

400 - Procurement

401 - AIP Requirements

Procurements made under the Airport Improvement Program (AIP) must adhere to the provisions established under Federal Regulation 49 CFR part 18.36. The AIP grant recipient (Sponsor) agrees these requirements by accepting the assurances associated with the FAA's offer of a grant. Title 49 USC Chapter 471 represents the enabling legislation that permits the FAA the authority to impose these requirements.

The policies and procedure contained in 49 CFR Part 18.36 represent requirements Sponsors must apply in their procurements for construction development, equipment purchases, and the selection for professional services (engineering consultants etc.).

402 - Limitations of this Guidance

This guidance provides a convenient resource for identifying the requirements associated with procurements under the AIP as established by relevant Federal regulations and statutes. This guidance itself **does not** establish nor create requirements for participation in the AIP. Requirements for AIP participation are established within United States Code, Public Law, Federal Regulations and official FAA policy.

403- Sponsor's Role

The Sponsor is the contractual authority for establishing and administering procurement actions and the resulting agreements. Sponsors shall use their own procurement system and procedures provided that it does not conflict with Federal statutes and regulations. The Sponsor remains responsible for all contractual matters without recourse to the FAA.

404 - FAA's Role

The FAA is not a party to the contract a Sponsor executes in support of the AIP. The FAA's role is essentially limited to determining the AIP eligibility of a Sponsor's procurement action. The FAA project manager carries out this role by a combination of cursory reviews and sponsor certification.

We caution Sponsors that the FAA cannot act on the behalf of the Sponsor in matters concerning procurement and contracting. Sponsors should not construe reviews conducted by the FAA as quality control checks or guarantees that their procurement action is compliant. Reviews conducted by the FAA project manager are primarily for the benefit of the FAA for the purpose of determining whether or not the sponsor's actions fall within the framework of AIP eligibility.

405 - Why Procurement Rules Matter

Adherence to the AIP procurement rules is a condition of AIP eligibility.

- If a sponsor fails to meet the requirements of 49 CFR Part 18.36, the FAA cannot issue a grant offer to the Sponsor.
- If the FAA identifies deficiencies in the Sponsor's procurement actions after receiving AIP reimbursement, the FAA may deem the reimbursement as "improper", thus requiring the Sponsor to immediately reimburse the FAA the AIP share of the questioned costs.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.
- [Title 49 USC Chapter 471](#) - Airport Development

410 Procurement Standards - §18.36(b)

Sponsors are to use their established procurement system provided it conforms to applicable Federal law and standards. This obligation includes but is not limited to the following

411 - Contract Administration System

Maintaining a contract administration system that assures the contractor performs in accordance with the terms and conditions of the contract. This includes but is not limited to the following:

- a) Maintaining a written code of conduct that governs the performance of their employees engage in the award and administration of their contract. No employee or agent of the Sponsor may participate in an AIP funded procurement action if a real or perceived conflict of interest exists. This includes:
 - The individual or a family member has a financial or other interest in firms under consideration for award of contract.
 - Solicitation or acceptance of gratuities, favors and other items of monetary value by a Sponsor's employee or family member.
- b) Reviewing proposed procurement actions to avoid unnecessary or duplicative items.
- c) Making award of contract to responsible contractors that possess the ability to successfully perform the contract in accordance with the terms and conditions of the agreement.
- d) Maintaining sufficient records that detail the significant history of the procurement action.
 - This includes the Sponsor's rationale for the method of procurement, selection of contract type, selection of the successful bidder and basis of contract price.
 - Failure to maintain and retain adequate documentation can result in FAA recovering previously reimbursed AIP funds
- e) Avoid time and material type contracts unless there are no other suitable procurement methods and the FAA has provided written concurrence.
- f) Applying good administrative practice and sound business judgment in the settlement of all contractual and administrative issues arising out of their procurement actions.
 - This includes bid evaluation, award of contract, dispute resolution, claim resolution, and settlement of all litigation issues.
 - FAA cannot substitute their judgment for that of the Sponsor unless the matter is primarily a Federal concern.

412 - Protest Procedure - § 18.36(b)(12)

Sponsors must have **established** bid protest procedures to handle and resolve all disputes relating to their procurement actions. The Sponsor is primarily responsible for resolving all protests. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with the FAA. The FAA review of any protests is limited to violations of Federal laws and regulations and deviations from the Sponsors formal protest procedures.

Formal Protest Procedures

Sponsors must have appropriate written procedures in place prior to initiating any AIP funded procurement action. Each solicitation should address critical information regarding the process a prospective bidder must follow to initiate a protest. This includes deadlines for submitting a protest. Any prospective bidder who requests a copy of the written procedures must receive the written policy in an expeditious manner.

In order to ensure that protests are received and effectively processed, A Sponsor's written procedures should typically address the following:

- Define the criteria for pre-bid protests, pre-award protests and post award protests.
- Specify deadline dates for filing a protest.
- Identify specific information required of a protest (name of protester, solicitation number, justification or grounds for protest).
- Identify location where protest is to be filed.
- Statement that the grantee will respond in detail to each substantive issue raised by the submitted protest.
- Identify the responsible official authorized to make the final determination.
- Statement that the Sponsor's determination is final.
- Include a statement that the FAA will only entertain protests the involve violation of Federal laws or regulations and protests that involve allegations that the Sponsor's written protest procedures were not followed.
- Allowance for reconsideration if relevant and critical information is discovered after final determination has been made.

