

42nd Annual AAEE
Airport Law Workshop
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Session #14

Procurement and Contract Requirements



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Speaker



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Agenda

1. What are you buying?
2. State and Local Procurement Requirements
3. State and Local Contract Requirements
4. Federal Procurement and Contract Requirements

Shopping!

What, exactly, are you buying?

1. What is it?
 - Goods
 - Services
 - Construction
 - Software...what is software?
2. How much does it cost?
3. How is it being paid for?



State and Local Procurement Requirements

- State statutes and regulations
 - ABA Model Procurement Code
- Goods vs. services vs. construction
 - Uniform Commercial Code applies to goods
- Often do not address modern issues such as software or software as a service (SaaS) requirements
- Beware of click-through contracts from tech companies and others
- Cooperative purchasing agreements



Sources for help:

International Municipal Lawyers Association (IMLA)

National Association of State Procurement Officials (NASPO)

State Departments of Transportation or Procurement Offices

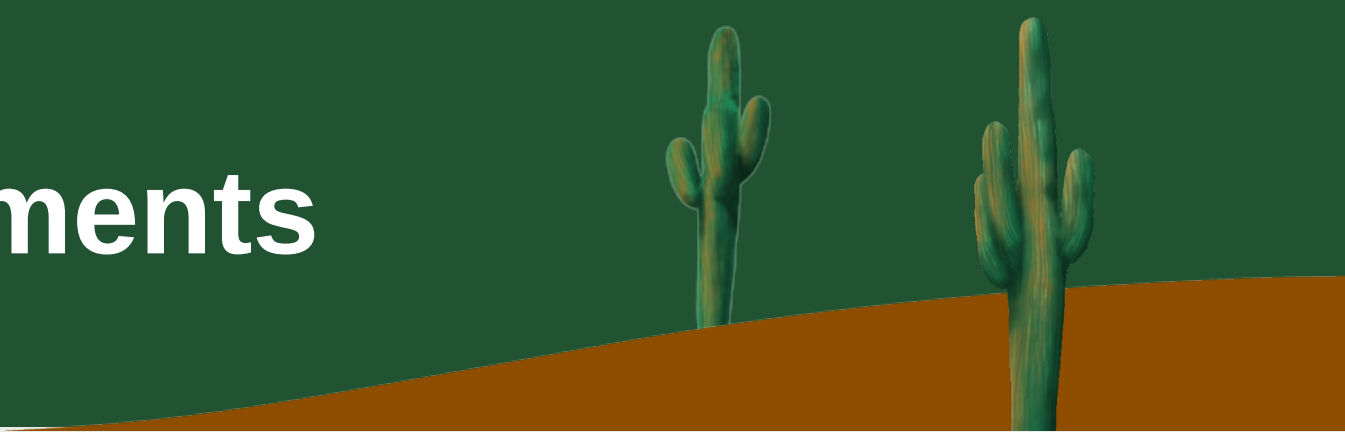


Procurement Types

- "Hard Bid" or Low Bidder
 - o select the lowest bidder from among all responsive, responsible bidders
 - o typical for a fixed price or unit price contract
 - o typical for design-bid-build construction delivery
- Request for Proposals (RFP)
 - o selections based on the best value for the public entity
 - o common for services, concessions, consultants, and some construction
- Request for Qualifications (RFQ)
 - o selections based on qualifications only
 - o may be required for some kinds of professional services
 - o state or local requirements might include both an RFQ and an RFP



Common Themes Across State Requirements



Competitive procurement is required

- Exceptions may exist

Fair and open procurements

- State/local definitions vary
- Fairness among all bidders
- No insider information

Lowest cost vs. best value

Bid protests

- State/local rights vary
- Some are very specific
- Some states have no automatic protest rights

Construction

States vary widely

- Do not assume that you can do what others can
- State laws may be very expansive or very limiting
- Pay attention to the details
- Delivery method “names” are a general idea of party roles and delivery approach but are not definitive

Colorado: C.R.S. § 31-25-1303: (4) “Integrated project delivery” or “IPD” means a project delivery method in which there is a contractual agreement between an agency and a single participating entity for the design, construction, alteration, operation, repair, improvement, demolition, maintenance, or financing, or any combination of these services, for a public project.

