

audit resolution items received from the cognizant agencies.

(iii) *The State Director* is responsible for the review of audits of borrowers whose indebtedness exceeds \$1,000,000 and delinquent and problem case borrowers. The State Director may recommend to the District Director any necessary actions to be taken.

(3) *Security inspections.* A representative of the borrower will ordinarily accompany the District Director during each inspection.

(i) *Post construction inspection.* The District Director will inspect each facility between the beginning of the ninth and the end of the eleventh full month of the first year of operation. This will normally coincide with the District Director's review of the borrower's total operational and management practices described in paragraph (r)(1)(ii)(A) of this section. The results of this inspection will be reported to the State Director on Form FmHA or its successor agency under Public Law 103-354 1924-12. Earlier inspections will be made when operational or other problems indicate a need. The State Director will provide guidance to the District Director to assure that action will be taken to correct project deficiencies.

(ii) *Subsequent inspections.* The District Director will make subsequent inspections of borrower security property and facilities during each third year after the post construction inspection. The results of this inspection will be reported to the State Director on Form FmHA or its successor agency under Public Law 103-354 1924-12.

(iii) *Special inspections.* The District Director may request, or the State Director may determine, the need for a member of the State staff to make certain security inspections. In such cases, the State Director will detail a staff member to make such inspections.

(iv) *Follow-up inspections.* If any inspection discloses deficiencies or exceptions, or otherwise indicates a need for subsequent inspections prior to the third year, the State Director will prescribe the type and frequency of follow-up inspections. These inspections will be made until all deficiencies and exceptions have been corrected.

(4) *Civil rights compliance reviews* will be performed under subpart E of part 1901 of this chapter for the life of the loan.

(5) Other loan servicing actions will be in accordance with subparts E and O of part 1951 of this chapter.

[50 FR 7296, Feb. 22, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1942.17, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1942.18 Community facilities—Planning, bidding, contracting, constructing.

(a) *General.* This section is specifically designed for use by owners including the professional or technical consultants and/or agents who provide assistance and services such as architectural, engineering, inspection, financial, legal or other services related to planning, bidding, contracting, and constructing community facilities. These procedures do not relieve the owner of the contractual obligations that arise from the procurement of these services. For this section, an owner is defined as an applicant, borrower, or grantee.

(b) *Technical services.* Owners are responsible for providing the engineering or architectural services necessary for planning, designing, bidding, contracting, inspecting, and constructing their facilities. Services may be provided by the owner's "in house" engineer or architect or through contract, subject to FmHA or its successor agency under Public Law 103-354 concurrence. Architects and engineers must be licensed in the State where the facility is to be constructed.

(c) *Preliminary reports.* Preliminary architectural and engineering reports must conform with customary professional standards. Preliminary report guidelines for water, sanitary sewer, solid waste, storm sewer, and other essential community facilities are available from FmHA or its successor agency under Public Law 103-354.

(d) *Design policies.* Facilities financed by FmHA or its successor agency under Public Law 103-354 will be designed and constructed in accordance with sound

engineering and architectural practices, and must meet the requirements of Federal, State and local agencies.

(1) *Natural resources.* Facility planning should be responsive to the owner's needs and should consider the long-term economic, social and environmental needs as set forth in this section. FmHA or its successor agency under Public Law 103-354's environmental considerations are under subpart G of part 1940 of this chapter.

(i) *Floodplains and wetlands.* Facilities must avoid, to the extent possible, the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and wetlands, and avoid direct or indirect support of floodplain and wetland development whenever there is a practicable alternative. This subject is more fully discussed in Executive Order 11988, Executive Order 11990, and Water Resources Council's Floodplain Management Guidelines (43 FR 6030) which is available in all FmHA or its successor agency under Public Law 103-354 offices. Facilities located in special flood and mudslide prone areas must comply with FmHA or its successor agency under Public Law 103-354's eligibility and insurance requirements in subpart B of part 1806 of this chapter (FmHA Instruction 426.2).

(ii) *Coastal zone management.* Facilities shall be designed and constructed in a manner consistent with approved State management programs, under the Coastal Zone Management Act of 1972 (Pub. L. 92-583 section 307 (c)(1) and (2)) as supplemented by the Department of Commerce regulations 15 CFR part 930.

(iii) *Wild and scenic rivers.* Facilities shall be designed and constructed in order that designated wild and scenic rivers be preserved in free-flowing condition and that they and their immediate environments be protected for the benefit and enjoyment of present and future generations under the Wild and Scenic Rivers Act of 1978 (Pub. L. 95-625).

(iv) *Endangered species.* Facilities shall be designed and constructed in a manner to conserve, to the extent practicable, the various endangered and threatened species of fish or wildlife and plants, and will not jeopardize

their continued existence and will not result in destruction or modification of the habitat of species in the Endangered Species Act of 1973 (Pub. L. 93-205).

