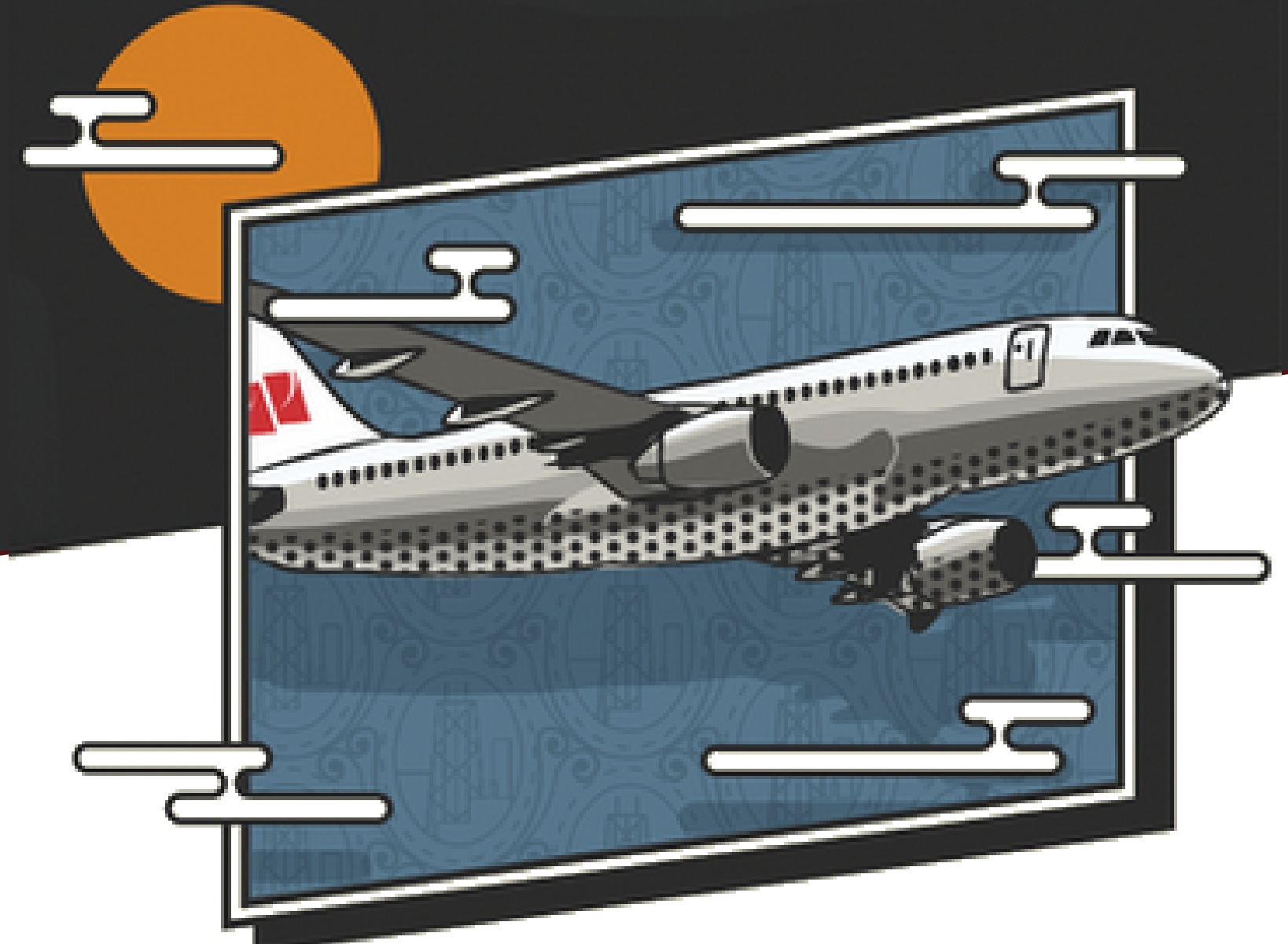


40th Annual
Airport Law Workshop



Session 12

Drafting Construction Contracts

Speakers