Massachusetts: M.G.L. Ch. 149A, § 14: the awarding authority may utilize design build for the construction, reconstruction, alteration, remodeling or repair of any public works project pursuant to this section and sections 15 to 21, inclusive; but, before using the design build, the awarding authority shall seek the approval of the inspector general pursuant to section 16.

§ 15: the term "public works project" shall not include a building project.

Practical Procurement Tips

- ❖ Good procurement documents improve the outcome
 - What information should my procurement documents contain?
 - Some states have very general requirements; some have detailed requirements
- ❖ You can talk to industry before issuing the procurement
 - The “cone of silence” applies after issuance
- ❖ Procurement based on bids
 - Fast, simple, but not ideal for complex procurements
- ❖ Requests for Proposals and Request for Qualifications
 - Best value to the purchaser
 - More flexibility but more work to create good documents and evaluation criteria



Sources of Contract Requirements



Required contract types and contract provisions

- State constitution and law
- Local ordinances
- Local policies/practices
 - Might limit negotiation of certain provisions that aren't legally required
- Authorizing Ordinance or Bond Indenture
- Federal requirements applicable to all contracts
 - FAA non-discrimination requirements
- Provisions applicable to the sponsor to be flowed down

Bond Indenture:

The contract between the public entity and the bond trustee setting out the public entity's obligations, including security requirements such as debt service coverage or that the public entity preserve and protect its assets, including physical assets.

State and Local Contract Terms



- ☐ Indemnification
 - Can the public entity indemnify another party?
 - Can you accept limitations of the other party's liability?
- ☐ Appropriation requirements
 - Payment under the contract is conditioned on future years' appropriations
- ☐ Surety Bonds
 - Payment and/or performance bonds
 - Bid bonds
- ☐ Liquidated damages
 - Pre-calculated actual damages for certain types of performance issues, usually delay
 - Differ from penalties and Key Performance Indicator (KPI) charges
- ☐ Open Records Act
- ☐ Contract approval process and process for amendments

Airport-Related Contract Terms



Include required flow-down provisions to ensure contractors comply with federal and airport requirements even if the contract is not federally funded.

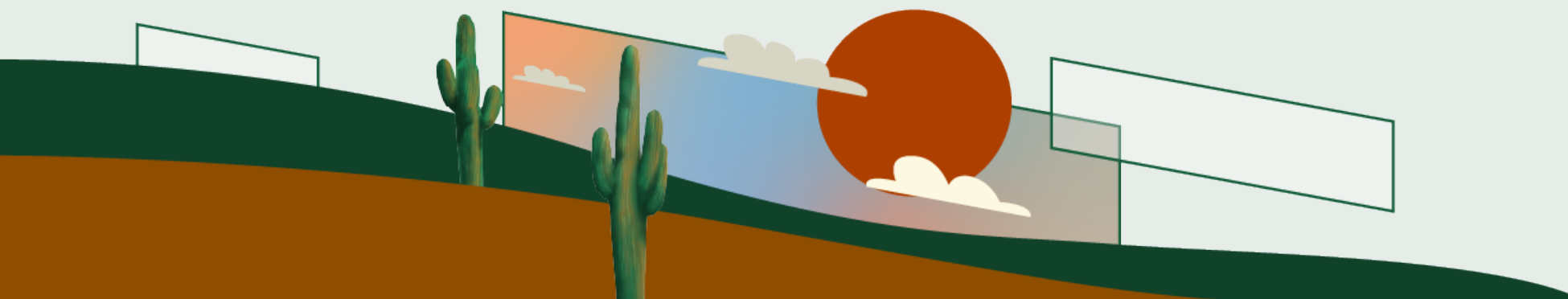
- ☐ Compliance with airport rules and regulations
- ☐ Security and badging requirements
- ☐ Sensitive Security Information (SSI)
- ☐ Driving on the airfield or airport property
- ☐ Ability to remove contractor employees or agents who do not comply with rules, regulations, security, or other requirements
- ☐ Subordinate the contract to the terms of federal agreements
- ☐ Consider a specific provision requiring the contractor to reimburse fines or penalties for federal violations that are imposed on the sponsor

Federal Funds

- Airport Improvement Program (AIP) grants
- Other grants managed under AIP
- TIFIA loans

Strings attached...

