



Procurement of Airport Development and Planning Contracts

DETAILS

45 pages | 8.5 x 11 | PAPERBACK
ISBN 978-0-309-25852-4 | DOI 10.17226/22712

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PROCUREMENT OF AIRPORT DEVELOPMENT AND PLANNING CONTRACTS

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I. OVERVIEW OF AIRPORT PROCUREMENT

A. Federal Procurement Laws and Regulations

1. In General

Airports procure a variety of contracts for construction services, professional services, and the purchase of equipment. Virtually every procurement made by a public airport is subject to some type of procurement law or regulation. The various competitive procurement requirements exist to promote fair and open competition and ensure integrity and confidence in the public procurement system. *See Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6th Cir. 1980); *City of Bristol v. Dominion National Bank*, 149 S.E. 632 (Va. 1929). They are designed to protect the public by preventing “favoritism, corruption, extravagance and improvidence,” and, therefore, should be construed fairly and reasonably to accomplish such purpose. *Allis-Chalmers v. Public Lighting Comm. of Detroit*, 155 Mich. 207, 213 (Mich. 1908); *see generally* 48 C.F.R. § 1.102 (statement of guiding principles for the Federal Acquisition System).

Which procurement requirements apply to any given procurement will depend upon the type of goods and services required and the funding source. Airports receive funding from a variety of sources, including funding from federal, state, and local governments and internal revenue sources, such as tenant revenue, concessions, and parking revenue. Airports often commingle funds from a variety of different sources to adequately fund a project. Each of these funding sources has its own procurement requirements, and, in some instances, the requirements may conflict.

When an airport receives federal funds, there are extensive statutes, regulations, operating guidance, and case law that will impact the procurement.¹ Airports can receive federal funding from a number of different federal agencies, each with its own requirements. The most common federal agencies providing financial support to airports include:

- United States Department of Transportation (USDOT).
- Federal Aviation Administration (FAA).
- Federal Highway Administration (FHWA).
- Department of Homeland Security.
- Transportation Security Administration (TSA).
- Federal Emergency Management Agency (FEMA).

Although most federal agencies provide financial assistance to airports in the form of a grant, federal funds can also be provided in the form of a contract or other transaction agreement (OTA). The type of funding (whether a grant, contract, or OTA) affects which requirements apply. Certain appropriations have additional procurement requirements, such as:

- Airport Improvement Program (AIP).
- American Recovery and Reinvestment Act of 2009 (ARRA).
- USDOT’s Transportation Investment Generating Economic Recovery (TIGER) Program.

The FAA also regulates an additional funding source known as passenger facility charges (PFC). PFCs fall into a special category because they are not federal funds distributed by the federal government, but the program is authorized and regulated by the federal government.

Because each funding source and funding type has its own procurement and contractual requirements, navigating through such a complex environment requires careful analysis, especially when the requirements are ambiguous or conflicting. This digest provides guidance on how to determine which requirements apply to any given procurement and provides an overview of the consequences for noncompliance so that airports can better understand the inherent risks associated with each funding source.

2. Applicability of 49 U.S.C. §§ 47101–142 and 49 C.F.R. § 18.36

The AIP is contained within Title 49 of the United States Code at 49 U.S.C. §§ 47101–142. The AIP requirements apply *only* when an airport actually applies for and receives FAA approval of its grant application under the AIP Program. The FAA publishes an AIP Handbook (Order 5100.38C) and has issued various advisory circulars that explain their interpretation of the federal requirements. When interpreting the federal regulations, the official guidance documents, such as the FAA AIP Handbook, should be considered since the courts give great deference to the federal agency’s interpretation of federal regulations. *City of Cleveland v.*

¹ Applicable legal authorities include federal agency regulations; federal agency operating guidance documents; federal administrative caselaw, such as Comptroller General opinions; and federal appellate caselaw, as well as state statutes, state agency regulations, state agency guidance documents, state agency administrative caselaw, state agency appellate caselaw, local ordinances, and internal policies and procedures that impact the procurement.

Ohio, 2006 U.S. Dist. LEXIS 1083 (S.D. Ohio 2006) (FHWA withdrew federal funds for violation of the federal requirements).

A significant portion of federal funds received by airports for airport development are distributed as grants, such as FAA AIP grants. When federal funds are distributed as grants or cooperative agreements, the procurement requirements contained within the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 49 C.F.R. 18.36 apply.

A grant is defined as:

an award of financial assistance, including cooperative agreements, in the form of money...by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

See 49 C.F.R. § 18.2 (2010). Because AIP funds are distributed as a grant, 49 C.F.R. § 18.36 applies to all AIP-funded projects.

The PFC Program is not considered a grant, and, therefore, the procurement requirements of 49 C.F.R. § 18.36 only apply to PFC-funded projects when other funding sources for the project include grants such as AIP.

By accepting a federal grant, airports assume certain legally-binding obligations that are contained in the grant agreement and grant assurances. See, e.g., *Consolidated Services Engineers & Constructors, Inc. v. City of Palm Springs*, 2004 FAA LEXIS 578 (FAA 2004). The standard federal grant assurances are numerous and generally require compliance with all applicable federal statutes and regulations, such as compliance with the Disadvantaged Business Enterprise (DBE) Program requirements contained in 49 C.F.R. Parts 26 and 23. See, e.g., *J&B Enterprises, Inc. v. Metropolitan Nashville Airport Authority*, 2009 FAA LEXIS 218 (FAA 2009). The 2011 grant assurances can be obtained on the FAA Web site, located at http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

When an airport is *state-owned and operated*, such as part of a state department of transportation, *the airport is allowed to follow its own procurement laws*, instead of 49 C.F.R. § 18.36(b)-(d). See 49 C.F.R. § 18.36(a). For state-operated airport projects using federal grant funds, the contract must contain the contractual provisions required by federal law, executive orders, and their implementing regulations, including the contractual provisions listed in 49 C.F.R. § 18.36(i). The major provisions required by 49 C.F.R. § 18.36(i) are described in Section III(A) below. There are no additional federal competitive procurement requirements for state airports, unless specified by the funding source, such as an OTA. For the purposes of this digest, a distinction is made between “procurement

requirements,” which refer to the various steps in the procurement process leading up to the execution of a contract, and “contractual requirements,” which are specific provisions that must be included in the contract.

When an airport is operated as a *local entity*, such as the Orlando International Airport, the airport must ensure that its local procurement regulations *follow the basic standards set forth in 49 C.F.R. § 18.36(b)-(i)*. The C.F.R. standards are addressed in detail in Section IV, below.

When an airport receives a federal grant as a subgrantee, through a state grantee, it has the same requirements under 49 C.F.R. § 18.36 as if it were a direct grantee. Grantees may delegate the monitoring and compliance requirements to the subgrantee, and additional requirements may be imposed by the state grantee, such as additional reporting or record-keeping. See 49 C.F.R. § 18.37 (requiring state grantees to ensure compliance by subgrantees).

3. Passenger Facility Charges

Airports may obtain authority from the FAA to impose PFCs, up to \$4.50 for each eligible enplaned passenger. Airlines collect the fees and pay them to the airport monthly. Airports use PFCs to fund FAA-approved projects that enhance safety, security, or capacity; reduce noise; or increase air carrier competition. The FAA advisory circular addressing the procurement of professional services does not apply to PFC-funded projects. See FAA Order 5500.1, Office of Management and Budget (OMB) Memorandum A-133, and 14 C.F.R. Part 158 for the PFC program details.

Projects funded totally with PFC revenue are not subject to the various AIP requirements that are addressed in this digest. See *generally* 14 C.F.R. Part 158 and Appendix A thereto; see also *Passenger Facility Charge Audit Guide for Public Agencies* (FAA 2000). For example, the FAA has explained that the civil rights requirements for the AIP do not apply to PFC-funded projects. See FAA Advisory Circular 150/5100-15A. However, if the PFC funds are commingled with AIP funds on a particular project, all of the AIP requirements will apply. See 14 C.F.R. Part 158.13(f). In addition, the AIP requirements may apply if the PFC-funded project is part of a past, current, or future FAA AIP-funded program or project.

The PFC Program allows airports to follow their own state and local procurement processes and does not impose additional procurement requirements. See *generally* FAA Order 5500.1, page 13 (setting forth certain federal laws that do not apply to PFC-funded projects), and pages 192–193 (requiring airports to follow state and local laws). In general, PFC expenditures must be within the approved project and must be reasonable and necessary to carry out the work. See 14 C.F.R. Part 158.3. One of the unique features of PFCs is that they are used to pay debt service on bond issues. It is imperative for airports to understand that the underlying capital development cost must still comply with all PFC

compliance regulations, even if the debt service is commingled with non-PFC-supported debt funding.

4. Other Transaction Agreements

Occasionally, a federal agency will enter into an OTA with an airport to fulfill some need of the agency. For example, the TSA may require something specific for their employees to properly perform their roles, such as security cameras or screening devices. When the federal agency decides to use an OTA, the agency will negotiate the terms of the OTA specifically for that purpose. The OTA often expressly states that it is not to be considered a grant or cooperative agreement. This means that 49 C.F.R. § 18.36 and the Federal Acquisition Regulation (FAR) do not apply to that transaction, unless otherwise set forth in the OTA. When funds are provided to an airport as part of an OTA, the airport must review the specific terms of the OTA to determine whether there are any additional procurement or contractual requirements, and, unless stated otherwise in the agreement, follow applicable state and local requirements.

B. Hierarchy of Federal, State, and Local Laws (Preemption)

In addition to the federal requirements, each state imposes its own procurement requirements, and there may be local requirements as well. If there is no conflict between the federal, state, and local requirements, then all of the requirements will apply to a federally funded project.² If there is a conflict between the federal requirements and any state or local requirement, the legal concept of federal preemption provides that the federal law will prevail over state and local laws.³

Congress has not preempted all state and local procurement laws. In fact, the only procurement requirements expressly imposed by Congress in the AIP statutes relate to the use of a qualifications-based selection (QBS) method for certain professional services and the FAA's authorization to approve grants for certain design-build selection methods. See 49 U.S.C. § 47107(a)(17) (2009) and 49 U.S.C. § 47142 (2009). Each is discussed in detail in Section IV(B). The federal

² Some federal requirements may also apply to non-federally funded projects. For example, "programs" (defined as the entire airport) receiving federal funds may have to include the standard nondiscrimination clause in all of their contracts, even contracts that are not funded with federal funds. See FAA Advisory Circular 150/5100-15A.

³ Federal preemption can be express or implied. See *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822–823 (1st Cir. 1992). Express preemption occurs when Congress explicitly states that it intends to preempt state law on the topic. *Id.* Implied preemption occurs when 1) there is an actual conflict between the federal and state law, 2) the state law poses an obstacle to the full purposes and objectives of Congress, or 3) the federal regulatory scheme is so pervasive as to "occupy the field" in that area of the law. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–223 (1983).

government agencies, such as the USDOT, have also expressly deferred the detailed procurement process to grant recipients. See 49 C.F.R. § 18.36(a) (distinguishing between state and other recipients). Therefore, federal requirements only preempt state and local procurement laws when there is an actual conflict between them or when the state or local requirement conflicts with the general requirement of "full and open competition" contained in 49 C.F.R. § 18.36(c).

Certain state and local "contractual" requirements, however, have been preempted for AIP-funded contracts because the federal government has set forth a number of specific contractual provisions that must be included in those contracts, such as prevailing wage and veterans preference provisions. 49 U.S.C. § 47112(b) and (c). State and local requirements that conflict with these provisions are preempted and cannot be used on AIP-funded contracts. Airports have more flexibility over the contract terms when the funds are PFC or OTA funds.

One example of a conflict between the AIP regulations and state law would be where the state law allows procurement of noncompetitive retainer contracts that do not include a specific scope of work. Some states may allow a continuation contract whereby a consultant is "on retainer" without first specifically defining the projects to which the firm may be assigned. When the solicitation does not reference a specific project or specific scope of work, the FAA may determine that the contract is noncompetitive and may require a justification for their use. See AIP Handbook, Section 907 (a)(2) (requiring professional service retainer contracts to include a specific scope of work for specific grant-funded projects).⁴

This does not mean that retainer contracts cannot be used on AIP-funded projects. In fact, the FAA has provided a number of examples of when retainer contracts may be used, such as the following:

- For work over the years when the services of the consultant may be intermittent.
- In the development of undertakings for which the services of a consultant specialist are not required on a full-time basis.
- On large projects, [a retainer contract] enables the sponsor to have the specialists who prepared the original plans and specifications on hand for maintenance or additions.