(2) *Historic preservation.* Facilities should be designed and constructed in a manner which will contribute to the preservation and enhancement of sites, structures, and objects of historical, architectural, and archaeological significance. All facilities must comply with the National Historic Preservation Act of 1966 (16 U.S.C 470) as supplemented by 36 CFR part 800 and Executive Order 11593, "Protection and Enhancement of the Cultural Environment," subpart F of part 1901 of this chapter sets forth procedures for the protection of Historic and Archaeological Properties.

(3) *Architectural barriers.* All facilities intended for or accessible to the public or in which physically handicapped persons may be employed or reside must be developed in compliance with the Architectural Barriers Act of 1968 (Pub. L. 90-480) as implemented by the General Services Administration regulations 41 CFR 101-19.6 and section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112) as implemented by 7 CFR parts 15 and 15b.

(4) *Health care facilities.* The proposed facility must meet the minimum standards for design and construction contained in the American Institute of Architects Press Publication No. ISBN 0-913962-96-1, "Guidelines for Construction and Equipment of Hospital and Medical Facilities," 1987 Edition. The facility must also meet the life/safety aspects of the 1985 edition of the National Fire Protection Association (NFPA) 101 Life Safety Code, or any subsequent code that may be designated by the Secretary of HHS. All publications referenced in this section are available in all FmHA or its successor agency under Public Law 103-354 State Offices. Under §1942.17(j)(8)(ii) of this subpart, a statement by the responsible regulatory agency that the facility meets the above standards will be required. Any exceptions must have prior National Office concurrence.

(5) *Energy conservation.* Facility design should consider cost effective energy saving measures or devices.

(6) *Lead base paints.* Lead base paints shall not be used in facilities designed for human habitation. Owners must comply with the Lead Base Paints Poisoning and Prevention Act of 1971 (42 U.S.C. 4801) and the National Consumer Health Information and Health Promotion Act of 1976 (Pub. L. 94-317) with reference to paint specifications used according to exhibit H of subpart A of part 1924 of this chapter.

(7) *Fire protection.* Water facilities must have sufficient capacity to provide reasonable fire protection to the extent practicable.

(8) *Growth capacity.* Facilities must have sufficient capacity to provide for reasonable growth to the extent practicable.

(9) *Water conservation.* Owners are encouraged, when economically feasible, to incorporate water conservation practices into a facility's design. For existing water systems, evidence must be provided showing that the distribution system water losses do not exceed reasonable levels.

(10) *Water quality.* All water facilities must meet the requirements of the Safe Drinking Water Act (Pub. L. 93-523) and provide water of a quality that meets the current Interim Primary Drinking Water Regulations (40 CFR part 141).

(11) *Combined sewers.* New combined sanitary and storm water sewer facilities will not be financed by FmHA or its successor agency under Public Law 103-354. Extensions to existing combined systems can only be financed when separate systems are impractical.

(12) *Compliance.* All facilities must meet the requirements of Federal, State, and local agencies having the appropriate jurisdiction.

(13) *Dam safety.* Projects involving any artificial barrier which impounds or diverts water, or the rehabilitation or improvement of such a barrier, should comply with the provisions for dam safety as discussed in the Federal Guidelines for Dam Safety (Government Printing Office stock No. 041-001-00187-5) as prepared by the Federal Coordinating Council for Science, Engineering and Technology.

(14) *Pipe.* All pipe used shall meet current American Society for Testing

Materials (ASTM) or American Water Works Association (AWWA) standards.

(15) *Water system testing.* For new water systems or extensions to existing water systems, leakage shall not exceed 10 gallons per inch of pipe diameter per mile of pipe per 24 hours when tested at 1½ times the working pressure or rated pressure of the pipe, whichever is greater.

(16) *Metering devices.* Water facilities financed by FmHA or its successor agency under Public Law 103-354 will have metering devices for each connection. An exception to this requirement may be granted by the FmHA or its successor agency under Public Law 103-354 State Director when the owner demonstrates that installation of metering devices would be a significant economic detriment and that environmental consideration would not be adversely affected by not installing such devices.

(17) *Seismic safety.* (i) All new building construction shall be designed and constructed in accordance with the seismic provisions of one of the following model building codes or the latest edition of that code providing an equivalent level of safety to that contained in latest edition of the National Earthquake Hazard Reduction Program's (NEHRP) Recommended Provisions for the Development of Seismic Regulations for New Building (NEHRP Provisions):

(A) 1991 International Conference of Building Officials (ICBO) Uniform Building Code;

(B) 1993 Building Officials and Code Administrators International, Inc. (BOCA) National Building Code; or

(C) 1992 Amendments to the Southern Building Code Congress International (SBCCI) Standard Building Code.

(ii) The date, signature, and seal of a registered architect or engineer and the identification and date of the model building code on the plans and specifications will be evidence of compliance with the seismic requirements of the appropriate building code.

(e) *Construction contracts.* Contract documents must be sufficiently descriptive and legally binding in order to accomplish the work as economically and expeditiously as possible.

