditions set forth in this clause, that this contract is subject and subordinate to any and all recorded mortgages, deeds of trust and other liens now or hereafter existing or imposed upon the premises, and to any renewal, modification or extension thereof. It is the intention of the parties that this provision shall be self-operative and that no further instrument shall be required to effect the present or subsequent subordination of this contract. Based on a written demand received by the RECO, the Government will review and, if acceptable, execute such instruments as the contractor may reasonably request to evidence further the subordination of this contract to any existing or future mortgage, deed of trust or other security interest pertaining to the premises, and to any water, sewer or access easement necessary or desirable to serve the premises or adjoining property owned in whole or in part by the contractor if such easement does not interfere with the full enjoyment of any right granted the Government under this contract.

B. No such subordination, to either existing or future mortgages, deeds of trust or other lien or security instrument shall operate to affect adversely any right of the Government under this contract so long as the Government is not in default under this contract. Contractor will include in any future mortgage, deed of trust or other security instrument to which this contract becomes subordinate, or in a separate non-disturbance agreement, a provision to the foregoing effect. Contractor warrants that the holders of all notes or other obligations secured by existing mortgages, deeds of trust or other security instruments have consented to the provisions of this clause, and agrees to provide true copies of all such consents to the RECO promptly upon demand.

C. In the event of any sale of the premises or any portion thereof by foreclosure of the lien of any such mortgage, deed of trust or other security instrument, or the giving of a deed in lieu of foreclosure, the Government will be deemed to have attorned to any purchaser, purchasers, transferee or transferees of the premises or any portion thereof and its or their successors and assigns, and any such purchasers and transferees will be deemed to have assumed all obligations of the contractor under this contract, so as to establish direct privity of estate and contract between Government and such purchasers or transferees, with the same force, effect and relative priority in time and right as if the contract had initially been entered into between such purchasers or transferees and the Government; provided, further, that the RECO and such purchasers or transferees shall, with reasonable promptness following any such sale or deed delivery in lieu of foreclosure, execute all such revisions to this contract, or other writings, as shall be necessary to document the foregoing relationship.

D. None of the foregoing provisions may be deemed or construed to imply a waiver of the Government's rights as a sovereign.

This clause is required in all real estate contracts except outgrants.

#### **6.3.37-2 Notification of Change in Ownership or Control of Land (MOA)**

If the Airport conveys to another party or parties any interest in the aforesaid land, rights of way thereto, and any areas affecting the premises, the Government shall be notified in writing, of any such transfer or conveyance within 30 calendar days after completion of the change in property rights. Concurrent with the written notification, the Airport's representatives, assignees, or trustees shall provide the Government copies of the associated legal document(s) (acceptable to local authorities) for transferring and/or conveying the property rights.

#### **6.3.45-4 RE Contract Disputes (Agreement)**

All contract disputes arising under or related to this Agreement will be resolved through the FAA dispute resolution system at the Office of Dispute Resolution for Acquisition (ODRA) and will be governed by the procedures set forth in 14 C.F.R. Parts 14 and 17, which are hereby incorporated by reference. Judicial review, where available, will be in accordance with 49 U.S.C. 46110 and will apply only to final agency decisions. A contractor may seek review of a final Government decision only after its administrative remedies have been exhausted.



All contract disputes will be in writing and will be filed at the following address:

Office of Dispute Resolution for Acquisition, AGC-70

Federal Aviation Administration

800 Independence Avenue, S.W., Room 323

Washington, DC 20591

Telephone: (202) 267-3290

A contract dispute against the FAA will be filed with the ODRA within two (2) years of the accrual of the lease claim involved. A contract dispute is considered to be filed on the date it is received by the ODRA.

The full text of the Contract Disputes clause is incorporated by reference. Upon request the full text will be provided by the RECO.

#### **6.3.47-1 Clearing/Disposing of Debris**

A. The Government shall notify the Airport in writing ten (10) days prior to the start of any clearing of trees and/or brush and tree cuttings.

B. The Airport grants the Government the right and privilege to enter upon the Airport's land in order to cut, trim, tip, shape and maintain to the maximum, height of 5'4" above ground level, any trees situated within the airport boundary and said cutting privilege granted to the Government shall include native grasses, scrub brush, and scrub to trees. Only those trees that are determined by the Government to interfere with the operation and proper function of the Government's facilities will be subject to the Government's granted privilege. Coordination with the Airport will be made prior to any cutting of any selected trees.

C. The Government agrees to dispose of all grass, brush, and tree cuttings by its contractor. All tree logs, limbs, or branches 2 or more inches in diameter and 5 feet in length, shall be stacked in an area selected by the Airport. The Government's disposal of debris, grass, branches, etc., shall comply with regulatory requirements.

#### **SECTION 6.4: FINANCIAL CLAUSES- Not Applicable**

#### **SECTION 6.5: DESIGN & CONSTRUCTION CLAUSES- Not Applicable**

#### **SECTION 6.6: GENERAL BUILDING REQUIREMENTS & SPECIFICATIONS CLAUSES- Not Applicable**

#### **SECTION 6.7: SERVICES, UTILITIES, & MAINTENANCE CLAUSES- Not Applicable**

#### **SECTION 6.8: ENVIRONMENTAL & OCCUPATIONAL SAFETY & HEALTH CLAUSES**

### 6.8.1 Hazardous Substance Contamination

The FAA agrees to remediate, at its sole cost, all hazardous substance contamination on the FAA facility premises that is found to have occurred as a direct result of the installation, operation, relocation and/or maintenance of the FAA's facilities covered by this contract. The Airport agrees to remediate at its sole cost, all other hazardous substance contamination found on the FAA facility premises. The Airport also agrees to hold the FAA harmless for all costs, liabilities and/or claims by third parties that arise out of hazardous contamination found on the FAA facility premises that are not directly attributable to the installation, operation and/or maintenance of the facilities.

## SECTION 6.9: SECURITY CLAUSES- Not Applicable

## SECTION 6.10: CLOSING

### 6.10.1-4 Notices for MOA:

All notices/correspondences must be in writing, reference the MOA number, and be addressed as follows:

TO THE AIRPORT:

<Insert Airport's Name>

<Insert correspondence address>

<Insert City, State, Zip code>

TO THE GOVERNMENT:

Federal Aviation Administration

Real Estate & Utilities Group, <Insert routing symbol>

<Insert address>

<Insert City, State, Zip code>

### 6.10.3-4 MOA Signature Block

The Airport and the FAA hereby agree to the provisions outlined in this agreement as indicated by the signatures herein below of their duly authorized representative(s). This agreement is effective upon the date of signature by the last party thereof.