See Advisory Circular 150/5100-14D, Section 4-3, and AIP Handbook, Section 907. To be eligible for AIP

⁴ When firms are already "on standby," the question may arise as to whether other federal agencies would approve their use, in order to expedite a project when the funds are not grant funds. For example, given the sensitive nature of some security TSA projects, the TSA may be inclined to allow airports more flexibility, such as allowing a designer, procured under a retainer contract, to design a CCTV project in order to minimize the dissemination of security information.

funding, the retainer contract must have been competitively procured with the specific project(s) and scope of work for those projects identified in the solicitation documents. *Id.*

Another example of a potential conflict between the federal and state requirements is the use of local preferences. In the evaluation of bids or proposals, 49 C.F.R. § 18.36(c)(2) specifically prohibits the use of in-state or local geographical preferences. There is an exception for architectural and engineering services, as long as there are sufficient qualified firms competing for the project. There is also an exception when a federal statute mandates or encourages the consideration of a geographic preference. When evaluating whether a conflict exists, airports should consider that when a federal agency deems a conflict to exist, its interpretation is given deference. *See City of Cleveland v. Ohio*, 2006 U.S. Dist. LEXIS 1083 (S.D. Ohio 2006) (FHWA was allowed to withdraw its federal funds when it determined that a local hiring preference law violated the federal prohibition against geographical or residency restrictions that tend to restrain competition).

Oftentimes, the state and local requirements do not actually conflict with the federal requirements, but merely provide an additional layer of regulation. For example, the QBS procedures for architectural services are consistent with state laws that track the basic process, even when they add further details or qualifiers. States can adopt illustrative factors to be considered in determining the legitimacy of a bidder's claim of good-faith efforts to obtain disadvantaged business enterprise subcontractor participation. *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991). Establishing those additional factors in advance of bid opening does not conflict with statutory requirements because it diminishes the element of subjectivity by the procurement officers and thereby assists the bidders in understanding what is required and how the contract award will be made. *Id.*

When an airport project is funded solely from state or local funds, the airport must follow both state and local requirements, unless there is a direct conflict between them, in which case the state requirements will govern. Although local governments cannot enforce a requirement that is contrary to state law, they may pass regulations that strengthen state law or fill a void when state law is silent. When determining which local government requirements apply to airport projects, the airport should look to the airport's enabling act that establishes the airport as an entity. The enabling act will set forth the authority under which it is created and is a starting point for determining whether the airport is subject to county or city ordinances or has the authority to develop its own local operating policies and procedures.

Airports may be structured in a variety of ways, including 1) a department or division within a municipality, such as the San Francisco International Airport and the Salt Lake City International Airport; 2) as a department or division within a county, such as the Fort

Lauderdale International Airport; 3) as a stand-alone authority, such as the San Diego County International Airport or the Metropolitan Washington Airports Authority; or 4) some hybrid, such as the Greater Orlando Aviation Authority, which is an agency of a city for some purposes but is an independent entity for most purposes.

Reconciling conflicts between the various state and local requirements is beyond the scope of this digest as the analysis would be highly individualized for each airport. In general, if an airport is structured as an authority with the power to govern itself and is responsible for its own revenues and expenditures, it is often not required to comply with the procurement requirements of other local governments such as the city or county where it is located. In that case, the airport should have its own internal procedures that govern procurement of contracts. If, however, the airport is a department or agency of a municipality or county, it is likely subject to the procurement rules of its municipality or county. Typically, if a municipality or county provides funding for the airport's use, the airport must comply with the procurement requirements of the funding entity.

II. DEVELOP SCOPE OF WORK AND TECHNICAL SPECIFICATIONS

After the funding source and applicable funding requirements have been identified, the scope of work and technical specifications can be developed. In the initial phase of a procurement, airports must adequately define the scope of the project, including the services to be performed and the equipment specification requirements, if any. When FAA grant funds are used, airports must use the FAA-approved specifications when they exist, unless a modification is preapproved. *See* FAA AIP Handbook, Section 905(b); *see also* 49 C.F.R. § 18.36(c)(3)(i) (explaining that specifications cannot unduly restrict competition) and § 18.36(b)(4) (avoid unnecessary or duplicative items and consider consolidating or breaking out procurements to obtain a more economical purchase, including lease-versus-purchase alternatives, and any other appropriate analysis to determine the most economical approach).

There are many sample forms that can be used to assist with developing the scope of work and specifications. *See, e.g.*, Central Region Airports Division, AIP Sponsor Guide, Sections 932 and 1220. Airports should ensure that the specifications do not unduly restrict competition. For example, requiring "too much" experience for a fairly simple project or requiring extremely specific experience practically tailored to a very small number of firms would unnecessarily limit competition. *See* 49 C.F.R. § 18.36(c) (requiring "unnecessary" experience is restrictive of competition). To simplify certain procurements, 49 C.F.R. § 18.36 encourages the use of intergovernmental agreements. *See* 49 C.F.R. § 18.36(b)(5) ("To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into

state and local intergovernmental agreements for procurement of common goods and services.”).

At least one FAA Regional Office recommends a pre-design conference prior to formally establishing the scope of work. *See, e.g.*, Central Region Airports Division, AIP Sponsor Guide, Section 910. It provides the airport an opportunity to explain important issues to the design consultant, including the impact of the project on airport operations, safety issues, and funding issues, such as distinguishing between eligible and ineligible costs.

When the procurement involves the purchase of equipment, the technical specifications must allow for reasonable competition. Airports must be attuned to the restrictions on using brand-name equipment specifications. *See* 49 C.F.R. § 18.36(c)(3)(i) (allowing the use of a brand name “or equal” to define the performance requirements *only* when it is impractical to otherwise describe the product requirements), 49 C.F.R. §§ 18.36(c)(1)(vi) and (g)(2)(iii); *Standard Heater Tube, Inc.*, B-403155, 2010 U.S. Comp. Gen. LEXIS 257 (2010) (finding a brand name or equal specification for heating tubes was necessary for valid testing results).

III. DETERMINE CONTRACT TYPE AND ESTABLISH CONTRACT TERMS

A. 49 C.F.R. § 18.36 and AIP

1. General Contract Terms (Price, Value Engineering)

After the scope of work and specifications are properly defined, airports must determine the project-delivery method if the project involves construction (e.g., whether construction manager at risk (CMAR), design-build, or traditional design-bid-build, etc.) and establish the contract terms, including the type of fee arrangement. The federal regulations require that most contracts be based upon a fixed fee. *See* 49 C.F.R. § 18.36(d)(2) and (d)(3). The FAA only allows “time and material” contracts in limited situations and prohibits the use of “cost plus percentage of costs” contracts. *See* 49 C.F.R. §§ 18.36(b)(10) (establishing limited exceptions for time and material contracts to situations after a determination that no other contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk), (d)(2)(ii)(D), and (f)(4). Contingency bonus fees for early completion and escalator fee provisions are also not allowed. Value engineering provisions, however, are encouraged. *See* 49 C.F.R. § 18.36(b)(7).

For all grant-funded projects (including AIP), 49 C.F.R. § 18.36(i) contains a long list of contractual provisions that are required. The FAA has also compiled a list of required contractual provisions, which vary by the type of procurement (construction, services, or equipment) and the amount of the procurement.⁵ For

⁵ The list can be obtained at http://www.faa.gov/airports/aip/procurement/federal_

construction contracts, the FAA has issued standard “General Provisions” that must be used as the basis for AIP-funded construction contracts. *See* FAA Advisory Circular 150/5370-10, Part I. The most significant provisions are briefly addressed below. In addition to the following, contractors must apply a veteran’s preference in the employment of labor. *See* Assurance 15. Contracts must also include a Buy America provision, which is a topic being addressed in a separate digest by a different author. *See* ACRP Study 11-01, Topic 4-04.

2. Bonds

For construction contracts valued over \$100,000, 49 C.F.R. § 18.36(h) requires the airport to obtain a bid guarantee equal to at least 5 percent of the bid price, as well as performance and payment bonds in the sum of 100 percent of the contract price. State laws often supplement this bonding requirement.⁶ *See* Section D. The bid guarantee can be in the form of a bid bond, certified check, or other negotiable instrument. Alternatives to the performance and payment bonds are allowed only if the FAA has determined that the policy and requirements of the airport adequately protect the airport’s interest. *See* 49 C.F.R. § 18.36(h); FAA AIP Handbook Section 911.

3. Wages

All federally funded construction contracts exceeding \$2,000 must comply with the Davis-Bacon Act provisions, including weekly reporting of wages paid. *See* 49 U.S.C. § 47112(b). The Department of Labor sets the prevailing minimum wage and fringe benefits that must be paid for certain classes of laborers. *See* Assurance Number 14, 29 C.F.R. § 3, 29 C.F.R. § 5, and FAA Advisory Circular 150/5100-6.

4. Disadvantaged Business Enterprise

The DBE Program is a major component of a federally funded procurement because it requires airports to take affirmative actions to ensure participation by the disadvantaged business community. Airports must establish a DBE program that contains DBE participation goals and must submit the program for FAA review and approval.⁷ *See* 49 C.F.R. § 26.21 and 49 U.S.C. § 47113 (requiring the minimal DBE participation goal, unless otherwise specified by the Secretary of the USDOT).

Federally funded construction contracts must also include two related DBE provisions regarding 1) non-discrimination, and 2) prompt payment. The FAA pro-

contract_provisions.

⁶ State laws that contain “excessive” bonding requirements conflict with 49 C.F.R. § 18.36(c)(1)(ii). Whether a requirement is excessive will depend upon the facts and circumstances of the particular project.

⁷ A sample DBE Program can be found at http://www.faa.gov/airports/central/airports_resources. Because DBE Programs must be tailored for each airport, following the sample may not always be sufficient.

vides sample language on its Web site.⁸ See Assurance Number 37 for the DBE Grant Assurance; see also 49 U.S.C. § 47113 and Title 49 C.F.R. 26 for the DBE Program requirements.

B. Federal Acquisition Regulation

It is important to distinguish the grant requirements that apply to airports, as recipients of federal funds, from the federal requirements that apply to direct federal contracts whereby a federal agency directly contracts for goods and services. For example, the Competition in Contracting Act of 1984, the Brooks Act, and the FAR apply to direct contracts by federal agencies. See *Matter of Assoc. of Soil and Foundation Engineers, Comp. Gen.* (1983); *Matter of Sieco, Inc.*, 59 *Comp. Gen.* 251 (1980). A procurement is a direct purchase by the federal government when the federal government contracts for goods and services as the owner of the property. Airports, therefore, are not subject to the requirements of the FAR because they are not federal agencies making direct purchases for the federal government. Instead, airports are almost always a grant recipient (either directly as a grantee or indirectly as a subgrantee), and will be subject to the requirements contained in 49 C.F.R. § 18.36. See also *Yager & Associates v. Toledo-Lucas County Port Authority*, 1998 FAA LEXIS 1133 (FAA 1998).

Although the FAR is not applicable to airport procurements, there is a vast amount of administrative and appellate case law interpreting the FAR requirements. This case law might be persuasive when there is no other directly applicable case law. For example, when 49 C.F.R. § 18.36 and state case law do not provide a clear answer to a procurement issue, there may be Government Accountability Office bid protest opinions that an airport can use to help it determine the proper course of action.

C. State and Local Contractual Provisions

In addition to the federal contractual requirements, states may have additional requirements as far as the terms and conditions to be included in public construction contracts. Some states devote an entire chapter of statutes to detailing the many requirements for the contract. Other states seem to have only minor requirements. The chart contained at Appendix A identifies the state statutes that contain specific bonding and prevailing wage requirements. The chart is not an exhaustive listing of all solicitation requirements, but can be used as a starting reference point for finding additional statutory requirements. In addition to the state statutes, if an airport is operated as a state entity, there will likely be state administrative code provisions that will apply.