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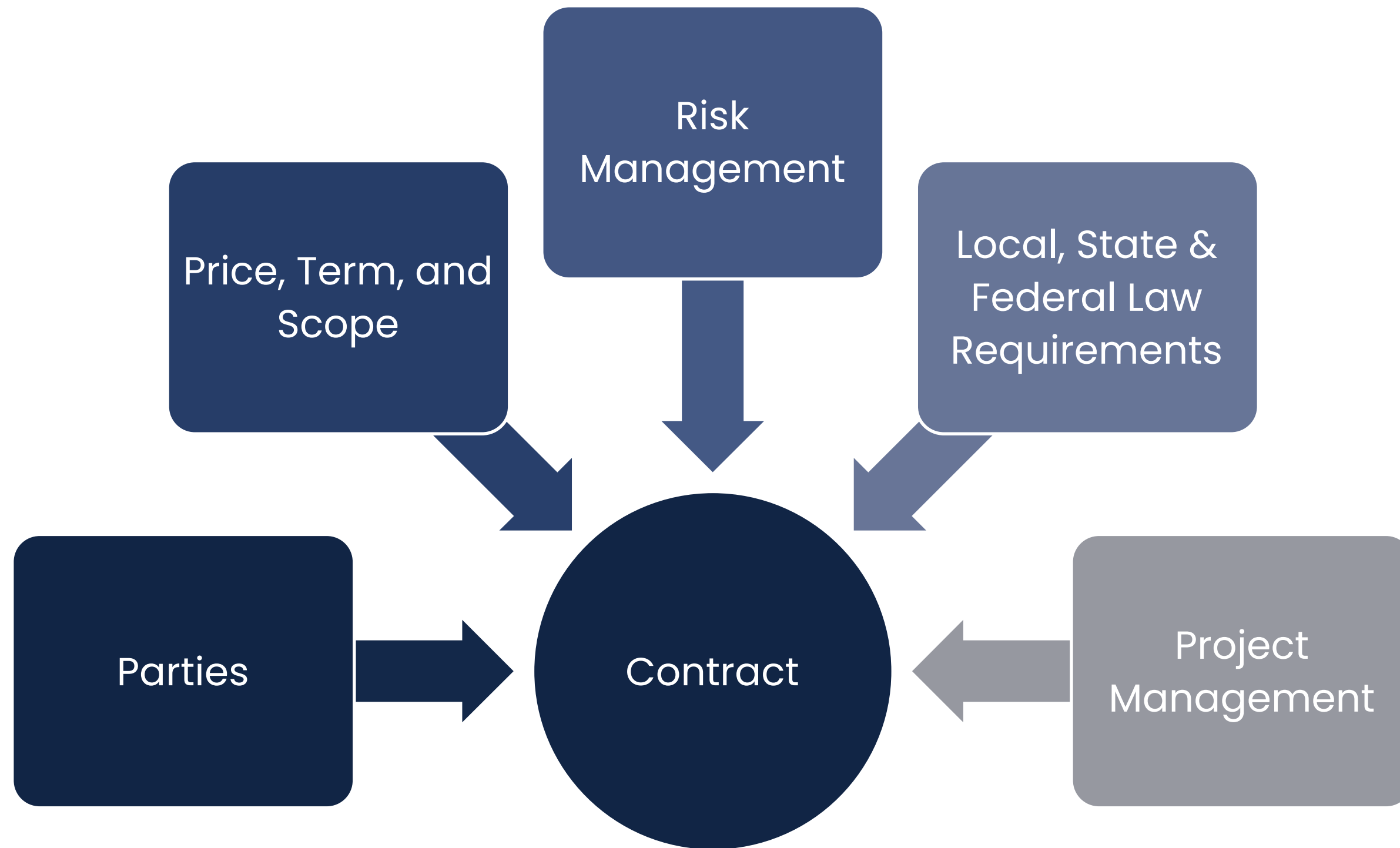
Introduction



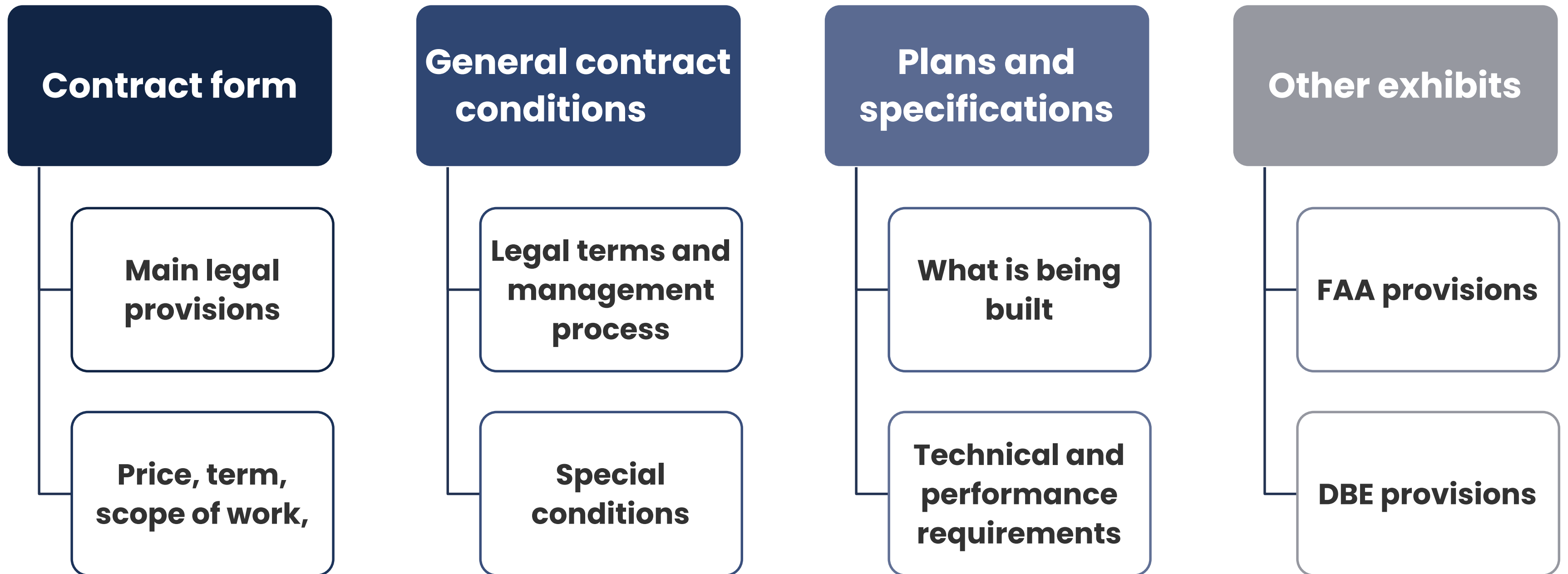
Session Goal:

Identify important provisions in airport construction contracts and discuss drafting considerations

Construction contract components



Documents in a construction contract



Contract form

- Sets out the parties' performance requirements – who, what, when, and how much
- Contract form may contain only basic terms and conditions
 - Use exhibits to complete legal and process requirements
- Contract form can also contain all terms and conditions
- Review templates for compliance with local, state, and federal requirements
- Review templates for allocation of rights and responsibilities

Sources of template contracts

American Institute of Architect (AIA)

American Society of Civil Engineers (ASCE)

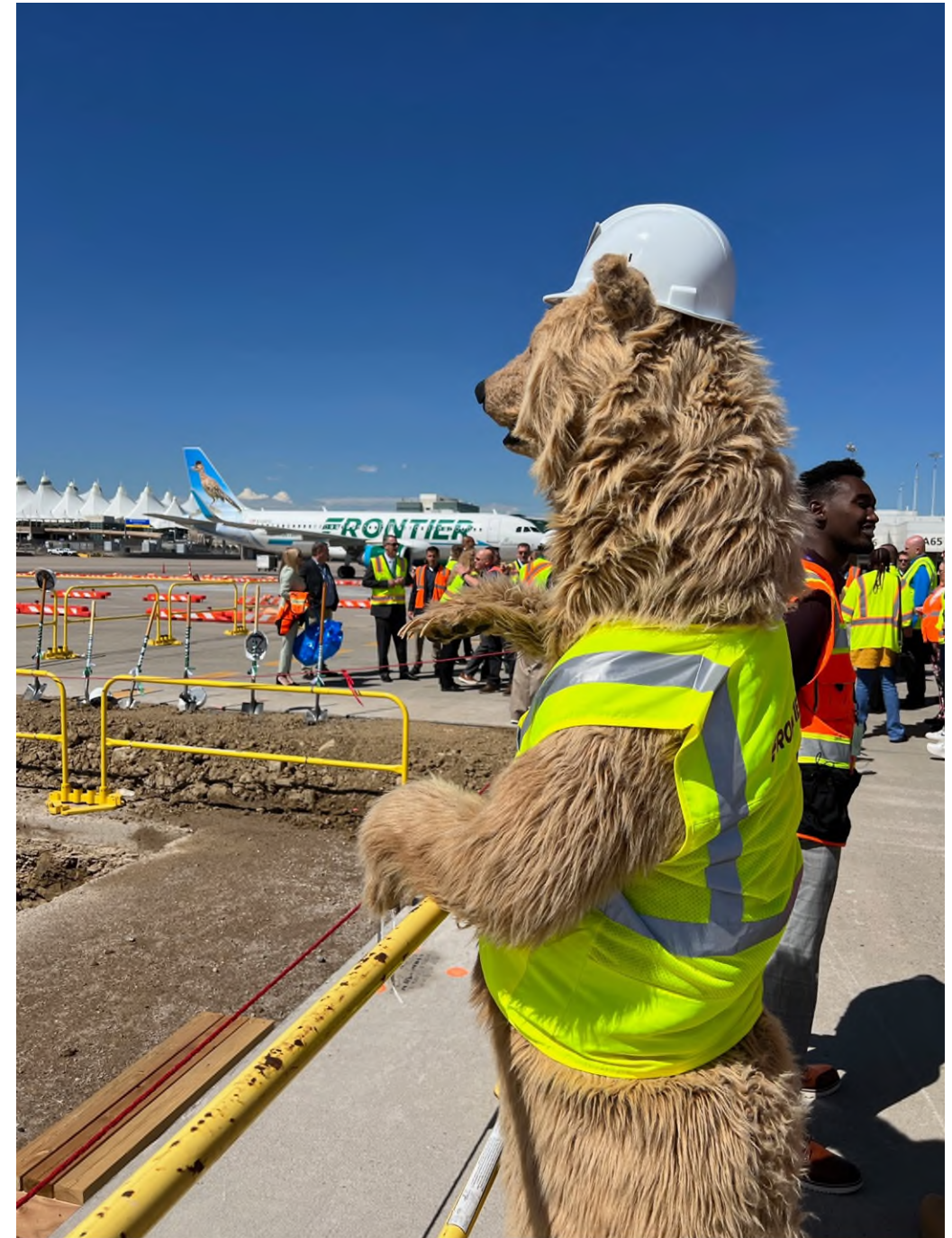
Engineers Joint Contract Documents Committee (EJCDC)

Local large governmental entities

State DOT, large cities, large governments

General contract conditions

- Standardized project management and contract performance requirements
- Attached to the contract form as an exhibit
- May include legal terms
- Review any standard form general contract conditions
- May be modified in the document or with special conditions





Basic contract provisions

Parties

CONTRACT FOR CONSTRUCTION

THIS CONTRACT FOR CONSTRUCTION (“Contract”) is made and entered into as of the date stated on the City’s signature page below by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado acting on behalf of its Department of Aviation (the “City”), and **HENSEL PHELPS CONSTRUCTION CO.**, a Delaware General Partnership authorized to do business in the State of Colorado (“Contractor”) (collectively the “Parties”).

