Exclusive Rights At Single FBO Airports

Part three of a six part series on airport tenant relations and aviation legal matters

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It is sometimes difficult to determine whether a federally funded airport with a single FBO has granted an Exclusive Right in violation of Federal Grant Assurance 23.

The purpose of this article is to help identify whether a single FBO airport is an Exclusive Right, or simply a situation where there is an allowable Proprietary Exclusive Right or a situation where there is legitimately no qualified competition.

about the author

Alison L. McKay focuses her practice primarily on employment, litigation, and insurance. Among her more noteworthy matters litigated was the successful defense of an airport fixed base operator from Rehabilitation Act claims.

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An Exclusive Right

Federal Grant Assurance 23 implements 49 U.S.C. §40103(e) and 49 U.S.C §47107(a)(4) and prohibits an airport sponsor from entering into any Exclusive Rights agreements. Specifically it provides that a federally obligated airport:

- Will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public ... and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

The FAA defines an Exclusive Right as follows:

- A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right.

According to FAA policy, "The intent of the prohibition on exclusive rights is to promote fair competition at federally-obligated, public use airports for the benefit of aeronautical users.

"... any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right."

So can there be a single FBO airport without an Exclusive Right?

A single FBO can exist without an impermissible Exclusive Right in two circumstances: (1) when there is a Proprietary Exclusive Right; and (2) when there is no qualified competition.

A Proprietary Exclusive Right

The owner of a public use airport may elect to provide any or all of the aeronautical services needed by the public at the airport. This is known as a Proprietary Exclusive Right. FAA uses the term owner and airport sponsor interchangeably and defines those terms as follows:

"A person or agency who has the legal authority to act on behalf of the airport. Unless the airport is owned and operated by a private entity, the airport sponsor is generally a public agency that owns and/or operates the airport. Here, the Naples Airport Authority is the sponsor of the airport for federal grant purposes.

Jet 1 Center, Inc. v. Naples Airport Authority, FAA Docket No. Docket No. 16-04-03 (January 4, 2005) (Director determined that an airport authority operating the airport pursuant to 99-year lease with the City of Naples was an appropriate exercise of the proprietary Exclusive Right).

An owner, may not exercise a Proprietary Exclusive Right through a management contract. "If the airport sponsor opts to provide an aeronautical service exclusively, it must use its own employees and resources." FAA Order 5190.6B ("Airport Compliance Manual") at Section 8.9. It is a violation of Grant Assurance 23 for an airport sponsor to designate an independent commercial enterprise to exclusively provide FBO services, even as an agent for the airport sponsor. See AC 150/5190-6 at Appendix 1, 1.1(k).

An airport owner or sponsor can elect to exercise its right to a proprietary Exclusive Right at any time. See Jet 1 Center, Inc. v. Naples Airport Authority, FAA Docket No. Docket No. 16-04-03 (January 4, 2005) (*"An airport sponsor or owner does not lose its ability to invoke a proprietary exclusive right on its airport regardless of previous arrangements. So long as the airport owner or sponsor is not violating any of its grant obligations by doing so, it may invoke its proprietary exclusive right at any time."*

Single FBO Airports

So when can there be a single

FBO because of Lack of Qualified Competition? FAA Order 5190.6B ("Airport Compliance Manual") expressly acknowledges that a single FBO airport can exist without creating an Exclusive Right. The Airport Compliance Manual specifically provides:

- 8.6. Airports Having a Single Aeronautical Service Provider: Where the sponsor has not entered into an express agreement, commitment, understanding, or an apparent intent to exclude other reasonably qualified enterprises, the FAA does not consider the presence of only one provider engaged in an aeronautical activity as a violation of the exclusive rights prohibition. The FAA will consider the sponsor's willingness to make the airport available to additional reasonably qualified providers. (See paragraph 8.9.b of this chapter.)

Whether a potential competitor is reasonably qualified is often a source of controversy. Often, a finding that a potential competitor is reasonably qualified involves a determination as to whether the competitor is safe. An airport sponsor can deny a prospective aeronautical service provider the right to engage in an on-airport aeronautical activity for reasons of safety and efficiency.