Notifying FAA

Upon receiving a protest, Sponsors should promptly notify the FAA project manager of the relevant details. This is primarily for informational purposes although eligibility issues may be discussed at this time. The Sponsor remains responsible for resolving the protest.

Effect of Protest on Procurement Action

The filing of a protest will likely impact the project schedule of a procurement action. The decision on whether to proceed with a bid opening of award of contract resides with the Sponsor. The Sponsor should seek legal counsel to weigh the risks associated with any procurement protest.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

420 – Competition - §18.36(c)

421 - Competition in Procurement Actions (§ 18.36(c))

Sponsors must conduct all procurement transactions in a manner providing full and open competition. Sponsors must avoid practices that limit or unduly restrict competition. Restrictive practices that Sponsors must avoid include but are not limited to the following:

- Incorporating unreasonable requirements in order to qualify
- Requiring unnecessary experience and bonding
- Non-competitive pricing practices between firms
- Non-competitive awards to consultants that are on retainer contracts.
- Conflicts of interest
- Unnecessary use of "brand name" specifications or use of "brand name" without identifying the salient characteristics.
- Use of arbitrary actions in the procurement process.
- Favoritism and restricting competition to Sponsor preference.

422- Geographic Preferences

Sponsors may not incorporate geographic preferences in their procurement actions. This prohibition includes both statutory and administrative imposed preferences and applies to in-State preferences as well as local geographic preferences. Since geographic preferences can take many forms, the following list addresses common geographical preferences that unduly restrict completion. This list is not all inclusive of such prohibited practices.

- Requiring a percentage of the contract material to be acquired locally or within the State.
- Imposing local or State contract employment goals. (e.g. requiring a percentage of the project labor force to reside in the municipality, county or State).
- Requiring vendors of equipment to be located within an established mile radius or travel time of the project location. (e.g. within 20 miles or 1 hour of the project location).
- Rejecting an apparent low bidder in favor of a higher bid from a local firm.
- Awarding the contract to a local firm that does not submit the apparent low bid but reduces their bid after bid opening to become the low bidder.

The restrictions for geographical preference do not apply to the following situations:

- State licensing requirements.
- The selection for architectural/engineering (A.E) services may include geographic location as a selection criteria provided the preference is not absolute and the numeric rating is not unduly disproportionate to other criterion that have more importance with respect to successful completion of the project.

423 - Description of Work or Services

Sponsors must not unduly restrict competition in their procurement actions. This includes the preparation of technical specifications. Specification requirements must clearly identify the qualitative performance characteristics of the material, equipment or product that are essential for the intended use.

Sponsors should avoid a proprietary tone when preparing technical specifications. This includes avoiding detailed specifications that establish requirements not necessary or that are excessive for the intended use. Clearly identify all requirements and other factors the offeror must fulfill.

424 - Maximize Competition

Sponsors should strive to maximize interest for their procurement actions through public solicitations in newspapers, trade magazines and web-based plan rooms. Sponsors should generally avoid targeting a minimum number of bidders (e.g. two bidders) simply to meet the definition of competition.

Sponsor should strive to establish the highest competitive environment that is reasonable and appropriate for the size and type of project they are undertaking. Such actions provide reasonable assurance that the apparent low bid is fair and reasonable.

Sponsors may not preclude any potential bidder from qualifying for the project.

425 - Brand Name or Equal

When it is impractical to make a clear and accurate description of the technical requirements, the sponsor may apply "Brand Name or equal" to establish the desired requirements. Sponsors may not use "brand name" to preclude an otherwise eligible bidder from participating.

In order to maintain AIP eligibility, specification writers should note the following concerns when incorporating "Brand Name or equal" provisions.

- Avoid applying "Brand Name or Equal" without identifying the salient characteristics. These are essential physical, functional, or other performance features that are mandatory requirements a proposed "equal" must have to meet the intended need.
- To avoid claims of preferential treatment or competitive advantage, avoid identifying only one known vendor when applying "Brand Name or equal". Strive to identify at least two or more known suppliers/vendors that can meet the salient characteristics.
- Avoid applying "brand name" without "or equal". This practice is a sole source action that likely precludes AIP participation.
- **Do not** use "Brand Name or Equal" to describe requirements for airfield lighting equipment identified under the FAA's Airport Lighting Equipment Certification Program. Under the FAA approved lighting equipment program, the identification of the "L" number along with the associated class, style and mode values represents a clear and accurate description of the technical requirement. Thus there is no justification for applying the "brand name" description. The application of a "brand name or equal" description to an FAA "L" number item give the brand name a competitive advantage which is contrary to "fair and open" provisions §18.36

426 - Uniformity of Equipment

Uniformity of equipment is not sufficient justification for sole source procurement under the AIP. A Sponsors cost of maintaining duplicate inventory is also not sufficient justification for limiting competition. For airfield lighting equipment acquisitions, the procurement of new equipment must be open to all vendors listed on the approved lighting equipment list.

A sole source acquisition due to valid compatibility issues with existing equipment requires an acceptable justification and approval action by the FAA. FAA will consider AIP participation in a sole source acquisition if the compatibility issue involves an improvement for which no other cost effective option exists.

Under this situation, the sponsor must provide adequate documentation that validates the incompatibility. For example, if there is a change in airfield signage standards that requires revised sign panels, a sole source may be acceptable for the new sign panels if the existing signs bases have a remaining service life and procuring new sign fixtures would significantly increase the cost of the project as compared to simply procuring new sign panels.