[INSERT AIRPORT OWNER'S OFFICIAL NAME]

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: Real Estate Contracting Officer

Date: \_\_\_\_\_

**SECTION 6.11- ATTACHMENTS/EXHIBITS/SPECIAL STIPULATIONS**

**[RECO SHOULD UPDATE/ADD/REMOVE AS NEEDED]**

Number	Title	Date	Number of Pages
1	MOA LIST OF FACILITIES		
2			
3			
4			
5			

**2 Appendix - Acquisition of Real Property by Eminent Domain - Procedure Guide for the FAA** Added 9/2020

Acquisition of Real Property by Eminent Domain  
A Procedural Guide for the Federal Aviation Administration

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- A. Overview of Eminent Domain
- B. When Is Condemnation Necessary?

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- Attachment 1: Definitions
- Attachment 2: Title Information
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## **Introduction**

### **A. Overview of Eminent Domain**

Eminent domain (also known as condemnation) is an essential attribute of government power. Without this power, a landowner could thwart agency objectives that depend on the acquisition of his property by refusing to sell the property at any price, or by demanding an exorbitantly high price based upon the agency's need for the property.[2] Eminent domain resolves such potential problems by enabling the agency to initiate a proceeding in federal court to acquire title to the property in exchange for "just compensation."

The Fifth Amendment of the Constitution states that "Nor shall private property be taken for public use without just compensation." This language has been interpreted by the Courts to mean that (1) condemnation must be for a public use, and (2) just compensation must be paid for the property taken. The term "public use" has been interpreted liberally by the Courts to mean a use that is rationally related to any valid public purpose or legitimate governmental activity.[3] The term "just compensation" usually means the "fair market value" of the property taken.[4]

There are two types of condemnation actions that may be filed: (1) declaration of taking cases, and (2) "straight," or complaint-only cases. In a declaration of taking case, the agency takes title to the estate as soon as the case is filed and an estimated amount of just compensation is deposited in the registry of the court. Once a declaration of taking case is filed, the agency is committed to the condemnation, and the land cannot be given back to the landowner without the landowner's consent. Moreover, the agency is committed to paying whatever amount of just compensation the court ultimately awards for the taking. By contrast, in a "straight" or complaint-only condemnation case, the agency does not take title until after the condemnation case is fully adjudicated and the court determines the amount of just compensation owed for the estate. At that point, the agency can decide based on the price whether it wants to acquire the estate, or whether it wants to abandon the condemnation because the price is too high.

The FAA almost exclusively uses declarations of taking when it acquires property by eminent domain. This is because the majority of FAA acquisitions involve property that the FAA currently leases and which already contain FAA facilities. Since it would clearly be impractical to vacate the property while the condemnation case is pending, the FAA utilizes a declaration of taking to acquire immediate title to the property, which permits the agency to continue operating the facility on the property.

### **B. When Is Condemnation Necessary?**

Although the agency is required by statute and agency policy to acquire real property by negotiation and direct purchase whenever possible, there are certain circumstances that necessitate acquisition by condemnation. Examples of situations that typically require condemnation are:

1. The **landowner is unwilling to negotiate or sell at any price** the property or interest therein.
2. The agency and the property owner agree in principle to most of the terms and conditions for direct purchase of the property or interest therein, but are **unable to agree on the price**.
3. An examination of title evidence discloses **title defects** that are too numerous or complex for curative action, or that can only be cured through condemnation proceedings.
4. It is **impossible to locate the owners** of the property or interests therein to be acquired.
5. The property **owners refuse to comply with the terms and conditions** of an executed offer-to-sell agreement.
6. The **owners request that condemnation be used** to acquire title to their property or interests therein, or where owners, such as fiduciaries, states, cities, or other public bodies **are without legal authority to sell** or otherwise dispose of real property or interests therein.

### **The Pre-Condemnation Process**

Outlined below are the initial considerations and steps that should be undertaken by realty specialists contemplating the use of condemnation to acquire property. Note that most of these same steps and considerations would apply to acquisition by purchase as well.

#### **A. Verify the Long-Term Need for the Property/Facility**

The FAA uses eminent domain whenever it cannot negotiate a long-term interest or a direct purchase of real property. Given the degree of difficulty, the length of time, and the considerable expense involved in litigating a condemnation action, the FAA seeks to avoid acquisition of non-permanent interests such as short-term leaseholds by condemnation. Rather, the agency encourages the use of condemnation primarily for the acquisition of the permanent fee simple or easement interests. Accordingly, when considering whether condemnation is the appropriate method of acquisition, the realty specialist should first ascertain whether there is a well-established, long-term need for the property that the agency seeks to acquire. The FAA typically acquires property on which a particular facility already exists. The contracting officer (CO) should determine whether there is a long-term need for the particular facility. In order to make this determination, the CO should contact appropriate personnel in the following service organizations: Air Traffic Organization (ATO), Terminal Services, En Route Services, Oceanic Services and Technical Operations, Aviation Safety (AVS), and/or Security and Hazardous Material (ASH) to advise of the agency's intention to acquire the property underlying the facility, and to solicit their feedback about whether there is a long-term

need for the facility.

B. Determine the Estate(s) to be Acquired

The CO must next determine what estate(s) should be acquired in order to meet the agency's needs, and then draft language describing such estate(s). The typical long-term interest FAA acquires is fee interest. Depending on the particular needs and circumstances of each acquisition, it may be necessary for the agency to acquire other estates as well. For example, if the acquired parcel is not accessible by public road, it will be necessary for the agency to acquire an access easement to ensure ongoing access to the facility. Similarly, if the agency plans to build a new facility on the acquired parcel, it may be necessary to acquire a temporary construction easement on adjacent property. In addition to access and construction easements, proper operation of the facility may require the acquisition of restrictive easements on adjacent property, such as limits on nearby tree height or restrictions on residential development.

When drafting the language to describe each estate, the CO should attempt to meet the agency's goals while minimizing encroachment on neighboring property interests whenever possible. For example, the estates taken should exclude all existing easements of record for public roads and highways, public utilities, railroads and pipelines when doing so does not conflict with the agency's needs. As discussed further in Part D below, an examination of the title evidence should reveal whether any such easements exist, while the appropriate Air Traffic Organization personnel should be able to determine whether such easements would interfere with the agency's needs. In cases where the agency must acquire an access easement, the CO should consider drafting the easement so that it is non-exclusive, or so that the easement could be shifted to another location at the landowner's request. All estates should be drafted in a manner that most closely resembles an estate recognized under state law.

C. Obtain an Accurate Survey

For any real property acquisition, it is necessary to obtain an up-to-date survey that accurately describes the area of each property interest that the agency seeks to acquire. An accurate survey should define all the property the FAA needs to operate the facility to include the site (plot), access right-of-way (ROW), building restrictions easement, tree cutting easement, metal fencing easement, etc. It will be essential for negotiations with the landowner (to depict the exact area of the interests the agency seeks to acquire), and is also a necessary part of the condemnation assembly that will be sent to the Department of Justice if the agency chooses to acquire by condemnation. The CO should refer to Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016) or as amended, Section 4.4, for additional information concerning surveys.