(1) *Standard construction contract documents* are available from FmHA or its successor agency under Public Law 103-354. When FmHA or its successor agency under Public Law 103-354's standard construction contract documents are used, it will normally not be necessary for the Office of the General Counsel (OGC) to perform a detailed legal review. If the construction contract documents utilized are not in the format of guide forms previously approved by FmHA or its successor agency under Public Law 103-354, OGC's review of the construction contract documents will be obtained prior to their use.

(2) *Contract review and approval.* The owner's attorney will review the executed contract documents, including performance and payment bonds, and will certify that they are adequate, and that the persons executing these documents have been properly authorized to do so. The contract documents, bids bonds, and bid tabulation sheets will be forwarded to FmHA or its successor agency under Public Law 103-354 for approval prior to awarding. All contracts will contain a provision that they are not in full force and effect until they have been approved by FmHA or its successor agency under Public Law 103-354. The FmHA or its successor agency under Public Law 103-354 State Director or designee is responsible for approving construction contracts with the legal advice and guidance of the OGC when necessary.

(3) *Separate contracts.* Arrangements which split responsibility of contractors (separate contracts for labor and material, extensive subcontracting and multiplicity of small contracts on the same job), should be avoided whenever it is practical to do so. Contracts may be awarded to suppliers or manufacturers for furnishing and installing certain items which have been designed by the manufacturer and delivered to the job site in a finished or semifinished state such as prefabricated buildings and lift stations. Contracts may also be awarded for material delivered to the job site and installed by a patented process or method.

(f) *Utility purchase contracts.* Applicants proposing to purchase water or other utility service from private or public sources shall have written con-

tracts for supply or service which are reviewed and approved by the FmHA or its successor agency under Public Law 103-354 State Director or designee. To the extent practical, FmHA or its successor agency under Public Law 103-354 review and approval of such contracts should take place prior to their execution by the owner. Form FmHA or its successor agency under Public Law 103-354 442-30, "Water Purchase Contract," may be used when appropriate. If the FmHA or its successor agency under Public Law 103-354 loan will be repaid from system revenues, the contract will be pledged to FmHA or its successor agency under Public Law 103-354 as part of the security for the loan. Such contracts will:

(1) Include a commitment by the supplier to furnish, at a specified point, an adequate quantity of water or other service and provide that, in case of shortages, all of the supplier's users will proportionately share shortages. If it is impossible to obtain a firm commitment for either an adequate quantity or sharing shortages proportionately, a contract may be executed and approved provided adequate evidence is furnished to enable FmHA or its successor agency under Public Law 103-354 to make a determination that the supplier has adequate supply and/or treatment facilities to furnish its other users and the applicant for the foreseeable future; and

(i) The supplier is subject to regulations of the Federal Energy Regulatory Commission or other Federal or State agency whose jurisdiction can be expected to prevent unwarranted curtailment of supply; or

(ii) A suitable alternative supply could be arranged within the repayment ability of the borrower if it should become necessary; or

(iii) Prior approval is obtained from the National Office. The following information should be submitted to the National Office:

(A) Transmittal memorandum including:

(1) Alternative supplies considered; and

(2) Recommendations and comments; and

(3) Any other necessary supporting information.

(B) Copies of the following:

- (1) Proposed letter of conditions; and
- (2) Form FmHA or its successor agency under Public Law 103-354 442-7, "Operating Budget"; and
- (3) Form FmHA or its successor agency under Public Law 103-354 442-3, "Balance Sheet"; and
- (4) Preliminary Engineering Report; and
- (5) Proposed Contract.

(C) Owner and FmHA or its successor agency under Public Law 103-354 engineer's comments and recommendations.

(D) Documentation and statement from the supplier that it has an adequate supply and treatment facilities available to meet the needs of its users and the owner for the foreseeable future.

(2) Set out the ownership and maintenance responsibilities of the respective parties including the master meter if a meter is installed at the point of delivery.

(3) Specify the initial rates and provide some kind of escalator clause which will permit rates for the association to be raised or lowered proportionately as certain specified rates for the supplier's regular customers are raised or lowered. Provisions may be made for altering rates in accordance with the decisions of the appropriate State agency which may have regulatory authority.

(4) Run for a period of time which is at least equal to the repayment period of the loan. State Directors may approve contracts for shorter periods of time if the supplier cannot legally contract for such period, or if the owner and supplier find it impossible or impractical to negotiate a contract for the maximum period permissible under State law, provided:

(i) The supplier is subject to regulations of the Federal Energy Regulatory Commission or other Federal or State agency whose jurisdiction can be expected to prevent unwarranted curtailment of supply; or

(ii) The contract contains adequate provisions for renewal; or

(iii) A determination is made that in the event the contract is terminated, there are or will be other adequate

sources available to the owner that can feasibly be developed or purchased.

(5) Set out in detail the amount of connection or demand charges, if any, to be made by the supplier as a condition to making the service available to the owner. However, the payment of such charges from loan funds shall not be approved unless FmHA or its successor agency under Public Law 103-354 determines that it is more feasible and economical for the owner to pay such a connection charge than it is for the owner to provide the necessary supply by other means.