AIP will not participate in a sole source acquisition if the source of the incompatibility is due to features and performance characteristics that are not FAA standard requirements. For example, if an existing piece of equipment has feature capabilities that exceed FAA standards, AIP will not participate in costs to accommodate such non-standard features.

In all cases, the sponsor must obtain FAA approval to apply sole source procurement actions. If approved, the FAA may require the Sponsor to separately procure the sole source item rather than have the successful bidder acquire the item. In this case, the Sponsor would furnish the equipment to the contractor as a “Sponsor furnished” item for installation by the contractor.

427 - FAA Approved Equipment

Where the FAA has established an approved equipment list (e.g. appendix 3 of AC 150/5345-53); AIP participation is limited to the certified equipment identified on the current FAA approved list. AIP cannot participate in vendors who claim their equipment meets the FAA standard but is not included on the approved equipment list.

Specifications for FAA approved equipment should only identify the FAA “L” number along with appropriate Type, Class, Style and Mode designations. Since specifying in this format represents the complete requirements for the equipment, Sponsors may not apply “Brand Name or Equal” description when specifying equipment addressed covered by FAA’s Airport Lighting Equipment Certification Program.

Sponsors **should not** rely solely on vendor statements that they meet the FAA standard. Sponsors should instruct their consultant to conduct cross checks of the equipment with the current version of appendix 3 to AC 150/5345-53 to assure compliance with AIP eligibility. We caution Sponsor that if installed equipment is not on the approved list, the cost associated with the unapproved equipment is ineligible for AIP participation.

428 - Buy America

By accepting an AIP grant, Sponsors are obligated to comply with AIP Buy America preferences as established by Title 49 USC Section 50101. Sponsors should note that Buy America preferences can differ between Federal programs. The Buy American requirements for the AIP are not necessarily the same as that for the Federal Transit Administration, the Federal Highway Administration or even Federal procurements made under the FAR.

To remain AIP eligible, the sponsor must not permit any contractor or subcontractor to acquire any steel or manufactured product produced outside of the United States unless otherwise authorized by the FAA.

The AIP Buy American provision does allow for a possible waiver if 100% U.S. made product cannot be provided. In such cases, the contractor must submit a formal request through the Sponsor for subsequent review and approval action by the FAA.

Sponsors shall note that if installed equipment is not in compliance with the Buy America provisions; the associated costs are ineligible for AIP participation. Refer to section AIP-490 for additional guidance.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

430 – Procurement Methods - §18.36(d)

Federal Regulation 49 CFR part 18.36(d) addresses four types of permissible procurement methods; 1) Small Purchase, 2) Sealed Bid 3) Competitive Proposal and 4) non-competitive.

431 - Small Purchase

Small purchase procedures provide the Public Agency with an expedient method of procuring equipment and small scale construction projects. Small purchase procedures are relatively simple and informal procurement methods for securing supplies, construction services and etc. that do not cost more than the "simplified acquisition threshold" as established in United States Code 41 U.S.C. 134 (formerly § 403 (11)). This value is currently set at \$100,000.

Application of Small Purchase Procedures

When the cost of equipment and/or construction contracts are expected to be less than \$100,000, the Public Agency may use small purchase procedures. Since the selection of a procurement method is a factor in the FAA offer of an AIP grant, we request Sponsors contact the FAA project manager to determine if the small purchase method is suitable for your procurement action.

Competition

§ 18.36(d)(1) requires the Sponsor to obtain price quotations from an adequate number of qualified sources. Normally, this requires obtaining a minimum of two bid proposals. However, Sponsors must not construe the application of the small purchase method as an option to waive fair and open competition. Sponsors may not preclude any interested bidder in participating in the procurement activity.

Under small purchase procedures, the number of sources may be determined by the following:

- Number of available qualified sources
- Time frame involved
- Dollar value of procurement action

Form of Solicitation

Verbal solicitations are acceptable for very small procurements. For other than very small purchases, we request the sponsor develop a written solicitation that requires a written proposal by the prospective bidders.

Documentation

Sponsors shall fully document all small purchase solicitations and offers. This includes verbal solicitations and offers. The documentation should be in written or printed format and should include vendors/companies that did not express an interest in the procurement.

Small Scale Development Projects

Sponsors that proposed to use small purchase method for small scale construction work must still develop appropriate contract specifications, safety plans and project plans. The project manual must incorporate all applicable Federal provisions. Note that some Federal provisions have differing dollar thresholds for application. For example, Davis-Bacon provisions apply to construction work expected to exceed \$2,000 while provisions for certifying debarment, suspension, ineligibility and voluntary exclusion do not apply for contracts under \$25,000.

432 - Competitive Sealed Bids

The sealed bid method is the preferred method for development projects and equipment acquisitions. Under this method, the Sponsors publicly solicits for bids ultimately resulting in the award of a firm fixed price contract to the responsible bidder whose bid conforms with all material terms and conditions of the solicitation and is lowest in price. Use of this method does not require prior FAA approval.

Conditions for use

The use of the sealed bid method requires the following conditions be met:

- Development of complete, adequate and reasonable specifications that convey the necessary characteristics and performance requirements for the development, equipment or services.
- Two or more responsible bidders are willing and able to effectively compete for the award.
- The selection of the successful bidder can be principally made on the basis of price.