In cases involving multiple or overlapping property interests, it is advised that the realty specialist obtain separate legal descriptions for each interest, and that all the interests should then be depicted on one single plat. The appropriate Air Traffic Organization (ATO) office should review and approve the estates, property descriptions and plats for

technical accuracy and to ensure that operational requirements are being met by the proposed acquisition.

#### D. Order Preliminary Title Evidence

At the outset of the acquisition process, it is imperative to obtain and review up-to-date title evidence of the property, which generally will be in the form of a title insurance commitment. The CO should refer to the most current version of the Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions for additional information concerning title matters.

The title evidence should identify all interests such as leases, easements, liens and other recorded documents that affect the property. These interests will be listed as exceptions on the title insurance policy, and must all be further researched to determine what impact they may have on the conveyance of good title to the United States. Some title exceptions, such as the rights of a mortgage holder, can usually be extinguished at or prior to closing and, when extinguished, will not affect the conveyance of good title.

In some instances, the existence of certain easements and other property interests may adversely impact the operation of FAA facilities. For example, gas/oil exploration agreements and utility easements that grant rights over or across the property may interfere with the operation of certain FAA facilities. In these cases, it is imperative for the CO to inform the appropriate Air Traffic Organization office of the existence of these property interests and determine whether they would adversely affect operation of the facility prior to making the acquisition. In cases where an existing easement conflicts with agency needs, appropriate FAA officials must determine whether the easement should be acquired and extinguished (often at significant cost), or alternatively, whether the agency should seek other property to meet its needs. For example, if an existing utility easement would interfere with the operation of an FAA facility, the FAA may choose to relocate the facility rather than pay the cost associated with acquiring the easement.

CO should discuss any title problems that are discovered with the title company as well as with the Regional Counsel or Headquarters Counsel. The Chief Counsel has the delegated authority from the Department of Justice to pass on the sufficiency of title to lands being acquired by the agency (see Appendix 2), which he/she will do by issuing a preliminary opinion of title prior to the acquisition and a final opinion of title afterwards. However, researching, clearing title defects and providing an opinion as to the sufficiency of title is generally the responsibility of the CO. If title cannot be satisfactorily cleared, condemnation to clear title may prove to be the only recourse.

#### E. Obtain an Initial Appraisal Report

Prior to any real estate acquisition, it is necessary for the agency to obtain an up-to-date and approved appraisal report. The information and analysis contained in the appraisal report, such as the determination of the highest and best use for the property and market data utilized by the appraiser, will provide the realty specialist with vital



information for use in negotiations with the landowner. In situations where the appraised amount for property containing an existing facility is exorbitantly high (as defined by the FAA), the CO should contact Technical Operations to explore the option of relocating the facility rather than proceeding with the acquisition.

The agency is required by statute to offer to purchase the property from the landowner for an amount that is not less than the value stated in an approved appraisal report.<sup>[5]</sup> If the agency chooses to acquire the property by condemnation, then the appraisal report must be updated to the date of taking and will be used as the primary evidence for establishing the amount of just compensation owed for the property.

Given the various purposes that the appraisal report must serve, the quality and professional nature of the report, along with the qualifications of the appraiser who prepared it, must be able to withstand intense scrutiny. Accordingly, it is strongly encouraged that the realty specialist select the appraiser with care. If the acquisition presents complex issues, such as a disagreement with the landowner about the possible highest and best use of the property, the agency will seek an appraiser who is qualified as an MAI (Member of the Appraisal Institute).

It is imperative that the CO provide the appraiser with all necessary information pertaining to the estates that are sought to be acquired. If the agency seeks to acquire an estate in fee simple and an estate for an access easement, the appraiser should be instructed to determine market value in accordance with most current version of the *Uniform Appraisal Standards for Federal Land Acquisitions*, , hereafter referred to as the Yellow Book. If there are any questions concerning whether additional should be given instructions to give the appraiser, particularly in situations presenting complex valuation problems, the CO should consult with FAA counsel or contact the DOJ Land Acquisition Section.

If condemnation is necessary and the case proceeds to trial, it will be up to the Department of Justice and the AUSA to determine whether the initial appraisal report is adequate for use at trial. If the initial report is not deemed adequate, it is the responsibility of the FAA to provide funding for an appraisal report that meets with DOJ approval. To avoid having to obtain a second appraisal for use at trial, the RECO should select the initial appraiser carefully, and provide the appraiser with all necessary information and instructions for the preparation of an adequate report. Although the agency may be required to select the “lowest bidder” when choosing an appraiser, the realty specialist can attempt to ensure a high quality appraisal report by adding qualification requirements to the scope of work, such as the requirement that the appraiser must be qualified as an MAI, or that the appraiser must have prior experience in federal condemnation actions.

#### F. Assess Any Environmental Issues

Agency policy requires that prior to acquisition of any real property, testing must be conducted to determine if the property contains any hazardous materials (“HAZMAT”). Under applicable environmental legislation, the current owner/operator of the property

may be liable for cleanup and remediation of certain hazardous materials that exist on the property. Thus, in cases where the FAA has occupied the site for a number of years under a leasehold agreement, the agency may be jointly or severally liable for any contamination that exists on the property. Even when the FAA is not responsible for the contamination on the property, the cost of remediation and potential future liability risk should be factored in as part of the cost of acquisition.

Accordingly, it is imperative that the property be inspected for hazardous material contamination prior to making the final decision to acquire the property.

In instances where the agency seeks to acquire the property by condemnation, the agency must certify that all applicable environmental regulations and procedures, including testing for hazardous material contamination, have been complied with. (See AMS T3.6.3 Environment, Conservation, Occupational Safety, and Drug Free Workplace) If cleanup or remediation of hazardous materials is necessary, it is not required that the cleanups be completed or even underway at the time of filing a condemnation action. Rather, the agency must inform the Department of Justice that hazardous materials exist on the site and explain the efforts that will be or have been taken to redress the contamination. Be aware that environmental contamination is a factor to be considered in determining property value.

### **Special Considerations for Expiring Leaseholds**

The FAA currently holds leasehold interests on many of the properties that it seeks to acquire. Because these leasehold arrangements often impose unfavorable economic terms for the agency, upon expiration of the lease the agency usually seeks to acquire the fee simple interest to the underlying property. In cases where the landowner is unwilling or unable to convey fee simple to the property, the agency must resort to condemnation in order to acquire the property.

In situations where an existing leasehold is about to expire, it is imperative that the CO be prepared to acquire an interest in the property as soon as the leasehold expires. Otherwise, once the lease expires the agency will enter into a “holdover tenancy,” meaning that the agency remains as the tenant on the property paying rent, which gives rise to an inverse condemnation claim for the landowner. In addition to the inverse condemnation claim, a holdover tenancy will likely complicate any potential negotiations for acquisition by purchase or for settlement of a condemnation case, and may also add to the agency’s overall cost of acquiring the property.