(6) Provide for a pledge of the contract to FmHA or its successor agency under Public Law 103-354 as part of the security for the loan.

(7) Not contain provisions for:

(i) Construction of facilities which will be owned by the supplier. This does not preclude the use of money paid as a connection charge for construction to be done by the supplier.

(ii) Options for the future sale or transfer. This does not preclude an agreement recognizing that the supplier and owner may at some future date agree to a sale of all or a portion of the facility.

(g) *Sewage treatment and bulk water sales contracts.* Owners entering into agreements with private or public parties to treat sewage or supply bulk water shall have written contracts for such service and all such contracts shall be subject to FmHA or its successor agency under Public Law 103-354 concurrence. Paragraph (f) of this section should be used as a guide to prepare such contracts.

(h) *Performing construction.* Owners are encouraged to accomplish construction through contracts with recognized contractors. Owners may accomplish construction by using their own personnel and equipment provided the owners possess the necessary skills, abilities and resources to perform the work and provided a licensed engineer or architect prepares design drawings and specifications and inspects construction and furnishes inspection reports as required by paragraph (o) of this section. For other than utility-type facilities, inspection services may be provided by individuals as approved by the FmHA or its successor agency

under Public Law 103-354 State Director. In either case, the requirements of paragraph (j) of this section apply. Payments for construction will be handled under § 1942.17(p)(5) of this part.

(i) *Owner's contractual responsibility.* This subpart does not relieve the owner of any contractual responsibilities under its contract. The owner is responsible for the settlement of all contractual and administrative issues arising out of procurements entered into in support of a loan or grant. These include, but are not limited to: source evaluation, protests, disputes, and claims. Matters concerning violation of laws are to be referred to the local, State, or Federal authority as may have jurisdiction.

(j) *Owner's procurement regulations.* Owner's procurement regulations must comply with the following standards:

(1) *Code of conduct.* Owners shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by FmHA or its successor agency under Public Law 103-354 funds. No employee, officer or agent of the owner shall participate in the selection, award, or administration of a contract supported by FmHA or its successor agency under Public Law 103-354 funds if a conflict of interest, real or apparent, would be involved. Examples of such conflicts would arise when: the employee, officer or agent; any member of their immediate family; their partner; or an organization which employs, or is about to employ, any of the above; has a financial or other interest in the firm selected for the award.

(i) The owner's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties of subagreements.

(ii) To the extent permitted by State or local law or regulations, the owner's standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the owner's officers, employees, agents, or by contractors or their agents.

(2) *Maximum open and free competition.* All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition. Procurement procedures shall not restrict or eliminate competition. Examples of what are considered to be restrictive of competition include, but are not limited to: Placing unreasonable requirements on firms in order for them to qualify to do business; noncompetitive practices between firms; organizational conflicts of interest; and unnecessary experience and bonding requirements. In specifying material(s), the owner and its consultant will consider all materials normally suitable for the project commensurate with sound engineering practices and project requirements. For a water or waste disposal facility, FmHA or its successor agency under Public Law 103-354 shall consider fully any recommendation made by the loan applicant or borrower concerning the technical design and choice of materials to be used for such a facility. If FmHA or its successor agency under Public Law 103-354 determines that a design or material, other than those that were recommended should be considered by including them in the procurement process as an acceptable design or material in the water or waste disposal facility, FmHA or its successor agency under Public Law 103-354 shall provide such applicant or borrower with a comprehensive justification for such a determination. The justification will be documented in writing.

(3) *Owner's review.* Proposed procurement actions shall be reviewed by the owner's officials to avoid the purchase of unnecessary or duplicate items. Consideration should be given to consolidation or separation of procurement items to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, owners are encouraged to enter into State and local intergovernmental

agreements for procurement or use of common goods and services.

(4) *Solicitation of offers*, whether by competitive sealed bids or competitive negotiation, shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. The description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used to define the performance or other salient requirements of a procurement. The specific features of the named brands which must be met by offerors shall be clearly stated.

(ii) Clearly specify all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(5) *Small, minority, and women's businesses and labor surplus area firms*. (i) affirmative steps should be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

(A) Include qualified small and minority businesses on solicitation lists.

(B) Assure that small and minority businesses are solicited whenever they are potential sources.

(C) When economically feasible, divide total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(D) Where the requirement permits, establish delivery schedules which will encourage participation by small and minority businesses.

(E) Use the services and assistance of the Small Business Administration and

the Office of Minority Business Enterprise of the Department of Commerce.

(F) If any subcontracts are to be let, require the prime contractor to take the affirmative steps in paragraphs (j)(5)(i) (A) through (E) of this section.

(ii) Owners shall take similar appropriate affirmative action in support of women's businesses.

(iii) Owners are encouraged to procure goods and services from labor surplus areas.

(iv) Owners shall submit a written statement or other evidence to FmHA or its successor agency under Public Law 103-354 of the steps taken to comply with paragraphs (j)(5)(i) (A) through (F), (j)(5)(ii), and (j)(5)(iii) of this section.