Additional Requirements

The use of the sealed bid method also requires the following:

- a) The Sponsor must publicly advertise the invitation-for-bids to maximize the interest by potential bidders for the purpose of creating a competitive bidding environment.
- b) The Sponsor must provide a sufficient amount of time to permit formulation of proposals by prospective bidder
- c) The invitation for bid shall fully and clearly identify all requirements for the development, equipment or services that allow prospective bidders the ability to formulate their bid.
- d) All submitted bids must be publicly opened at a time and place prescribed in the invitation for bids.
- e) Sponsor will award a firm fixed contract to the bidder that submits the lowest responsive and responsible bid.
- f) When specified, the award of contract may be made on the basis of a life cycle cost analysis. The sponsor must make known all pertinent factors and considerations of the life cycle cost analysis as part of the invitation for bids.
- g) Any and all bids may be rejected if there is a sound documented reason.

433 - Competitive Proposal

This method is permitted when procurement by competitive sealed bids is not reasonable or appropriate. Projects that include significant variables and alternatives which preclude preparation of definitive specifications in favor of performance specifications are candidates for the competitive proposal method. Under this method, price is not the only factor for the basis of award. The use of competitive proposals requires two or more offerors. The type of contract with the successful firm may be a firm fixed contract or a cost reimbursement type contract.

Competitive Proposal versus Sealed bids

Unlike sealed bidding, the competitive proposal method permits:

- Consideration of technical factors other than price;
- Discussion with offerors;
- Negotiation of contract price and other contract terms and conditions;
- Revision of proposals before the final contractor selection;
- Withdrawal of an offer at any time up until the point of award.

Requirements for Use

The following requirements apply if competitive proposals are used:

- a) Sponsor must publicize the request for proposals and identify all evaluation factors and their relative importance.
- b) Sponsor must solicit from an adequate number of qualified sources to maximize interest.
- c) Sponsor must establish a method for conducting technical evaluations prior to receiving proposals.

- d) Sponsor will make award of contract to the responsible firm whose proposal is most advantageous to the program taking into considerations price and other factors.

FAA Prior Approval

Because the sealed bid method is a preferred method, the use of a competitive proposal method requires concurrence from the FAA project manager. The sponsor shall prepare and submit their justification and rationale for selecting a competitive proposal approach. If a Sponsor cannot adequately demonstrate why the sealed bid method is not feasible, the sponsor must use the sealed bid method.

Selection of A/E Consultant

The selection of an A/E consultant represents a unique competitive proposal where price is not a factor in the selection of the successful firm. In conformance with the Brooks Act, procurement of professional services requires a qualification-based selection. The qualifications of competing firms are evaluated based on pre-established criteria. Sponsors negotiate price after a selection is made. Refer to AIP sponsor guide AIP-300 for additional information regarding selection of A/E consultants under the competitive proposal method.

434 - Procurement by Noncompetitive Proposals

While as a rule, Sponsor musts conduct procurement actions in a manner that assures fair and open competition, a non-competitive proposal is permissible under certain conditions.

Requirements

- a) Sponsors may use a non-competitive procurement method if the award of contractor is infeasible under small purchase procedures, sealed bid or competitive proposals. The following provisions apply:
- The required item is only available from a single source.
 - A public exigency or emergency requires urgent procurement action.
 - After solicitation from a number of sources, competition is determined to be inadequate.
 - The FAA authorizes noncompetitive negotiations.
- b) Sponsors must conduct a cost analysis that includes an itemized breakout of costs elements, profit and overhead.

FAA Prior Approval

A Sponsor desiring to use a non-competitive procurement must seek prior approval from the FAA. The sponsor must submit to the FAA their justification and rationale for a non-competitive procurement.

The one exception to the prior approval requirement is the acquisition of professional services that do not exceed \$10,000. Sponsors typically use this method to secure a firm for preparation of independent estimates, legal sufficiency reviews, or audit services.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

440 - Small & Minority Firms & Women's Business Enterprises-§18.36(e)

Sponsors shall implement affirmative steps to assure that small businesses, including minority firms and women's business enterprises are afforded an opportunity to participate in the project.

Affirmative steps include

- 1) Including qualified small businesses, minority businesses and women's business enterprises on solicitation lists
- 2) When feasible, dividing requirements into smaller tasks or quantities that permit participation by small and minority businesses and women's business enterprises.
- 3) When requirements permit, establishing delivery schedules that encourage participation by small and minority businesses and women's business enterprises.
- 4) Using the services and assistance of the Small Business Administration and the Minority Business Development Agency.
- 5) Encouraging the prime contractor to take affirmative steps to employ small and minority businesses and women's business enterprises.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

Federal Offices

- [Office of Small and Disadvantage Business Utilization](#)

450 - Cost and Price Analysis - §18.36(f)

Federal Regulation 49 CFR Part 18.36(f) requires Sponsors to perform an analysis of cost or price for **all procurement actions**. This includes contract modifications. The method and degree of analysis is dependent upon the size and complexity of the procurement action.

451 - Independent Estimate

As a starting point, the Sponsor must prepare an independent estimate **prior to** receiving bids or proposals. The estimate should include itemized elements of costs including profit and overhead. Such estimates should be signed and dated by the preparer and retained in the Sponsor's records. The sponsor shall use the estimate as an aid in determining reasonableness and necessity of costs.