Virtually every state requires that public construction contracts include some type of performance or

payment bond to protect the public owner from a contractor's failure to perform and to ensure that subcontractors receive payment. Most states also have prompt payment laws to ensure that contractors and subcontractors are paid timely. To determine which requirements apply to any given project, the statutes should be analyzed in detail, including evaluation of whether the statute applies to the airport at all. Some apply to only state government entities, while others apply to all public entities. Close attention should also be paid to the definition of "public works" or "public construction" or "project" since some of the bonding requirements apply to specific projects. When analyzing each statute, the standard questions should be asked:

1. Who does it apply to (which public entities, which contractors)?
2. What types of projects does it apply to? See applicable definitions.
3. What bonds are required and in what amount? Some require both payment and performance; some require only one or the other.
4. When does it apply? Most have certain dollar thresholds.
5. Are there any explicit exceptions in the statute?

In addition to bonding requirements, many states require specific payment terms, such as the amount of retainage that is allowed and the deadline for making payments under the contract (prompt payment acts). In addition to the statutory requirements on the governmental entity, many states also impose requirements on the contractor, such as requiring the contractor to comply with local preference provisions when purchasing construction materials and supplies or when retaining subcontractors, employees, or other labor. Such local preference laws may conflict with 49 C.F.R. § 18.36(c)(2). Another trend is to require electronic verification of the citizen status of a contractor's employees and subcontractors (known as e-verify).

Many states have also enacted their own versions of Buy America acts that are modeled after the Federal Buy America Act. See generally, *Validity, Construction, and Application of State "Buy America" Acts*, 107 *American Law Reports* 5th 673 (2003). The Supremacy Clause of Article VI of the U.S. Constitution provides that United States treaties are to be considered the supreme law of the land, and that when a state statute conflicts with any such treaty, the treaty will control. However, the state statutes are generally upheld unless they contain an outright prohibition on the purchase of foreign goods. *Id.* Local ordinances and regulations that limit the use of foreign items may be invalid when they conflict with a state statute that requires open competition on government contracts. See, e.g., *American Institute for Imported Steel, Inc. v. Erie County*, 32 A.D. 2d 231 (N.Y. App. 1969).

⁸ A link to the sample language is located at http://www.faa.gov/airports/aip/procurement/federal_contract_provisions.

IV. IDENTIFY THE APPROPRIATE SELECTION METHOD AND BASIS FOR AWARD

A. Sealed Bid Method

1. Advertisement Requirements

Once the project scope and basic contract terms have been developed, airports must determine which selection method applies. On federal grant-funded projects, when there is a defined scope of work with an estimated value exceeding \$100,000, a contract for construction services or equipment *must* be publicly advertised, unless one of the enumerated exceptions apply. *See* Section C, below. The advertisement must contain sufficient information so that the general public will know the nature of the project, how interested companies can bid on the work, when the bids are due, and the date, time, and place of the bid opening. The advertisement must also identify any criteria that will be used in evaluating the qualifications of the bidder and the responsiveness of the bid. The evaluation criteria may not be prescribed after responses have been received.

49 C.F.R. § 18.36 generally requires public advertisement but does not provide specific advertising requirements. State laws often provide the detailed requirements, such as the number of days the advertisement must be published and the manner of publication (e.g., often requiring advertisement in a local newspaper of general circulation). The general rule is that bid opening should occur at least 30 days after the advertisement is published and the bid documents are made available. More complex projects may require more time, and simple projects may allow less time, as long as state laws are followed. *See* FAA AIP Handbook, Section 914(c).

Federal grant-funded projects can require contractors to become prequalified to submit a bid for a construction contract, as long as the prequalification requirements are not overly restrictive. *See* FAA Advisory Circular, 150/5370-10E, Section 20-02.

Although virtually every state has a sealed bidding statute that applies to construction services and equipment, there are exceptions to the sealed bidding requirement, including alternative delivery methods and various thresholds over which sealed bids must be obtained. *See* Appendix B. The first column in Appendix B identifies the state statutes that require awards be made to the lowest responsible and responsive bidder. The second column identifies the various state statutes that allow alternative delivery methods, such as design-build and CMAR. The last column identifies the state statutes that address exceptions from competition, such as dollar thresholds over which competition is required. Appendix B is not an exhaustive listing of all procurement statutes, but is intended as a starting point for further research. Careful analysis of the competitive procurement statutes will be required to determine their applicability in any given situation. In some states, the statutes have broad application, meaning

that they apply to all construction projects by all public entities. Other states differentiate between state contracts and local contracts.

When the funding may not be sufficient to cover the entire scope of a project, the bid documents may either divide the project into a base bid with alternates or provide different alternatives for the project to allow the airport to select the best option that matches the funds. In that case, the bid documents must clearly set forth how the low bid will be determined. Generally, the low bidder should be selected based on the combination of base bid plus alternates that most closely matches the available funding for the project. *See* FAA AIP Handbook, Section 913.

When there are multiple possible ways in which the award could be made, there is the possibility that the award could be challenged as arbitrary. To be AIP-eligible, the airport must establish a reasonable objective standard that will be applied in making the award. *Id.* For example, the bid documents could set forth the order in which the alternates will be combined until the maximum amount of funding is reached. Another option would be to set the parameters for determining how the award will be made, such as if the lowest bid exceeds a certain price, then the alternate will be awarded if the lowest bid on the alternate comes within the acceptable range. These are merely examples. Whatever the standard is, it should be established prior to the opening of the bids and should be capable of being applied objectively, to be fully AIP-eligible. Otherwise, AIP funds will be limited to the lowest responsive bid. *Id.*

2. Bid Evaluation

Under the sealed-bid method, contracts for construction and equipment must be made to the lowest responsive and responsible bidder. It is important to note that the basis for award is not simply the lowest bidder. *See, e.g., Irwin R. Evens & Son, Inc. v. Board of Indianapolis Airport Auth.*, 584 N.E.2d 576 (Ind. App. 1992). The low bid must also be responsible and responsive. Responsive means that the bid complies with all of the material terms of the solicitation. Although a determination of responsiveness is made by analyzing the bid, without reference to outside materials, making a responsiveness determination is not always simple. For example, airports will need to determine whether the bidder has complied with the DBE participation goal and, if not, whether good-faith efforts have been met.⁹

When determining responsiveness, the airport must analyze whether the bid contains any errors or irregularities. Whether an airport has authority to waive a bid irregularity or allow a bidder to rescind a bid will be determined by state law. *See* FAA Advisory Circular, 150/5370-10E, Section 20-08; *see, e.g., Powder Horn*

⁹ Even when the bidder has not met the DBE participation goal, the contract may be awarded if the bidder has documented that it acted affirmatively in trying to meet the goal, such as actively soliciting DBE firms and using bids from DBE firms when possible.

Constructors, Inc. v. Florence, 754 P.2d 356 (Colo. 1988). Usually minor irregularities, such as obvious mathematical or typographical errors, can be corrected. See, e.g., *Dillingham Constr., Inc. v. Milwaukee Metro. Sewage Dist.*, 629 F. Supp. 406 (E.D. Wis. 1986) (bidder's failure to fill in the penal sum of bond was not material when the bond was not required by law); see also *Dick Corp. v. Associated Elec. Co-operative, Inc.*, 475 F. Supp. 15 (W.D. Mo. 1979) (allowing correction of \$1 million typographical error under equitable reformation principles).

Material irregularities, however, cannot be waived. See, e.g., *Bleccs, Inc. v. Augusta*, 2009 U.S. Dist. LEXIS 126458 (S.D. Ga. 2009) (failure to properly notarize bid documents); *Balsbaugh v. Commonwealth Dep't of Gen. Servs.*, 815 A.2d 36 (Pa. 2003) (lack of signature on bid is material); *Interstate Rock Prods. v. United States*, 50 Fed. Cl. 349 (Fed. Cl. 2001) (finding no abuse of discretion when agency declared bid nonresponsive for failure to include the penal sum on a required bid bond); *Kokosing Constr. Co. v. Dixon*, 594 N.E.2d 675, 680 (Ohio App. 1991) (stating that for a bid to be rejected as nonresponsive, the deviation must both be substantial and provide the bidder an advantage over its competitors).

Generally, when analyzing procurement challenges involving bid errors, the issue is whether the airport acted arbitrarily in its decision and whether the bidder obtained any competitive advantage by committing the error. *Interstate Rock Prods. v. United States*, 50 Fed. Cl. 349 (2001). Courts accord local government decisions with great deference. See, e.g., *Paul Jacquin & Sons, Inc. v. City of Port St. Lucie*, 36 Fla. L. Weekly D 1613 (Fla. 4th DCA 2011) ("Even if the public entity makes an erroneous decision about which reasonable people may disagree, the discretion of the public entity to solicit, accept and or reject contract bids should not be interfered with by the courts, absent a showing of dishonesty, illegality, fraud, oppression or misconduct."). Airports usually have wide discretion to reject all bids or cancel a solicitation for any reason, though a justification is recommended. See, e.g., *Paul Wholesale B.V./Hols Trading, GMBH, J.V. v. Alaska*, 908 P.2d 994 (Alaska 1995).

The lowest bidder also must be responsible, meaning that it meets the minimum qualifications set forth in the bidding documents. See 49 C.F.R. § 18.36(b)(8) (requiring that awards be made only to responsible contractors possessing the ability to perform successfully the terms and conditions of the contract). Factors for consideration include integrity, compliance with public policy, past performance, and financial and technical resources. *Id.* When considering past performance, an airport may consider a firm's past claims or litigation history. See FAA Advisory Circular 150/5100-14D, Section 2-7 (listing selection factors, including the capability of the firm to complete projects without having major cost escalations or overruns and the reputation of the key personnel).

One court recently summarized California law on determining a bidder's responsibility as follows:

A truly nonresponsive bid may be summarily denied by a public entity even if the bid is otherwise monetarily the best for the entity. On the other hand, a determination of nonresponsibility entitles the bidder to a hearing where certain minimal elements of due process must be afforded before the contract can be awarded to the next-best bidder.

See *Great West Contractors, Inc. v. Irvine Unified School Dist.*, 187 Cal. App. 4th 1425 (Cal. 4th App. 2010).

On AIP projects, airports must obtain FAA concurrence whenever they reject an apparent low bid or when a bidder objects that the lowest bidder is nonresponsible or that the low bid is nonresponsive. See FAA AIP Handbook, Section 904. In addition, when a project is federally funded, airports cannot accept a bid from a contractor who is listed on the excluded parties list or from any bidder in which an ineligible contractor has a substantial interest. See OMB Guidance, 2 C.F.R. Part 180.

Appendix D contains a flowchart that depicts the sequence of a typical sealed-bid procurement of construction services and equipment.

B. Competitive Proposals

The federal regulations limit the use of competitive proposals to situations when "conditions are not appropriate for the use of sealed bids." 49 C.F.R. § 18.36(d)(3). When sealed bids are not feasible (because, for example, the precise scope of work is not defined), the airport may issue a request for proposals (RFP) for construction services or equipment, as long as this procurement method is allowed by state and local laws. The third column of Appendix B, titled "Proposals," contains the state statutes that may allow the RFP selection method for equipment and construction services. Each state statute should be evaluated in detail because some states allow the public entity broad discretion in using this procurement method whenever they deem it appropriate, while other states limit the use of the RFP method to certain defined situations. Other state statutes are silent as to whether the proposal selection method is allowed. In those cases, a close examination of the statute requiring sealed bids should be made to determine if, in fact, that is the only method allowed for the public procurement of construction and equipment. If there are no procurement statutes that apply to the airport, then the airport can establish its own procurement process that allows for procurement by competitive proposals, as long as it has authority to do so. Airports should limit this method to situations when sealed bids are not feasible if they intend to use federal funds for the project.

When proposals are solicited, the selection is not limited to the lowest price but may be based upon a number of other factors that are set forth in the RFP. The RFP typically asks the proposer to explain its approach to the project, as well as submit the qualifications and

experience of the proposer and its personnel. The RFP must specify the selection criteria, award process, and scoring method, if any, that will be used in evaluating the proposals. Airports have broad discretion in determining the evaluation factors that apply and their relative importance. *See, e.g., JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002) (agency may give non-cost factors greater weight than cost factors). Even though airports have broad discretion in evaluating proposals and making procurement decisions, the decisions still must have a rational basis. *See, e.g., Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010).

