

3.8 Special Categories of Contracting

3.8.1 Agreements

3.8.1.1 Applicability

3.8.1.2 Use of Agreements Revised 1/2012

3.8.1.3 Principles for Agreements

3.8.2 Service Contracting

3.8.2.1 Applicability

3.8.2.2 Policy

3.8.2.3 Personal Services Contracts

3.8.2.3.1 Reserved

3.8.2.3.2 Determination

3.8.2.4 Performance Based Service Contracts

3.8.2.5 Cloud Computing Services Contracts Added 10/2016

3.8.3 Federal Supply Schedule Contracts

3.8.3.1 Applicability

3.8.3.2 Policy

3.8.4 Required Sources of Products/Services and Use of Government Sources

3.8.4.1 Applicability Revised 2/2005

3.8.4.2 Government Sources for Products and Services Revised 10/2014

3.8.5 Accounting Treatment of Leases Added 9/2020

3.8.5.1 Applicability Added 9/2020

3.8.5.2 Policy Added 9/2020

3.8.6 Strategic Sourcing Revised 4/2022

3.8.7 Construction Contracting Added 9/2020

3.8.7.1 Applicability Added 9/2020

3.8.7.2 Policy Added 9/2020

3.8.8 Real Property Special Categories of Contracting Added 9/2020

3.8.8.1 Real Property Purchases Added 9/2020

3.8.8.2 Leases Revised 9/2020

3.8.8.2.1 Applicability Revised 9/2020

3.8.8.2.2 Policy Revised 9/2020

3.8.8.2.2.1 Types of Leases and Applicability Added 9/2020

3.8.8.2.2.2 Lease Authority Added 9/2020

3.8.8.2.2.3 Firm Term Leases Added 9/2020

3.8.8.2.2.4 Holdover Tenancy Added 9/2020

3.8.8.2.2.5 Alterations and Improvements Added 9/2020

3.8.8.2.2.6 Capitalization of Leases and Leasehold

Improvements Added 9/2020

3.8.8.2.2.7 Secure Federal LEASEs Act Added 7/2023

3.8.8.3 No-Cost Land on Airports Revised 7/2023

3.8.8.4 Utilities Added 9/2020

3.8.8.5 Condemnation Added 9/2020

3.8.8.6 Disposal of Real Property Added 9/2020

3.8.8.7 Conveyance Added 9/2020

3.8.8.8 Outgrants Added 9/2020

[3.8.8.9 Housing Policy](#) Added 9/2020

[3.8.8.10 Rural Development Act \(RDA\)](#) Added 1/2022

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## **3.8 Special Categories of Contracting**

### **3.8.1 Agreements**

#### **3.8.1.1 Applicability**

##### **3.8.1.2 Use of Agreements Revised 1/2012**

It is FAA's policy to use various agreements, other than procurement contracts, to obtain or provide services and supplies when necessary to accomplish the mission of FAA. These agreements may be made with another Federal agency or instrumentality of the Federal government, a modal administration within the Department of Transportation, a state, local government, municipality, or other public entity, and private entities. (See 49 U.S.C. 106(l)). The following is a list of the more commonly used agreements (other than procurement contracts):

- (a) Interagency agreements;
- (b) Intra-agency agreements;
- (c) Reimbursable agreements;
- (d) Agreements with other public entities; and
- (e) Agreements to provide services to a private entity on an individualized basis.

#### **3.8.1.3 Principles for Agreements**

Agreements with other Federal Agencies (as defined in section 551(1) of title 5) are appropriate where FAA provides services or supplies or facilities to another Federal agency, or where FAA is the requesting agency to receive services, or supplies, or facilities from another Federal agency or that agency's contractor. Where the FAA and the Department of Defense are engaged in joint actions to improve or replenish the national air traffic system, the AMS policies governing FAA acquisitions are applicable. In those instances where the FAA acquires goods or services through the Department of Defense or other agencies, the FAA is bound by the acquisition laws governing those agencies.

### **3.8.2 Service Contracting**

#### **3.8.2.1 Applicability**

This section applies to advisory and assistance contracts and other services, including personal services such as employees support service as provided for in FAA's Personnel Management System. This section does not apply to FAA employees, temporary, part-time or permanent appointed or hired in accordance with the other applicable portions of the FAA Personnel Management System.