- ✓ 2 C.F.R Part 200 - the Uniform Guidance
- ✓ Grant Agreements and Sponsor Grant Assurances
- ✓ Other Federal laws and regulations
- ✓ USDOT and FAA policy





2 C.F.R. Part 200

◎ **PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

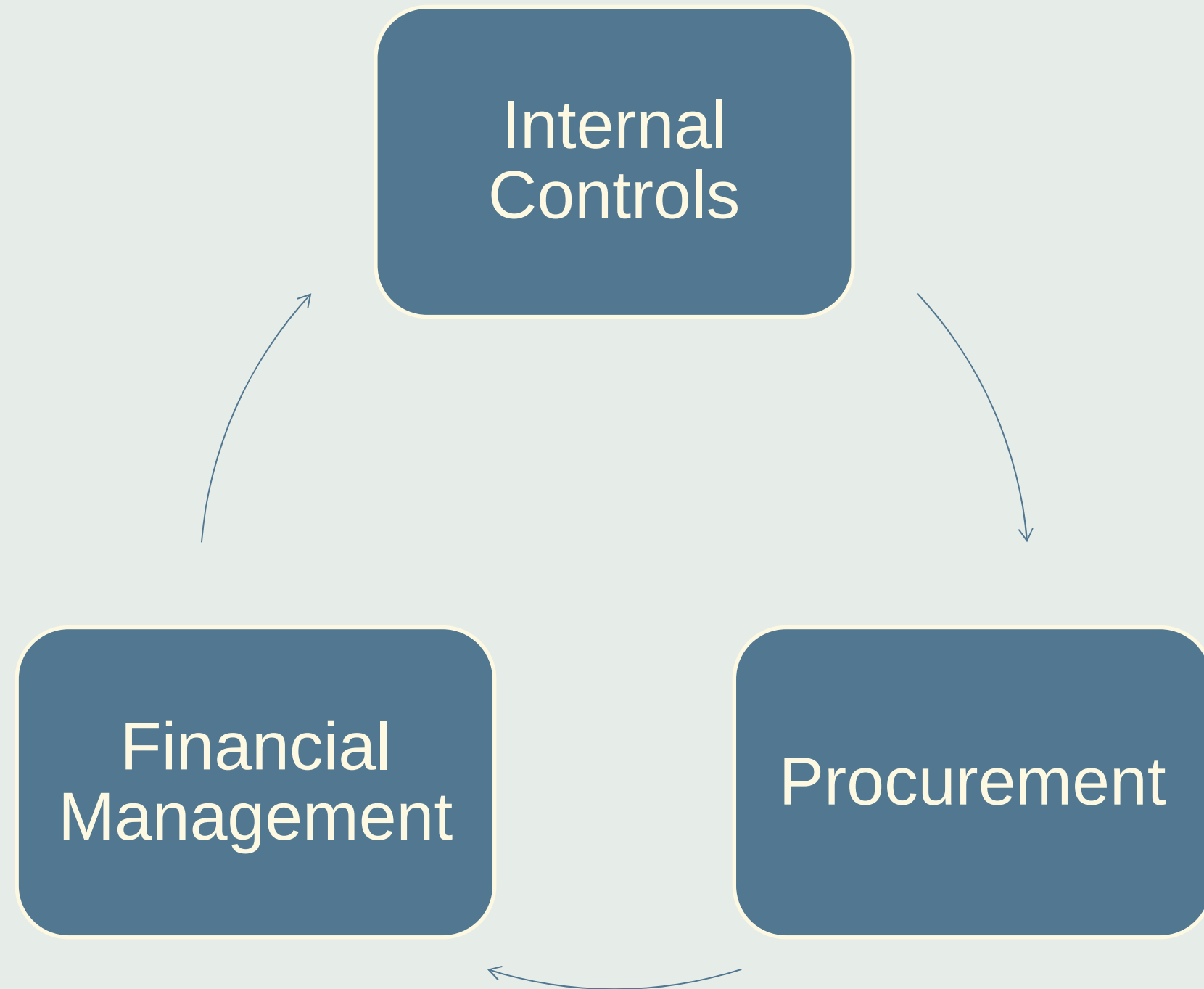
Authority: 31 U.S.C. 503; 31 U.S.C. 6101-6106; 31 U.S.C. 6307; 31 U.S.C. 7501-7507.