Accordingly, the CO must be aware of the expiration dates of existing leases, and proceed with plans for acquiring the underlying property accordingly. If the CO determines that a condemnation action may be necessary, then the Declaration of Taking condemnation assembly should be prepared and sent to the Department of Justice at least sixty days prior to the date of expiration of the leasehold. Negotiations to purchase the property from the landowner may continue after the condemnation package has been sent to the DOJ; however, any agreement to purchase the property must be made before the

declaration of taking is filed.

If the agency is already in holdover status before the condemnation package has been sent to the Department of Justice, the Declaration of Taking should include a retroactive taking of a leasehold interest for the holdover period. The agency must separately appraise the value of the holdover leasehold interest, and include an estimated amount of just compensation for this holdover leasehold. Note that the property owner may challenge the holdover (retroactive) portion of the taking and there is a possibility that he may succeed because, technically, a Declaration of Taking cannot have a retroactive effect. This is a matter to be decided by the Court, but if the property owner's challenge succeeds, the agency could be liable for attorney fees. Moreover, if the landowner subsequently brings an inverse condemnation claim for the holdover period and is successful, the agency will be liable for attorney's fees associated with that action as well. Thus, it is in the agency's best interests to avoid holdover situations altogether by preparing to file a condemnation action as soon as the existing leasehold expires.

### **Negotiations to Purchase the Property**

Prior to initiating a condemnation action, an agency should first attempt to acquire the property by negotiation and direct purchase. The Uniform Relocation Assistance and Real Property Acquisition Policy Act, 42 U.S.C. § 4651, requires the agency to make "every reasonable effort to acquire expeditiously real property by negotiation." The Act states in pertinent part that:

"Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value." See 42 U.S.C. § 4651(2).

The Act goes on to state that "Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property . . . The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated." See 42 U.S.C. § 4651(3).

Although the Act requires the Agency to provide the landowner with a "written statement" and summary of the basis for the estimated just compensation, the realty specialist is **strongly discouraged from providing the landowner with a copy of the appraisal report**, in case the negotiations are not successful and the property must be acquired by condemnation.

Frequently, once the realty specialist has made an offer to purchase the property, the landowner will wish to suspend the negotiations while the landowner retains an attorney and/or his own appraiser. This may cause several months to one year of delay, depending on how expeditiously the landowner chooses to proceed. The CO should therefore establish a time frame in which the landowner is to respond to the Government's initial offer. Moreover, it is crucial for the CO to initiate negotiations well before the existing leasehold is to expire, in order to avoid adding the pressure of an impending deadline to the negotiations process.

Early in the negotiations for the purchase of the property, the CO should urge the landowner to make a counteroffer. If the property owner is unresponsive to repeated requests for a counteroffer, it is probably appropriate to advise the owner that you will continue the acquisition process through condemnation. The exercise of tact at this critical juncture may result in the realization by the property owner that delaying tactics and unreasonable counteroffers will serve no useful purpose and he or she will begin to negotiate in good faith. The CO should be open to any reasonable counteroffer from the property owner that will immediately lead to the prompt purchase of the property. Be wary of minor concessions made by the property owner in an effort to reopen negotiations where substantial differences still exist.

In some cases, however, the CO will conclude that further negotiations are fruitless, and that acquiring the property through condemnation is necessary. In such cases, the CO should provide the property owner with a certified letter outlining the progress of negotiations to date, make a final and best offer, and establish a deadline for a response from the property owner. The letter should also inform the landowner that if no response is made by the deadline, the agency will initiate a condemnation action to acquire the property, and that thereafter all negotiations would involve the Department of Justice and the United States Attorney's office. This letter may be sent at any time but should be sent at no later than 90 days before expiration of current leasehold rights.

The preparation and submission of the condemnation assembly to the Department of Justice does not prevent continued negotiations and settlement up to the date of filing the Declaration of Taking. Generally, the Declaration of Taking will be drafted so that the taking will become effective on the day of the expiration of the leasehold. Coordination with the appropriate U.S. Attorney's office should resolve any issues regarding last minute negotiated agreements.

Please note that it is crucial to document all offers and counter-offers made during the negotiation process. This information will be useful to the U.S. Attorney's office and prevents duplication of negotiations by that office after the filing of the Declaration of Taking.

### **Statutory Authority for Condemnation and Financing the Acquisition**

The basic authority for FAA to acquire property by condemnation is contained in Section 303(a)(i) and 307(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40110(a)(1) et seq and 49 U.S.C. 106 (L6-N1A). This basic authority has been delegated

from the Administrator of the Federal Aviation Administration to the Director of the Real Property Management Organization, APM- 1. Authority to acquire property by declaration of taking is set forth in the Declaration of Taking Act, 40 U.S.C. § 3114.

Funding for acquisitions is generally made available by appropriations acts, which change from year to year. It is important to note that funding for acquisitions is valid for only three years after enactment of the appropriations statute. This means that all funds must be obligated (though they need not actually be spent) within three years of passage of the statute. Accordingly, CO must be aware of the applicable deadlines on which particular funding will expire, and must be prepared to expedite the acquisition process if the three-year deadline is fast approaching. If there is some doubt as to which appropriations act applies to a given acquisition, you should contact the Service Center budget office or, alternatively, ABU- for guidance.

In some condemnation cases, the ultimate award of just compensation, or the settlement amount agreed to by the parties, may exceed the amount of funding provided by the original appropriations legislation. In those cases, it is imperative that the CO contact the appropriate service organization to attempt to secure additional funding to cover the shortfall. The CO should identify potential funding shortfalls as soon as possible to maximize the agency's ability to acquire additional funding. For example, if the landowner's appraiser produces a credible report concluding that the value of the property is in excess of the total funds provided by the appropriations legislation, the CO should alert the appropriate service organization of the possibility that there could be a funding shortfall for the acquisition, so that Service Center Logistics Manager may begin to plan for this contingency.

### **Preparing a Condemnation Assembly**

In order to acquire property by condemnation, the CO must send a condemnation assembly to the Department of Justice. This section describes the necessary contents of the condemnation assembly.

Given the lengthy amount of time needed to prepare all the necessary elements of a condemnation assembly, CO are strongly encouraged to begin assembling these materials well in advance of the expiration of any existing leasehold. Once the condemnation assembly has been completed it should be forwarded to the regional Assistant Chief Counsel and headquarters counsel for final review. Upon completion of this review, the condemnation package should be forwarded to the Director of the Real Property Management Organization, APM- 1 for signature and mailing to the U.S. Attorney General. Regional procedures vary but in all instances the condemnation package should be tracked to insure that the package is mailed to Department of Justice at least 60 days prior to the expiration of the current lease agreement.

