

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. AO-370-A5; FV93-930-1]

Proposed Tart Cherry Marketing Agreement and Order; Reopening of Comment Period To File Written Exceptions to the Proposed Marketing Agreement and Order for Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Reopening of the comment period to file written exceptions to the proposed marketing agreement and order.

SUMMARY: Notice is hereby given that the time period for filing written exceptions to the proposed marketing agreement and order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin is reopened until January 16, 1996.

DATES: Comments must be received by January 16, 1996.

ADDRESSES: Interested persons are invited to submit written comments in triplicate to the Hearing Clerk, U.S. Department of Agriculture, room 1079-S, Washington, DC, 20050-9200. All written comments will be available for public inspection at the Office of the Hearing Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: (1) R. Charles Martin or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, room 2523-S, AMS, USDA, P.O. Box 96456, Washington, DC 20090-6456; telephone number (202) 720-5053.

(2) Robert Curry, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220

S.W. Third Avenue, room 369, Portland, Oregon, 97204; telephone: (503) 326-2725.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on November 23, 1993, and published in the November 30, 1993, issue of the Federal Register (58 FR 63108); Notice of Additional Hearings on the Proposed Agreement and Order issued on December 20, 1993, and published in the December 23, 1993, issue of the Federal Register (58 FR 68065); and an Amendment to the Notice of Hearing issued on January 25, 1994, and published in the Federal Register (59 FR 4259) on January 31, 1994. The Notice Reopening the Hearing was issued on December 5, 1994, and published in the Federal Register on December 8, 1994 (59 FR 63273). The Recommended Decision and Opportunity To File Written Exceptions to the proposed marketing agreement and order was issued on November 20, 1995, and published in the November 29, 1995, Federal Register (60 FR 61292).

The proposed marketing agreement and order are based on the record of a public hearing held December 15-17, 1993, in Grand Rapids, Michigan; January 10-11, 1994, in Rochester, New York; January 13, 1994, in Provo, Utah; February 15-17, 1994, in Portland, Oregon; January 9-10, 1995, in Grand Rapids, Michigan; and, January 12-13, 1995, in Portland, Oregon. These multiple hearing sessions were held to receive evidence on marketing order proposals from growers, handlers, processors and other interested parties located throughout the proposed production area.

The Recommended Decision was issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act, and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders [7 CFR part 900]. The deadline for filing written exceptions with the Hearing Clerk on the Recommended Decision was December 29, 1995.

The U.S. Department of Agriculture (USDA) has received three requests from interested parties to provide more time for interested persons to analyze the Recommended Decision and prepare and file with the Hearing Clerk their

written comments. These requesters cite severe weather (that led to extended electrical power outages) in their respective growing areas, the holiday season and the voluminous hearing record as the reasons for requesting a 30-day extension for filing written comments to January 31, 1996.

Reopening the period in which written comments may be filed will provide interested persons more time to review the Recommended Decision and submit written comments thereto. Extending the comment period by 18 days to January 16, 1996, would provide additional time for commenters, to fairly address their concerns. A delay of 18 days should not substantially add to the time required to complete this proceeding. Accordingly, the period in which to file written comments is reopened until January 16, 1996. This notice is issued pursuant to the Act and the applicable rules of practice governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Authority: 7 U.S.C. 601-674.

Dated: December 27, 1995.

Kenneth C. Clayton,
Acting Administrator, Agricultural Marketing Service.

[FR Doc. 95-31574 Filed 12-27-95; 3:36 pm]

BILLING CODE 3410-02-P

Rural Utilities Service

7 CFR 1789

RIN 0572-AB17

Use of Consultants Funded by Borrowers

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS) hereby proposes to implement recent amendments to the Rural Electrification Act of 1936, as amended, (RE Act) (7 U.S.C. 918(c)) and to amend 7 CFR chapter XVII by adding a new Part 1789, Use of Consultants Funded by Borrowers. This part would set forth procedures and policies pursuant to which a borrower under the RE Act may fund consultants used by the Administrator for financial, legal, engineering, environmental and other technical advice and services. The use of the consultants will assist RUS in the

expeditious review of applications for financial assistance or other approvals sought by borrowers.