(6) *Contract pricing*. Cost plus a percentage of cost method of contracting shall not be used.

(7) *Unacceptable bidders*. The following will not be allowed to bid on, or negotiate for, a contract or subcontract related to the construction of the project:

(i) An engineer or architect as an individual or firm who has prepared plans and specifications or who will be responsible for monitoring the construction;

(ii) Any firm or corporation in which the owner's architect or engineer is an officer, employee, or holds or controls a substantial interest;

(iii) The governing body's officers, employees, or agents;

(iv) Any member of the immediate family or partners in paragraphs (j)(7)(i), (j)(7)(ii), or (j)(7)(iii) of this section; or

(v) An organization which employs, or is about to employ, any person in paragraph (j)(7)(i), (j)(7)(ii), (j)(7)(iii) or (j)(7)(iv) of this section.

(8) *Contract award*. Contracts shall be made only with responsible parties possessing the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall include but not be limited to matters such as integrity, record of past performance, financial and technical resources, and accessibility to other necessary resources. Contracts shall not be made with parties who are suspended or debarred.

(k) *Procurement methods.* Procurement shall be made by one of the following methods: small purchase procedures; competitive sealed bids (formal advertising); competitive negotiation; or noncompetitive negotiation. Competitive sealed bids (formal advertising) is the preferred procurement method for construction contracts.

(1) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than \$10,000. If small purchase procedures are used for a procurement, written price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) *Competitive sealed bids.* In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest, price and other factors considered. When using this method the following shall apply:

(i) At a sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of qualified sources. In addition, the invitation shall be publicly advertised.

(ii) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation under paragraph (j)(4) of this section.

(iii) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(iv) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. When specified in the bidding documents, factors such as discounts and transportation costs shall be considered in determining which bid is lowest.

(v) Any or all bids may be rejected by the owner when it is in their best interest.

(3) *Competitive negotiation.* In competitive negotiations, proposals are re-

quested from a number of sources and the Request for Proposal is publicized. Negotiations are normally conducted with more than one of the sources submitting offers. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising and where discussions and bargaining with a view to reaching agreement on the technical quality, price, other terms of the proposed contract and specifications may be necessary. If competitive negotiation is used for a procurement, the following requirements shall apply:

(i) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(ii) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required, and their relative importance.

(iii) The owner shall provide mechanisms for technical evaluation of the proposals received, determination of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

(iv) Award may be made to the responsible offeror whose proposal will be most advantageous to the owner, price and other factors considered. Unsuccessful offerors should be promptly notified.

(v) Owners may utilize competitive negotiation procedures for procurement of architectural/engineering and other professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiations of fair and reasonable compensation.

(4) *Noncompetitive negotiation.* Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is not feasible under small purchase, competitive sealed bids (formal advertising) or

competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiations are limited to the following:

(i) The item is available only from a single source; or

(ii) There exists a public exigency or emergency and the urgency for the requirement will not permit a delay incident to competitive solicitation; or

(iii) After solicitation of a number of sources, competition is determined inadequate; or

(iv) No acceptable bids have been received after formal advertising; or

(v) The procurement of architectural/engineering and other professional services.

(vi) The aggregate amount does not exceed \$50,000.

(5) *Additional procurement methods.* Additional innovative procurement methods may be used by the owner with prior written approval of the FmHA or its successor agency under Public Law 103-354 National Office.

(1) *Alternate contracting methods.* The services of the consulting engineer or architect and the general construction contractor shall normally be procured from unrelated sources in accordance with paragraph (j)(7) of this section. Alternate contracting methods which combine or rearrange design, inspection or construction services (such as design/build or construction management/constructor) may be used with Rural Development written approval.

(1) The owner will request Rural Development approval by providing the following information to the State Office for review and approval by the State Architect:

(i) The owner's written request to use an unconventional contracting method with a description of the proposed method.

(ii) A proposed scope of work describing in clear, concise terms the technical requirements for the contract. This would include a nontechnical statement summarizing the work to be performed by the contractor, the expected results, the sequence in which the work is to be performed, and a proposed construction schedule.

(iii) A proposed firm-fixed-price contract for the entire project which provides that the contractor shall be re-

sponsible for any extra cost which may result from errors or omissions in the services provided under the contract and compliance with all Federal, State, and local requirements effective on the contract execution date.

(iv) An evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.

(v) A detailed listing and cost estimate of equipment and supplies not included in the construction contract but which are necessary to properly operate the facility.

(vi) Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.

(vii) Preliminary plans and outline specifications. However, final plans and specifications must be completed and reviewed by Rural Development prior to the start of construction.

(viii) The owner's attorney's opinion and comments regarding the legal adequacy of the proposed contract documents and evidence that the owner has the legal authority to enter into and fulfill the contract.

(2) The State Office may approve design/build or construction management/constructor projects if the contract amount is equal to or less than \$250,000.

(3) If the contract amount exceeds \$250,000, National Office prior concurrence must be obtained in accordance with §1942.9(b) of this subpart. Additional information, such as plans and specifications, may be requested by the National Office.