#### **A. The Transmittal Letter**

The first part of a condemnation assembly is the Transmittal Letter from the FAA to the Attorney General of the United States. Generally, the Transmittal Letter will be signed by the Director of the Real Property Management Organization, APM-1. The Transmittal Letter should contain the following information (see Appendix 3 for a sample Transmittal Letter):

1. GENERAL AUTHORITIES AND APPROPRIATIONS ACT

The letter should contain a recitation of the FAA's general authority to acquire real property by condemnation, as well as a recitation of the delegation of that authority from the FAA Administrator to the Director of the Real Property Management Organization, APM- 1. It is also necessary to include the correct appropriations act that provides the funds to acquire the property.

2. NECESSITY STATEMENT

The letter should include a statement that the taking is necessary for a well-established long-term need for a particular property or facility. A simple statement usually will suffice. For example, "The Remote Communications Air/Ground facility is a vital part of future FAA navigational aids and is a critical element of the National Airspace System. It is in the best interest of the Government to utilize the facility in its present location. There will be a continuing need for the facility throughout the foreseeable future."

3. IMMEDIATE POSSESSION STATEMENT

The letter should contain a statement as to whether immediate possession of the property being acquired is needed. If the property is currently under lease, the letter should note when the leasehold is set to expire. If the FAA is continuing its existing occupancy, no order of possession is required.

4. DECLARATION OF TAKING STATEMENT

If applicable, the letter should include a statement that the agency seeks to acquire the property by a Declaration of Taking (DT). A Declaration of Taking will vest the property with the United States immediately upon filing the action and depositing the estimated amount of just compensation in the appropriate District Court.

5. COMPLIANCE WITH UNIFORM RELOCATION ACT

The letter should include a general statement that the agency has complied with the provisions of Uniform Relocation Assistance and Real Property Acquisition Policy Act, 42 U.S.C. § 4601.

6. ENVIRONMENTAL COMPLIANCE STATEMENT

If the acquisition will result in the construction of new facilities, the Transmittal Letter should indicate compliance with the provisions of the National Environmental Policy Act, 42 U.S.C. § 4332 and, if applicable other statutes such as the National Historic Preservation Act of 1966, 16 U.S.C. § 470f. If the acquisition is for an existing facility that will not undergo any site changes or modifications, environmental proceedings are excepted by 42 Fed. Reg. 32467 Appendix 5, Paragraph 5f. In such cases, a statement referencing this exception will suffice.

## 7. LIMITATION STATEMENT

If there is any limitation that may be imposed on the acquisition by any statute, a statement as to the limitation must be included. The Federal Aviation Act does not impose any limitations on the acquisition of land for technical facilities except that of funding imposed by annual appropriations acts. It is unlikely that any individual acquisition will exceed the appropriation for all the land acquisitions funded in any particular year. Accordingly, a general statement that the acquisition will not exceed statutory limitations will serve to meet this requirement

## 8. POINT OF CONTACT

The letter should contain the name and contact information of the agency official who has been involved in the negotiations and preparation of the condemnation assembly.

### **B. Attachments to the Transmittal Letter**

Several attachments must be included along with the transmittal letter, the most notable being the Declaration of Taking which will be discussed in detail in the next section. Other attachments are described below:

#### 1. PAYMENT OF ESTIMATED JUST COMPENSATION

A Treasury check payable to the Clerk of the Court for the appropriate federal district should be enclosed. If doubt exists as to what district the case will be filed in, contact the Assistant Chief Counsel's office. The estimated amount of just compensation should be not less than the appraised value for the rights and/or interests being acquired. Be mindful that checks issued by the Treasury expire one year after the date of issue.

#### 2. APPRAISAL REPORTS AND REVIEWS

Copies of all appraisal reports, including all unapproved and outdated appraisal reports and updates, along with the appraisal reviews should be included as an attachment to the transmittal letter.

#### 3. TITLE EVIDENCE AND PRELIMINARY TITLE OPINION

A title package should be prepared that includes a copy of the title evidence (usually a title insurance commitment with copies of the documents mentioned therein), preliminary title opinion, a statement as to the location of title evidence (name and address of the local recorder of deeds, registrar, etc.), and all efforts made to cure title defects, if any. For those cases where a condemnation is being requested because of title defects, the following information is also required:

- A. An analysis of the defects and the agency's opinion as to the correct resolution of those title defects.
- B. A listing of the attempts to cure title defects made by the realty specialist.
- C. A summary of all discussions with the title company to have title defects removed.
- D. Any curative data obtained to remedy title defects.
- E. A Contract-to-Sell signed by the property owners, if applicable.

Additional Guidance can be found in the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions.

#### 4. NEGOTIATOR'S REPORTS

A copy of the negotiator's report that lists the time and place of all negotiations, offers and counter-offers made, and any other relevant information concerning discussions with the property owner(s).

#### 5. HAZARDOUS MATERIALS NARRATIVE

In accordance with FAA policy, DOJ should be provided with an explanation of all HAZMAT testing and remediation efforts that are planned for or underway on the property being acquired.

#### 6. CERTIFICATE OF INSPECTION AND POSSESSION

This form should be completed, signed and dated by an individual employed by the acquiring agency who has recent knowledge of the property being acquired. (See Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions Appendix of Forms).

#### 7. DECLARATION OF TAKING

A minimum of one copy of the Declaration of Taking (described in Part C below), signed by the Director of the Real Property Management Organization, APM- 1, along with the necessary attachments (described in Part D below), must be included with the Transmittal



Letter to the Attorney General. If more copies are requested by the Department of Justice, more will be provided.

### **C. The Declaration of Taking**

The format and content of a Declaration of Taking is standardized, and must include the following information (see example in Appendix Four).

#### **1. CASE CAPTION**

A case caption should be set at the top of the Declaration of Taking, setting forth the name of the United States District Court, with the names of the parties set forth below. In all cases, the Plaintiff in the condemnation action will be "THE UNITED STATES OF AMERICA." The Defendants are identified by stating the property interest by size and location (for example "32.945 Acres of Land, More or Less, Situated in Montgomery County, Maryland"), and listing at least one individual who possesses an interest in the property (usually the primary landowner). Leave the Civil Number as a blank; the number will be assigned by the clerk after the case has been filed.

#### **2. AUTHORITY FOR THE TAKING AND CERTIFICATIONS**

The body of the DT begins by identifying the individual possessing the authority to acquire the property. This will be the Director of the Real Property Management Organization, APM- 1 in most cases. The DT continues with a number of certifications that identify FAA's authority to take the property including the funding appropriation, the public uses for which the land is being taken, the estimated compensation for the taking, a legal description of the property and the estate(s) being taken, and a plat showing the estate(s) being taken. The legal description, estates being taken, and the plat are usually schedules that are attached to the DT.

#### **3. CLOSING**

The DT closes with an authorizing statement, date, signature, and signature block.