When addressing the advertisement requirements for RFPs, 49 C.F.R. § 18.36 uses a slightly different phrase, requiring only that the RFP be “publicized,” as opposed to requiring sealed bids to be “publicly advertised.” Some have argued that RFPs may be pursued without a publicly advertised RFP. The rationale is that 49 C.F.R. § 18.36(d)(3)(ii) only requires that proposals be solicited from an “adequate number of sources.” Apparently, in determining whether costs are allowable, the FAA has agreed that there is a distinction between “publicized” and “publicly advertised.” *See Yager & Associates v. Toledo-Lucas County Port Authority*, 1998 FAA LEXIS 1133 (FAA 1998) (“in regard to allowable cost policy—under Part 18, it has been the FAA practice to accept that “publish” and “publicize” include the actions of informing the specific consultants concerned, verbally.”). The best approach, however, is to publicly advertise the RFP, since the distinction between publish and publicize is somewhat tenuous, public advertisement is often required by state law, and the consequences for noncompliance can be severe. Advertisement may also better accomplish the practical goal of increasing the pool of qualified proposers.

Proposals must be evaluated based upon the criteria set forth in the RFP. Airports can exercise reasonable discretion in determining the scope and weight of a given evaluation factor. *See, e.g., PlanetSpace Inc. v. United States*, 92 Fed. Cl. 520, 536 (2010). Undisclosed factors cannot be considered. *See, e.g., Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342 (11th Cir. 1994). The award is made based upon which proposal is the “best value” or is the “most advantageous” or other similar phrase that is set forth in the RFP and state law. Because an RFP has a price component, it *cannot* be used to solicit professional services. Other prerequisites for the use of the RFP method are contained in 49 C.F.R. § 18.36(d)(3). A flowchart depicting a typical RFP process is located at Appendix E.

C. Alternative Delivery Methods

1. Design-Build Projects

Congress has authorized the FAA to approve funding for design-build projects that follow a selection process that is permitted under state or local law, so long as there are at least three competing bids for the project and the Administrator is satisfied with the selection process, the contract form, and the schematic design.

See 49 U.S.C. § 47142 (2009). Design-build projects can be procured using the same QBS method that is used for professional services (discussed in Section D below), or they can be procured using a competitive proposal process, whereby technical points are evaluated along with pricing information to determine the most advantageous contract (as discussed in Section B above). *See* FAA AIP Handbook Sections 930 and 931.

When using FAA grant funds for a design-build project (including AIP), the airport must obtain preapproval from the FAA, including preapproval of which selection method is to be used. The vast majority of states have statutes that specifically address design-build procurements. *See* Appendix D. The state statutes that are specific to the design-build delivery method will be the starting point for determining which selection method can be used for design-build projects. For example, if state law requires a QBS method, then that will be the only procurement method allowed. If, however, the state statute allows various options, then the airport will have more flexibility in structuring the procurement. *See, e.g., Fla. Stat. Section 287.055(9)* (allowing multiple options, including QBS or RFP, consistent with the AIP Handbook).

2. Construction Manager at Risk

For AIP-funded projects, the FAA allows airports to procure a CMAR contract as an alternative to the traditional design-bid-build sealed bid and RFP selection methods. CMARs are procured “at the early stage of design” before sealed bids are feasible. Instead, the airport selects the CMAR entity based upon qualifications and then “negotiates a ceiling amount for the construction.” *See* FAA AIP Handbook, Section 930. This alternative is consistent with the AIP statute that requires airports to use the QBS method for “program management, construction management...and related services.” *See* 49 U.S.C. § 47107(a)(17).

The federal grant regulations, at 49 C.F.R. § 18.36(t), also require a QBS method for architectural, engineering, and “certain other related services.” Specifically,

Federal Aviation Administration (FAA) grantees and subgrantees *shall* extend the use of *qualifications-based* (e.g., architectural and engineering services) contract selection procedures to *certain other related areas* and shall award such contracts in the same manner as Federal contracts for architectural and engineering services are negotiated under Title IX of the Federal Property and Administrative Services Act of 1949, or equivalent State (or airport sponsor for FAA) qualifications-based requirements. 49 C.F.R. 18.36(t).

This is also consistent with many state statutes that allow CMAR procurements to be based upon qualifications and subject to competitive negotiation. *See* Appendix B. The statutes referenced in Appendix B are the starting point for determining which selection method can be used for CMAR procurements. For example, if state law requires the sealed-bid method on all construction contracts and does not have a specific

statute addressing CMAR, then using a QBS method would not be permissible.

3. Task-Order Contracting

For AIP-funded projects, the FAA allows airports to use an alternative delivery method known as task-order contracting. See FAA AIP Handbook, Section 930(b). Before the scope of each project is fully defined, airports can publicly solicit competitive proposals, select the contractor based upon the published criteria, including price (“standard fees and unit rates”), and then award individual “tasks” using those fees and rates. 49 C.F.R. § 18.36(d)(3); FAA AIP Handbook Section 930. The FAA AIP Handbook explains that *this exception is limited to tasks that can be completed within 1 year*, unless FAA approval is obtained. *Id.* Otherwise, the costs that exceed the 1-year period may be deemed ineligible. See FAA AIP Handbook Section 930(b).

The task-order method dispenses with the requirement for public advertisement of each individual project. *Id.* The basis of award is the “most advantageous to the program, price and other factors considered.” See FAA AIP Handbook, Section 930. This method is different from the sealed-bid method because price is not necessarily the determinative factor, and it is also significantly different from the QBS method because price must be one of the considered factors. *Id.*

As previously explained, state and local requirements will still apply and may restrict the use of this method by requiring public advertisement or competition for projects that exceed a certain value or estimated amount. If this alternative method is allowed by state law, airports may want to use this method for procuring a pool of prequalified contractors that will be able to quickly bid on projects as they arise.

D. Qualifications-Based Selection—Professional Services

Professional services are generally defined as “contracts and subcontracts for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping and related services.” 49 U.S.C. § 47107(a)(17) (2009).

Airports may also require cost estimating services and owner’s authorized representatives (OARs) to assist with the management of large construction projects. Airports can procure cost estimating services by following their local procedures because the fees typically fall under the small purchase threshold. OAR fees, however, can be quite substantial on large projects, depending upon how the airport is staffed and the scope of services that are needed. When an OAR provides program management services or performs substantial engineering services or full-time, on-site construction inspection services, the following “qualifications-based” selection method must be used. See FAA Advisory Circular 150/5100-14D, Section 1-5 (listing the special services that the FAA considers to be professional). Otherwise, for “extension of staff” services that are nonprofessional

and nonconstruction services, airports should follow their local procurement procedures.

The solicitation of professional services must be qualifications-based, meaning that the interested firms must be ranked in order of the “most qualified” without considering any pricing, fee, or profit information. See 49 U.S.C. § 47107(a)(17) (2009) (AIP requires compliance with the Brooks Act “or equivalent qualification-based procedure prescribed by or for the sponsor.”).

When procuring professional services using a QBS procedure, airports must:

- Adequately publicize the request for qualifications (RFQ).
- Identify all evaluation factors and their relative importance in the RFQ.
- Specifically identify all projects to be covered by the agreement (limited to those that are anticipated to be constructed within 5 years of the contract date).
- Have a method for conducting evaluations and ranking the firms that is in place prior to the RFQ.
- Negotiate a fair and reasonable price with the most qualified firm.

The key to establishing a successful QBS process is to be able to demonstrate how the selected firm is, in fact, the most qualified, based upon objective, measurable standards. Because qualifications are inherently subjective, the factors to be considered need to be documented in advance of the selection. The selection factors typically include:

- The firm’s capability to perform.
- The firm’s experience in past projects of a similar nature.
- Qualifications of key personnel.
- Current workload (ability to meet schedule).
- DBE compliance.
- Knowledge of FAA standards and practices (e.g., Davis-Bacon compliance, if applicable).
- Understanding of project requirements.

Often, the QBS procedure will involve two stages. First, the airport selects a shortlist of the most qualified and invites those selected to make presentations regarding their qualifications and their approach for the specific project. The presentation allows the airport to interact with, question, and interview the key personnel and develop confidence in the firm’s ability to meet the needs of the airport. The firm can explain its experience and general approach to the project and demonstrate its understanding of the airport’s needs for the project. Sometimes state law will allow the airport to issue the RFP to the shortlisted firms. The RFP provides the firms with more detail about the project and allows the firms to create and present a general schematic design.

After the firm presentations, the airport will rank the firms in order of preference. Usually the airport will use a selection committee comprised of qualified individuals to evaluate the qualifications and recommend

the ranking to the airport Board of Directors. Once the most qualified firm is officially identified by the airport, the contract price and terms are negotiated. *See* FAA Advisory Circular 150/5100-14D, Sections 2-11 through 2-14. If negotiations with the top-ranked firm fail, negotiations can begin with the second-ranked firm. Simultaneously negotiating with two or more firms is not allowed. The price does not have to be the lowest, but it has to be “competitive,” meaning that the price can be documented as fair and reasonable. The goal is not the lowest price. The goal is to obtain the most advantageous contract (or best value), which assumes that more-qualified firms may demand higher compensation compared to their lesser-qualified competition.

The chart located at Appendix B identifies various state statutes applicable to the procurement of professional services. Virtually every state has some form of statute that allows for QBS procurement of professional services. Some QBS procedures set forth mandatory or preferred qualifications, such as requiring a certain number of similar projects in the last few years and experience with a similar scope, size, complexity, and dollar value to the procurement at issue. As explained above, each statute should be carefully examined to determine whether it applies to any given airport project. Some apply to state agencies only (e.g., state department of transportation), while others apply to every public procurement.

Appendix E depicts a simplified QBS process. *See also* FAA Advisory Circular 150/5100-14D, Section 2-8.

E. Limited Competition and Noncompetitive Procurements

Under the following circumstances, airports are typically excused from the federal competitive procurement requirements; however, prior approval by the federal agency may be required:

- The item is only available from a single source (e.g., when there is a justifiable operational requirement, when the product is unique, or patent rights, copyrights, secret processes, or control of certain materials or components provide superior use that cannot be obtained from similar products).
- Emergency situations (e.g., emergency roofing repairs).
- When competition is deemed inadequate (e.g., only one bid received and survey reveals there is no further interest in the procurement).
- Other instances when the federal agency allows noncompetitive awards.

In addition, for small purchases of less than \$100,000 (e.g., minor maintenance issues), 49 C.F.R. § 18.36 requires only “limited competition” from an adequate number of qualified sources, meaning that quotes are obtained without public advertisement. *See* 49 C.F.R. § 18.36(d)(1); FAA AIP Handbook, Section 904(c).

Many states also follow this limited competition approach to small procurements. The last column of Ap-

pendix B identifies various state laws that allow exceptions from competition, including state statutes that allow certain contracts to be procured with limited competition. In some states, the statutory framework provides for different levels of competition depending upon the estimated cost of the project. For example, informal bids may be allowed for projects estimated to cost less than the threshold, and there may be three or more different approaches, with competition being excused when the cost is relatively minor. Some states have other specific exceptions from competition that may not be used on federal grant-funded projects unless the federal agency gives prior approval. *See, e.g., Assoc. Builders and Contractors, Inc., v. Tri-County Metro. Transp. Dist. of Oregon*, 12 P.3d 62 (Oregon App. 2000) (upholding a sole source contract for light rail at the Portland International Airport because it met the requirements of state law, such as representing a significant cost savings to the public).

A recent question has arisen as to whether procurements that involve sensitive security information or have important security implications can be procured with limited competition. This type of procurement may fall within the “other” category requiring preapproval by the federal agency. Although normally bids and proposals must be publicly solicited, there may be sufficient justification for deviating from this requirement in the context of certain security projects. When a construction project, such as installation of security cameras, falls within this arena of sensitive security information (SSI), deviations from the requirement for publicly advertised sealed bids may be allowed by the FAA or TSA because limiting public dissemination of security information is generally considered to be a more important goal than obtaining the lowest price.¹⁰

V. PERFORM COST ANALYSIS (COMPLIANCE WITH COST PRINCIPLES)

Cost or price analysis must be performed on every project using grant funds. *See* 49 C.F.R. § 18.36(f) and (d)(4)(ii). Essentially, the costs must be reasonable, allowable, and necessary to accomplish the project, and within the scope of the approved grant agreement and associated documents.