Source: 89 FR 30136, Apr. 22, 2024, unless otherwise noted.

a/k/a the “Uniform Guidance”

<https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200>

2 C.F.R. Part 200



Issued by the Office of Management and Budget

Last major update in 2024

*Major proposed revision pending

Standards for federal agencies in making and managing grants

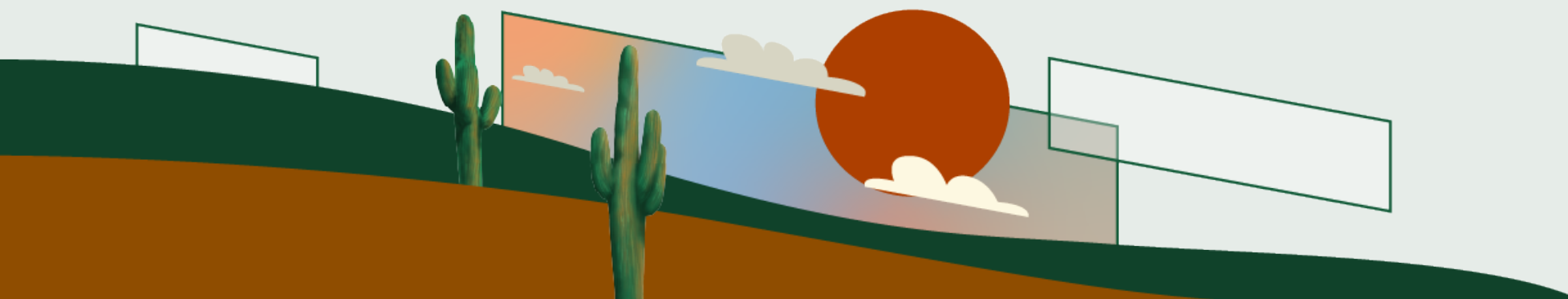
Standards for grant recipients



General Procurement Standards

2 C.F.R. §§ 317-326

- ✓ Recipient must have written procurement procedures
- ✓ Cooperative purchasing and other shared services agreements can be used if the procurement and contract meet the requirements
- ✓ Contract awards may only be made to responsible contractors
- ✓ Recipient must maintain records sufficient to detail the history of the procurement transaction
- ✓ Time and material contract only permitted in limited circumstances and with maximum price above which contractor is at risk
- ✓ The recipient must resolve procurement and contract disputes; FAA will not substitute its judgment unless the issue is a matter of federal concern
- ✓ Substantive required contract terms and conditions



Conflicts of Interest

- § 200.318(c)

Definition:

- A conflict of interest includes when the employee, officer, agent, or board member, any member of their immediate family, their partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from an entity considered for a contract.
- The person also cannot solicit gratuities, favors, or anything else of value from a proposer.



Recipient **must** have conflict of interest standards



Standards can include *de minimis* or unsolicited gift exceptions



Employees, agents, officers cannot participate in selection, award, or administration, if they have a conflict of interest

Competition - § 200.319

- Procurements **must** provide for **full and open competition**
- No organizational conflicts of interest
- Contractors cannot have inside information from other work related to the project
- Cannot use:
 - arbitrary restrictions on who can bid or propose
 - unnecessary qualifications or financial requirements on potential proposers
- Can require: “scoring mechanism that rewards bidders that commit to specific numbers and types of U.S. jobs, minimum compensation, benefits, on-the-job-training for employees making work products or providing services on a contract, and other worker protections.”
 - *Other requirements including full and open competition must be met*



Procurement Methods - § 200.320



Informal procurement methods

- “Micro purchases” = do not exceed \$15,000
- Simplified acquisitions = do not exceed \$350,000

Formal procurement methods

- Sealed bids with a firm, fixed price contract
- Requests for proposals awarded to the responsible offeror whose proposal is most advantageous considering price and other factors
 - Requests for proposals must be advertised
 - Specify evaluation criteria and relative importance
- Requests for qualifications for architecture/engineering under the Brooks Act

Non-competitive procurements

- Allowed in limited situations, including when only one source is available

AIP Handbook

Order 5100.38D, Change 1 (2019)

- Order describing how the FAA interprets requirements and manages AIP grants (and other grants)
- Appendix U and Tables = Sponsor Procurement Requirements
- FAA's application of 2 C.F.R. § 200.317-326
- Supplemented by Program Guidance Letters (PGL)

*The Handbook was last updated in 2019, so the quoted parts of 2 C.F.R. Part 200 are not up to date.