### **D. Attachments to the Declaration of Taking**

#### **1. Attachment A**

The first attachment should be labeled "Schedule A" and should consist of a legal description of the property being acquired. In instances where more than one parcel is being acquired, each parcel should be separately identified (Parcel 1, Parcel 2, etc.) and described. It is strongly recommended that, rather than re-type legal descriptions from a title report or land survey, that such legal descriptions instead be copied in order to avoid mistakes or omissions. Label and number successive pages as "Schedule A, page 1 of 3", to avoid confusion with other schedules.

## 2. Attachment B

The second attachment should be labeled "Schedule B" and should consist of the survey plat(s) of the property being acquired. The plats should be easy to read and understand, but contain sufficient information to be useful. As a practical matter, try to avoid plats drawn on excessively large size paper.

## 3. Attachment C

The third attachment should be labeled "Schedule C" and should describe the interest(s) or estate(s) to be acquired. The types of estates taken may include the fee simple title and perpetual easements of various kinds (i.e., restrictive use, utility, access, etc.). Exercise care in describing the estates you wish to acquire as errors are common. For example, if you need an easement that will provide access and serve as a utility corridor, you should call it an access and utility easement, and not simply an access easement.

Each interest or estate being acquired should be matched to the appropriate parcel identified in Schedule A. Schedule C should also include a listing of all entities by name and address that may have an interest in the property being acquired. This list should include not only all the owners but also all persons shown by the title evidence as potentially or actually having an interest in the property, if we are taking that interest. Depending on the estate taken this could include the local tax assessing office, mortgagees, lienholders, utility companies with rights-of-way interests, lessees, as well as holders of gas, oil, timber, and mineral rights, etc. If an interest, or class of interests, is excluded from the estate taken, the holder of such interest need not be named. For example, if the estate taken is "fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipeline.", then holders of utility easements need not be owners and parties in interest is required because all holders of any interest in the property being taken must be given notice by the Assistant U.S. Attorney that the property is being acquired for public purposes. If all individuals with an interest in the property are not served, the possibility exists that the acquiring agency may have to pay twice for the property being taken.

## **Post-Transmittal Activities**

Once the Condemnation Assembly is sent to the Department of Justice, it is reviewed by an attorney in the Land Acquisition Section of the Environment and Natural Resources Division. That attorney may contact the realty specialist to discuss details of the taking and/or the assembly package. Typically, the condemnation assembly is then sent to the appropriate U.S. Attorney's office in the federal district where the subject property is located, where it will be assigned to an Assistant U.S. Attorney (AUSA). Once the realty specialist receives the name and contact information for the AUSA handling the condemnation, the CO should initiate a call to the AUSA and offer any assistance possible in preparing the case for trial. This initial contact should begin a period of close cooperation between the AUSA and the realty specialist. A meeting between the CO and the AUSA at this stage may provide the AUSA with insight about property valuation issues

as well as negotiation prospects with the property owner.

In Declaration of Taking cases, the estimated amount of just compensation is deposited in the registry of the court at the time that the case is filed. Distribution of the estimated amount of just compensation to the appropriate parties is the responsibility of the court. However, the realty specialist and the AUSA should make every effort to assist the court in this endeavor.

As soon as the AUSA files the Declaration of Taking, or notice of lis pendens, the RECO should coordinate with the AUSA and file a copy of the Declaration of Taking (or, in complaint-only cases, a notice of lis pendens) in the local land records for the county in which the subject property is located. The CO should also obtain updated title evidence, usually in the form of a title insurance policy (see the Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016), Section 3.6). to include a search of all records through the date of recording of the Declaration of Taking or the lis pendens. This updated title report should be promptly furnished to the AUSA. In addition, the initial appraisal report will need to be updated to the date of taking. In some cases, the AUSA may ask the acquiring agency to obtain a new appraisal or to assist in locating and retaining expert witnesses such as environmental or land use experts.

The CO should offer to attend pre-trial meetings and negotiation sessions and should have full authority from the agency to recommend settlement prior to trial based on detailed knowledge of the circumstances surrounding the case and on advice of the AUSA. Prior to any negotiation session, the CO should contact ABA to determine exactly what funding

limits may apply to settlements due to budgetary constraints. As the case proceeds to trial the CO should offer to assist in the preparation of any exhibits that may be required. In many instances the official property file will contain photographs or plats that may be useful during the trial.

Finally, the CO should plan to attend the entire trial proceeding. Negotiations and settlements have been known to occur up until the day of the trial itself, or during the trial. DOJ officials are the ones who negotiate and settle matters after a case has been filed. The realty specialist should consult the AUSA handling the case regarding how the realty specialist should participate in the settlement process.

### **Post-Trial Activities**

When a court award (or a negotiated settlement) has been made that exceeds the estimated amount of just compensation deposited in the registry of the court, the AUSA will provide a certified copy of the judgment to the realty specialist. The CO should then take immediate steps to arrange for prompt payment of the deficiency (with interest) by Treasury check to the Clerk of the Court. The Land Acquisition section can assist in the calculation of the amount of interest due.

In those instances where compensation is awarded that is significantly higher than the Government's appraised amount, the title insurance policy may need to be increased to correspond to the higher property value (see the Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016), Section 3.6). However, that portion of the compensation awarded for damages to the remaining property should not be considered as part of the value of the property taken when determining how much title insurance to acquire. Unfortunately, the compensation awarded does not always provide a distinction between the value of property taken and any severance damages to the landowner's remainder parcel.

When the judgment involves an award which is considered to be excessive, the CO should discuss the possibility of an appeal with the AUSA and APM-1. Those discussions should focus on the potential success of an appeal and be weighed against the additional litigation costs associated with the appeal process. Specific procedures are required for filing an appeal; contact APM-1 for guidance concerning appeal procedures.

## ATTACHMENT 1

### **Definitions**

#### **Appraisal**

An appraisal is an estimate of value of property. Usually an appraisal is a written statement setting forth an opinion of value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant data.

#### **Assistant United States Attorney (AUSA)**

An attorney employed by the Department of Justice who works under the supervision of a United States Attorney in one of the 94 United States Attorneys offices located throughout the United States. There is a United States Attorney in each federal judicial district.

#### **Condemnation**

The process by which property of a private owner is taken for public use upon the award and payment of just compensation. Condemnation is the right of the state to reassert its dominion over any part of the soil of the state on account of public exigency and for the public good.

For all practical purposes the terms "condemnation" and "eminent domain" are synonymous.

#### **Complaint**

A complaint is the first or initial pleading on the part of a plaintiff in a civil action. A

complaint will generally contain a statement of facts constituting a cause of action and a demand of relief to which the plaintiff supposes himself entitled.

### **Declaration of Taking**

A document in the form and content specified in the Declaration of Taking Act, 40 U.S.C. § 3114, prepared by an acquiring agency and signed by an authorized agency official. The filing of a declaration of taking in a condemnation action together with a deposit into the registry of the court of estimated compensation thereby immediately vests title to the property in the United States. The amount of compensation due for the taking is adjudicated in subsequent proceedings and any difference between the estimated and actual just compensation with interest thereon computed from the date of taking is due the property owner.