DATES: Written comments concerning the proposed rule and/or its information collection requirements must be received by RUS or carry a postmark or equivalent by March 4, 1996.

ADDRESSES: Written comments should be addressed to F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, U.S. Department of Agriculture, Rural Utilities Service, AG Box 1522, Washington, DC 20250-1522. RUS requires a signed original and 3 copies of all comments (7 CFR 1700.30(e)). Comments will be available for public inspection during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, (address as above). Telephone: (202) 720-0736. Facsimile: (202) 720-4120.

SUPPLEMENTARY INFORMATION: This proposed rule has been determined to be not significant for purposes of Executive Order 12866, Regulatory Planning and Review, and therefore has not been reviewed by the Office of Management and Budget (OMB). The Administrator of RUS has determined that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to this rule. The Administrator of RUS has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore this action does not require an environmental impact statement or assessment. This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. A Notice of Final Rule title Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts RUS electric loans and loan guarantees from coverage under this Order. This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This proposed rule: (1) Will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule; (2) will not have any retroactive effect; and (3) will not require administrative proceedings before any parties may file suit challenging the provisions of this rule in accordance with existing law.

The programs covered by this rule are listed in the Catalog of Federal Domestic Assistance Programs under numbers 10.850, Rural Electrification Loans and Loan Guarantees, 10.851, Rural

Telephone Loans and Loan Guarantees, and 10.852, Rural Telephone Bank Loans. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402-9325.

Information Collection and Recordkeeping Requirements

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) RUS is requesting comments on the information collection incorporated in this proposed rule.

Dates: Comment on this information collection must be received by March 4, 1996.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

For Further Information Contact: Sue Arnold, Financial Analyst, Program Support Staff, Rural Utilities Service, U.S. Department of Agriculture, 14th & Independence Avenue, SW., AG Box 1522, Washington, DC 20250. Telephone: (202) 690-1078. FAX: (202) 720-4120.

Supplementary Information:

Title: Title 7 Part 1789, Use of Consultants Funded by Borrowers.

Type of Request: New information collection.

Abstract: On November 1, 1993, Public Law 103-129 amended section 18 of the RE Act to provide a mechanism for expediting RUS reviews. As amended, section 18(c) authorized RUS to use consultants voluntarily funded by borrowers for financial, legal, engineering, and other technical services. The consultant may be used to facilitate timely action on applications by borrowers for financial assistance and for approvals required by RUS, pursuant to the terms of outstanding loans, or otherwise. RUS may not require borrowers to fund consultants. The provisions of section 18(c) may be utilized only at the borrower's request.

Estimate of Burden: Public reporting burden for this collection of information

is estimated to average 2 hours per response.

Respondents: Business or other for-profit, small businesses or organizations.

Estimated Number of Respondents: 6.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 12.

Copies of this information collection can be obtained from Dawn Wolfgang, Program Support Staff, at (202) 720-0812.

Comments: Send comments regarding this information collection requirement to the Office of Information and Regulatory Affairs, OMB, ATTN: Desk Officer, USDA, Room 10102, New Executive Office Building, Washington, DC 20503, and F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, Rural Utilities Service, AG Box 1522, Washington, DC 20250-1522.

Comments to OMB are best assured of having full effect if OMB receives them within 30 days of publication in the Federal Register.

All responses to this information collection requirement will be summarized and included in the final rule. All comments will become a matter of public record.

Background

Section 18 of the RE Act was amended effective November 1, 1993, pursuant to Public Law 103-129, 2(c)(4), 107 Stat. 1364. As amended, subsection (c) of section 18 authorizes the RUS to use consultants funded by borrowers for financial, legal, engineering, and other technical advice and services. The consultants are to be used to facilitate timely action on applications by borrowers for financial assistance and for approvals required by RUS pursuant to the terms of outstanding loan or security instruments or otherwise.