R-PGL 25-01: Runway Projects (posted 4/4/2025)

R-PGL 25-02: AIP Discretionary Set Aside (posted 4/4/2025)

R-PGL 25-03: Extended, Expanded, and Revised Programs (posted 4/4/2025)

R-PGL 25-04: Procurement (posted 5/12/2025)

R-PGL 25-05: Funding and Formula Changes (posted 5/12/2025)

R-PGL 25-06: Planning and Project Eligibility (posted 5/12/2025)

R-PGL 25-07: Civil Rights (posted 5/14/2025)

R-PGL 25-08: Alaska and Other Non-contiguous States and Territories (posted 5/20/2025)

R-PGL 19-01: Extended & Expanded Programs

R-PGL 19-02: Planning & Project Eligibility



Contract Provisions



FAA Airports

Contract Provision Guidelines for Obligated Sponsors and Airport Improvement Program Projects (Issued on March 17, 2026)

https://www.faa.gov/airports/aip/procurement/federal_contract_provisions

FAA Contract Provisions

- Contain provisions for solicitations and contracts
- Instructions + required or model language
- If the language is not required, your own provision might be acceptable
- Comply with 2 C.F.R. § 327 and Appendix II and other federal requirements
- Civil Rights provisions are always required
- Check the FAA web site regularly for updates
- Make sure flow-down provisions are included
- CANNOT incorporate by reference or by link

Provisions/Clauses	Dollar Threshold	Solicitation	Professional Services	Construction	Equipment	Property (Land)	Non-AIP Contracts
Access to Records and Reports	\$ 0	NIS	REQD	REQD	REQD	REQD	n/a
Breach of Contract	\$350,000	NIS	REQD	REQD	REQD	REQD	n/a
Buy American Preferences	\$ 0	REF	Limited	REQD	REQD	Limited	n/a
(1) Buy American Statement	\$ 0	NIS	Limited	REQD	REQD	Limited	n/a
(2) Construction	\$ 0	NIS	Limited	REQD	REQD	Limited	n/a

What is in the Contract Provisions?

Statutes and regulations that apply to projects when federal funding is used including:

- Davis-Bacon Act
- Build America, Buy American / Buy American
- Working and payment conditions – wages and hours, Occupational Safety and Health Administration (OSHA)
- Good government provisions – Byrd Anti-Lobbying Act, debarment
- Project quality/contents – seismic safety, technology limitations
- Civil Rights / Title VI requirements

NOT THERE ANYMORE:

- Equal Employment Opportunity (EEO) - 41 C.F.R. Parts 60-1, et seq. were rescinded, including EEO plans, employment goals for women and minorities, and reporting requirements

DBE/ACDBE



- 49 C.F.R. Parts 23 and 26
- 2025 Interim Final Rule (IFR)
- Sponsors must set goals for the participation of disadvantaged small businesses in grant funded projects and concessions
- Eliminated race-based presumption of disadvantage
- Businesses/owners must demonstrate they are disadvantaged
- Requires recertification of DBEs and ACDBEs
- Requires sponsors to do new studies and set new DBE and ACDBE goals

- 2026 Final Rule
- Published 9/25/2026
- FAQ issued 9/25/2026
- Clarifies issues created in the IFR
- Certifiers must finish within 90 days – December 24, 2026 (+ possible 90-day extension)
- DBEs have a deadline to reapply or be disqualified
- Be prepared to reset your goals

Monitor Your State's Status:

- <https://www.transportation.gov/UCPstatus>

Major Updates Coming

2 C.F.R. Part 200

- Issued for comments in 2026
- OMB states it will issue the final rule effective October 1, 2026
- Congress delayed implementation to December 11, 2026, in the 2027 budget reconciliation*
- Not just a routine, technical update
- Grant must align with both the law and administration priorities, including policy-based restrictions on DEI and other activities
- Political appointees review and approve grants
- Grant suspension and termination provisions