Airport’s Sponsor

- Not the airport’s name unless the airport is the legal entity
- City and County of Denver, not Denver International Airport

Contractor

- The legal entity responsible for performing the contract

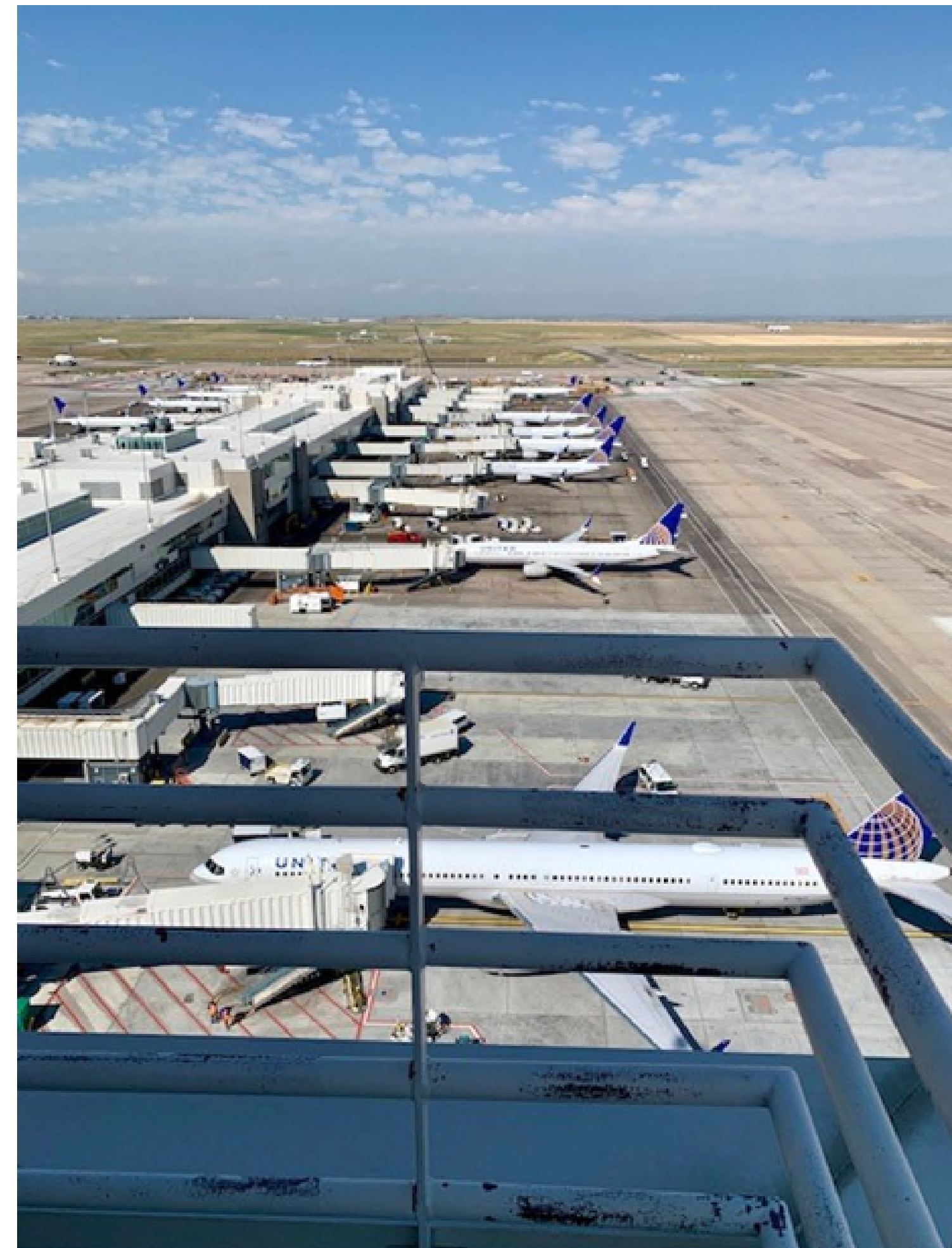
Price

What are you paying for?

- The cost to build and supervise the project
- Some part of administrative expenses and profit

Price components:

- Cost of the Work: the labor and materials
- General conditions (GC): costs to manage and perform the contract, including permits, supervision, insurance
- Overhead (OH): costs to manage the company
- Profit



Price

How is the price determined?

Allocates risk for cost overruns and underruns

- Fixed price/lump sum: one price regardless of how much it costs the contractor
- Unit price: one price per unit, and at the end add up all the units
- Guaranteed maximum price: maximum price for the work
- Cost + fee or % of cost: hard costs + soft costs + fee



Term provisions

How long do they have to do the work?