##### **3.8.2.2 Policy**

The FAA will generally rely on the private sector for commercial services (see OMB Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services Need by the Government). In no event may a contract be awarded for the performance of an inherently governmental function. Advisory and assistance contracts must comply with all applicable laws concerning post-employment and other conflict of interest and ethics laws and policies.

### **3.8.2.3 Personal Services Contracts**

#### **3.8.2.3.1 Reserved**

#### **3.8.2.3.2 Determination**

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

- (a) Worker's compensation payments and other tax implications;
- (b) Government's potential liability for services performed;
- (c) Availability of temporary hires to perform the desired services;
- (d) Demonstration of tangible benefits to the agency;
- (e) Detailed cost comparison demonstrating a financial advantage to the Government from such contract;
- (f) Potential post-employment restrictions applicable to former employees;
- (g) Legal determination that the work to be performed is not inherently governmental; and
- (h) Potential post-employment restrictions pursuant to Federal Workforce Restructuring Act of 1994 Public Law 103-226.

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

### **3.8.2.4 Performance Based Service Contracts**

Service contracts should incorporate performance based contracting methods to encourage contractor innovation and efficiency, and to help ensure contractors provide timely, cost-effective, and quality performance with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.

### **3.8.2.5 Cloud Computing Services Contracts Added 10/2016**

All cloud computing services contracts will be conducted in accordance with Federal Risk and Authorization Management Program (FedRAMP) requirements. Further information on FedRAMP may be found at [www.fedramp.gov](http://www.fedramp.gov).

### **3.8.3 Federal Supply Schedule Contracts**

#### **3.8.3.1 Applicability**

This section is applicable when FAA awards Federal Supply Schedule delivery orders for recurring products and services. Additionally, this section addresses requirements to utilize Federal Supply Schedules awarded by GSA, when the FAA is identified in the schedule as a mandatory/non-mandatory user of any supply/service on the schedule.

#### **3.8.3.2 Policy**

The FAA may consider awarding Federal Supply Schedule contracts, or placing orders against Federal Supply Schedules awarded by GSA, for recurring products and services when it is determined to be in the best interest of the FAA.

### **3.8.4 Required Sources of Products/Services and Use of Government Sources**

#### **3.8.4.1 Applicability Revised 2/2005**

This section applies to procurement of all products and services, except for real property, utilities, and construction.

#### **3.8.4.2 Government Sources for Products and Services Revised 10/2014**

The CO may use available Government sources when they offer the best value to satisfy FAA's mission need. However, pursuant to FAA policy, the CO must acquire products and services offered through the Randolph-Sheppard Vending Facilities Program (20 U.S.C. § 107) and AbilityOne (formerly the Javits-Wagner-O'Day Program) (41 U.S.C. §§ 8501-8506).

FAA policy also requires that FAA purchase products offered by Federal Prison Industries (FPI) when the FPI's product represents the best value to FAA, unless an exception below applies. In making a best value determination for FPI products, the CO must utilize the procedures in AMS Procurement Guidance T3.8.4.A.4. The CO must post an announcement for any procurement for products available from FPI in accordance with AMS Policy 3.2.1.3.12. This policy concerning FPI does not apply if:

- (a) The monetary value of the procurement would not require a competitive procurement process under AMS Policy 3.2.2.4;
- (b) A market analysis would not be required under AMS Policy 3.2.2.4 to support a single-source procurement of the product;
- (c) Suitable used or excess products are available from the government;
- (d) The products are acquired and used outside the United States;
- (e) Services are being acquired; or

(f) FAA has obtained a waiver from FPI with respect to the particular product or class of products at issue in the procurement.

The CO may allow contractors with cost-reimbursement contracts to use Government sources when in FAA's best interest and the products or services are available. Contractors with fixed-price contracts to protect classified information may acquire security equipment through GSA sources after CO approval.

### **3.8.5 Accounting Treatment of Leases Added 9/2020**

#### **3.8.5.1 Applicability Added 9/2020**

This section applies to products, services, and real property to the extent authorized by law.

#### **3.8.5.2 Policy Added 9/2020**

It is this policy of the FAA to enter into leases for various products and services when it is determined by the CO, based on financial and other considerations, to be in the best interest of the Government compared to the outright purchase of such assets or services.