452 - Cost Analysis

Sponsors must conduct a cost analysis whenever they use a competitive proposal or a noncompetitive proposal procurement method. A cost analysis is also necessary whenever adequate price competition is lacking (e.g. single bid). Note that a change order that establishes new contract items is a non-competitive procurement action.

A cost analysis represents a comparative evaluation of the proposal cost elements with that of the independent estimate for the purpose of determining whether the proposed total cost represents a reasonable price. The costs elements that make up the proposal must be necessary for the fulfillment of the project. The breakout of costs elements must be reasonable and logical. Elements include labor hours, overhead, material costs and etc. Sponsors must negotiate profit as a separate cost element of price

453- Price Analysis

Sponsors must conduct a price analysis for all other procurement methods. A price analysis is a comparative analysis whereby there is adequate sufficient competition and related price information. For example, under a sealed bid method where more than one bid is received, the price analysis consists of evaluating the apparent low bid against the engineer's estimate as well as the other submitted bids.

454 - Cost Principles

In order to remain eligible, costs must be allowable, allocable and reasonable.

Costs are allowable provided they are necessary and are consistent with the Federal cost principles of §18.22. For the Sponsors, costs must conform to OMB-A-87. For consultants, the costs they claim under their agreements must conform to the principles established under 48 CFR part 31.

Allocable means the costs is necessary and is logically assignable in proportion to the benefit to the project. For example, if a necessary cost benefits two or more projects, the cost must be distributed in reasonable proportion to benefit.

Reasonable is broadly defined as a cost that a prudent business person would pay in a competitive environment.

455 - Cost-Plus-Percentage of Cost

Sponsors **may not** use the cost-plus-percentage of cost contract method for AIP funded projects.

456 - Limitation of FAA Review

AIP Sponsors must not construe any review conducted by the FAA as a waiver of the Sponsor's responsibility to conduct a cost/price analysis. The FAA project manager will review the Sponsor's actions to ascertain whether their cost/price analysis supports a determination of a fair and reasonable price acceptable for AIP participation.

460 - FAA Review of Procurement Documents - § 18.36(g)

Within the FAA Central region, the FAA project manager bases acceptance of the plans and specifications on a combination of a FAA cursory review and Sponsor self certification. The purpose of this review is to allow the FAA the opportunity to verify a Sponsor's conformance to applicable AIP eligibility requirements, including procurement provisions.

461 - Self Certification

FAA's reliance on Sponsor certification does not preclude the FAA from conducting a review of the procurement documents at any time during the project or prior to grant closure. The acceptance of a Sponsor certification does not negate any discrepancies and improper payments discovered after reimbursement by AIP funds. Sponsors may be required to return previously reimbursed AIP funds if the Sponsor cannot correct a procurement defect.

462 - Extent of FAA review

For most situations, the extent of review is at the discretion of the FAA project manager but within the parameters established by §18.36(g). The FAA risk management model may dictate that a sponsor with a moderate to high risk be subject to a higher review.

Within the FAA Central Region, we request all Sponsors to submit their procurement package (Front end, technical specifications and project plans) to the FAA project manager prior to advertising for bids. The project manager will assess the level of review ranging from acceptance of Sponsor certification to combination of certification and thorough review. Early coordination with your FAA project manager will typically facilitate a review.

463 - Limitation of FAA Review

AIP Sponsors must not construe any review conducted by the FAA as a waiver of the Sponsor's responsibility to meet AIP requirements. The primary purpose of the FAA project manager's review is to provide assurance to the FAA that the Sponsor is properly applying FAA standards and to verify AIP eligibility. This review is not a quality control measure or guarantee that the Sponsor's procurement action is fully compliant.

Our reviews generally include:

- Verification that plans and specifications address development consistent with the approved scope of work,
- Overall determination of AIP eligibility
- Review of critical project elements such as the construction safety plan, pavement details, airfield marking details and airfield signage details.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

470- Bond Requirements - § 18.36(h)

49 CFR part 18.36(h) allows the FAA to accept the bonding policy and requirements of the Sponsor provided the Sponsor adequately protects the FAA's interest.

471 - Minimum Requirements

If the FAA has not made such a determination, the minimum requirements are as follows:

Bid guarantee: Each bidder must furnish a bid guarantee equivalent to 5% of the bid. This may be in the form of a bond or certified check. A bid guarantee provides assurance to the Sponsor that the prospective bidder will honor its submitted bid and will execute a contract if selected as the successful bidder.

Performance Bond: The successful bidder (Contractor) must provide a performance bond equal to 100% of the contract price. The Sponsor ordinarily should not allow a contractor to execute a performance bond prior to the establishment of a contract agreement. A performance bond provides assurance that the contractor will complete the work in conformance with the terms and conditions of the contract. If the contractor fails to perform, the Sponsor may take legal action against the contractor and surety to complete the project. If during the course of the project work, the Sponsor adds supplemental work to the project, the penal sum of the performance bond may require an upward adjustment.

Payment Bond: The successful bidder must provide a payment bond equal to 100% of the contract price. The Sponsor ordinarily should not allow a contractor to execute a payment bond prior to the establishment of a contract. A payment bond provides assurance to the Sponsor that subcontractors and material suppliers will be properly paid the monies that they are due even if the contractor defaults.

Sponsors with bonding policy that differ from the minimum requirements must provide justification to the FAA that provides adequate assurance their bonding policy protects the AIP investment.