### **Department of Justice**

Department of the Executive branch of the Federal government responsible for, inter alia, prosecuting condemnation actions on behalf of other agencies of the Federal government.

### **Easement**

An interest which one person has in the land of another, normally for the benefit of adjoining land. There are two types of easements. One is an “appurtenant” easement, which is an easement across a servient estate for the benefit of another property. An access easement is one example of an appurtenant easement. (For an example of a “Floating” access easement, see Appendix Four, Paragraph 6, subparagraph b.) The other is an “easement in gross”, or “restrictive” easement, which is an easement that restricts what an owner can do with his property.

### **Fee**

An absolute estate, subject only to the limitations of eminent domain, escheat, police powers, and/or taxation, where the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs upon his death intestate.

### **Hazmat**

An acronym referring to any substance or class of substances that may be hazardous to the health and well being of the human population. Environmental regulations recommend that testing for hazardous substances be conducted prior to the acquisition of real estate in order to limit the liability of the property owner or user to correct any contamination discovered on the property regardless of who caused the contamination.

**Interest**

A very general term that denotes a right, claim, or share in real estate or chattels.

**Inverse Condemnation**

This is a claim brought by a property owner against a governmental agency to recover damages for the taking of property as a result of the government's activities when no compensation has been made to the property owner. A frequent basis for an inverse condemnation claim is damage to property due to airplane overflights which, by noise and vibration, cause a diminution of the property below the flight path.

**Just Compensation**

The full and fair monetary equivalent for the property taken for public use.

**Lease**

A written document by which the rights of use and occupancy of land and/or structures are transferred by the owner to another person for a specified period of time in return for a specified rent or other recompense.

**Leasehold**

An estate in realty held under a lease. The right of use by a lessee to use and enjoy real estate by virtue of a lease agreement.

**Plat**

A map or representation on paper of a piece of land, usually drawn to a scale. Plats will generally show property lines, and may also show other features such as roads, abutting ownerships, building locations, topographical features, vegetation, etc.

**Property Description**

This is an unequivocal identification of a specific piece of land. Several methods of have been devised for adequately describing tracts of land such as the metes and bounds system and the Government Survey system (also called the Township/Section system).

**Public Use**

This means a use concerning the whole community as distinguished from particular individuals. Each member of the community need not be equally interested in such use, or be personally or directly affected by it; if the object is to satisfy a public want or exigency, that is sufficient.

## **Title Insurance**

This is insurance against loss or damage resulting from defects or failure of title to a particular parcel of real estate, or from the enforcement of liens existing against it at the time of the insurance. In some locations the Torrens system of land registration exists in which the sovereign governmental authority issues title certificates covering the ownership of land which tends to serve as title insurance.

## **Vest**

This means to give a fixed and indefeasible right. To have vested rights to a property means that rights have been so completely and definitely accrued to or settled in a person that they are not subject to being defeated or cancelled by the act of any other private person.

## **ATTACHMENT 2**

### **Title Information**

The Attorney General has redelegated his authority to pass on the sufficiency of title in land acquisitions to the Department of Transportation, Federal Aviation Administration. That redelegation is recited below.

FEDERAL REGISTER, VOL. 35 NO. 251 - 29 DECEMBER 1970

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION

ADMINISTRATION

REGIONAL COUNSELS AND CENTER COUNSELS AND/OR  
HEADQUARTERS COUNSEL

Notice of Redelegation of Authority to

Approve Sufficiency of Title to Land

Section 355 of the Revised Statutes, as amended by Public Law 91-393, 84 Stat. 835 (40 U.S.C.

255) authorizes the Attorney General to delegate to other departments and agencies his authority to give written approval of the sufficiency of the title to lands being acquired by the United States. The Attorney General has delegated to the Assistant Attorney General in charge of the Land and Natural Resources Division the authority to make delegations under that law to other Federal departments and agencies (35 Fed. Reg. 16084; 28 C.F.R. 0.66). The Assistant Attorney General, Land and Natural Resources Division has further delegated certain responsibilities in connection with the approval of the sufficiency of title to land to

the department of Transportation as follows:

**DELEGATION TO THE DEPARTMENT OF TRANSPORTATION FOR THE APPROVAL  
OF THE TITLE TO LANDS BEING ACQUIRED FOR FEDERAL PUBLIC PURPOSES**

Pursuant to the provisions of Public Law 91-393, approved September I, 1970, 84 Stat. 835, amending R.S. 355 (40 U.S.C. 255), and acting under the provisions of Order No. 440-70 of the Attorney General, dated October 2, 1970, the responsibility for the approval of the sufficiency of the title to land for the purpose for which the property is being acquired by purchase or condemnation by the United States for the use of your Department is, subject to the general supervision of the Attorney General and to the following conditions, hereby delegated to your Department.

This delegation of authority is further subject to:

- i. Compliance with the regulations issued by the Assistant Attorney General on October 2, 1970, a copy of which is enclosed.
2. This delegation is limited to:
  - (a) The acquisition of land for which the title evidence, prepared in compliance with these regulations, consists of a certificate of title, title insurance policy, or an owner's duplicate Torrens certificate of title.
  - (b) The acquisition of lands valued at \$100,000 or less, for which the title evidence consists of abstracts of title or other types of title evidence prepared in compliance with said regulations.

As stated in the above-mentioned act, any Federal department or agency which has been delegated the responsibility to approve land titles under the Act may request the Attorney General to render an opinion as to the validity of the title to any real property or interest therein, or may request the advice or assistance of the Attorney General in connection with determinations as to the sufficiency of title.

This the 2nd day of October, 1970

**SHIRO KASHIWA**, Assistant Attorney General, Land and Natural Resources Division.

The above authority was delegated to the General Counsel of the Department of Transportation by Amendment 1-41 to Part 1 of Title 49, Code of Federal Regulations, 35 F.R. 17658,  
November 17, 1970

Finally, the authority was redelegated to the Chief Counsels of the operating administrations of the Department of Transportation, including the Federal Aviation



Administration (35 F.R.  
18412, December 3, 1970).

In consideration of the foregoing and pursuant to the authority delegated to me as chief counsel of the Federal Aviation Administration by the General Counsel of the Department of Transportation, the Regional Counsels and Center Counsels of the Federal Aviation Administration are hereby authorized to approve the sufficiency of the title to land being acquired by purchase or condemnation by the United States for the use of the Federal Aviation Administration. This delegation is subject to the limitations imposed by the Assistant Attorney

General, Land and Natural Resources Division, in his delegation to the Department of Transportation. Redelegations of this authority may only be made by the Regional Counsels and Center Counsels to one attorney within their respective staffs.

