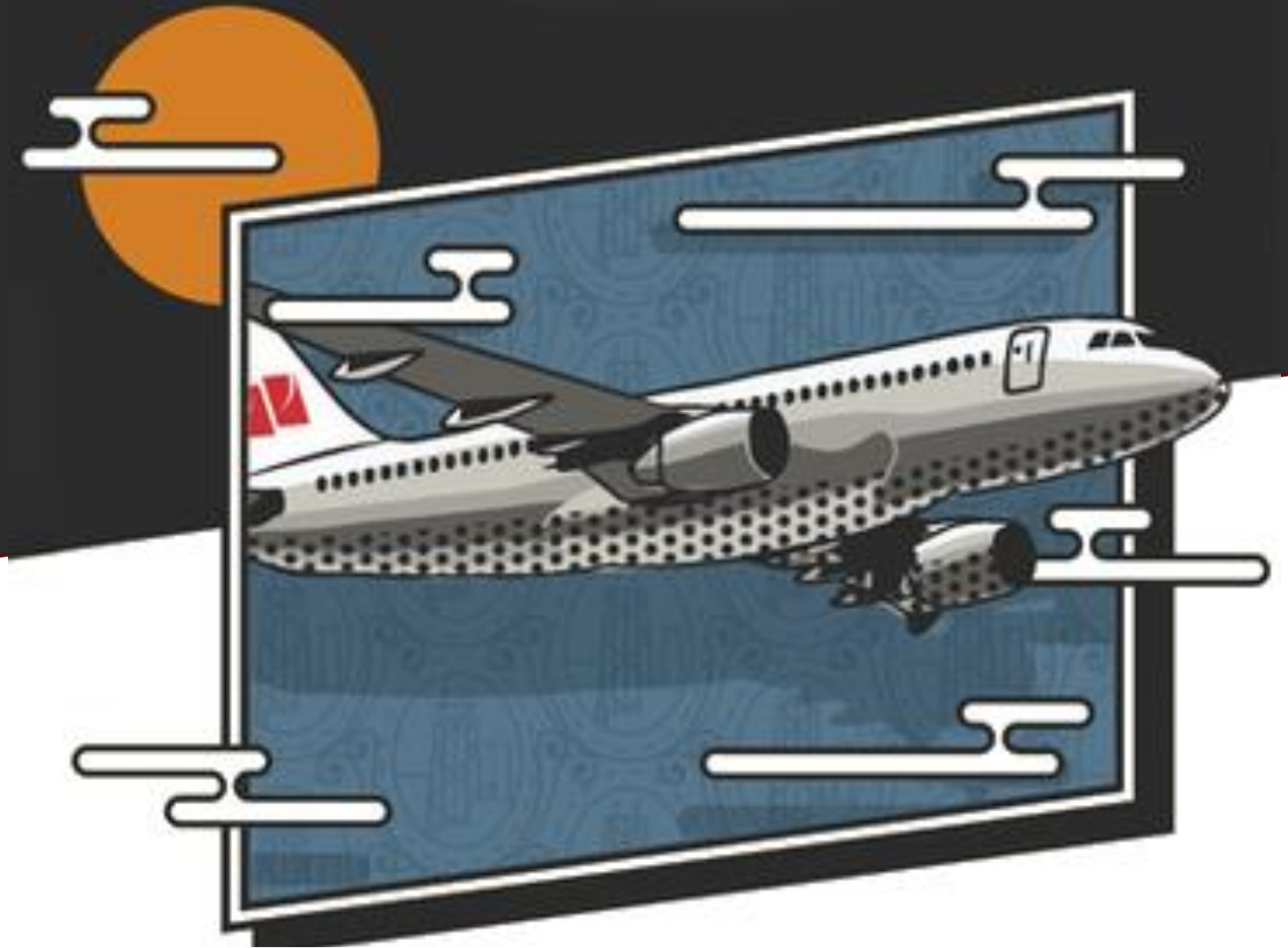




40th Annual
Airport Law Workshop



Session #6

Negotiating with Non-Airline Aeronautical Tenants

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Overview

Negotiating with non-airline aeronautical tenants

- Aeronautical leases are fraught with potential compliance issues
- We're assuming Airport Layout Plan and/or NEPA approvals.
- We will discuss:
 - Direct negotiation versus procurements
 - Types of agreements with non-airline aeronautical tenants
 - Minimum Standards for Commercial Aeronautical Activities
 - Key issues and terms in negotiating aeronautical agreements

To procure or not to procure?