Subsection (c) expressly requires that RUS establish procedures for the use of consultants to ensure that the consultants have no financial or other conflicts of interest in the outcome of the application. Subsection (c) further provides that funding of consultants is strictly voluntary with the borrowers, that RUS may not require borrowers to agree to fund consultants. This proposed rule sets forth procedures and policies implementing the authority under subsection (c).

Policy

RUS believes that both RUS and its borrowers will be well served by the prudent use of this authority. It will assist RUS in the processing of certain complex transactions that have placed a

burden on its staff and resources. For example, financial and legal consultants may assist in the review of certain transactions involving complicated financing arrangements between borrowers and third parties that potentially impact on the feasibility of and security for outstanding government loans. Such transactions may require the review and analysis of voluminous documents and the development of an extensive administrative record. The transactions may involve complex technical issues regarding which RUS has limited expertise thus slowing the review process. Such transactions may be very time sensitive; any delays may jeopardize the transaction or reduce the benefits of the transaction to the borrower. In some cases, the transactions are very important to the borrower but cannot be given corresponding priority by the RUS as it dedicates its resources to matters that have program wide significance. It is in the interests of both RUS and the borrower to expedite review of such transactions with borrower funded consultants.

Examples of how RUS might use borrower funded consultants include, but are not limited to, the use of an engineering firm to review proposed generation projects for technical or financial feasibility, e.g., wind or hydroelectric projects utilizing relatively new technology. RUS could use consultants to make periodic visits to major construction projects and report to RUS on the status of construction and whether or not the project is on budget. Financial advisory consultants may be used to evaluate new financial products which are the basis for requests to modify the RUS mortgage. Legal support services will enhance RUS' ability to review and process merger, consolidation and holding company applications from both telephone and electric borrowers. RUS would also consider using environmental consultants to prepare environmental assessments and environmental impact studies under RUS' direction and supervision.

RUS does not, however, believe that use of subsection (c) authority is authorized or appropriate for all transactions requiring RUS review. The authority will not be used unless it is reasonably expected to facilitate timely action on an application by RUS. Even then, it may not always be in RUS' interest to rely on consultants. For example, transactions that involve matters that RUS is particularly qualified to address or which have program wide implications may not be well suited for expedited processing

facilitated with borrower funded consultants. Thus, RUS will weigh its use of the authority under subsection (c) on a case by case basis.

Procedure

Under the proposed rule RUS may enter into contracts on the basis of case by case procurements or on a retainer basis with a series of consultants having different areas of expertise, i.e. financial, legal, engineering, or environmental. In order to assure that sufficient consultant resources are available and to allow for competition in terms of both quality and cost, RUS may contract with several different consultants in a given area of expertise.

RUS will solicit bids for the services of financial, legal, engineering, and environmental consultants in accordance with the provisions of the Federal Acquisition Regulations (FAR), 48 CFR Chapter 1. Notwithstanding the use of borrowers' funds, it has been determined that such funding must be treated as appropriated funds and the contracts are subject to the provisions of FAR.

The proposed rule provides that RUS will decide when timely consideration of an application or approval would best be facilitated by the use of borrower funded consultants. When the RUS has made such a determination, and the borrower in question is willing to fund consulting services, the borrower must provide to RUS an appropriate notice of proposal to fund consulting services. RUS will consider the borrower's proposal, whether it is consistent with this regulation and otherwise in the interests of the government. If RUS chooses to proceed with the borrower's proposal, RUS will require the borrower and the consultant selected by RUS to execute a funding agreement which complies with the regulation. The funding agreement will provide for the borrower to establish and fund an escrow account with a third-party commercial institution prior to the commencement of work by the consultant.