Contract term

- Contract needs an end date – deadline for the contractor to finish

Milestones

- Contract can set interim milestones to identify progress to completion

Liquidated Damages

- A specific amount of money owed by the contractor if it fails to finish the work by a deadline
- Replace some or all actual damages; not a penalty

Mod 2 Milestone	Amount	Milestone NTP Date	Milestone Completion Date
Ticket Pod Steel Completion	\$1,000 daily	March 2, 2020	August 1, 2020
Ticketing Pods Completion	\$2,000 daily	March 2, 2020	August 3, 2021
Commissioning Completion	\$2,000 daily	July 1, 2020	August 27, 2021
Substantial Completion	\$5,000 daily	March 2, 2020	October 1, 2021

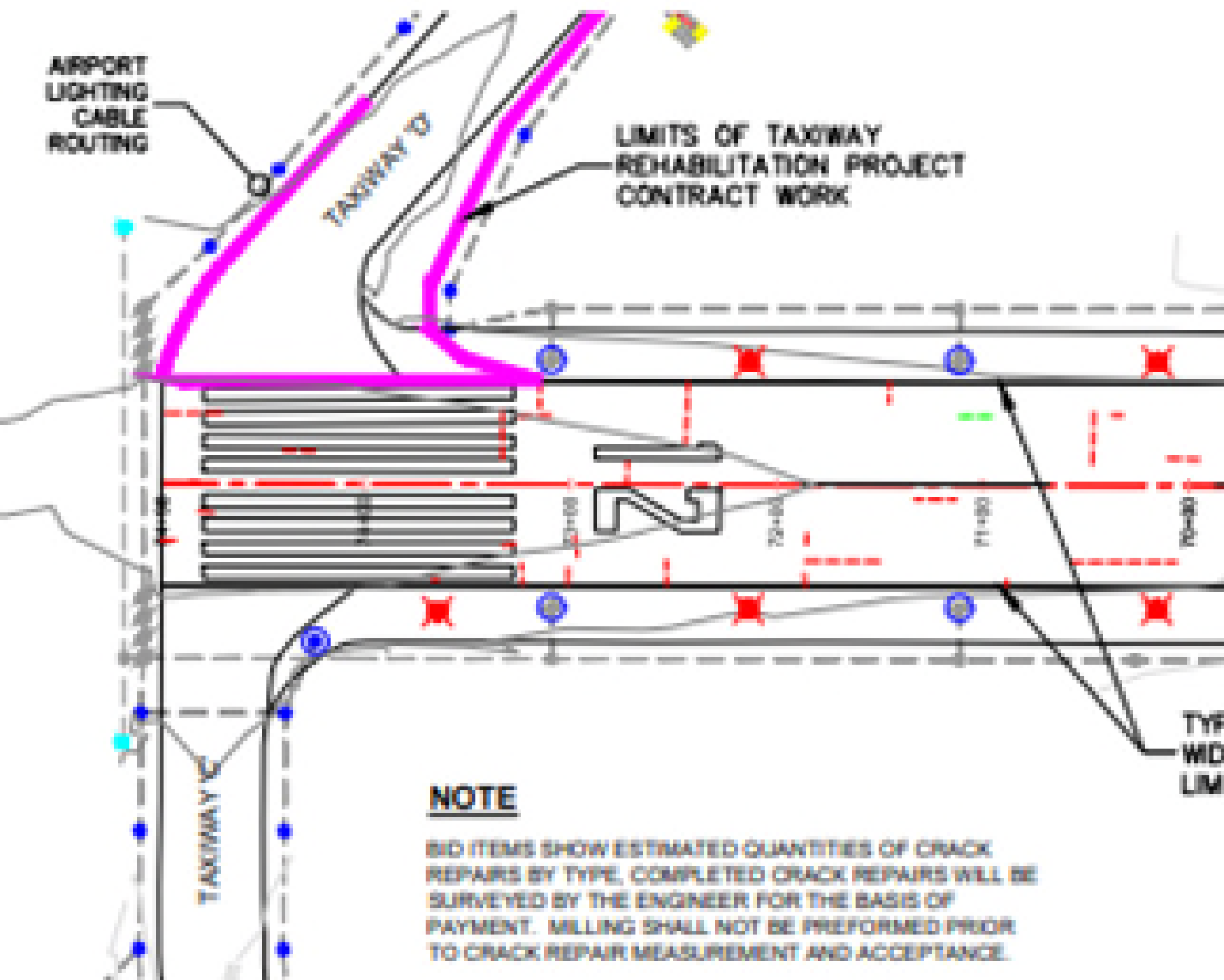
Scope of Work

The contract must specify:

- What the contractor must do
- What standards the contractor must meet

Scope of Work includes:

- Plans: what is being built
- Technical specifications: details about how to build and materials to use
 - Concrete specifications
 - Types of fixtures, like bathroom fixtures or gate furniture
- Construction management:
 - Inspections
 - Testing
 - Quality control/quality assurance





Risk Management – Protecting the Sponsor

Insurance and surety bonds

Insurance

- Commercial general liability – property damage, personal injury
 - Does not cover the work
 - Does cover damage caused by the work
 - Does not cover construction materials
- Workers' compensation
- Builder's risk
 - Covers construction materials owned by the contractor
- Auto
- Cyber
- Airfield driving and other risks
- Subcontractor default insurance