When a contract exceeds \$100,000, an independent estimate must be obtained. *See* 49 C.F.R. § 18.22 and 48 C.F.R. § 31 for contract cost principles and procedures. Although a detailed discussion of cost compliance is beyond the scope of this digest, when grant funds are used for a project, airports must comply with the following OMB circulars:

1. A-87, *Cost Principles for State, Local and Indian Tribal Governments*.
2. A-102, *Grants and Cooperative Agreements With State and Local Governments*.

¹⁰ *See* 49 C.F.R. Pt. 1520 for the different categories of information that can constitute SSI.

3. A-133, Audits of States, Local Governments, and Non-Profit Organizations.

See also the *Catalog of Federal Domestic Assistance*, Program 20.106.

There are also important grant assurances that require airports to retain inspectors to ensure that the work was performed in accordance with the plans and specifications and that require airports to maintain project accounting records to facilitate effective auditing. See Assurances 17 and 26.

VI. PROTESTS

The federal grant regulations contained in 49 C.F.R. § 18.36(11) and (12) provide that grantees and subgrantees are required to maintain their own protest procedures for handling and resolving all procurement disputes and contractual and administrative issues. Federal review is limited to violations of federal law or regulations or violations of the local protest procedures that result in a failure to review the complaint or protest. See FAA AIP Handbook, Section 914.

The chart contained at Appendix C identifies various state bid protest procedures. The protest procedures are sometimes found in state statutes. More often, however, they are set forth in the state administrative code for state contracts. Most local government entities have their own procedures. Frequently, airports that are operated as an independent local entity are not required to follow any particular procedure, as long as their practice complies with basic due process. Most protest policies are developed with the intention of minimizing disruptions to the procurement process. They usually require a notice of the protest to the airport that must be filed within a very short time frame, such as 3 business days. In addition, patent errors in the solicitation must be challenged prior to bid opening. Allowing bidders to challenge a patent error in a solicitation after the bids are made public undermines the integrity of the competitive process. See, e.g., *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 150 (2010).

Some state rules set forth the precise contents of the protest. When there are no written procedures in place, a bidder may initiate legal action in the local court, which can be costly and time-consuming for all involved. Therefore, if an airport determines that there are no requirements that are directly applicable to it, it must enact its own procedures to provide bidders with the protest procedures required by 49 C.F.R. § 18.36.

Given the vast number of procurements made each year, bid protest litigation at the state and local government level is, surprisingly, not very common. Many states do not allow a disappointed bidder to initiate legal action in court. Compare *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31 (6th Cir. 1992) (bidder has no right to challenge award) with *Pataula Electric Membership Corp. v. Whitworth*, 951 F.2d 1238 (11th Cir. 1992) (Georgia case and statutory law mandating the award of a public contract to the "lowest responsible

bidder" represents a rule or understanding sufficient to create a protected property interest) (opinion limited in application). Even when a bidder has standing and has exhausted its administrative remedies, the standard of review is extremely deferential to the government and relief is limited. See, e.g., *Paul Jacquin & Sons, Inc. v. City of Port St. Lucie*, 36 Fla. L. Weekly D. 1613 (Fla. 4th DCA 2011); *T & A Utils. v. City of Panama City*, 10 Fla. L. Weekly Fed. D. 484 (N.D. Fla. 1997). The more severe consequences for noncompliance are discussed below.

VII. CONSEQUENCES FOR NONCOMPLIANCE

The failure to comply with an AIP procurement requirement may result in the FAA determining the costs of a project to be ineligible. This can be a very severe consequence for an airport that does not have the ability to fund a project on its own, but is already contractually obligated to pay the contractor. Airports can attempt to limit their financial exposure by clearly stating in the contract that it is based upon the receipt of federal funds, and if not received, the procurement, award, or contract may be terminated without recourse.

In addition, if the FAA determines that an airport has failed to comply with any of the federal requirements, the FAA may:

- Terminate eligibility for grants pursuant to 49 U.S.C. §§ 47106(d) and 47111(d).
- Suspend or deny the payment of grant funds.
- Withhold approval of any new application to impose a PFC (for revenue diversion violations).
- Direct the refund of fees unlawfully collected.
- Issue any other compliance order to carry out the provisions of the grant assurances, such as requiring a written corrective action plan that will ensure compliance with all requirements.

The FAA may also impose sanctions as provided for under 49 C.F.R. Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. § 1001 or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. § 3801).

The remedies available to the FAA for the violation of a grant assurance are generally prospective in nature—the withholding of future grants or future payments under outstanding grants. These remedies are designed to address ongoing compliance issues by providing financial incentives for correcting continuing violations of the grant assurances. See *Yager & Associates v. Toledo-Lucas County Port Authority*, 1998 FAA LEXIS 1133 (FAA 1998). The FAA does not generally find sponsors in noncompliance for past compliance violations that have been or are being cured. The FAA's Airport Compliance Program is designed to achieve voluntary compliance with a sponsor's federal obligations and recognizes that voluntary corrective action is the means to cure compliance violations. Therefore, the FAA generally considers the airport's most current ac-

tions, including any actions it has taken to correct past errors or omissions. This means that once an airport becomes aware of a grievance it must timely respond to the concerns.

Federal agencies, such as the FAA, are also subject to the Improper Payments Elimination and Recovery Act, which requires them to implement controls to eliminate improper payments that should not be made for ineligible goods or services. This means that airports must maintain proper documentation of their compliance with procurement and eligibility requirements.

The GAO ensures accountability by auditing federal agencies and can investigate how federal funds are spent, including investigations of improper procurement using federal funds. If improprieties are found, funding of the agency may be jeopardized. For example, failure to comply with ARRA requirements can result in the termination of federal funding, suspension or debarment, an action for reclaiming the funds and possibly punitive actions, including civil and criminal penalties. *See* OMB Memorandum 10-17, dated May 4, 2010.

The USDOT also has an Office of Inspector General (OIG) that can perform an audit of airport compliance with federal requirements. The OIG performs quality control reviews of airport audits and can investigate fraud by grantees and contractors. The most common fraud investigation involves compliance with DBE program requirements. The most recent reports include a May 2011 report recommending that the FAA strengthen its cost and price analysis on noncompetitive contracts and a December 2010 report identifying improper payments in the AIP Program. As a result, airports can expect increased scrutiny of eligibility of AIP payments and noncompetitive procurements.

Airports can also expect increased scrutiny of compliance with Buy America provisions. In response to a November 2010 DHS OIG report recommending that the TSA implement more proactive measures to ensure Buy America compliance, the TSA stated that it intended to perform compliance audits of sample programs. *See* OIG Report 11-07: *Use of ARRA Funds by TSA for Electronic Baggage Screening Program*. The USDOT and TSA can also impose civil penalties and other enforcement or corrective action for violations of the federal regulations regarding the disclosure of sensitive security information.

In addition to the remedies available to the federal government for noncompliance, there are also consequences for violations of state law. Generally, when a contract is let in violation of the procurement statutes, the contract can be deemed void and unenforceable and the airport may be subject to legal action to recoup improperly spent funds. *See, e.g., Sault Ste. Marie City Comm. v. Sault Ste. Marie City Atty.*, 313 Mich. 644 (Mich. 1946); *City of Bristol v. Dominion National Bank*, 149 S.E. 632 (Va. 1929). In addition, in some states, the individuals involved may be criminally charged with a misdemeanor or felony for a violation of certain statutes, including public ethics laws and false claims acts. *See, e.g., Fla. Stat. § 287.094* (false claim of

minority status); § 287.0943 (failure to report change in minority status); § 287.055 (improper payments to secure a contract, e.g., bribes).

VIII. CONCLUSION

To summarize, the procurement requirements for any given airport planning or development project will be different, depending upon what services the project requires and how the project is funded. For every project, airports must understand their state and local requirements, and, for federally funded projects, airports must determine which federal requirements apply and whether any of those contradict (and thus supersede) the state and local requirements. Although sometimes standard forms can be developed, airports should carefully analyze each step of the procurement from project conception through project completion.

APPENDIX A—STATE SOLICITATION REQUIREMENTS

State	Bonds	Prevailing Wages	Selected Other Provisions, Such as Local Preferences
Alabama	Title 39, Chapter 1	None	Title 39, Chapter 3, resident preference
Alaska	Title 36, Chapters 25 and 30	Title 23, Chapter 10	Title 36, Chapter 30, subcontractor list and preferences
Arizona	Title 34, Chapter 2	None	
Arkansas	Title 22, Chapter 9	Title 22, Chapter 9	
California	Civil Code, Title 15, Chapter 7	Labor Code, Part 7, Chapter 1, Article 2	Code of Regs., Title 2, preferences Public Contract Code, Div. 2, Part 1, Chapter 6, preferences
Colorado	Title 38, Article 26 Title 24, Article 105	None	Title 43, Article 2, highway and bridge contract preferences
Connecticut	Title 49, Chapter 847 Title 4b, Chapter 60	Title 31, Chapter 557	
Delaware	Title 29, Chapter 69	Title 29, Chapter 69	
Florida	Title 18, Chapter 255	None	Title 18, Chapter 255, preferences
Georgia	Title 13, Chapter 10, Article 1 Title 36, Chapter 91, Article 3	None	Title 13, Chapter 10, Article 3, e-verify Title 50, Chapter 5, Article 3, Part 1, preferences
Hawaii	Title 9, Chapter 103D	Title 9, Chapter 104	
Idaho	Title 54, Chapters 19 and 45	None	Title 67, Chapter 23, preferences
Illinois	Chapter 30, Section 550	Chapter 820, Section 130	
Indiana	Title 5, Article 16, Chapter 5 Title 36, Article 1, Chapter 12	Title 5, Article 16, Chapter 7 Title 36, Article 1, Chapter 12	Title 5, Article 22, Chapters 11–15, preferences
Iowa	Title 14, Subtitle 3, Chapter 573 Title 1, Subtitle 9, Chapter 23	None	Title 2, Subtitle 3, Chapter 73, preferences
Kansas	Chapter 60, Article 11	None	
Kentucky	Title 6, Chapter 45A, and Title 27, Chapter 341	Title 27, Chapter 337	Title 6, Chapter 45A, preferences

State	Bonds	Prevailing Wages	Selected Other Provisions, Such as Local Preferences
Louisiana	Title 38, Chapter 10, Part 2	None	Title 38, Chapter 10, Part 2, preferences and e-verify Title 39, Chapter 17, preferences
Maine	Title 14, Chapter 205, § 871	Title 26, Chapter 15	Title 26, Chapter 15, preference
Maryland	State Finance and Procurement, Div. II, Title 17, Subtitle 1 State Finance and Procurement, Div. II, Title 13, Subtitle 2	State Finance and Procurement, Div. II, Title 17, Subtitle 2	State Finance and Procurement, Div. II, Title 14, preferences
Massachusetts	Part 1, Title 21, Chapter 149 and Part 1, Title 3, Chapter 30	Part 1, Title 21, Chapter 149	Part 1, Title 21, Chapter 149, preferences
Michigan	Chapter 129	Chapter 408	Chapter 450, Minority- and Women-Owned Business Enterprise (MWBE)
Minnesota	Chapter 574	Chapter 177	
Mississippi	Title 31, Chapter 5	None	Title 31, Chapter 5, resident labor
Missouri	Title 8, Chapter 107	Title 18, Chapter 290	
Montana	Title 18, Chapter 2, Parts 2 and 3	Title 18, Chapter 2, Part 4	Title 7, Chapter 5, optional local preference
Nebraska	Chapter 72	Chapter 73	Chapter 73, resident preference
Nevada	Title 28, Chapter 339	Title 28, Chapter 338	Title 28, Chapter 338, preferences
New Hampshire	Title 41, Chapter 447	None	
New Jersey	Title 52, Sections 32-42 and 32-43	Title 34, Section 11-56	Title 52, Section 32-17, set-asides for small, female, and minority businesses
New Mexico	Chapter 13, Article 4	Chapter 13, Article 4	Chapter 13, Articles 1 and 4, preferences, small business assistance, and subcontractor listing
New York	State Finance Law, Article 9, § 137 Public Buildings Law,	Labor, Article 8, § 220	