The use of a third-party commercial institution will allow for the escrow account to be interest-bearing and greatly ease the administrative burden of arranging for any excess funds to be remitted to the borrower upon the closing out of a task order. With the exception of an annual retainer fee, if applicable, the consultants shall not be entitled to any payments from RUS. Rather, all payment obligations for work performed must be satisfied by amounts available in the escrow account and RUS shall have sole discretion in

directing that payments be made from the escrow account.

Once the escrow account is funded, RUS will then issue a task order to the consultant under the applicable contract and the consultant will commence work for RUS. Periodically, the consultant will submit invoices to RUS. Upon due authorization by RUS, the escrow agent will make payments to the consultant. The escrow account will be closed and any remaining funds remitted to the borrower upon direction from RUS.

The procedure outlined above generally applies to financial, legal, engineering and environmental consultant services. The proposed rule reserves the discretion, however, for RUS to contract for any type of consultant services on a case by case basis after receipt of an appropriate notice of proposal to fund from the borrower.

Legal and Selected Other Consultants

The procedures and policies applicable to the use of legal consultants pursuant to subsection 18(c) differs from the use of other consultants in several key respects. First, pursuant to 7 CFR part 2.47(a)(1), the Administrator may utilize consultants and attorneys for the provision of legal services with the concurrence of the General Counsel. The Secretary by regulation (7 CFR 2.31) has designated the General Counsel as the chief law officer of the Department and legal advisor to the Secretary with the responsibility for providing legal services for all activities of the Department; accordingly, any proposal by RUS to use outside legal counsel will require the approval of the General Counsel. The approval will include a review of the nature of the transaction and the scope of legal services to be provided. Moreover, any contracts for legal consultants will provide that an attorney from OGC will serve as a technical representative and adviser to the contracting officer. The technical representative will be responsible for, among other matters, evaluating the adequacy of performance.

The conflict of interest provisions in the proposed rule are different from the FAR in certain respects, particularly in the case of legal and financial consultants. For all consultants, however, it is important to protect against the possibility, or the appearance, that those consultants providing services to RUS might handle particular assignments in such a way as to encourage their own future employment with RUS program beneficiaries after fulfilling their government contract requirements. The electric and telephone borrowers are

particularly closely tied to RUS since RUS is responsible for a significant percentage of their annual capital requirements. Because of the unique position of RUS vis a vis its borrowers, it is in the government's interest that prospective legal counsel, financial consultants and other consultants be reasonably indifferent to the subsequent marketing implications of having RUS as a client. Additionally, because of the special nature of the attorney/client relationship, there is a need to provide for maximum discretion on the part of the RUS Administrator in the determination of conflict criteria for legal consultants. Accordingly, proposed conflict provisions specific to borrower funded RUS consultants are as follows:

(1) Disclosure requirements incorporated in procurements under the proposed rule shall provide that consultants disclose all business relationships with current or former RUS borrowers at the time proposals to offer consulting services are made to RUS and in the event additional business relationships are entered into subsequent to the original disclosure.

(2) Certification requirements incorporated in procurements under the proposed rule shall provide that consultants certify, at the time a proposal is made to provide consulting services to RUS, to the best of their knowledge and belief, that no Organizational Conflict of Interest exists and there are no relevant facts or circumstances which could give rise to an Organizational Conflict of Interest, or the consultant has disclosed all such relevant information. The representations in the certificate shall be deemed reaffirmed upon the execution of the Consultant Contract and upon the undertaking of each Task Order by the contractor.

(3) The determination of whether or not an Organizational Conflict of Interest exists shall rest with the Administrator in his sole discretion; RUS shall not award a contract or Task Order, as the case may be, to a consultant if an Organizational Conflict of Interest exists.

(4) Authority to waive an Organizational Conflict of Interest vests with the RUS Administrator; such waivers must be in writing to be effective.

(5) Consultant contracts with all legal consultants, all financial consultants and such other consultants as the RUS may determine on a case by case basis (selected other consultants) shall provide that such consultants agree not to undertake during the term of the applicable contract, inclusive of option

or renewal periods, to represent any RUS borrower on the same or other matters without the express written consent of RUS.