Surety Bonds

May be required by law or terms of bonds issued by the sponsor

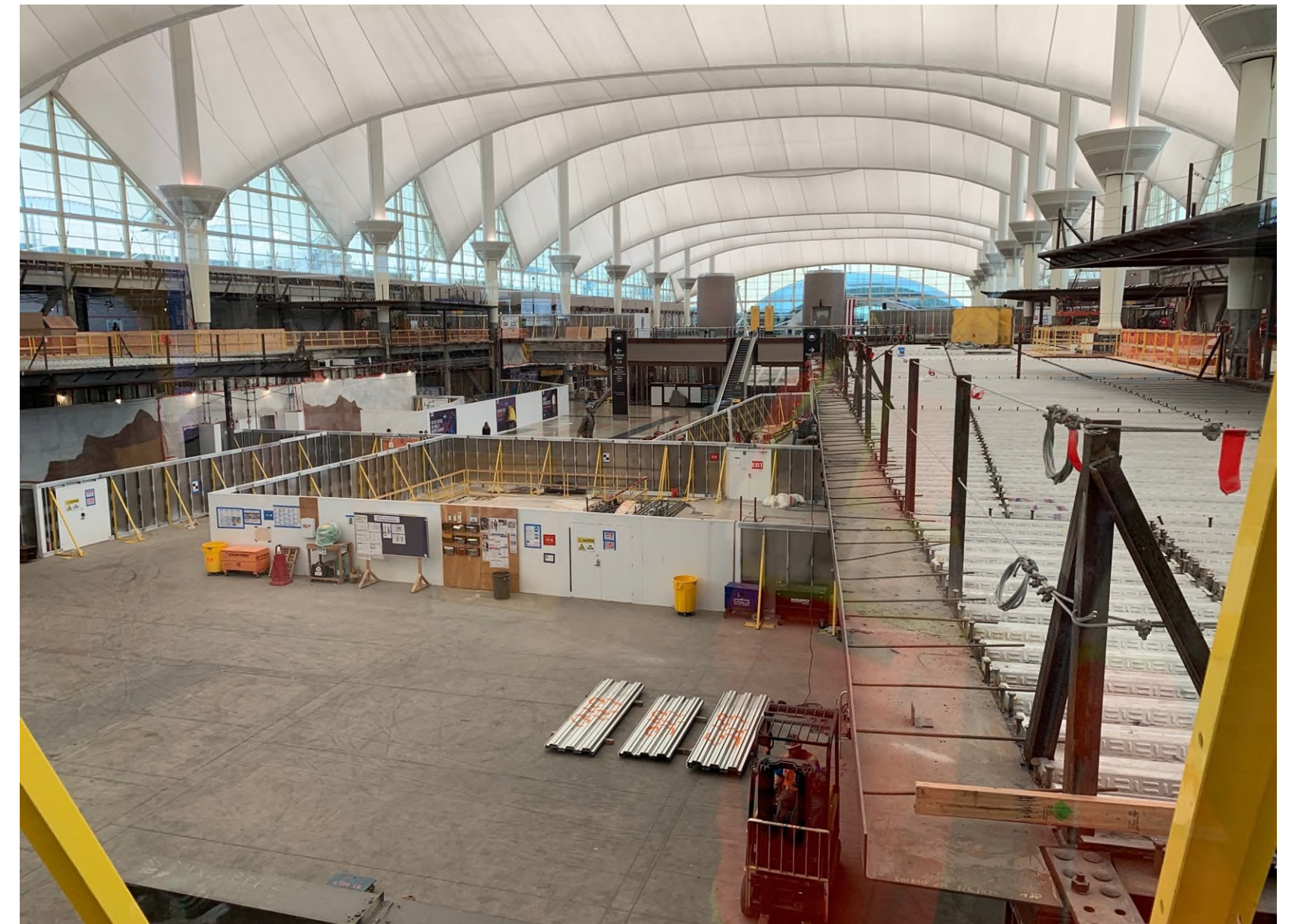
- Performance bond – guarantees Contractor's performance
- Payment bond – guarantees contractor's payment of subcontractors
- Bid bond – protects if the low bidder refuses to honor the bid

Indemnification

Protection from losses and damage

Contractor should pay to defend, repair, or if it causes damages or loss to the sponsor or its property.

- Some jurisdictions: an owner may require that the contractor indemnify unless the damage or loss is caused solely by the owner
- Some jurisdictions: require that parties can only be liable for their % of fault for damage or loss
- More is better – get what you legally can



Other performance guarantees

Warranty

- Contractor's warranty
 - Warranty that the work was done according to the Scope of Work
- Assignment of any manufacturer's warranty



Retainage

- Owner must withhold a percent of each invoice as security
- Provides funds if owner must complete or fix work
- Often 5% but may be provided by law or finance requirements
- Typically paid at the end of the project
- DBEs subject to special limitations





Local, state, and federal requirements

Sources of legal requirements

Federal

- Federal Law
- 2 CFR 200 – Federal procurement/contract rules
- FAA Grant Assurances, rules, orders, guidance