- Duty to consider an unsolicited proposal in good faith
- FAA does not require a competitive solicitation process
- Procurement can avoid unjust discrimination challenges
- Consider state/local law requirements



Types of agreements

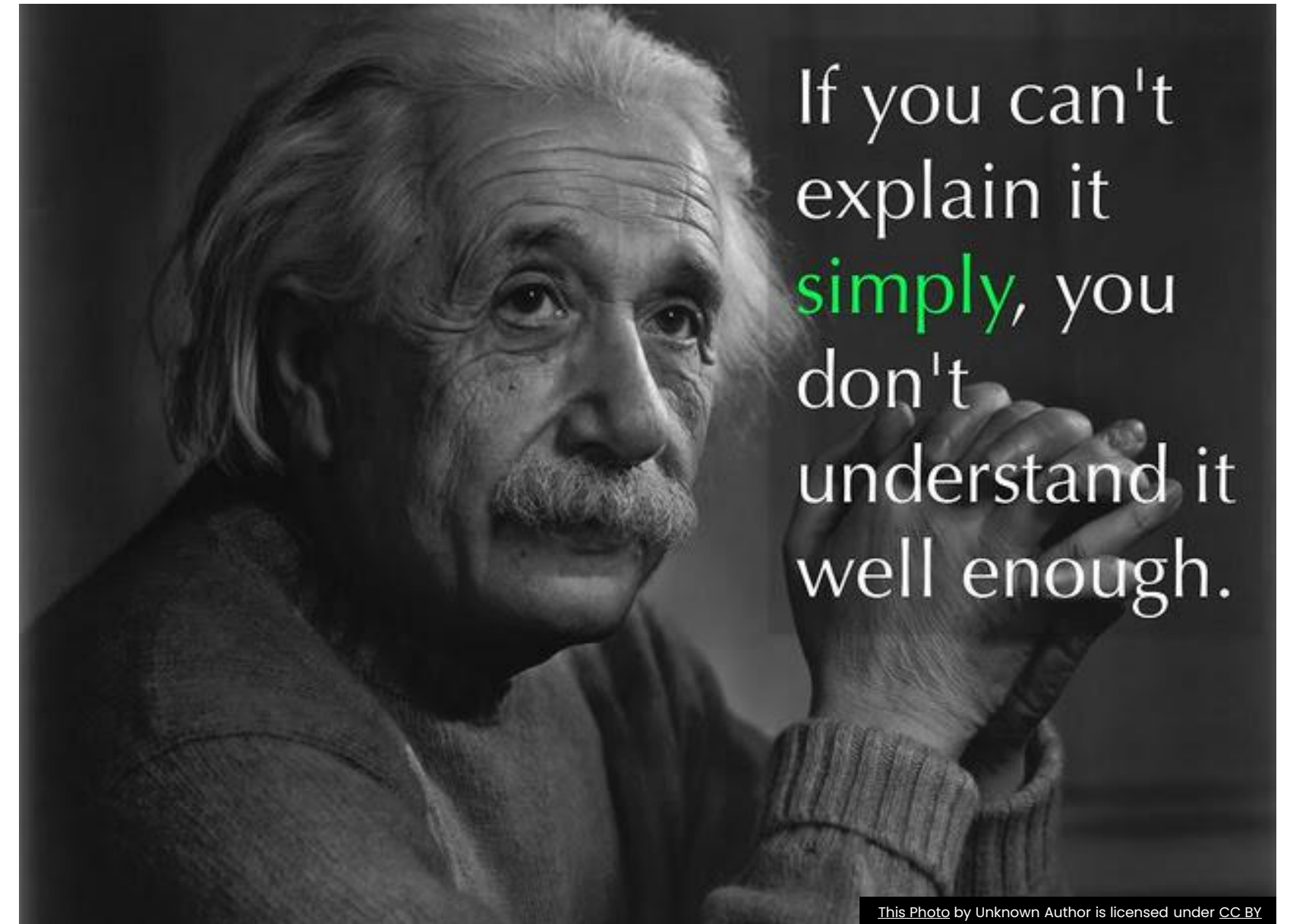


- **Leases**
 - Aeronautical, non-aeronautical, or combinations of both
 - Ground versus facilities leases
 - Operating authorization
- **Commercial activity permit**
 - Short-term agreements
 - Operating authorization on existing leaseholds
- **Miscellaneous**
 - Easements
 - Right of entry
 - Licenses