(4) The Design/Build method of construction is one in which the architectural and engineering services, normally provided by an independent consultant to the owner, are combined with those of the General Contractor under a single source contract. These services are commonly provided by a Design/Build firm, a joint venture between an architectural firm and a construction firm, or a company providing pre-engineered buildings and design services.

(5) The Construction Management/constructor (CMc), acts in the capacity of a General Contractor and is actually responsible for the construction. This type of construction management is

also referred to as Construction Manager “At Risk.” The construction contract is between the owner and the CMc. The CMc, in turn, may subcontract for some or all of the work.

(6) The National Office may approve other alternative contact methods, such as Construction Management/advisor (CMA), with a recommendation from the State Office. The recommendation shall indicate the circumstances which prove this method advantageous to the applicant and the Government. A CMA acts in an advisory capacity to the owner, and the actual contract for construction is between the owner and a prime contractor or multiple prime contractors. When a contract for an architect and a CMA are being provided, it is important to make sure that separate professionals are not being paid to provide similar services. Further, paragraph (e)(3) of this section discourages separate contracts for construction.

(7) All alternate contracting method projects must comply with the requirements for “maximum open and free competition” in paragraph (j)(2) of this section. Choosing an alternate contracting method is not a way to avoid competition. Further information on procurement methods, which must be followed, is provided in paragraph (k) of this section.

(m) *Contracts awarded prior to preapplications.* Owners awarding construction or other procurement contracts prior to filing a pre-application with FmHA or its successor agency under Public Law 103-354 must comply with the following:

(1) *Evidence.* Provide conclusive evidence that the contract was entered into without intent to circumvent the requirements of FmHA or its successor agency under Public Law 103-354 regulations. The evidence will consist of at least the following:

(i) The lapse of a reasonable period of time between the date of contract award and the date of filing the preapplication which clearly indicates an irreconcilable failure of previous financial arrangements; or

(ii) A written statement explaining initial plans for financing the project and reasons for failure to obtain the planned credit.

(2) *Modifications.* Modify the outstanding contract to conform with the provisions of this subpart. Where this is not possible, modifications will be made to the extent practicable and, as a minimum, the contract must comply with all State and local laws and regulations as well as statutory requirements and executive orders related to the FmHA or its successor agency under Public Law 103-354 financing. When all construction is complete and it is impracticable to modify the contracts, the owner must provide the certification required by paragraph (m)(4) of this section.

(3) *Consultant’s certification.* Provide a certification by an engineer or architect that any construction performed complies fully with the plans and specifications.

(4) *Owner’s certification.* Provide a certification by the owner that the contractor has complied with all statutory and executive requirements related to FmHA or its successor agency under Public Law 103-354 financing for construction already performed even though the requirements may not have been included in the contract documents.

(n) *Contract provisions.* In addition to provisions defining a sound and complete contract, any recipient of FmHA or its successor agency under Public Law 103-354 funds shall include the following contract provisions or conditions in all contracts:

(1) *Remedies.* Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. A realistic liquidated damage provision should also be included.

(2) *Termination.* All contracts exceeding \$10,000, shall contain provisions for termination by the owner including the manner by which it will be affected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions when the contract may be terminated because of circumstances beyond the control of the contractor.

(3) *Surety*. In all contracts for construction or facility improvements awarded exceeding \$100,000, the owner shall require bonds, a bank letter of credit or cash deposit in escrow assuring performance and payment, each in the amount of 100 percent of the contract cost. The surety will normally be in the form of performance bonds and payment bonds; however, when other methods of surety may be necessary, bid documents must contain provisions for such alternative types of surety. The use of surety other than performance bonds and payment bonds requires concurrence by the National Office after submission of a justification by the State Director together with the proposed form of escrow agreement or letter of credit. For contracts of lesser amounts, the owner may require surety. When a surety is not provided, contractors will furnish evidence of payment in full for all materials, labor, and any other items procured under the contract. Form FmHA or its successor agency under Public Law 103-354 1924-10, "Release by Claimants," and Form FmHA or its successor agency under Public Law 103-354 1924-9, "Certificate of Contractor's Release," may be obtained at the local FmHA or its successor agency under Public Law 103-354 office and used for this purpose. The United States, acting through the Farmers Home Administration or its successor agency under Public Law 103-354, will be named as co-obligee on all surety unless prohibited by State law. Companies providing performance bonds and payment bonds must hold a certificate of authority as an acceptable surety on Federal bonds as listed in Treasury Circular 570 as amended and be legally doing business in the State where the facility is located.

(4) *Equal Employment Opportunity*. All contracts awarded in excess of \$10,000 by owners shall contain a provision requiring compliance with Executive Order 11246, entitled, "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by Department of Labor regulations 41 CFR part 60.

(5) *Anti-kickback*. All contracts for construction shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874).

This Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled. The owner shall report all suspected or reported violations to FmHA or its successor agency under Public Law 103-354.