State	Bonds	Prevailing Wages	Selected Other Provisions, Such as Local Preferences
	Article 2, § 8		
North Carolina	Chapter 143, Article 8, and Chapter 44A, Article 3	None	Chapter 143, Article 8, MWBE
North Dakota	Chapter 48-01.2	None	
Ohio	Title 1, Chapter 153, and General Provisions, Chapter 9	Title 41, Chapter 4115	Title 1, Chapter 153, preference and drug-free
Oklahoma	Title 61	None (declared unconstitutional in 1995)	Title 61, preferences and Buy American
Oregon	Chapter 279C	Chapter 279C	Chapter 279A, MWBE and preference
Pennsylvania	Title 62, Chapter 9	Unconsolidated statutes, 1961 Act, 442 P. L. 987	
Rhode Island	Title 37, Chapters 2 and 12	Title 37, Chapter 13	Title 37, Chapter 14.1, MWBE Title 37, Chapter 2.2, preference
South Carolina	Title 11, Chapter 35	None	
South Dakota	Chapter 5-18B	None	Chapter 5-18A, preferences
Tennessee	Title 12, Chapter 4	Title 12, Chapter 4	Title 12, Chapter 4, preferences Title 12, Chapter 3, MWBE
Texas	Government Code, Chapter 2252	Government Code, Chapter 2258	Government Code, Chapter 2252, preference
Utah	Title 63G, Chapter 6	None	Title 63G, Chapter 6, preference
Vermont	Title 19 (Vermont Agency of Transportation)	Title 29, Chapter 5	Title 19, preferences and wages (Vermont Agency of Transportation)
Virginia	Title 2.2, Chapter 43	None	
Washington	Title 39, Chapter 39.08 Title 18, Chapter 18.27 Title 35, Chapter 35.23	Title 39, Chapter 39.12	Title 39, Chapter 39.19, MWBE
West Virginia	Chapter 5, Article 22	Chapter 21, Article 5A	

State	Bonds	Prevailing Wages	Selected Other Provisions, Such as Local Preferences
Wisconsin	Chapter 779	Chapter 66, Subchapter 9, and Chapter 103	Chapter 16, Subchapter 4, Buy America
Wyoming	Title 16, Chapter 6, Article 1	Title 27, Chapter 4, Article 4	Title 16, Chapter 6, Articles 1 and 2, preferences

**APPENDIX B—STATE PROCUREMENT LAWS
FOR CONSTRUCTION, EQUIPMENT, AND PROFESSIONAL SERVICES**

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Alabama	<ul style="list-style-type: none"> • Lowest. • Qualified (responsible). • Responsive. <p>Title 39, Chapter 2 Title 41, Chapter 16 (state, equipment)</p>	<ul style="list-style-type: none"> • Design/Build. • Construction Manager at Risk. <p>Title 39, Chapter 2 (excludes certain CM services from sealed bidding) Alabama Toll Road, Bridge and Tunnel Authority (Title 23, Chapter 2)</p>	<ul style="list-style-type: none"> • Best value. • Most advantageous. • Best interest of state. <p>Alabama Toll Road, Bridge and Tunnel Authority (Title 23, Chapter 2)</p>	<ul style="list-style-type: none"> • Most qualified. <p>Title 41, Chapter 16 (state)</p>	<ul style="list-style-type: none"> • Sole or single source. • Emergencies. • Small purchase, dollar value over which public competition is required. <p>Title 39, Chapter 2 Title 41, Chapter 16</p>

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Alaska	Title 36, Chapter 30	Title 36, Chapter 30 (D/B)	Title 36, Chapter 30	Title 36, Chapter 30	Title 36, Chapter 30 (including certain airport exceptions) Title 44, Chapter 33 Title 35, Chapter 15
Arizona	Title 34, Chapter 2 Title 41, Chapter 23	Title 34, Chapter 6 Title 41, Chapter 23 (including job-order contracting)	Title 34, Chapter 2 (time may supersede cost)	Title 34, Chapter 6 Title 41, Chapter 23	Title 34, Chapters 2 and 6 Title 41, Chapter 23
Arkansas	Title 19, Chapter 11 Title 22, Chapter 9	Title 19, Chapter 11 (D/B and CM)	Title 19, Chapter 11	Title 19, Chapter 11	Title 19, Chapter 11 Title 22, Chapter 9

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
California	Public Contract Code, Div. 2, Part 2 (state) and Part 3 (local)	<p>Public Contract Code, Div. 2, Part 1, Chapter 6.5 (D/B Demonstration Program)</p> <p>Public Contract Code, Div. 2, Part 3 (certain cities D/B)</p> <p>Public Contract Code, Div. 2, Part 1 (CM)</p> <p>Cal. Govt. Code, Title 1, Div. 5, Chapter 10 (CM)</p>	Public Contract Code, Div. 2, Part 2 (state) and Part 3 (local)	<p>Public Contract Code, Div. 2, Part 1</p> <p>Cal. Govt. Code, Title 1, Div. 5, Chapter 10</p>	Public Contract Code, Div. 2, Part 2 (state) and Part 3 (local)

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Colorado	<p>Title 24, Articles 91–93 and 101–112</p> <p>Title 29, Article 1, Part 7 (state-funded local projects)</p> <p>Title 30, Article 20 (county)</p> <p>Title 31, Articles 15 and 25 (city)</p>	<p>Title 24, Article 105</p> <p>Title 43, Article 1 (Department of Transportation (DOT)) (D/B)</p>	<p>Title 24, Article 103</p> <p>Title 24, Article 93 (state integrated project delivery)</p> <p>Title 30, Article 20, Part 11 (county integrated project delivery)</p> <p>Title 31, Article 25, Part 13 (city integrated project delivery)</p>	<p>Title 24, Article 30, Part 14</p> <p>Title 31, Article 15 (cities)</p>	<p>Title 24, Articles 16, 102, and 103</p> <p>Title 24, Article 30, Part 14</p> <p>Title 29, Article 1, Part 7 (state-funded local projects)</p>
Connecticut	<p>Title 4e, Chapter 62</p> <p>Title 4b, Chapter 60, Part 2 (state public work)</p>	<p>Title 4b, Chapter 60 (CM)</p>	<p>Title 4b, Chapter 60</p> <p>Title 4b, Chapter 59 (total cost basis)</p>	<p>Title 4b, Chapter 60, Part 1</p>	<p>Title 4b, Chapter 60, Part 2 (state public work)</p>

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Delaware	Title 29, Chapter 69, Subchapter 4 (state) Title 9, Chapter 3 (counties)		Title 29, Chapter 69, Subchapter 4 (state)	Title 29, Chapter 69, Subchapter 6 Title 9, Chapter 3 (Kent and New Castle counties exempt from sealed bidding for professionals)	Title 29, Chapter 69 Title 9, Chapter 3 (counties)
Florida	Title 18, Chapter 255	Title 19, Chapter 287 (D/B) Title 18, Chapter 255 (CM)	Title 18, Chapter 255	Title 19, Chapter 287	Title 18, Chapter 255 Title 19, Chapter 287
Georgia	Title 50, Chapter 5 (state) Title 36, Chapter 91 (local)		Title 50, Chapter 5 (state) Title 36, Chapter 91 (local)	Title 50, Chapter 22 (state, predesign exempt when predesign fees under \$75,000)	Title 50, Chapter 5 (state) Title 36, Chapter 91 (local)
Hawaii	Title 9, Chapter 103D		Title 9, Chapter 103D	Title 9, Chapter 103D	Title 9, Chapter 103D

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Idaho	Title 67, Chapter 57 (state) Title 67, Chapter 28 (local) See also Title 54, Chapter 19 for additional procedures.	Title 67, Chapter 57 (D/B) Title 67, Chapter 23 (CM)		Title 67, Chapter 23	Title 67, Chapters 28 and 57 (state) Title 67, Chapter 28 (local)
Illinois	Chapter 30, Section 500 (state) Chapter 50, Section 20 (local)	Chapter 30, Section 537 (state D/B) Chapter 30, Section 500 (CM) Chapter 50, Section 20 (D/B local)		Chapter 30, Section 535 Chapter 50, Section 510 (local)	Chapter 30, Section 500

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/ Engineering (A/E)) Services	Exceptions
Indiana	<p>Title 5, Article 16, Chapter 1 (public works)</p> <p>Title 5, Article 17, Chapter 1 (state equipment)</p> <p>Title 36, Article 1, Chapter 12 (local)</p>	<p>Title 5, Article 30 (D/B)</p> <p>Title 5, Article 16 (CM)</p>		<p>Title 5, Article 16, Chapter 11.1</p>	<p>Title 5, Article 16, Chapter 1</p> <p>Title 5, Article 22, Chapter 10</p> <p>Title 36, Article 1, Chapter 12 (local)</p>
Iowa	<p>Title 8, Subtitle 4, Chapter 330A (airport authorities to follow Chapter 26)</p> <p>Title 1, Subtitle 9, Chapter 26</p> <p>Title 9, Subtitle 1, Chapter 331 (counties follow Chapter 26)</p>			<p>Title 1, Subtitle 9, Chapter 26 (A/E not subject to competitive requirements)</p>	<p>Title 1, Subtitle 9, Chapter 26</p> <p>Title 8, Subtitle 4, Chapter 330A</p>

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Kansas	Chapter 75, Article 37 (state) Chapter 19, Article 2 (counties)	Chapter 75, Article 37 (alternative D/B, CM for state buildings) Chapter 19, Article 2 (alternative D/B, CM for counties)		Chapter 75, Articles 12 and 58	Chapter 75, Article 37 Chapter 19, Article 2
Kentucky	Title 6, Chapter 45A	Title 6, Chapter 45A (CM, D/B)	Title 6, Chapter 45A	Title 6, Chapter 45A	Title 6, Chapter 45A
Louisiana	Title 39, Chapter 17 (state) Title 38, Chapter 10, Part 2	Title 38, Chapter 10, Part 2 (D/B for certain entities)		Title 38, Chapter 10, Part 7	Title 39, Chapter 17 Title 38, Chapter 10, Part 2

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Maine	<p>Title 5, Part 4, Chapter 153 (non-DOT state)</p> <p>Title 23, Chapter 410 (DOT, any method that is in the best interest of the state, with approval of Governor)</p>	<p>Title 5, Part 4, Chapter 153 (state CM, D/B)</p> <p>Title 23, Part 5, Chapter 410 (DOT D/B)</p>	Title 5, Part 4, Chapter 153 (terms “bid” and “proposals” used interchangeably)	Title 5, Part 4, Chapter 153	Title 5, Part 4, Chapters 153 and 155
Maryland	State Finance and Procurement, Div. II, Title 13	State Finance and Procurement, Div. I, Title 3, Subtitle 6 (D/B)	State Finance and Procurement, Div. II, Title 13 (limited)	State Finance and Procurement, Div. II, Title 13	State Finance and Procurement, Div. II, Title 13

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Massachusetts	<p>Part I, Title 3, Chapter 30 (public work construction)</p> <p>Part I, Title 2, Chapter 7 (equipment)</p> <p>Part I, Title 3, Chapter 30B (uniform procurement act)</p> <p>Part I, Title 21, Chapter 149A (alternative delivery methods)</p>	Part I, Title 21, Chapter 149A (alternative delivery methods, CM, D/B)	<p>Part I, Title 3, Chapter 30B</p> <p>Part I, Title 21, Chapter 149A (best value option)</p>	Part I, Title 2, Chapter 7	<p>Part I, Title 3, Chapter 30</p> <p>Part I, Title 21, Chapter 149A</p> <p>Part I, Title 2, Chapter 7 (state equipment)</p> <p>Part I, Title 3, Chapter 30B</p>

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Michigan	Chapter 259 (airport authorities) Chapter 124 (local transportation authority) Chapter 18, Act 431 of 1984, Article 2 (state equipment and construction)	Chapter 18, Act 431 of 1984, Article 2 (CM)	By State Administrative Board regulation	Chapter 18, Act 431 of 1984, Article 2	Chapters 259 and 124 Chapter 18, Act 431 of 1984, Article 2
Minnesota	Chapter 16C	Chapter 16C (D/B) Chapter 161 (DOT D/B)	Chapter 16C	Chapter 16C	Chapters 16B and 16C Chapters 471 and 473
Mississippi	Title 31, Chapter 7	Title 31, Chapter 7 (D/B and CM)	Title 31, Chapter 7 (limited)	Silent on A/E	Title 31, Chapter 7
Missouri	Title 2, Chapter 8 Title 8, Chapter 34 (state)	Title 2, Chapter 8 (CM)	Title 4, Chapter 34 (state)	Title 2, Chapter 8	Title 2, Chapter 8 Title 8, Chapter 34