Grant Assurance 22 (again)

Economic nondiscrimination

- Airport must be available for aeronautical use on reasonable and not unjustly discriminatory terms
- “Hey, they got a better deal!”
- Consider:
 - Level of capital investment
 - Changes in airport policies
 - Differences in use/facilities



Commercial Minimum Standards

Leveling the playing field and avoiding unjust discrimination claims

- Minimum Standards should be:
 - Reasonable and not unjustly discriminatory
 - Relevant and attainable
 - Uniformly applied to similarly situated users
 - Incorporated by reference into aeronautical agreements



Commercial Minimum Standards

Common pitfalls



- Do not confuse Minimum Standards with Rules and Regulations
- Do not use Minimum Standards to prevent competition
- Do not waive Minimum Standards
- Do not include *too much* discretion in implementation and enforcement
- Do not “juggle” Minimum Standards

Key business terms and issues

Frequently asked questions



- How do I determine the length of term?
- Can I grant a right a first refusal?
- How do I determine an aeronautical rental rate?
- Can I grant exclusivity?
- What happens at the end of the lease?
- Why is subordination clause important?
- How do I handle assignments and subleases?
- What about leasehold mortgages?
- Does a commercial operator *have* to lease property?
- Can I allow non-aeronautical activities?
- Are there other FAA requirements?



How do I determine the length of term?

- Term should allow tenant to **amortize investment and earn a reasonable return.**
- Term over **50 years** is considered a disposal of airport property (FAA approval is required!).
- Similar concerns for extensions.
- **Consider:**
 - Level of investment and use
 - Financing of tenant facilities
 - Long-term plans



Can I grant exclusivity?

Grant Assurance 23, exclusive rights

- Sponsors may “permit **no exclusive right** for the use of the **airport** by any person providing, or intending to provide, aeronautical services to the public.”
- Exclusive rights may be express or *de facto*.



Can I grant a right a first refusal?

Land banking and exclusive rights

- Avoid leasing more space than an aeronautical user can put to “**gainful aeronautical use**” within a “**reasonable period of time.**”
- Allowing a user to “block out” competition by exercising an option or right of first refusal is a potential **exclusive rights** violation.



How do I determine an aeronautical rental rate?

Common methodologies

- Types of aeronautical charges:
 - Ground/facility rent
 - Fuel flowage fees
 - Landing fees
 - Parking/security fees
 - Other revenue sharing
- Various approaches to rate-setting:
 - Historical valuation
 - Direct negotiation
 - Appraisal/rate studies



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How do I determine an aeronautical rental rate?

FAA rates and charges policy

- Limited application to general aviation airports, absent accumulation of surplus revenue
- Rates and charges must be:
 - Fair and reasonable
 - Not unjustly discriminatory
 - Self-sustaining



What happens at the end of the lease?

Reversion, removal and surrender

- Events of default
- Reversion or removal
- Environmental testing and remediation
- Shared risks
- Collections



Why is that subordination clause important?

Preserving rights and powers

- Grant Assurance 5, Rights and Powers
- “This Agreement will be subordinate to the provisions of any existing or future agreement between Authority and the United States of America”
- Be very careful about negotiating!



How do I handle assignments and subletting?

- Require pre-approval
- Review financials
- Review corporate structure and business history
- Pass on all obligations of underlying lease
- Remember AIP grant assurances 5 and 23 obligations



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What about leasehold mortgages?