(6) Consultant contracts with all legal consultants, all financial consultants and selected other consultants shall provide that such consultants agree not to undertake, for a period of not less than four years from the contract expiration date, to represent any RUS borrower or generation and transmission (G&T) affiliate thereof, including a borrower which may prepay outstanding RUS indebtedness subsequent to the consultant undertaking to represent RUS, on any matter in which RUS has a significant interest in the outcome, where such borrower(s) were the subject of consulting services rendered by that consultant during the tenure of the applicable contract, without the express written consent of RUS. *G&T affiliate* in this context shall refer to all members of the applicable generation and transmission cooperative and the cooperative(s) in which the borrower was itself a member. Representation includes any retainer or advisory contract and is not limited to representation relating to negotiations with or applications before RUS.

(7) RUS may waive any of the foregoing requirements or procedures by determining that its application in a particular situation would not be in the government's interest.

Key Personnel

Legal service contracts are distinguished from other consulting services funded by borrowers pursuant to Section 18 of the RE Act with respect to provisions relating to key personnel. Factors such as trust, judgment, negotiating style and presence and other intangibles affect the quality and effectiveness of representation and client satisfaction. Borrower funded legal service contracts will provide that no substitution of key personnel may occur without prior approval of the contracting officer, who may confer with the legal and RUS technical representatives for the applicable contract.

List of Subjects in 7 CFR Part 1789

Administrative practice and procedure, legal services, Electric power, Electric utilities, Loan programs—energy, Loan programs—telecommunications, escrow fund, consulting contracts.

For the reasons stated, RUS proposes to add a new part 1789 to chapter XVII of title 7 of the Code of Federal Regulations as follows:

PART 1789—USE OF CONSULTANTS FUNDED BY BORROWERS

Subpart A—Policy and Procedures With Respect to Consultant Services Funded by Borrowers—General

Sec.	
1789.150	Purpose.
1789.151	Definitions.
1789.152	Policy.
1789.153	Borrower funding.
1789.154	Eligible borrowers.
1789.155	Approval criteria.
1789.156	Proposal procedure.
1789.157	Consultant contract.
1789.158	Implementation.
1789.159	Contract administration.
1789.160	Access to information.
1789.161	Conflicts of interest.
1789.162	Indemnification agreement.
1789.163	Waiver.
1789.164–1789.165	[Reserved]

Subpart B—Escrow Account Funding and Payments

Sec.	
1789.166	Terms and conditions of funding agreement.
1789.167	Terms and conditions of escrow agreement.
1789.168–1789.175	[Reserved]
	Authority: 7 U.S.C. 901 et seq.; Pub. L. 103–354, 108 Stat. 3178 (7 U.S.C. 6941 et seq.); [Title I, Subtitle D, Pub. L. 100–203, 101 Stat. 1330].

Subpart A—Policy and Procedures With Respect to Consultant Services Funded by Borrowers—General

§ 1789.150 Purpose.

This part sets forth policies and the procedures for implementing subsection (c) of section 18 of the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.) (RE Act) which authorizes the Rural Utilities Service (RUS) to use the services of Consultants funded by the Borrowers to facilitate timely action on Applications by Borrowers for financial assistance and other approvals.

§ 1789.151 Definitions.

As used in this part:
Administrator means the Administrator of the Rural Utilities Service (RUS).

Application means a request for financial assistance under the RE Act or such other approvals as may be required of the RUS pursuant to the terms of outstanding loan or security instruments or otherwise.

Borrower means any organization which has an outstanding loan(s) made or guaranteed by RUS or its predecessor agency, the Rural Electrification Administration (REA) under the RE Act or any organization which has an Application before RUS.

Consultant means a person or firm which has been retained by RUS under

a contract to provide financial, legal, engineering, environmental, or other technical advice and services.

Consultant Contract means a contract for the performance of consulting services for RUS, to be paid using funds provided by a Borrower, which may be in the form of a Retainer Contract, purchase order, or such other form as RUS may choose.