State

- Construction laws applicable to public entities
- Statutes that govern airports
- May be preempted or not applicable if federal funds used

Local

- Local laws and rules
- Board or Authority policies or rules
- May be preempted or not applicable if federal funds used

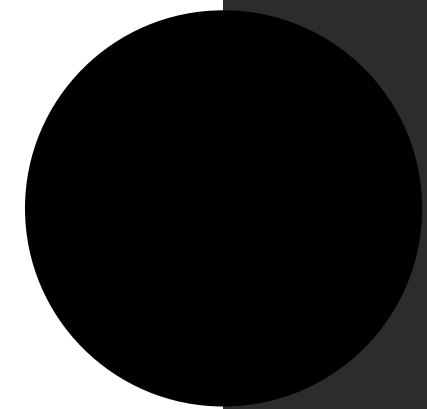
FAA contract provisions



- Required for all contracts
- Federal law and regulations
 - Civil rights statutes
 - Always include these first in the order of precedence
- Some only apply to AIP-funded projects
 - ✓ Davis Bacon/Prevailing Wage
 - ✓ Build America/Buy America
 - ✓ Disadvantaged Business Enterprises
 - ✓ Limits on technology sources

FAA Matrix –

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



Project Management

Change management

Changes to cost, schedule, and design

Change will happen

- Discovery of unexpected circumstances
- Errors or changes in the plans and specifications
- Cost of the work
- Other impacts – weather, pandemics

Allocate the risk for changes

- What is most likely to happen and who is responsible
- General categories or more remote risks
- Process for contractor to request changes and owner to direct changes
- How to determine price of changes
- How to document changes and incorporate them into the contract
 - Change orders

Other considerations during construction



- Security –
 - Site security
 - Badging and airport security
- Airfield work and operations
 - Driving on the airfield and around airplanes
- Safety Requirements
- Work in an operating airport