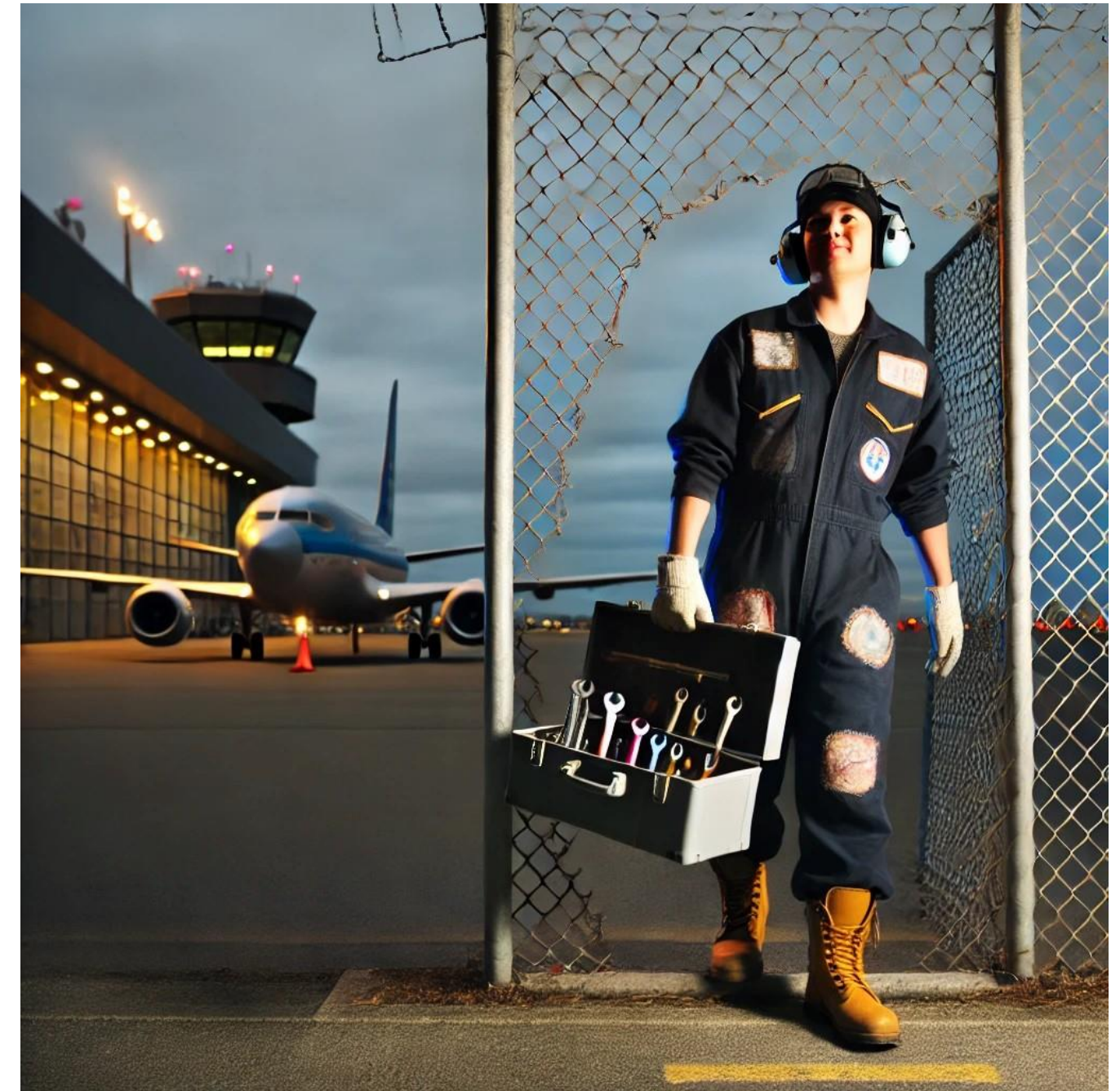
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- Sponsor must retain rights and powers
- Sponsor's fee interest must be superior
- Lender must have limited rights to foreclose and transfer the lease
- Cross-collateralization dangers
- General assignment clauses offer insufficient protection

Does a commercial operator *have* to lease property?

Independent operators and “through the fence” agreements

- **No obligation to accommodate independent commercial operators not leasing property**
 - Commercial aeronautical activity permits
 - Guard against unjust discrimination
 - Hard to take away access once granted
- **No obligation to grant access to owners of property adjacent to the airport**
 - Must retain rights and powers
 - Must protect on-airport operators
 - Requires FAA approval



Can I allow non-aeronautical activities?



- Aeronautical use versus nonaeronautical use
 - *FAA Policy on the Nonaeronautical Use of Airport Hangars*
 - *FAA Policy on Temporary Closures for Nonaeronautical Purposes*
- Mixed use? Mixed rent!
- FAA approval may be required

Are there other FAA requirements?

FAA required contract provisions

- Grant assurance 22(b): **provision of services** on reasonable and not unjustly discriminatory terms
 - How will you enforce?
- FAA-required contract provisions
 - Title VI requirements
 - AIP funding?