(6) *Records*. All negotiated contracts (except those of \$2,500 or less) awarded by owners shall include a provision to the effect that the owner, FmHA or its successor agency under Public Law 103-354, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to a specific Federal loan program for the purpose of making audits, examinations, excerpts, and transcriptions. Owners shall require contractors to maintain all required records for three years after owners make final payments and all other pending matters are closed.

(7) *State Energy Conservation Plan*. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(8) *Change orders*. The construction contract shall require that all contract change orders be approved in writing by FmHA or its successor agency under Public Law 103-354.

(9) *FmHA or its successor agency under Public Law 103-354 concurrence*. All contracts must contain a provision that they shall not be effective unless and until the FmHA or its successor agency under Public Law 103-354 State Director or designee concurs in writing.

(10) *Retainage*. All construction contracts shall contain adequate provisions for retainage. No payments will be made that would deplete the retainage nor place in escrow any funds that are required for retainage nor invest the retainage for the benefit of the contractor. The retainage shall not be less than an amount equal to 10 percent of an approved partial payment estimate until 50 percent of the work

has been completed. If the job is proceeding satisfactory at 50 percent completion, further partial payments may be made in full, however, previously retained amounts shall not be paid until construction is substantially complete. Additional amounts may be retained if the job is not proceeding satisfactorily, but in no event shall the total retainage be more than 10 percent of the value of the work completed.

(11) *Other compliance requirements.* Contracts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency (EPA) regulations 40 CFR part 15, which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to FmHA or its successor agency under Public Law 103–354 and to the U.S. Environmental Protection Agency, Assistant Administrator for Enforcement. Solicitations and contract provisions shall include the requirements of 40 CFR part 15.4(c) as set forth in guide 18 of this subpart which is available in all FmHA or its successor agency under Public Law 103–354 offices.

(o) *Contract administration.* Owners shall be responsible for maintaining a contract administration system to monitor the contractors' performance and compliance with the terms, conditions, and specifications of the contracts.

(1) *Preconstruction conference.* Prior to beginning construction, the owner will schedule a preconstruction conference where FmHA or its successor agency under Public Law 103–354 will review the planned development with the owner, its architect or engineer, resident inspector, attorney, contractor(s), and other interested parties. The conference will thoroughly cover applicable items included in Form FmHA or its successor agency under Public Law 103–354 1924–16, "Record of Preconstruction Conference," and the discussion and agreements will be doc-

umented. Form FmHA or its successor agency under Public Law 103–354 1924–16 may be used for this purpose.

(2) *Monitoring reports.* Each owner will be required to monitor and provide reports to FmHA or its successor agency under Public Law 103–354 on actual performance during construction for each project financed, or to be financed, in whole or in part with FmHA or its successor agency under Public Law 103–354 funds to include:

(i) A comparison of actual accomplishments with the construction schedule established for the period. The partial payment estimate may be used for this purpose.

(ii) A narrative statement giving full explanation of the following:

(A) Reasons why established goals were not met.

(B) Analysis and explanation of cost overruns or high unit costs and how payment is to be made for the same.

(iii) If events occur between reports which have a significant impact upon the project, the owner will notify FmHA or its successor agency under Public Law 103–354 as soon as any of the following conditions are met:

(A) Problems, delays, or adverse conditions which will materially affect the ability to attain program objectives or prevent the meeting of project work units by established time periods. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any Federal assistance needed to resolve the situation.

(B) Favorable developments or events which enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected or which will result in cost underruns or lower unit costs than originally planned and which may result in less FmHA or its successor agency under Public Law 103–354 assistance.

(3) *Inspection.* Full-time resident inspection is required for all construction unless a written exception is made by FmHA or its successor agency under Public Law 103–354 upon written request of the owner. Unless otherwise agreed, the resident inspector will be provided by the consulting architect/engineer. Prior to the preconstruction conference, the architect/engineer will

submit a resume of qualifications of the resident inspector to the owner and to FmHA or its successor agency under Public Law 103-354 for acceptance in writing. If the owner provides the resident inspector, it must submit a resume of the inspector's qualifications to the project architect/engineer and FmHA or its successor agency under Public Law 103-354 for acceptance in writing prior to the preconstruction conference. The resident inspector will work under the general supervision of the project architect/engineer. A guide format for preparing daily inspection reports (Guide 11 of this subpart) and Form FmHA or its successor agency under Public Law 103-354 1924-18, "Partial Payment Estimate," are available on request from FmHA or its successor agency under Public Law 103-354.

(4) *Inspector's daily diary.* The resident inspector will maintain a record of the daily construction progress in the form of a daily diary and daily inspection reports as follows:

(i) A complete set of all daily construction records will be maintained and the original set furnished to the owner upon completion of construction.

(ii) All entries shall be legible and shall be made in ink.

(iii) Daily entries shall include but not be limited to the date, weather conditions, number and classification of personnel working on the site, equipment being used to perform the work, persons visiting the site, accounts of substantive discussions, instructions given to the contractors, directions received, all significant or unusual happenings involving the work, any delays, and daily work accomplished.