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Montana	Title 7, Chapter 5, Part 23 (county) and Part 43 (city) Title 18, Chapter 2, Part 3 (state)	Title 18, Chapter 2, Part 5 (D/B, CM) Title 60, Chapter 2 (DOT D/B)	Title 18, Chapter 4, Part 3 (state equipment)	Title 18, Chapter 8, Part 2	Title 18, Chapter 4 Title 7, Chapter 5, Part 23 (county) and Part 43 (city)
Nebraska	Chapter 72 (state) Chapter 18 (local)	Chapter 13 (D/B)	Chapter 73 (state, if Purchasing Bureau allows)	Chapter 81	Chapters 16, 18, 23, and 73
Nevada	Title 28, Chapter 338 Title 27, Chapters 332 and 333	Title 28, Chapter 338 (CM and D/B)	Title 28, Chapter 338 (alternative process for airport proposals)	Title 54, Chapter 625	Title 28, Chapter 338 Title 27, Chapters 332 and 333

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/ Engineering (A/E)) Services	Exceptions
New Hampshire	<p>Title 1, Chapter 21-I (state)</p> <p>Title 20, Chapter 228 (transportation-related)</p> <p>Title 2, Chapter 28 (county)</p>		Title 1, Chapter 21-T (Best Value Pilot Program)	Title 1, Chapter 21-I	<p>Title 1, Chapter 21-I</p> <p>Title 2, Chapter 28 (county)</p>
New Jersey	<p>Title 52, Sections 52:27B and 52:34 (state)</p> <p>Title 40A, Section 40A:11 (local)</p>			Title 52, Section 52:34	<p>Title 52, Sections 52:25 and 52:34</p> <p>Title 52, Section 52:27C</p> <p>Title 40A, Section 40A:11</p> <p>Note that the Port Authority of NY/NJ has its own policy.</p>
New Mexico	Chapter 13, Article 1	Chapter 13, Article 1 (D/B and CM)	Chapter 13, Article 1	Chapter 13, Article 1	Chapter 13, Article 1

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
New York	<p>State Finance Law, Art. 9, § 144</p> <p>General Municipal Code, Art. 5A</p> <p>Public Buildings Law Article 2, § 8</p> <p>Public Authorities Law, Art. 9, Title 4</p>		Public Buildings Law, Article 2, § 8	<p>State Finance Law, Article 9, § 136A</p> <p>Public Authorities Law, Article 9, Title 4</p>	<p>Executive Law § 29-a (emergency)</p> <p>State Finance Law § 165</p> <p>Public Buildings Law, Article 2, § 9</p> <p>Note that the Port Authority of NY/NJ has its own policy.</p>
North Carolina	<p>Chapter 143, Article 8</p> <p>Chapter 136, Article 2 (DOT)</p>	<p>Chapter 143, Article 8 (CM)</p> <p>Chapter 136, Article 2 (DOT D/B)</p>	Chapter 143, Article 8 (bids/proposals possibly used interchangeably)	Chapter 143, Article 3C	<p>Chapter 143, Article 8</p> <p>Chapter 136, Article 2 (DOT)</p>

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
North Dakota	Chapter 48-01.2 (state and local construction) Chapter 54-44.4 (state equipment)	Chapter 48-01.2 (CM)	Chapter 54-44.4 (state)	54-44.7-02 <i>et seq.</i> (A/E, state)	Chapter 48-01.2
Ohio	Title 1, Chapter 153	General Provisions, Chapter 9 (CM) D/B limited to ODOT		Title 1, Chapter 153	Title 1, Chapter 153 Title 3, Chapter 307 Title 1, Chapter 121
Oklahoma	Title 61	Title 61 (D/B, CM)	Title 74 (state equipment)	Title 61	Title 61
Oregon	Chapter 279C Chapter 279B (equipment)		Chapter 279C Chapter 279B (equipment)	Chapter 279C	Chapter 279C Chapter 279B

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Pennsylvania	Title 62, Chapter 5 Title 74, Chapter 17 (metro transportation authority)	Title 62, Chapter 5	Title 62, Chapter 5	Title 62, Chapter 9	Title 62, Chapter 5
Rhode Island	Title 37, Chapter 2 (state) Title 45, Chapter 55 (local)	Title 37, Chapter 2 (CM)	Title 37, Chapter 2 (state) Title 45, Chapter 55 (local)	Title 37, Chapter 2 (state) Title 45, Chapter 55 (local)	Title 37, Chapter 2 (state) Title 45, Chapter 55 (local)
South Carolina	Title 11, Chapter 35	Title 11, Chapter 35 (D/B, CM)	Title 11, Chapter 35	Title 11, Chapter 35	Title 11, Chapter 35
South Dakota	Chapter 5-18A See also 50-7-11 (airports)	Chapter 5-18B (D/B and CM)	Chapter 5-18A		Chapter 5-18A
Tennessee	Title 12, Chapter 3	Title 12, Chapter 10 (D/B, CM)	Title 12, Chapter 3 Title 12, Chapter 10	Title 12, Chapter 4	Title 12, Chapter 3

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/ Engineering (A/E)) Services	Exceptions
Texas	Government Code, Chapter 2166 Local Government Code, Chapter 271	Government Code, Chapter 2166 (D/B and CM) Local Government Code, Chapter 271 (D/B)	Government Code, Chapter 2166	Government Code, Chapter 2166 (state A/E by administrative rule)	Government Code, Chapter 2166 Local Government Code, Chapter 271
Utah	Title 63G, Chapter 6 Title 11, Chapter 39 (local)	Title 63G, Chapter 6 (D/B and CM) Title 11, Chapter 39 (local D/B and CM)	Title 63G, Chapter 6	Title 63G, Chapter 6	Title 63G, Chapter 6 Title 11, Chapter 39
Vermont	Title 29, Chapter 5 Title 29, Chapter 49 (best interest of state) Title 19, Vermont Agency of Transportation has own standards	Title 29, Chapter 5 (D/B) Title 19 (D/B by Vermont Agency of Transportation)		Title 19 (A/E by Vermont Agency of Transportation)	Title 29, Chapters 5 and 49
Virginia	Title 2.2, Chapter 43	Title 2.2, Chapter 43 (D/B)	Title 2.2, Chapter 43	Title 2.2, Chapter 43	Title 2.2, Chapter 43

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Washington	<p>Title 43, Chapter 43.19</p> <p>Title 39, Chapter 39.04</p> <p>Title 35, Chapters 35.22 and 35.23</p> <p>Title 36, Chapter 36.22</p>	Title 39, Chapter 39.10 (D/B and CM)		Title 39, Chapter 39.80	<p>Title 39, Chapters 39.04 and 39.28</p> <p>Title 35, Chapters 35.22 and 35.23</p> <p>Title 36, Chapter 36.22</p>
West Virginia	<p>Chapter 5, Article 22</p> <p>Chapter 17, Article 27 (transportation facility)</p> <p>Chapter 8, Article 27 (urban mass transportation authority)</p>	Chapter 5, Article 22A (D/B)	Chapter 5A, Article 3 (state, best value)	Chapter 5G, Article 1	Chapter 5, Article 22

State	Sealed Bids	Alternative Construction Delivery Methods	Proposals	Competitive Negotiation (Qualifications-Based Selection) for Professional (Architecture/Engineering (A/E)) Services	Exceptions
Wisconsin	Chapter 16 (state) Chapter 66, Subchapter 9 (local)		Chapter 16	Chapter 16	Chapter 16 Chapter 66, subchapter 9 (local)
Wyoming	Title 9, Chapter 2 (state) Title 15, Chapters 1 and 6 (local)	Title 16, Chapter 6 (D/B and CM) Title 15, Chapter 1 (CM, D/B)	Title 9, Chapter 2 Title 15, Chapter 1	Title 9, Chapter 2 Title 15, Chapter 1	Title 9, Chapter 2 Title 15, Chapters 1 and 6

APPENDIX C—STATE BID PROTEST PROCEDURES

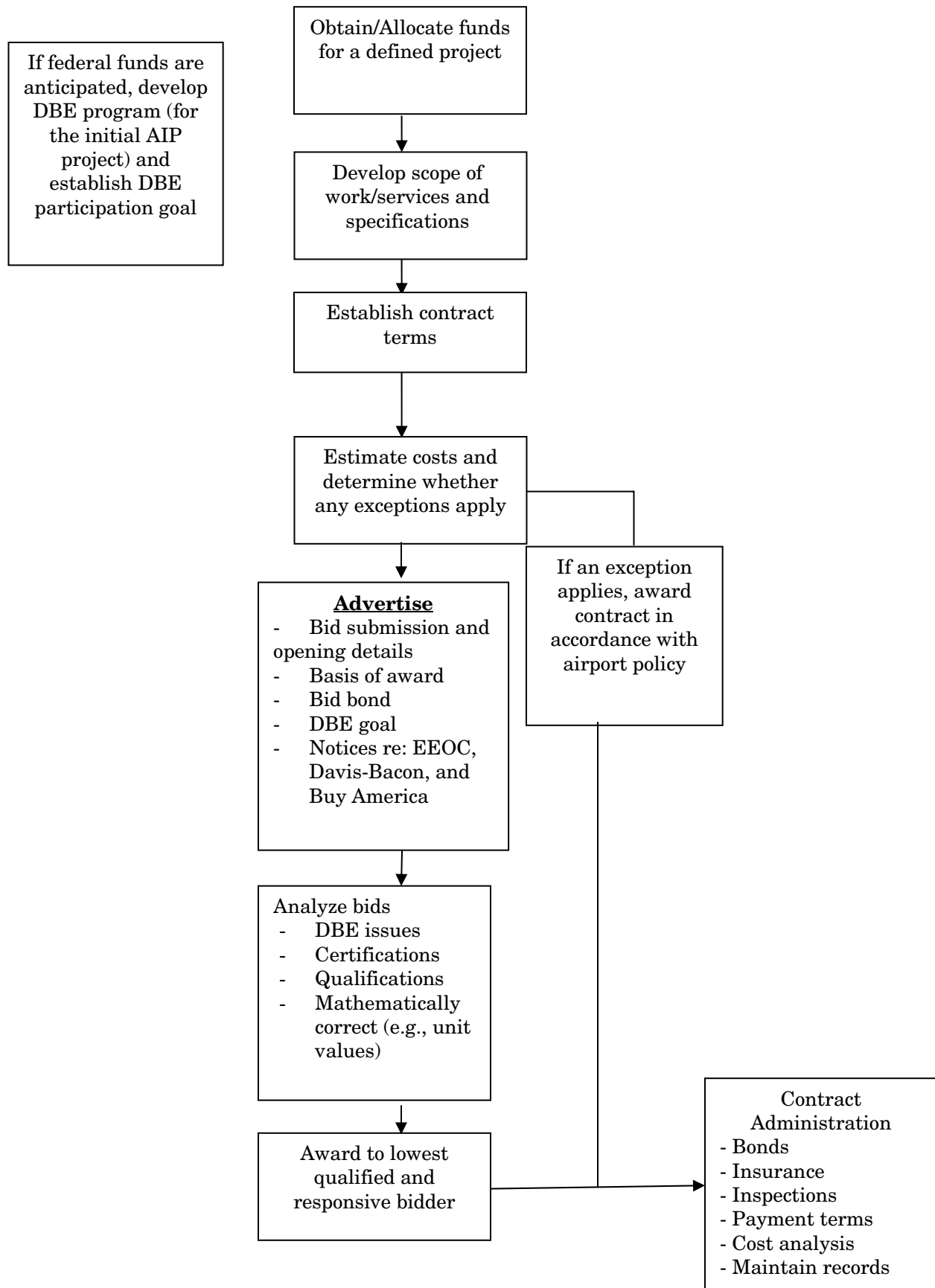
State	
Alabama	Ala. Admin. Code r. 355-4-1-.04
Alaska	36.30.550 <i>et seq.</i>
Arizona	34-603 <i>et seq.</i> (A/E, CM, D/B) 41-1993, 41-2578, 41-2579
Arkansas	19-11-244
California	Public Contract Code 10306, 10343, 10376
Colorado	24-109-101 <i>et seq.</i>
Connecticut	4-141 (claims vs. state generally) State Selection and Bidding Manual explains a debriefing option (but is silent as to official protests), http://www.ct.gov/dpw/lib/dpw/010m_selection_and_bidding_manual.pdf
Delaware	29 Del. Code 6908 <i>et seq.</i>
Florida	337.11 (DOT) 120.57 (most agencies)
Georgia	Georgia Vendor Manual, § 3.8 Georgia Procurement Manual, ch. 9, § 1
Hawaii	103D-0701 <i>et seq.</i>
Idaho	67-5733
Illinois	30 Ill. Comp. Stat. 500/20-75 30 Ill. Comp. Stat. 500/15-25
Indiana	4-13-1-18 25 Ind. Admin. Code 2-16-7 and 2-16-8 prequalification appeals 105 Ind. Admin. Code 11-2-9 prequalification appeals
Iowa	Iowa Code ch. 17A Iowa Admin. Code, Admin. Services Dept., ch. 7
Kansas	75-6907 (enjoin award when bid mistake) Dept. of Admin., Div. of Facilities, http://www.da.ks.gov/fp/contractor/protestpolicy.htm Dept. of Admin., Div. of Purchase, Vendor Protest Policy, http://www.da.ks.gov/purch/forms.htm
Kentucky	45A.285 (state) 45A.343 (local)
Louisiana	39:1671
Maine	Title 5, ch. 156, § 1831
Maryland	21.10.02
Massachusetts	OIG informal procedures for violations of ch. 30B, http://www.mass.gov/ig/publ/c30bprot.htm
Michigan	http://www.michigan.gov/buymichiganfirst/0,4541,7-225-48677-20046--,00.html
Minnesota	16C.03 (commissioner may adopt rules, but no formal rules adopted)
Mississippi	11-51-75
Missouri	http://oa.mo.gov/purch/vendorinfo/vendormanual.pdf
Montana	18-4-242 http://www.mdt.mt.gov/business/contracting/bidprocedure.shtml
Nebraska	http://www.das.state.ne.us/materiel/purchasing/vendorinfo.htm
Nevada	338.142
New Hampshire	21-I:86
New Jersey	52:27B-56 N.J. Admin. Code 17:12-3.1 <i>et seq.</i>
New Mexico	13-1-172 <i>et seq.</i>
New York	State Finance Law 123-b, 139-j Policy for OSC contracts, http://www.osc.state.ny.us/agencies/gbull/attachments/contractawardprotestprocedure.pdf