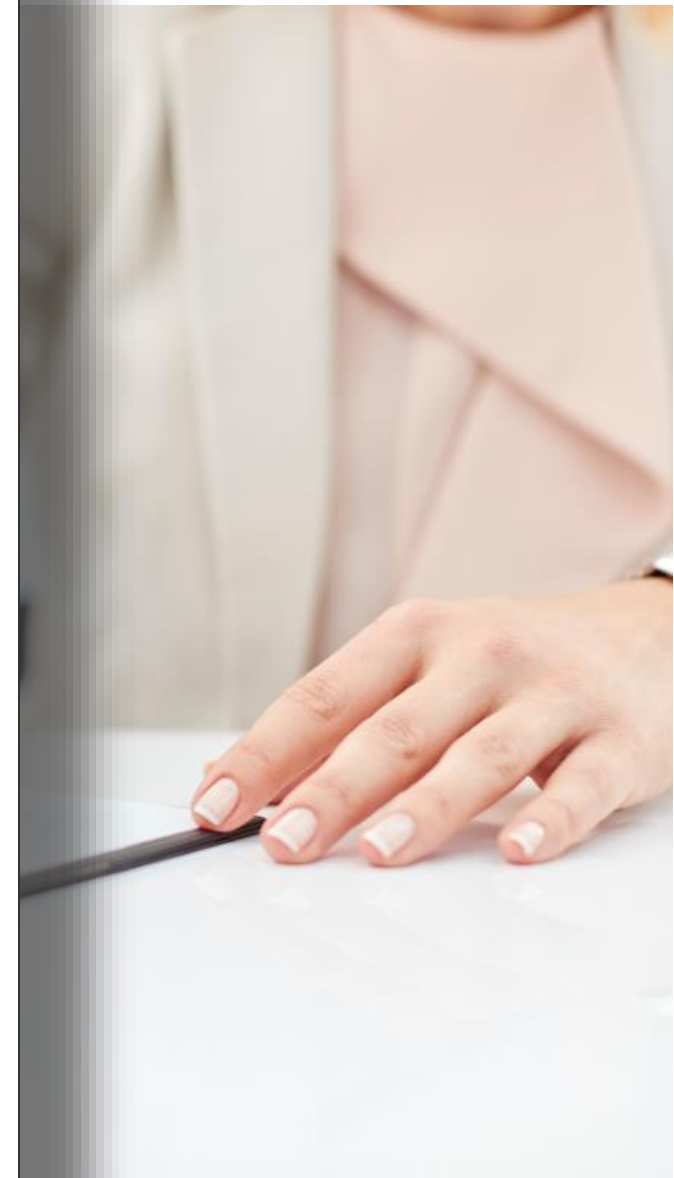


Are the FAA require

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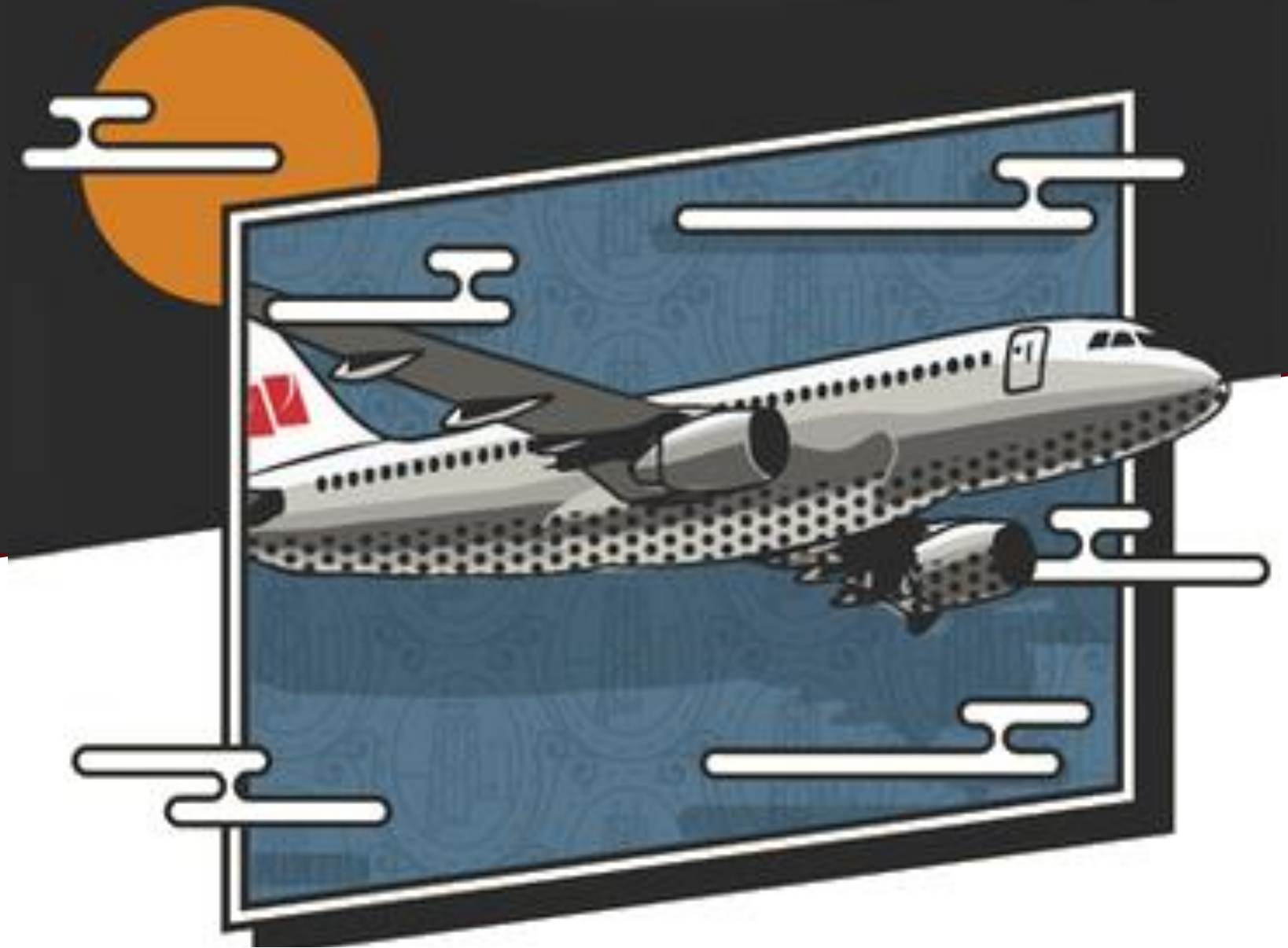
Table 1 – Applicability of Provisions