The FAA, however, is the ultimate arbiter of whether a certain aviation activity is unsafe. Simply stated, an FAA certificated entity is presumed safe and a denial of access on the basis of safety may give rise to an Exclusive Right in violation of Grant Assurance 23. Decisions by an airport sponsor to block access based on safety is permissible when the airport sponsor determines that an aeronautical activity as a whole is inconsistent with safety and efficiency of the airport and the FAA concurs.

A second source of controversy arises when an airport sponsor is accused of placing restrictions on a tenant that are insurmountable. An airport sponsor is not permitted to place unreasonable restrictions on an entity seeking to compete with an airport's sole FBO. Notwithstanding that, "The mere fact that lease payments are not identical does not necessarily constitute 'unjust discrimination' in prices or the grant of an 'exclusive right.'" Penobscot Air Servs. v. FAA, 164 F.3d 713 (1st Cir. 1999).

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Looking Back

In the June/July 2012 issue of airport business, Paul Lange and Megan Bryson addressed rate structures, and asked, 'So your airport sponsor is trying to dictate your rate structure for subtenants and customers?'

In case you missed it, see what Paul and Megan had to say: http://www.aviationpros.com/article/10725469/so-your-airport-sponsor-is-trying-to-dictate-your-rate-structure-for-subtenants-and-customers

Impermissible Exclusive Rights

The following are some examples of airport sponsor conduct found to be impermissible Exclusive Rights in violation of Grant Assurance 23:

- Norwood Airport Commission's failure to provide Boston Air Charter with access to utilities necessary to conduct fueling operations precluded Boston Air Charter from self-fueling and forced Boston Air Charter to fuel through Eastern Air Center (the sole FBO) was found to be a constructive creation of an Exclusive Right. See Boston Air Charter v. Norwood Airport Commission, FAA Docket No. 16-07-03, June 7, 2011.
- *The grant of options or preferences on future airport lease sites to a single service provider may be construed as intent to grant an Exclusive Right such that the use of leases with options or future preferences, such as rights-of-first refusal, may be held to violate Grant Assurance 23.* See AC No: 150/5190-6 at 1.3(b)(3).
- An airport sponsor may not deny access to an individual FAA certificated operator based solely on the airport's determination that the aeronautical operations are not safe because those operators having an FAA certificate are presumed safe. See Bodin v. County of Santa Clara, CA, FAA Docket No. 16-11-06 (December 19, 2011).
- "Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire lease area is presently required and will be immediately used to conduct the activities contemplated by the lease." Bodin v. County of Santa Clara, CA, FAA Docket No. 16-11-06 (December 19,

An airport sponsor may exclude an incumbent FBO from participating under a competitive solicitation in order to bring a second FBO onto the airport to create a more competitive environment.

YUMA COUNTY ADDED TO LAWSUIT AGAINST AIRPORT AUTHORITY

Judge John Nelson grants a motion to amend a complaint against the Yuma County Airport Authority to add Yuma County as a defendant, according to the Yuma Sun.

As reported by the Yuma Sun, the amended motion granted by Nelson also drops several claims in the complaint filed by DBT Yuma LLC against the Yuma Airport Authority. This will focus DBT's lawsuit on the main issue of alleged breach of a lease by the airport authority, states DBT's motion.

The lawsuit was brought in October 2010 against the Airport Authority by DBT Yuma. DBT Yuma had been doing business as Lux Air, a fixed-base operator at the airport. In October 2009, the Airport Authority had Lux Air evicted from the airport and seized its property because the FBO was behind on its rent.
According to DBT's lawsuit, however, Lux was always in arrears, "And the airport authority always acquiesced to these late payments."
In the lawsuit, DBT is asking for $9.5 million in lost assets plus compensation for damages the company suffered through the forfeiture of its 30-year lease.

DBT's motion to amend states that the plaintiff is seeking to include Yuma County to the lawsuit as the landlord for the property that is leased to the Airport Authority to operate Yuma County International Airport.