Escrow Account means an account established pursuant to § 1789.158 herein.

Escrow Agreement means an agreement, between a Borrower, a Consultant and a Third-party Commercial Institution, meeting the requirements of § 1789.167.

Final Invoice means the closing Invoice prepared for a given Task Order.

Financial Consultant means a Consultant retained pursuant to this part to provide financial advisory services.

Funding Agreement means an agreement, between a Borrower and a Consultant providing for the Borrower to fund the costs of a Task Order and otherwise meeting the requirements of § 1789.166.

Indemnification Agreement means an agreement by a Borrower meeting the requirements of § 1789.162.

Invoice means an invoice, satisfactory to RUS, prepared by a Consultant pursuant to the terms of a Consultant Contract.

Legal Consultant means any Consultant retained pursuant to this part to provide legal services to RUS.

Notice of Proposal to Fund means a notice meeting the requirements of § 1789.156 provided to RUS by the Borrower.

Organizational Conflict of Interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. Organizational conflicts of interest shall include, but not be limited to, a financial interest in the project which is the subject of the Application; and providing advice and services concurrently to RUS and to the Borrower which submitted the relevant Application, on the same or different matters. Organizational conflicts of interest may also include activities or relationships determined by the Administrator pursuant to § 1789.161 to constitute an organizational conflict of interest.

Retainer Contract means a Consultant Contract providing for a minimum

required payment to a Consultant irrespective of whether services are utilized by RUS thereunder.

Task Order means a written request for consultant services made by RUS pursuant to the terms of a Consultant Contract.

Third-party Commercial Institution means a commercial financial institution mutually acceptable to the Borrower and the Consultant.

§ 1789.152 Policy.

(a) As provided in this subpart, RUS may, at its discretion, use the services of Consultants funded by a Borrower where such services will facilitate timely action on an Application by such Borrower for financial assistance or other approvals. Such Consultants may provide financial, legal, engineering, environmental or other technical advice and services in connection with the review of an Application.

(b) With the approval of RUS, a Borrower may fund the cost of consulting services in connection with the review by RUS of an Application by such Borrower. Such funding shall be provided pursuant to the terms of a Funding Agreement between the Borrower and the Consultant designated by RUS.

(c) RUS may not, without the consent of the Borrower, require, as a condition of processing any Application for approval, that the Borrower agree to pay the costs of a Consultant hired to provide services to RUS.

(d) RUS shall retain sole discretion in the selection of Consultants to provide services to RUS. RUS may use the services of one or more Consultants retained under Retainer Contracts to provide services for projects to be identified by RUS. Alternatively, RUS may elect to retain a Consultant in connection with a specific project. RUS shall have sole discretion to prescribe terms and conditions of Consultant Contracts. The Borrower shall be advised of the Consultant selected only after committing to fund consultant services.

§ 1789.153 Borrower funding.

Borrowers shall use their general funds for the purposes of funding consultant services hereunder. Borrowers may not use the proceeds of loans made or guaranteed under the RE Act for costs incurred by Borrowers pursuant to the funding of consultant services for RUS.

§ 1789.154 Eligible borrowers.

All Borrowers are eligible to fund consultant services under this part.

§ 1789.155 Approval criteria.

RUS will consider approving the use of consultant services funded by a Borrower on a case by case basis taking into account, among other matters, the following:

(a) Whether such services are required to facilitate timely action on a Borrower's Application. RUS shall determine what represents timely action with respect to each Application considering, among other matters, the review period normally required for such projects by RUS and other lenders and the consequences to the Borrower of adjusting the review period.

(b) The availability of staff resources, the priorities of other projects then before RUS, and the efficiencies to be realized from the use of consultant services.

(c) Whether it is in the best interest of RUS to use Borrower-funded Consultants. Certain types of projects, such as those involving issues of program-wide significance, may not be well suited for the use of Borrower funded Consultants.

§ 1789.156 Proposal procedure.