472 - Separate Bonds

FAA prefers Sponsor establish separate payment and performance bonds. This practice is consistent with the requirements of the Miller Act, which applies to Federal procurement actions.

The practice of combining payment and performance bonds can have an adverse affect since the penal amount of the bond represents the upper liability limit for the surety. Combining bonds may result in a situation where there is insufficient bonding capacity to meet the claims of a project with major default issues. Separating the bonds benefits the Sponsor (and FAA) by ensuring there is sufficient bonding capacity to complete the project even if significant problems arise.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

480 - Federal Provisions - §18.36(i)

As a condition of AIP eligibility, Sponsor must incorporate applicable Federal provisions into their procurement actions and contracts. Several of these provisions also flow down to the prime's subcontractors.

481 - Origination of Federal Provisions

While § 18.35(i) addresses several of the required Federal provisions, additional provisions may originate for other Federal statutory and regulatory requirements. For example, Title 49 USC 501 establishes Buy American Preferences for projects funded under the AIP.

The most common provisions may be found on the "[Procurement and Contracting under AIP](#)" webpage.

482 - Applicability

Sponsors should note that some of the provisions are not applicable for all procurement actions. Some have monetary thresholds that trigger incorporation, while others are only applicable based on the type of procurement. For example, Davis-Bacon provisions do not apply to equipment acquisitions.

Sponsor should take care to only incorporate the applicable provisions. Including superfluous requirements can adversely impact the bid result.

483 - Form of Provision

Sponsor should also take caution when making changes to the Federal provisions. Some provisions require the language to be inserted into the contract verbatim. While other Federal leave it up to the Sponsor to develop the contract language suitable for the Federal provisions.

Resources - Procurement

Regulations/Statutes

- [49 CFR Part 18.36](#): Uniform Administrative Requirements for Grants and Cooperative agreements.

FAA Guidance

- [Procurement and Contracting Under the AIP](#)

490 – Buy America Requirements

491 - Overview

By accepting an AIP grant, Sponsors are obligated to comply with Buy America preferences. In order to remain eligible under the Airport Improvement Program (AIP), Sponsor's must not permit any contractor or subcontractor to acquire any steel or manufactured product produced outside of the United States unless otherwise authorized by the FAA. The costs associated with equipment that is not compliant with AIP Buy America provisions are ineligible for AIP participation.

Section 50101 - Buy America

- (a) Preference. - The Secretary of Transportation may obligate an amount that may be appropriated to carry out section 106(k), 44502(a)(2), or 44509, subchapter I of chapter 471 (except section 47127), or chapter 481 (except sections 48102(e), 48106, 48107, and 48110) of this title for a project only if steel and manufactured goods used in the project are produced in the United States.
- (b) Waiver. - The Secretary may waive subsection (a) of this section if the Secretary finds that -
 - (1) Applying subsection (a) would be inconsistent with the public interest;
 - (2) The steel and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;
 - (3) When procuring a facility or equipment under section 44502(a)(2) or 44509, subchapter I of chapter 471 (except section 47127), or chapter 481 (except sections 48102(e), 48106, 48107, and 48110) of this title -
 - A. The cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the facility or equipment; and
 - B. Final assembly of the facility or equipment has occurred in the United States; or
 - (4) Including domestic material will increase the cost of the overall project by more than 25 percent.
- (c) Labor Costs. - In this section, labor costs involved in final assembly are not included in calculating the cost of components.

492 - Waivers

While the intent of Buy America is to install only steel and manufactured goods that are **100%** made in the United States, the statute permits certain waivers to this preference. There are four types of permissible waivers:

1. Public Interest Waiver
2. Insufficient U.S. made quantity
3. Cost of components and subcomponents produce in the US is more than 60 percent of the cost of all components and subcomponents and final assembly is within the United State.
4. The cost of including domestic material will increase the cost of the overall project by more than 25%.

FAA headquarters retains responsibility for addressing the first two waivers situations, public interest and insufficient US made quantity. The FAA addresses such waivers through a Federal Register notice. A Sponsor would not typically initiate a waiver request under these two scenarios.

AIP sponsors will likely be involved with the third type of the waiver. Given the expanse of global economies, it is common for a manufacturer to incorporate non-domestic components in the manufacture of their product. To remain eligible under the AIP, the contractor will need to demonstrate that 60% or more of a product is produced in the United States and that final assembly occurs within the United States. Additional information on the type 3 waiver follows this sub-section.

While possible, it is unlikely a Sponsor will encounter a situation where the type 4 waiver is appropriate. Please contact the FAA project manager if a contractor expresses a desire to pursue a type 4 waiver.

FAA National Waivers

The FAA Office of Airports will evaluate submittals from manufacturers for the purpose of determining conformance with the FAA Buy American preferences. This office maintains a national listing of products they have evaluated. Equipment identified on this list means the FAA either has granted a national waiver or has found the product to be 100% American made. The inclusion of a product on the national listing does not necessarily mean the product is 100% U.S. made.

The FAA maintains a national listing of equipment and products for which the FAA has issued a waiver to Buy American Preferences. The "[Nationwide Buy American Waivers Issued](#)" (pdf) listing represents all current permissible waivers per 49 U.S.C. 50101(b).

Additional waiver evaluation is not necessary for equipment identified on this listing. However, the contractor will need to identify to the Sponsor that they intend to install equipment that already has an FAA Buy American conformance determination. This typically occurs at the shop drawing submittal phase.