In other action in the case, the airport authority has filed a counterclaim against DBT Yuma in which it alleges it "had a valid and lawful right to evict Lux Air entities and seize their property" pursuit to state law. The counterclaim also states that the plaintiffs's alleged loss was related to the 'plaintiffs' own actions, inactions, failures, misconduct, bad faith, negligence, assumption of risk, and/or contributory negligence."

The counterclaim seeks a judgment against Lux Air for costs incurred, loss of rent, and damages suffered, including the FBO's failure to honor its agreement to construct a new $2.5 million general aviation terminal.

2011) (citing FAA Order 5190.6B. Sec. 8.9.d Space Limitation.

- Awarding favorable leases to parties that are established businesses which would erect a potentially insurmountable barrier to entry for new operators may be a grant of an Exclusive Right, as cautioned by the U.S. Court of Appeals for the 11th Circuit. See BMI Salvage Corp. v. FAA, 272 Fed. Appx. 842; 2008 U.S. App. LEXIS 7964 (11th Cir. 2008).

> "The existence of only a single FBO at a federally funded airport is not, in and of itself, evidence of an Exclusive Right in violation of Grant Assurance 23."

The following are examples of scenarios for which the FAA has determined that there is no Exclusive Rights violation of Grant Assurance 23:

- An airport sponsor may exclude an incumbent FBO from participating under a competitive solicitation in order to bring a second FBO onto the airport to create a more competitive environment. See AC No: 150/5190-6 at 1.3(b)(3).
- An airport sponsor's refusal to permit a single FBO to expand based on the sponsor's desire to open the airport to competition is not a violation of the Grant Assurances. See AC No: 150/5190-6 at 1.3(b)(3).
- An airport sponsor can deny a prospective aeronautical service provider the right to engage in an on-airport aeronautical activity for reasons of safety and efficiency. The FAA, however, must confirm that a certain aviation activity is unsafe. See AC No: 150/5190-6 at 1.3(a)(1).
- Allowing one FBO to occupy a priority use area within its leasehold while denying a competing FBO use of a comparable priority use area when to do so would infringe upon existing taxi ways. See Platinum Aviation v. Bloomington-Normal Airport Authority, FAA Docket No. 16-06-09 (November 28, 2007).

Conclusion

In conclusion, the existence of only a single FBO at a federally funded airport is not, in and of itself, evidence of an Exclusive Right in violation of Grant Assurance 23. A single FBO is permissible when you have an airport owner exercising its right to a Proprietary Exclusive Right or a lack of qualified competition.

If, however, you have a situation in which the airport sponsor is not engaged in a Proprietary Exclusive Right and is imposing unreasonable restrictions on a potential second FBO (that are not likewise imposed on the sole existing FBO), there may be a violation of Grant Assurance 23. If you believe that there is an Exclusive Right in violation of Grant Assurance 23, you should retain legal counsel to (1) evaluate your remedies under Federal and State Law; and (2) guide you in gathering and preserving evidence to support your claims. ab

CAN A TENANT EVER REALLY BE EXEMPT ... ?

Back in the May 2012 issue of *airport business*, the first part of our six part series of articles on aviation legal matters, attorney Paul Lange discusses minimum standards exemptions; here are some highlights.

- The necessity for an exemption may arise due to a myriad of conditions. There is no question that the economic climate of late has resulted in substantial losses to FBO operators and other airport tenants, particularly with the widespread loss of general aviation aircraft hours flown. In response, airport tenants may look to non-aviation subtenants to make up some of their lost revenue.
- An airport tenant can never have a valid and enforceable 'exemption' to accommodate non-aviation subtenants upon designated aeronautical property unless the airport sponsor obtains explicit permission from the FAA with respect to the same.
- One airport tenant's 'exemption' is the foundation for another airport tenant's Part 16 claim for a violation of Federal Grant Assurance 22 (Economic Non-Discrimination).
- Airport tenants should be cautious if afforded an 'exemption' from the applicable minimum standards and airport rules and regulations by an airport sponsor. Such 'exemptions' are fleeting, unreliable, and almost never a source of competitive advantage.