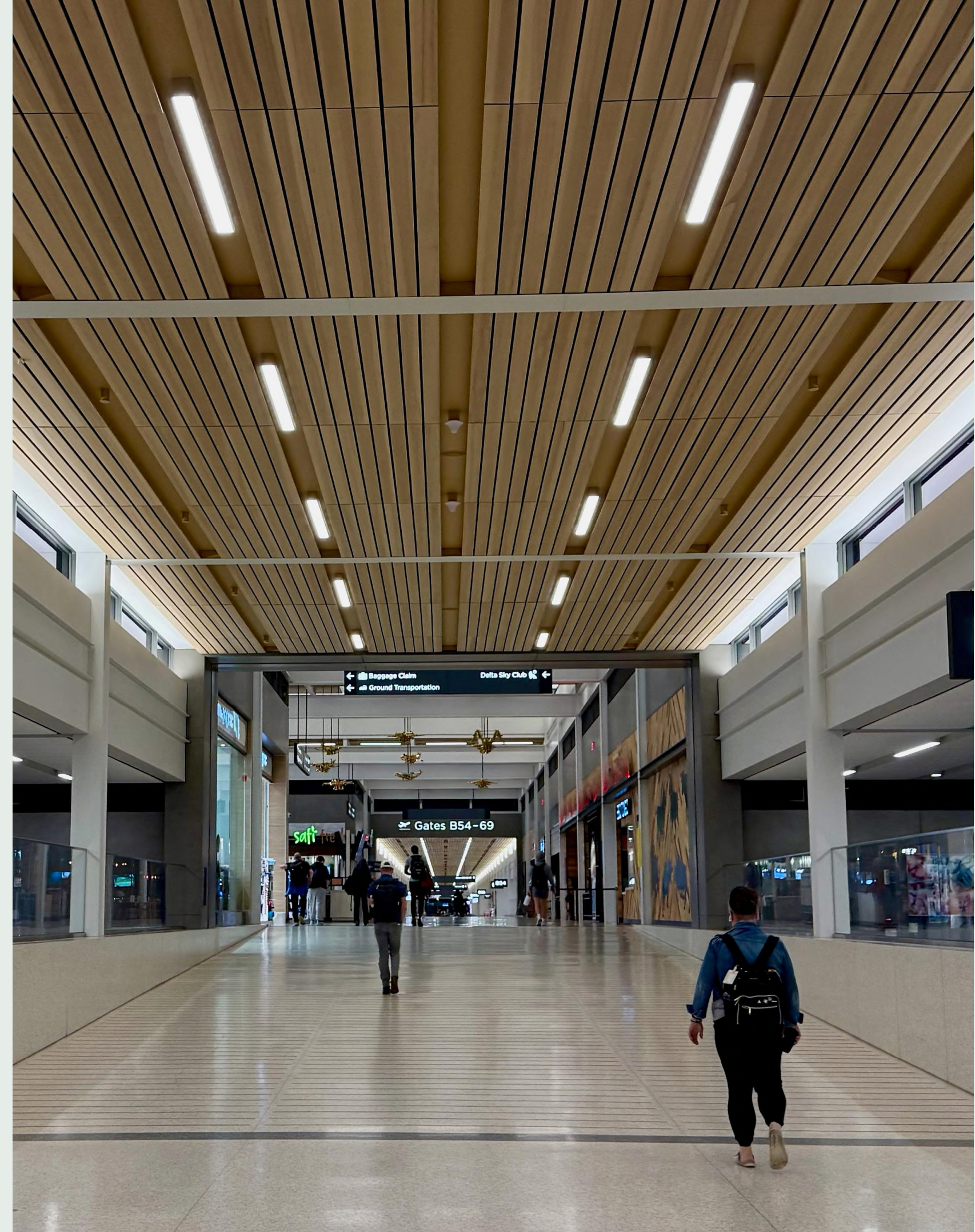
AIP Handbook

- Update required by Congress
- Draft circulated in 2026
- Final version expected in Summer 2027
- Statutory exceptions to 2 C.F.R. Part 200 and Congressional directives incorporated
- Highly simplified – too simplified?
- Incorporates the PGLs

*Public Law No. 119-103, Continuing Appropriations and Extension Act, 2027

Practical Contract Tips

- Understand the scope of work and what good performance means
- Draft provisions to address the sponsor's risks in the contract
- Add requirements related to airport operational needs
- For federally-funded projects, make sure to include federal contract language in the current FAA version
- If the contract is based on a click-through form, click through!
 - Some companies will allow edits to those forms
- Ask companies if they have a government form



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Questions?




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Thank You!



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