Waiver determinations made by Regional personnel are valid only for the specific project. Regional waivers do not constitute a national waiver.

Type 3 Waiver

The FAA will consider a "type 3" waiver if the contractor can demonstrate that 60% of the components and subcomponents comprising a manufactured equipment/facility were produced in the United States and that final assembly occurs in the United States. The 60% provision does not apply to steel used to fabricate a product. **All** steel used in the manufacture of a facility or equipment must be from a U.S. manufacturer.

The process to initiate a type 3 waiver request starts with the bid process.

1. Bid Solicitation

- AIP Sponsors must incorporate the Buy America provision within all bid packages involving buildings, equipment and airfield development projects funded under the AIP.
- As a matter of bid responsiveness, all bidders must indicate within their proposal how they intend to meet the Buy American provisions (Buy America Certification) by certifying one of the following:
 - (1) Certify 100% compliance by only installing US made steel and manufactured products; or
 - (2) Request a waiver to Buy America preferences. To remain eligible for FAA approval, the bidder must demonstrate that 60% or more of the components comprising the end product is U.S. made steel or manufactured product.

2. After Bid

- Once the sponsor identifies an apparent low bidder, the Sponsor shall evaluate the submitted Buy America certification. We caution Sponsors to avoid executing any contract until the Buy American evaluation is complete and the FAA concurs with any waiver request.
 - a. If the low bidder certifies 100% compliance, the Sponsor may proceed with award of contract. The Sponsor, through their consultant, remains responsible for monitoring the contractor's compliance with this certification by reviewing submittal documentation to verify all manufactured products are 100% made in the U.S.
 - b. If the low bidder requests a waiver to Buy America provisions, the bidder need to take one of the following actions 1) prepare and submit a Buy America waiver request that includes a component cost calculation table or 2) provide a listing of products proposed for project use that are already identified on the national waiver list.

3. Waiver Request

- **National Waiver List** – If a contractor proposes to utilize material and equipment identified on the National Buy American Waiver list, the contractor does not need to prepare a component cost calculation table since this evaluation has already occurred at the national level. However, the contractor does need to provide a listing of what equipment they are proposing to use off of the national waiver list.
- **Component Cost Calculation**
 - The successful bidder must identify the percentage of the product components and subcomponents that are U.S made. The bidder **shall avoid** simply stating they will meet the 60% requirement.
 - The bidder shall base the percentage on the value that results from completing a component calculation table. The component breakout shall be along major elements of the equipment. Inadequate breakout of components is cause for owner rejection of the waiver request. The bidder **must exclude** labor costs from this calculation.
 - The bidder shall furnish statements from their vendors that identify the percentage of U.S. made components and the origin of final assembly.
 - The Sponsor shall review the bidder's request for completeness. If the Sponsor concurs with the bidder's waiver request, the Sponsor then submits their recommendation for FAA approval of the bidder's waiver request.

4. FAA Approval

- The FAA will review the bidder's waiver request and sponsor's recommendation. If the FAA deems the documentation sufficient and consistent with the AIP Buy America statute, the FAA will generate a project specific Buy America Waiver approval letter to the Sponsor.
- **Causes for FAA rejection include but are not limited to:**
 - Including labor and assembly costs in the component cost calculation
 - Insufficient component breakout or inadequate component calculation
 - Foreign made steel included in waiver request
 - Less than 60% US made participation.
 - Bidder stating they will meet the 60% requirement without providing the component cost calculation

5. After Award

- The Sponsor remains responsible for verifying the contractor's compliance with the approved waiver by reviewing submittal documentation and monitoring actual installation.
- The percentage value identified in the approved waiver request becomes a contract obligation. The contractor may not furnish components and subcomponents that results in a U.S. made percentage lower than the value identified in the approved waiver. The contractor may furnish components and subcomponents that result in a U.S. made percentage higher than the approved waiver without any additional action.

6. Substitutions

- The FAA does understand that unique and unavoidable circumstances may arise that forces the prime contractor to adjust the percentage of US made components and subcomponents. A supplier going out of business is one such example.
- The prime contractor may request the Sponsor to revisit the original waiver determinations for such instances. In such cases, the prime contractor will need to resubmit all waiver request information for the purpose or re-evaluating the overall U.S. made percentage. The contractor will also need to demonstrate why a US made product is not available as a substitute.
- The FAA will not consider any request from a prime contractor to lower the value of the approved US made percentage for the sole purpose of installing a lesser cost non-domestic component or subcomponent.

Suggested Buy America Forms and Sample Calculations

For the benefit of the Sponsor, we have prepared suggested Buy America forms and sample component calculation formats that the Sponsor may use as a guide in preparing their own specific bid package. Sponsors and Consultants shall not construe these samples as being complete and whole. The provision of such suggested sample contract documents by the FAA is not a guarantee of legal sufficiency. Per AIP statute, Sponsors remain solely responsible for their procurement actions.

Supplemental Provisions

[Buy American Provision](#)

Bid Proposal

[Buy America Certification](#) (MS Word)

AIP Airfield Development Projects

[Buy America Waiver Request](#) (MS Word)

[Sample Buy America Component Calculation](#) (PDF)

AIP Building Projects

[Buy America Waiver Request](#) (MS Word)

[Sample Buy America Component Calculation](#) (PDF)

AIP Equipment Projects

[Buy America Waiver Request](#) (MS Word)

[Sample Buy America Component Calculation](#) (PDF)

Frequently Asked Questions

Listed below are some answers to common questions that pertain to Buy America preferences under the Airport Improvement Program.