It is also FAA policy to avoid establishment of capital leases or lease purchases unless the requesting service organization demonstrates they have complied with the requirements of OMB Circular A-11, Part 8, Appendix B "Scoring of Lease Purchases and Leases of Capital Assets."

For FAA's policy on Capitalization of Leases and Leasehold Improvements, see AMS 3.8.8.2.2.6.

### **3.8.6 Strategic Sourcing Revised 4/2022**

The FAA is leveraging its spending through strategic sourcing and will award contracts for products and services to help the agency optimize performance and minimize price to increase the value of each dollar spent. Therefore, when a needed product or service is available through a strategic sourcing contract, purchasing employees must use a strategic sourcing contract.

All strategic sourcing contracts are established following the AMS Policy and Guidance. To increase achievement of socio-economic acquisition goals, all strategic sourcing procurements must be balanced with socio-economic goals for small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned businesses, service-disabled veteran-owned businesses, and historically underutilized business zone small businesses in accordance with AMS Policy 3.6.1 Small Business Development Program.

When performance of any strategic sourcing contract requires access to FAA facilities and/or requires handling of sensitive material, the contract must include all of the appropriate clauses

and/or restrictions and comply with FAA Order 1600.1F, Personnel Security Program and FAA Order 1600.75, Protecting Sensitive Unclassified Information (SUI).

When an organization is going to strategically source a product or service, it must use mandatory government sources as described in AMS Policy 3.8.4 and Procurement Guidance T3.8.4A.

### **3.8.7 Construction Contracting Added 9/2020**

#### **3.8.7.1 Applicability Added 9/2020**

This section applies to construction contracts, contracts for dismantling, demolition, or removal of improvements, and to the construction portion of contracts for products or services.

#### **3.8.7.2 Policy Added 9/2020**

If portions of multipurpose contracts are so commingled that priced deliverables for construction, service, or supply cannot be segregated and the predominant purpose of the contract is construction, the contract will be classified as construction.

### **3.8.8 Real Property Special Categories of Contracting Added 9/2020**

This section applies to the procurement of all real property interests by lease, purchase, condemnation, or otherwise.

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

It is policy of the FAA to purchase real property interests that are in the best interest of the FAA and at fair and reasonable prices. A lease versus purchase analysis must be completed for all prospective real property land acquisitions. All lease versus purchase analyses must take into consideration the anticipated term to satisfy the FAA's needs.

The lease versus purchase analysis is used to determine the most cost-effective method acquisition strategy. 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.

#### **3.8.8.2 Leases Revised 9/2020**

##### **3.8.8.2.1 Applicability Revised 9/2020**

This section applies to real property leases to the extent authorized by law.

#### **3.8.8.2.2 Policy Revised 9/2020**

It is the policy of the FAA to enter into leases for real property when it is determined by the Contracting Officer, based on financial and other considerations, to be in the best interest of the Government compared to the outright purchase of real property.

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

For all new, superseding, and succeeding leases, APM-200 Policy, Planning & Systems Division, must notify and coordinate with the service organization and contracting office at least thirty six (36) months prior to the lease expiration date for all General Services Administration (GSA) controlled space, and FAA direct land and space leases. For specific lease issues that could jeopardize timely completion of the new, superseding, or succeeding lease transaction, the cognizant CO may provide earlier notification to the service organization and APM-200.

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

In accordance with the provisions of 49 U.S.C. § 40110(c)(1), the CO may enter into a lease with a term of up to twenty (20) years, notwithstanding the Anti-Deficiency Act. The lease must, however, be appropriately funded by the last day of the first period due under the rental schedule.

##### **3.8.8.2.2.3 Firm Term Leases Added 9/2020**

A firm term lease occurs 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 lease 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. Prior to awarding a firm term lease, 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).

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

A holdover tenancy is created when the FAA continues to occupy leased premises after the lease terms has expired. It is the FAA's policy to avoid holdovers to the extent that it is possible and to limit its use in leases. Indefinite holdover clauses should be limited to land acquisitions or for space leases housing mission critical safety equipment. If using a holdover clause, the CO must document the rationale in the award decision document (Negotiator's Report).