Issued in Washington, D. C. on December 22,

1970. GEORGE U. CARNEAL, JR. General

Counsel

### **ATTACHMENT 3**

#### Sample Transmittal Letter

The Honorable Name, Attorney

General c/o Land Acquisition

Section

P.O. Box 561

Washington, DC

20044

Dear Mr. Attorney General:

It is respectfully requested that you acquire, by condemnation, fee simple title to certain land situated in Perry County, Illinois, for use as a land site for radio communication link (RCL) facility. The land is more fully described in the Declaration of Taking.

This request is made pursuant to 49 U.S.C. § 40110, 40 U.S.C. §§ 3113-14, and in accordance with the authority delegated by the Administrator of the Federal Aviation Administration to the Director of the Real Property Management Organization, APM- 1 .

Funding was apportioned to the Federal Aviation Administration for the purchase of this property by the Transportation and Related Agencies Act of 1993 (Public Law 107-388), dated April 3, 2001.

The radio communication facility link facility provides a voice and data link between air traffic control facilities and is critical to the operation of the National Airspace System. There will be a continuing need for the facility throughout the foreseeable future.

The government has operated and maintained this facility under a lease agreement since 1977. The owners have rejected all government offers to purchase the subject property. The current lease will expire on September 30, 2004, and continued possession is required on October 1, 2004. Thus, immediate possession is necessary and a Declaration of Taking is therefore requested.

Since this acquisition is for an existing operational facility that will not undergo any site change, environmental processing is exempted by our procedure 42 Fed. Reg. 32647 (Appendix 5, paragraph 5f).

I certify that the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act (Pub. L. 91-646) have been complied with in our attempts to acquire this property. I also certify that there are no statutory limitations imposed on this acquisition and that the

ultimate award for said land will probably be within any limits prescribed by law on the price to be paid therefore.

Enclosed herewith are the following:

1. An original and three copies of the Declaration of Taking with Schedules "A", "B", and "C" attached.
2. U.S. Treasury Check No. 786,465,982 in the amount of \$86,500, said sum being the amount estimated as just compensation for said property with all buildings and improvements thereon.
3. Four copies of the complete condemnation assembly package.

If you or your staff need any assistance or additional information in connection with this request, please contact (insert and telephone number of point of contact) of FAA's Great Lakes Region Real Estate and Utilities office.

Sincerely,

Director of the Real Property Management  
Organization, APM- 1  
Enclosures

**ATTACHMENT 4**

**Sample Declaration of Taking**

UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF MARYLAND

United States,	)	
	)	
Plaintiff,	)	CIVIL NO.
<hr style="border: 0.5px solid black;"/>		
	)	
vs.	)	
	)	
32.945 ACRES OF LAND, MORE	)	OR LESS, SITUATED IN
MONTGOMERY	)	
COUNTY, MARYLAND, AND FRED	)	JOHNSON, AND UNKNOWN
OWNERS	)	
	)	
Defendants.	)	

**DECLARATION OF TAKING**

I, Name, Director of the Real Property Management Organization, APM- 1,  
Federal Aviation Administration, Eastern Region, do hereby declare that:

1. The land, hereinafter referred to as the “property,” is hereby taken under and in accordance with 49 U.S.C. § 40110, 40 U.S.C. §§ 3113 and 3114, and Public Law 107-87, dated December 18, 2001, which appropriated funds for such purposes, and the authority delegated by the Administrator of the Federal Aviation Administration (FAA) to the APM-1 of the FAA (27 Fed. Reg. 3773).

2. A determination has been made by me that the subject property is necessary for public use to provide a site for the continued operation and maintenance of a Non-Directional Radio Beacon facility. This facility is used by aircraft for navigational purposes and is a critical element to the National Airspace System.

3. A general description of the property being taken is set forth in "Schedule A" attached hereto and made a part hereof.

4. A plan showing the property taken is attached hereto as "Schedule B" and made a part hereof.

5. The owner and any parties having or claiming an interest in the subject property are listed in "Schedule C," attached hereto and made a part hereof.

6. The estates being acquired here for public use are:

a. As to the Non-Directional Radar Beacon facility lot, containing 32.00 acres of land: fee simple, subject to existing easements for public roads and highways, public utilities, railroads, and pipelines.

"Floating" Easement - A perpetual and assignable easement and right-of-way to locate, construct, operate, maintain, and repair a roadway in, upon, over and across the land described in "Schedule A", together with the right to trim or remove any vegetative or structural obstacles that interfere with the right-of-way; subject, to existing easements for public roads, highways, public utilities, railroads and pipelines; reserving, however, to the landowner, its heirs and assigns, to 1.) the right to use the surface of such land as access to their adjoining land or for any other use consistent with its use as a road; 2) the right to relocate said right-of-way at any time, provided a) the United States shall have continuous access during the relocation process; b) the relocated easement and right-of-way shall provide access as passable as that of the existing road, and it shall be located on a reasonably convenient route from described in Schedule "A" to the public road; c) the relocated easement and right-of-way shall be of equal width as the road described in Schedule "A", and shall be clearly described in the same manner as the original easement in a properly recorded instrument; and d) the relocated easement and right-of-way is clearly described in a recordable instrument, and the United States must sign said instrument to acknowledge that it has received notice of the relocation, which signature shall not be unreasonably withheld.

b. The estate(s) taken for said public uses is (list estate(s) or interest being taken – fee simple, perpetual easement such as utilities, cabling, leasehold, leasehold than fee simple or term of years then fee simple for holdover situations, etc.) and is further set forth in "Schedule A" which is attached thereto and made a part hereof.

7. A plan showing the property taken in the form of a survey is attached hereto as "Schedule B" and made a part hereof.

8. The owner and any parties having an interest in the subject property are listed in "Schedule C" attached hereto and made a part hereof.

9. The sum of money estimated by me as just compensation for the acquisition of said property interest is ninety-five thousand five hundred dollars (\$95,500.00). It is my opinion that the ultimate award of just compensation for this acquisition will be within any limits prescribed by law on the price to be paid therefore.

10. I herewith deposit (\$95,500.00) in the registry of the court for use and benefit of the persons entitled thereto.

In witness whereof, the United States of American has caused this Declaration of Taking to be signed in its name by me, as Director of the Real Property Management Organization, APM- 1 , Federal Aviation Administration on this \_\_\_\_\_ day of \_\_\_\_\_, 2005 at Jamaica, New York.

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Name APM-1

Federal Aviation Administration

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[1]/This document is a revision to the 1993 pamphlet Preparing Condemnation Assemblies for Submission to Department of Justice

[2]/ The Supreme Court has stated that "[Condemnation] authority is essential to [the] independent existence and perpetuity [of the United States] .....If the right to acquire property .. may be made a barren right by the unwillingness of property holders to sell..... the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of . . . a private citizen. This cannot be." Kohl v. United States, 91U.S.367, 371 (1875).

[3]/ See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

[4]/ See, Kirby Forest Industries v. United States, 467U.S.1 (1984).

[5]/ See Uniform Relocation Assistance and Real Property Acquisition Policy Act, Pub. L. 91- 646, 42 U.S.C. § 4651(3) (1987).