

Dueling FBOs



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How does the
FAA settle
“exclusive
right” airport
battles?

ALTHOUGH THE FAA IS working to reduce runway incursions, no one can prevent local and national politics, big money from colliding on airport ramps.

When an airport applies for federal funding, the Airport and Airway Improvement Act of 1982 (AAIA) requires written assurances on numerous “anti-discrimination” issues. One element of these promises is that the airport won’t give an “exclusive right” to a single FBO. Although the FAA has made a valiant effort to assure that promise, battles have been waged over nearly every word of the statutory language.

Specifically, the law says the secretary of transportation may approve a project grant only after receiving written assurances that,

... a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport deemed not to be an exclusive right if:

(A) The right would be unreasonably costly, burdensome or impractical for more than one fixed-base operator to provide the services; and

(B) Allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator.

In plain English, that means it is acceptable for an airport to have only one FBO if it would be “impractical” to have two FBOs and there is no existing space available for a second FBO. At many airports, there is enough land to go around, but not enough business. Or is there? Who gets to decide?

The FAA. The agency has a statutory mandate to ensure that airport owners comply with their sponsor assurances. To do so, the FAA created the Airport Compliance Program.

How does the FAA determine the meaning of airport compliance language such as “unreasonably costly, burdensome or impractical?” FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The order provides basic guidance for agency personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes.

It is pointless to begin a fight over “exclusive right” issues without studying FAA Order 5190.6A. A mere pamphlet by FAA standards, it provides 90 pages of insight into how the agency interprets these multi-million-dollar issues. The Order emphasizes that the presence on an airport of only one FBO will not be considered a violation of policy if there is no understanding, commitment, express agreement or apparent intent to exclude other reasonably qualified enterprises. The Order acknowledges that, in many instances, the volume of business may not be sufficient to attract more than one FBO. As long as the opportunity to engage in an aeronautical activity is available to those meeting reasonable qualifications and standards relevant to such activity, the FAA will find that the fact that only one enterprise takes ad-

vantage of the opportunity does not constitute the grant of an exclusive right.

Now, you have read the entire Order, you want to build an FBO and are well qualified to operate it, and yet the airport, which has accepted federal funding, says, “No.” What do you do? Whom do you sue? In the words of the courts, there is no “private right” to sue under the “exclusive right” language of the AAIA. So you can’t file suit against the airport authority for violating its federal funding assurances.

And so you complain to the FAA, either informally or formally. The agency accepts informal complaints either verbally or in writing under FAR Part 13.1. Part 13 imposes no time deadlines for issuing decisions. In addressing allegations of non-compliance, the FAA will make a determination as to whether an airport authority is currently in compliance with the applicable federal obligations. Consequently, the FAA will consider, as grounds for dismissal of such allegations, the successful action by the airport authority to cure any alleged or potential past violation of applicable federal obligations, subsequent to FAA receipt of the allegations and prior to the issuance of a final FAA compliance decision.

Formal complaints against airport authorities fall under Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings. By contrast these complaints must be in writing and can only be filed by parties who are substantially affected by an airport’s alleged noncompliance. The rules require parties to attempt settlement in good faith prior to filing the formal complaint. FAA headquarters staff looks into these. Part 16 imposes strict deadlines for complaint filing, adjudication and appeal. If the FAA believes that a complaint warrants it, the FAA will conduct an investigation, and the director of the Office of Airport Safety and Standards will issue a determination. A party adversely affected by the director’s determination may appeal the matter to the associate administrator.

If a party then wants to appeal from a determination of the associate administrator, they may seek judicial review in a U.S. Court of Appeals. The courts have been strict in requiring that parties “exhaust all administrative remedies” before they arrive at the steps of the federal courthouse.

You cannot file a suit against the FAA over an airport issue simply because the informal complaint process didn’t turn out in your favor. You must “exhaust” all of the administrative steps in Part 16 first. The trick is to make your point along the way without exhausting the administrator. Anyone who brings a complaint to the FAA on airport actions carries the burden of proof. The legal standard throughout the process is whether the FAA relied on a “preponderance of the evidence.” This standard of evidence favors the agency.

In contentious issues such as these, keep in mind some fundamentals that have little to do with law, but much to do with life, and success. First impressions matter. From the outset, be organized, be calm and most of all, be polite. **B&CA**