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



Alterations and/or improvements, including Tenant Improvements (TIs), may be required by the FAA to make the leased premises acceptable for FAA occupancy. Post occupancy alterations and improvements must be based upon the service organization's technical requirements, business practices or programmatic needs.

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

It is FAA policy to avoid establishment of capital leases or lease purchases unless the requesting organization demonstrates they have complied with the requirements of OMB Circular A-11, Part 8, Appendix B “Scoring of Lease Purchases and Leases of Capital Assets”. Capitalized leases and leasehold improvements 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). The FAA must follow the FAA Financial Manual Vol. 8, Property, Plant and Equipment, Chapter 8.6 for capitalization of Leases and Leasehold Improvements.

#### **3.8.8.2.2.7 Secure Federal LEASEs Act Added 7/2023**

Pursuant to the Secure Federal LEASEs Act, Public Law 116-276, the FAA, prior to entering into a lease or approving a novation agreement for high-security space (facility security level FSL III or above), must require a covered entity to identify and disclose whether the immediate or highest-level owner of the leased space, including an entity involved in the financing thereof, is a foreign person or a foreign entity, including the country associated with the ownership entity.

#### **3.8.8.3 No-Cost Land on Airports Revised 7/2023**

It is the policy of the FAA to confirm when an airport has received Airport Grant Assurance funds requiring it to provide rent-free land. Contracts will be prepared in accordance with Airport Grant Assurance 28 and related appropriation regulations.

#### **3.8.8.4 Utilities Added 9/2020**

The utility acquisition process must be conducted in a fair and equitable manner, following the best commercial business practices, while complying with all applicable regulations. All new construction and major renovation projects at FAA facilities will include installation of advanced meters for electricity in accordance with the Energy Policy Act of 2005 (EP Act of 2005), and gas and steam advanced meters in accordance with the Energy Independence and Security Act (EISA) 2007, Section 434(b). Advanced meters should also be considered to collect water use data for each water supply sources (e.g., domestic potable water and non-potable water, including reclaimed water and rainwater). For existing FAA facilities where no major renovations are anticipated, advanced meters must be implemented where cost-effective and practicable.

#### **3.8.8.5 Condemnation Added 9/2020**

Condemnation proceedings, also referred to as eminent domain, may be initiated, in accordance with established procedures, as a last resort for real property acquisitions when negotiations have reached an impasse and a satisfactory conclusion to the procurement cannot be reached. All condemnations require legal participation. When real property is acquired by purchase or condemnation proceedings, the FAA must follow the Department of Justice Condemnation Guidelines and Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016) for title requirements.

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

There are two sources of authority under which the FAA may dispose of real property:

- (a) Pursuant to 49 U.S.C. § 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.
- (b) 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.

#### **3.8.8.7 Conveyance Added 9/2020**

Conveyance is the legal process of transferring real property from the FAA to another owner. It is the policy of the FAA to transfer ownership of real property when it is in the best interest of the FAA and in compliance with FAA Order 1050.19C, Environmental Due Diligence Audits in the Conduct of FAA Real Property Transactions. Buildings and structures being considered for conveyance must be screened by the appropriate FAA environmental and safety professionals for any environmental or safety issues that may require mitigation prior to transfer.

#### **3.8.8.8 Outgrants Added 9/2020**

The FAA may convey unutilized or underutilized leased or owned real property to another government entity or third party as long as the use does not interfere with current or known future FAA needs for the property. The term for a new or succeeding outgrant may not exceed five (5) years.

#### **3.8.8.9 Housing Policy Added 9/2020**

The purpose of the FAA Housing program is to provide 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. These provisions are applicable for all Lines of Business/Staff Offices and organizational elements having a requirement for and using FAA housing quarters.

#### **3.8.8.10 Rural Development Act (RDA) Added 01/2022**

The requesting FAA service organization must give first consideration to rural areas when searching for locations for new space, other facilities (i.e. research and development facilities, warehouses, labs, clinics, etc.), and land acquisitions, unless mission or program requirements call for urban areas. A rural area is defined as a city, town, or unincorporated area that has population of 50,000 inhabitants or less, other than an urbanized area immediately adjacent to a city, town, or unincorporated area that has a population in excess of 50,000 inhabitants.

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