- 1. Is there a difference between Buy American requirements addressed under the Federal Acquisition Regulation (FAR) and that of the Buy America preferences for the Airport Improvement Program?**

Answer: Yes, there is a difference. Title 48 of the Code of Federal Regulations establishes the Federal Acquisition Regulation (FAR) and serves as the uniform policy for purchases and acquisitions made by the Federal government. AIP Buy America provisions are established under a separate statute (Title 49 USC 501) and are applicable to procurement actions made by AIP grantees.

Sponsors should note that while there may be some similarities, exclusions made under the FAR may not be applicable to the AIP Buy America preferences. One such example is US trade agreements. For example, the AIP Buy America preference does not include participation in US trade agreements whereas the FAR does take such agreements into consideration. Items listed in Federal Acquisition Regulation Part 25.104 may be counted as US Origin, however the contractor should include a note stating that item is exempt in 25.104

- 2. Are the “Buy America” requirements for grants issued by the Federal Transit Administration (FTA) or the Federal Highway Administration (FHWA) the same as the FAA Airport Improvement Program (AIP)?**

Answer: No. The “Buy America” provisions for each agency are derived from separate and distinct statutes. Title 49 USC Section 50101 establishes “Buy America” provisions applicable for AIP grants. AIP Sponsors must adhere to the AIP “Buy America” requirements. Sponsors should note that exceptions permitted under another agency’s Buy America requirements may not be permissible under the AIP Buy America statute.

3. Do products covered by the North American Free Trade Act (NAFTA) meet the AIP Buy American provisions?

Answer: No. The FAA position is that the NAFTA agreement does not specifically apply to the AIP grant program. Sponsor must address steel and manufactured goods that originate from Mexico or Canada as foreign made products. This limitation also applies to the US trade agreement acts.

4. Do Buy America provisions apply to cement and concrete?

Answer: No, but with comment. Public Law PL 98-229 excluded cement and cement products from Buy American provisions. Concrete is a product of cement. Sponsors shall note however that this exclusion does not apply to steel (reinforcing, ties, chairs and etc) incorporated into the concrete. All steel products must be 100% manufactured in the United States.

5. What about asphalt and other petroleum products?

Answer: Asphalt and other petroleum products are excluded from Buy America requirements for AIP funded projects. Subsection 25.104 of the Federal Acquisition Regulation establishes a list of materials and products that are not available in sufficient supply within the United States and thus are excluded from Buy American requirements. This exception extends to the AIP Buy America preferences.

6. Can a contractor submit a 60% waiver for a steel component?

Answer: No. All steel components must be manufactured in the United States.

7. Once the FAA approves a waiver request, can a contractor make material substitution that lowers the percentage identified on the approved waiver request?

Answer: No, but with comment. Once the FAA approves the waiver request, the percentage of U.S. made components becomes a contract obligation between the contractor and the AIP Sponsor. The FAA expects the Sponsor to enforce the percentage noted in the approved waiver.

The FAA does understand that unique and unavoidable circumstances may arise that forces the prime contractor to adjust the approved percentage. A supplier going out of business is one such example. The prime contractor may request the Sponsor and the FAA to revisit the original determinations for such instances. The prime contractor may need to resubmit all waiver request information to determine the overall US made percentage. The contractor will also need to demonstrate why a US made product is not available as a substitute.

8. Can a foreign vendor simply have final assembly occur in the United States to meet the Buy America requirement?

Answer: No, with comment. Although final assembly occurs in the United States, 60% of the subcomponents must be made in the United States. The FAA would not consider approval of a waiver if the vendor cannot meet the 60% requirement.

Furthermore, in order to be considered as "Final Assembly" in the U.S., the U.S. work effort must result in a **substantial transformation** of the materials used. The FAA would not consider actions such as simply attaching panels or mounting tires on a vehicle as "Final Assembly".

- 9. Can a foreign vendor utilize 100% U.S. made components, but have final assembly occur outside of the United States and still meet the Buy American requirements?**

Answer: No. Section 50101(b)(3)B requires final assembly to occur within the United States.

- 10. To meet Buy American requirements, can a company simply demonstrate they are a company based in the United States even though they may have their manufacturing plants overseas?**

Answer: No. Complying with Buy American provisions is not a matter of company ownership. A non-domestic company can meet Buy America provisions by simply having a manufacturing plant in the United States that uses 60% or more U.S. made product. Conversely, a US based company that has manufacturing facilities located outside of the United States would not be in compliance with Buy America provisions.

- 11. A significant amount of the worlds copper ore is mined outside of the United States. How does copper wire meet Buy American preferences?**

Answer: The mining of copper ore does not represent a manufactured product. It is the substantial transformation of the ore into processed copper (foundry process) that represents the end product. Thus the copper ore can originate from a non-domestic location. The processing of the ore into copper wire must occur in the United States,

Resources – Buy America

Regulations/Policy

- [Program Guidance Letter \(PGL\) 10-02](#): Guidance for Buy America on Airport Improvement Program (AIP) or American Recovery and Reinvestment Act (ARRA) Projects

FAA Guidance

- [Buy American Preferences](#) – FAA webpage