(iv) The daily entries shall be made available to FmHA or its successor agency under Public Law 103-354 personnel and will be reviewed during project inspections.

(5) *Prefinal inspections.* A prefinal inspection will be made by the owner, resident inspector, project architect or engineer, representatives of other agencies involved, the District Director and a FmHA or its successor agency under Public Law 103-354 State Office staff representative, preferably the State Staff architect or engineer. Prefinal inspections may be made

without FmHA or its successor agency under Public Law 103-354 State Office staff participation if the State Director or a designee determines that the facility does not utilize complicated construction techniques, materials or equipment for facilities such as small fire stations, storage buildings or minor utility extensions, and that an experienced District Office staff representative will be present. The inspection results will be recorded on Form FmHA or its successor agency under Public Law 103-354 1924-12, "Inspection Report," and a copy provided to all appropriate parties.

(6) *Final inspection.* A final inspection will be made by FmHA or its successor agency under Public Law 103-354 before final payment is made.

(7) *Change in development plans.* (i) Changes in development plans may be approved by FmHA or its successor agency under Public Law 103-354 when requested by owners, provided:

(A) Funds are available to cover any additional costs; and

(B) The change is for an authorized loan purpose; and

(C) It will not adversely affect the soundness of the facility operation or FmHA or its successor agency under Public Law 103-354's security; and

(D) The change is within the scope of the contract.

(ii) Changes will be recorded on Form FmHA or its successor agency under Public Law 103-354 1924-7, "Contract Change Order," or, other similar forms may be used with the prior approval of the State Director or designee. Regardless of the form, change orders must be approved by the FmHA or its successor agency under Public Law 103-354 State Director or a designated representative.

(iii) Changes should be accomplished only after FmHA or its successor agency under Public Law 103-354 approval on all changes which affect the work and shall be authorized only by means of contract change order. The change order will include items such as:

(A) Any changes in labor and material and their respective cost.

(B) Changes in facility design.

(C) Any decrease or increase in quantities based on final measurements

that are different from those shown in the bidding schedule.

(D) Any increase or decrease in the time to complete the project.

(iv) All changes shall be recorded on chronologically numbered contract change orders as they occur. Change orders will not be included in payment estimates until approved by all parties.

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§ 1942.19 Information pertaining to preparation of notes or bonds and bond transcript documents for public body applicants.

(a) *General.* This section includes information for use by public body applicants in the preparation and issuance of evidence of debt (bonds, notes, or debt instruments, herein referred to as bonds). This section is made available to applicants as appropriate for application processing and loan docket preparation.

(b) *Policies related to use of bond counsel.* Preparation of the bonds and the bond transcript documents will be the responsibility of the applicant. Public body applicants will obtain the services and opinion of recognized bond counsel with respect to the validity of a bond issue, except as provided in (b) (1) through (3) below. The applicant normally will be represented by a local attorney who will obtain the assistance of a recognized bond counsel firm which has experience in municipal financing with such investors as investment dealers, banks, and insurance companies.

(1) *Issues of \$250,000 or less.* At the option of the applicant for issues of \$250,000 or less, bond counsel may be used for the issuance of a final opinion only and not for the preparation of the bond transcript and other documents when the applicant, FmHA or its successor agency under Public Law 103-354, and bond counsel have agreed in advance as to the method of preparation of the bond transcript documents. Under such circumstances the applicant will be responsible for the preparation of the bond transcript documents.

(2) *Issues of \$50,000 or less.* At the option of the applicant and with the prior approval of the FmHA or its successor agency under Public Law 103-354 State Director, the applicant need not use bond counsel if:

(i) The amount of the issue does not exceed \$50,000 and the applicant recognizes and accepts the fact that processing the application may require additional legal and administrative time.

(ii) There is a significant cost saving to the applicant particularly with reference to total legal fees after determining what bond counsel would charge as compared with what the local attorney will charge without bond counsel.

(iii) The local attorney is able and experienced in handling this type of legal work.

(iv) The applicant understands that, if it is required by FmHA or its successor agency under Public Law 103-354 to refinance its loan pursuant to the statutory refinancing requirements, it will probably have to obtain at its expense a bond counsel's opinion at that time.

(v) All bonds will be prepared in accordance with this regulation and will conform as nearly as possible to the preferred methods of preparation stated in paragraph (e) of this section but still be consistent with State law.

(vi) Many matters necessary to comply with FmHA or its successor agency under Public Law 103-354 requirements such as land rights, easements, and organizational documents will be handled by the applicant's local attorney. Specific closing instructions will be issued by the Office of the General Counsel of the U.S. Department of Agriculture for the guidance of FmHA or its successor agency under Public Law 103-354.

(3) *For loans of less than \$500,000.* The applicant shall not be required to use bond counsel in a straight mortgage-note situation where competitive bidding is not required for the sale of the debt instrument, unless a complicated financial situation exists with the applicant. In addition, if there is a known backlog in a particular OGC regional office the applicant will be advised of such backlog and it will be suggested to the applicant that the appointment