North Carolina	143.53
North Dakota	54-44.4-12
Ohio	9.312
Oklahoma	Okla. Admin. Code 580:20-1-10.1
Oregon	279B.400 <i>et seq.</i>
Pennsylvania	Title 62, § 1711.1
Rhode Island	37-2-49 <i>et seq.</i>
South Carolina	11-35-4210(1)
South Dakota	No procedures located
Tennessee	12-3-214
Texas	Government Code 2155.076
Utah	63G-6-802
Vermont	Title 19, § 923 <i>et seq.</i> (Vt. Agency for Transp.)
Virginia	2.2-4365
Washington	39.04.105 local
West Virginia	W.V. Code of State Rules 148-11-14 (D/B) Title 148, Series 1, § 8 (148-1-8)
Wisconsin	W. Admin. Code 10.15 State Procurement Manual sets forth the appeals process that is to be included in the solicitation, http://vendornet.state.wi.us/vendornet/procman/proc5.pdf .
Wyoming	Wyoming Rules, Dept. of Admin., Purchasing Div., ch. 4

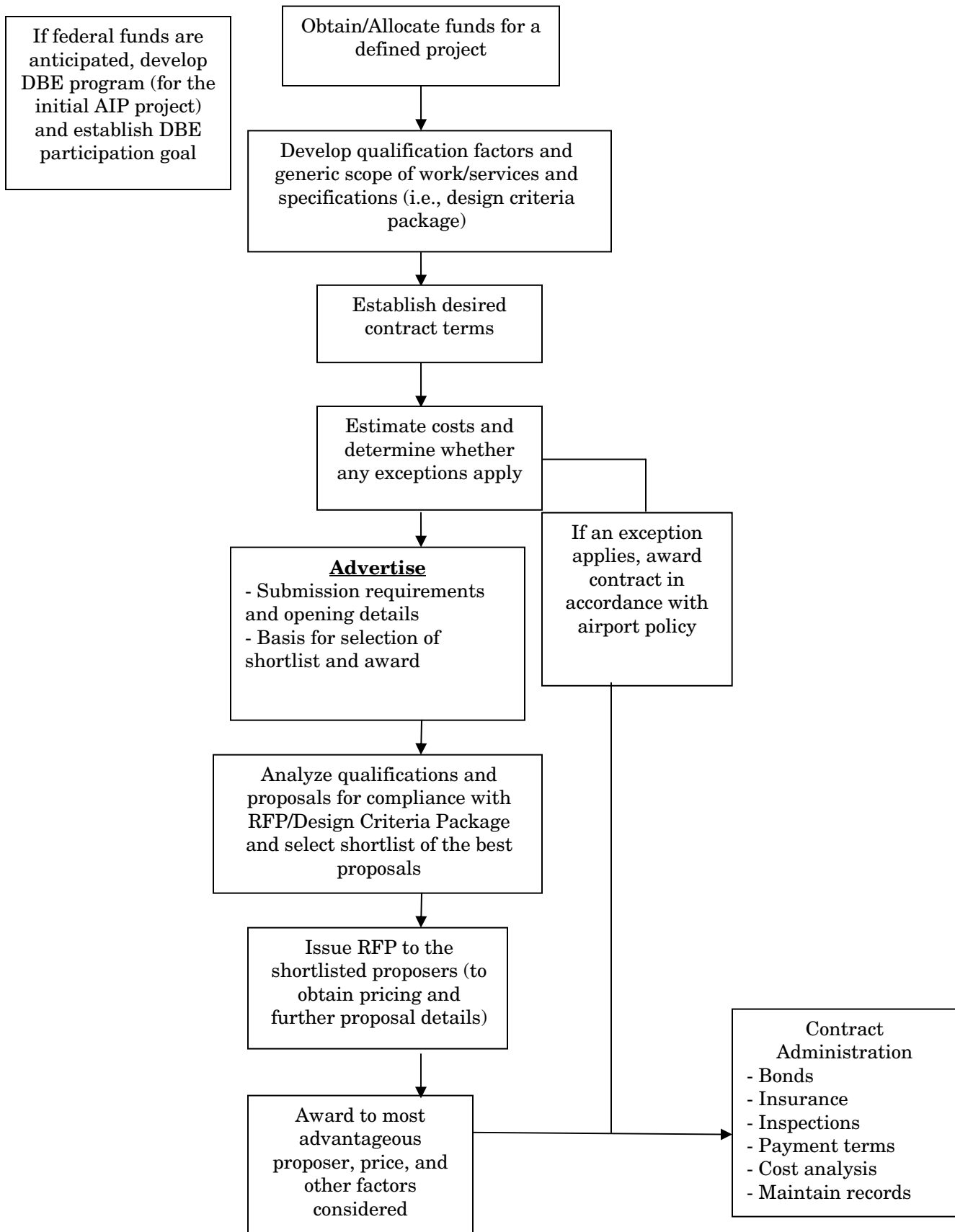
As explained in the digest, an attempt has been made to compile a listing of the bid protest procedures for each state. However, each airport must evaluate whether the state procedures actually apply to local airports. All references are to state statutes, unless otherwise indicated.

A listing of Web site links for state governments, including links to state statutes and state administrative codes, can be found at <http://www.llsdc.org/state-leg>.

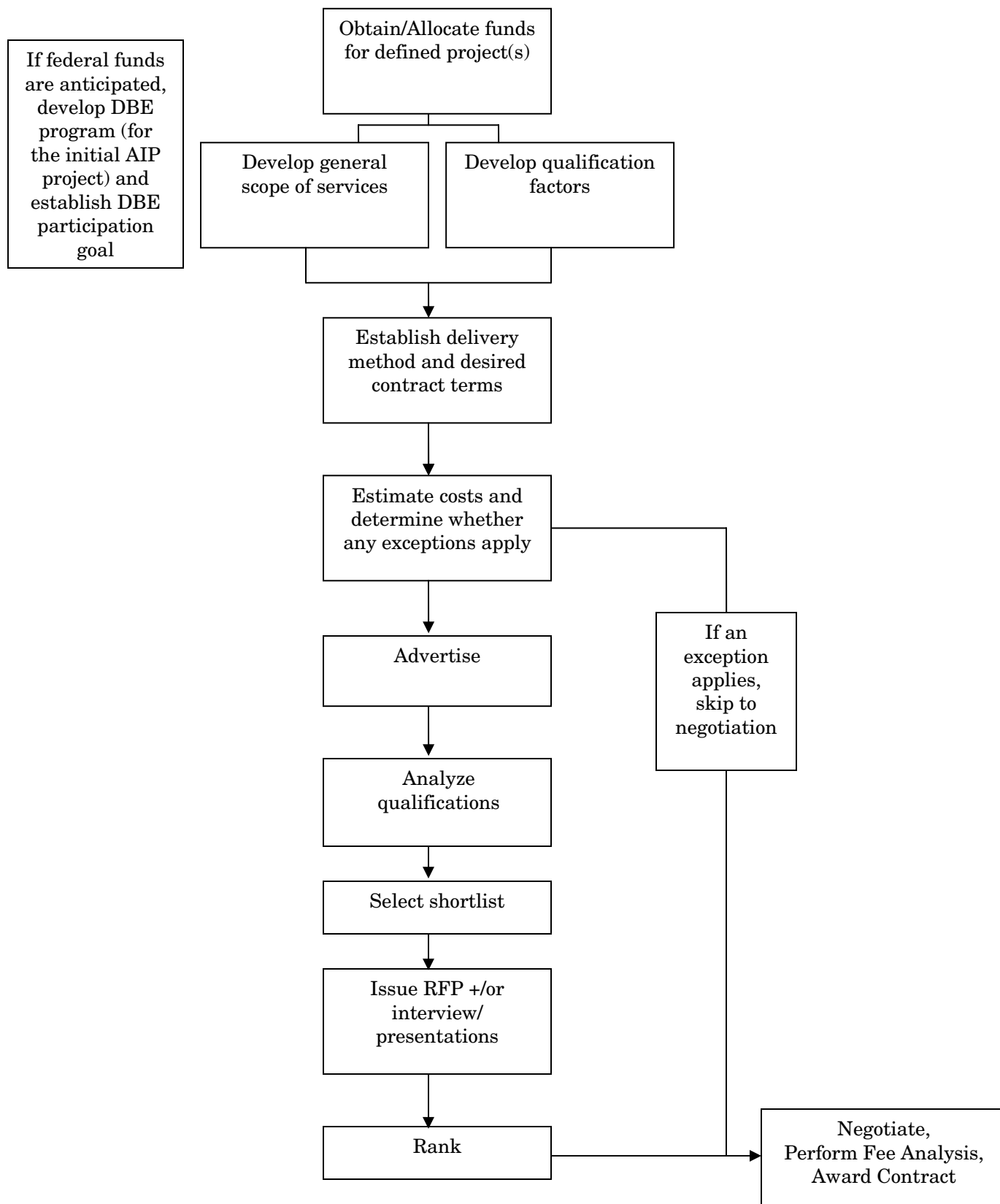
APPENDIX D—TYPICAL CONSTRUCTION PROCUREMENT SEALED-BID PROCESS



APPENDIX E—TYPICAL REQUEST FOR PROPOSAL PROCUREMENT



APPENDIX F—TYPICAL PROFESSIONAL SERVICES PROCUREMENT— QUALIFICATIONS-BASED SELECTION PROCESS



ACKNOWLEDGMENTS

This study was performed under the overall guidance of the ACRP Project Committee 11-01. The Committee was chaired by BARRY MOLAR, Unison Consulting, Inc., Wheaton, Maryland. Members are THOMAS W. ANDERSON, Metropolitan Airports Commission, Minneapolis, Minnesota; PATRICIA A. HAHN, Patricia A. Hahn Consulting, Washington, DC; TIMOTHY KARASKIEWICZ, General Mitchell International Airport, Milwaukee, Wisconsin; CARLENE MCINTYRE, Port Authority of New York & New Jersey, New York, New York; E. LEE THOMSON, Clark County, Las Vegas, Nevada; and KATHLEEN YODICE, Yodice Associates, Aircraft Owners and Pilots Association, Washington, DC.

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ISBN 978-0-309-25852-4



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