| 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 |
| Affirmative Action Requirement | \$10,000 | REQD | Limited | REQD | Limited | Limited | n/a |
| Breach of Contract | \$250,000 | 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 |
| (3) Equipment/Building Projects | \$ 0 | NIS | Limited | REQD | REQD | Limited | n/a |
| Civil Rights – General | \$ 0 | NIS | REQD | REQD | REQD | REQD | REQD |
| Civil Rights - Title VI Assurances | \$ 0 | REF | REQD | REQD | REQD | REQD | REQD |
| (1) Notice - Solicitation | \$ 0 | REQD | REQD | REQD | REQD | REQD | REQD |
| (2) Clause - Contracts | \$ 0 | NIS | REQD | REQD | REQD | REQD | REQD |
| (3) Clause – Transfer of U.S. Property | \$ 0 | NIS | n/a | n/a | n/a | Limited | REQD |
| (4) Clause – Transfer of Real Property | \$ 0 | NIS | n/a | n/a | n/a | REQD | REQD |
| (5) Clause - Construct/Use/Access to Real Property | \$ 0 | NIS | n/a | n/a | n/a | REQD | REQD |
| (6) List – Pertinent Authorities | \$0 | NIS | REQD | REQD | REQD | REQD | REQD |
| Clean Air/Water Pollution Control | \$150,000 | NIS | REQD | REQD | REQD | REQD | n/a |
| Contract Work Hours and Safety Standards | \$100,000 | NIS | Limited | REQD | Limited | Limited | n/a |
| Copeland Anti-Kickback | \$ 2,000 | NIS | Limited | REQD | Limited | Limited | n/a |
| Davis Bacon Requirements | \$ 2,000 | REF | Limited | REQD | Limited | Limited | n/a |
| Debarment and Suspension | \$25,000 | REF | REQD | REQD | REQD | Limited | n/a |
| Disadvantaged Business Enterprise | \$ 250,000 | REQD | REQD | REQD | REQD | REQD | n/a |
| Distracted Driving | \$10,000 | NIS | REQD | REQD | REQD | REQD | n/a |
| Domestic Preferences for Procurements | \$0 | NIS | REQD | REQD | REQD | REQD | Info |
| Equal Employment Opportunity | \$10,000 | NIS | Limited | REQD | Limited | Limited | n/a |
| (1) EEO Contract Clause | \$10,000 | NIS | Limited | REQD | Limited | Limited | n/a |
| (2) EEO Specification | \$10,000 | NIS | Limited | REQD | Limited | Limited | n/a |





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QUESTIONS?