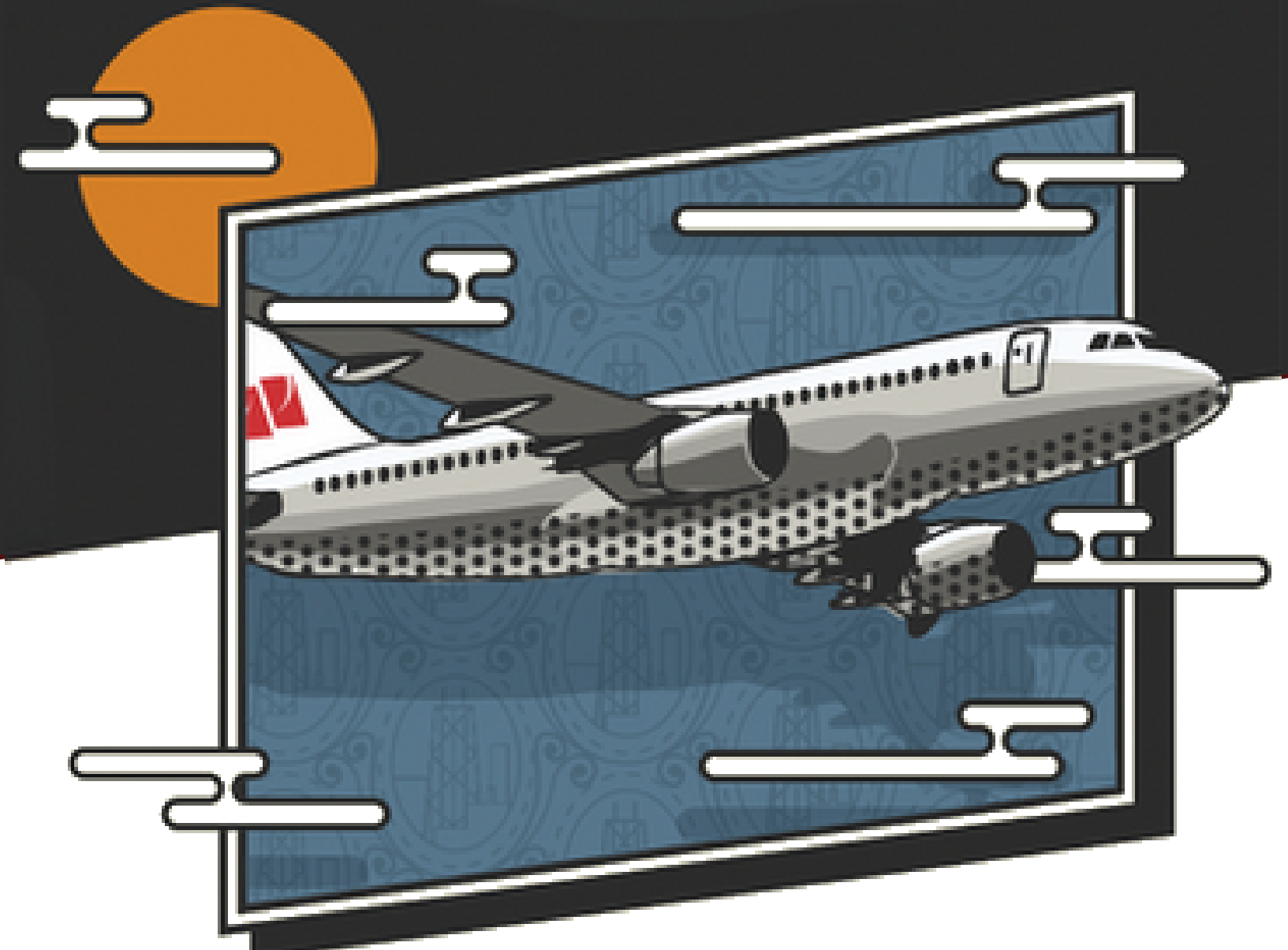
End of work and the contract

- Substantial completion and final completion
- Contract closeout
- Mechanic's/contractors liens or alternatives for public property
- Document retention
 - Tie to statute of limitations
- Termination provisions
 - Termination for cause
 - Termination for convenience
- Dispute resolution

Takeaways

- Know the applicable law and requirements of funding sources
 - *Contractors that don't do federal work often aren't familiar with them*
- Consider the risks of your project and contract provisions to mitigate
- Consider the risks to the contractor and how they will want to mitigate
- Delivery method will impact the specific structure and contract terms
- Consider provisions that require the construction team and the airport staff to work collaboratively
- Review any form contracts closely

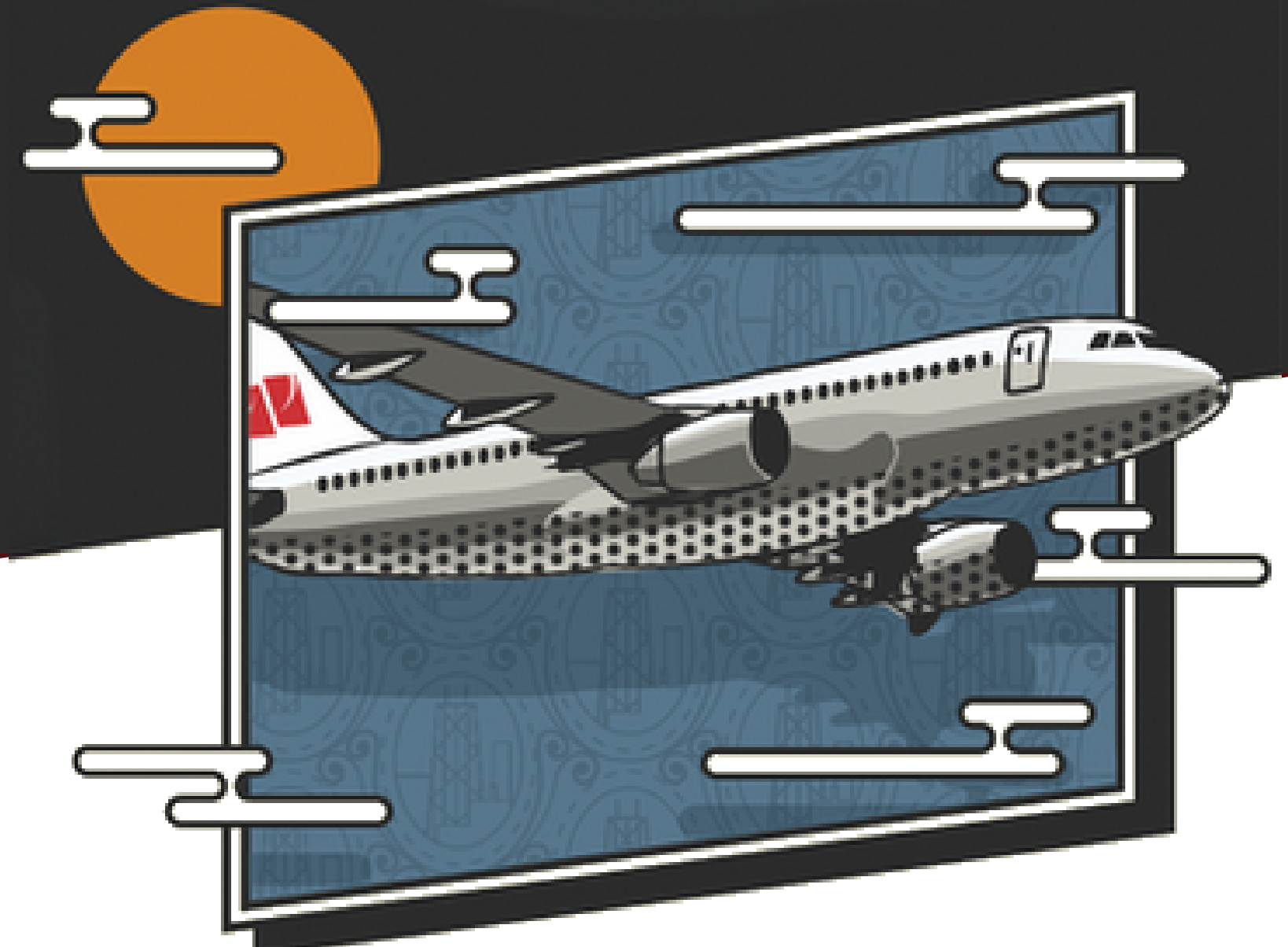
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QUESTIONS?



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THANK YOU!