(a) In the event RUS determines that consideration should be given to the use of a Borrower-funded consultant in connection with the review of an Application, the RUS Regional Director or the Director of the Power Supply Division, as appropriate, will discuss with the Borrower the nature of the Application and the projected review period required of RUS. If RUS concludes that the projected review period will not result in timely action on the Application, and after being so notified in writing by RUS the Borrower wishes to fund consultant services to facilitate RUS review, the Borrower shall submit to the same Director a funding proposal. The proposal shall set forth the following:

(1) Identification in the heading or caption as a Notice of Proposal to Fund Consulting Services;

(2) Borrower's REA/RUS designation;

(3) Borrower's legal name and address;

(4) A description of the Application, critical issues and concerns relating to the Application, time deadlines, and the consequences of any delays in RUS review;

(5) A description of the consulting service(s) that would facilitate timely RUS review of the Application; and

(6) Such additional documents and information as RUS may request.

(b) RUS will review the Notice of Proposal to Fund and any additional information RUS deems relevant in determining whether to proceed with

procuring Borrower funded Consultants. If RUS proposes to utilize Legal Consultants, RUS must obtain the concurrence of the Office of General Counsel (OGC) of the Department of Agriculture. RUS will notify the Borrower in writing of its determination.

§ 1789.157 Consultant contract.

(a) The Federal Acquisition Regulation (FAR), 48 CFR Ch. 1 and Ch. 4 of the Agriculture Acquisition Regulation (AGAR) shall apply to all Consultant Contracts entered into pursuant to this part except as herein provided. Where there is a conflict between FAR and AGAR and the provisions of this part, the provision of this part shall apply. Exceptions to FAR and/or AGAR shall be incorporated in Consultant Contracts under this part as follows:

(1) Contracts for Legal Consultants shall provide for a technical representative from OGC and that no substitution of key personnel may occur without the prior approval of the applicable contracting officer.

(2) All Consultant Contracts shall provide for an escrow account funding mechanism pursuant to this part and for RUS sole discretion in determining whether payments are to be made from the Escrow Account to the Consultant.

(3) All Consultant Contracts shall provide that payment of all obligations for work performed thereunder must be satisfied by amounts available in the Escrow Account; with the exception of the annual retainer fee, if any, Consultants shall not be entitled to any payments from RUS.

(4) Consultant Contracts, as applicable, shall incorporate the applicable conflict of interest provisions set forth in § 1789.161.

(b) Notice of the provisions herein shall be given by RUS at such time as requests for proposals are issued under this part.

§ 1789.158 Implementation.

(a) Upon making a determination to go forward with Borrower funding for consulting services, RUS shall select a Consultant to provide the services. RUS may either contract with a Consultant on a case by case basis or elect to use a Consultant pursuant to an outstanding Retainer Contract. The Borrower will not be informed of the Consultant selected by RUS until such time as RUS provides the information set forth in subparagraph (c)(3) of this section.

(b) If RUS determines to contract with a Consultant on a case by case basis, RUS shall notify the Borrower of the applicable procedures.

(c) If RUS determines to contract with a Consultant under an outstanding Retainer Contract, the following procedures will normally apply:

(1) Pursuant to the terms of the contract, RUS will prepare a draft Task Order requesting consultant services in connection with the review of the Borrower's Application. The draft Task Order shall set forth for the Consultant's review and acceptance a description of the services to be provided and applicable time frames for the provision of such services.

(2) RUS will request that the Consultant:

(i) notify RUS as to the acceptability of the form and substance of the draft Task Order;

(ii) notify RUS as to its ability to provide RUS with a satisfactory conflict of interest certification consistent with the requirements of § 1789.161; and
(iii) provide a cost estimate for the draft Task Order.

(3) When RUS is satisfied with the response(s) received pursuant to paragraph (c)(2) of this section, RUS shall promptly provide to the Borrower:

(i) a copy of the draft Task Order identifying the Consultant;
(ii) the Consultant's cost estimate for the draft Task Order; and
(iii) contract information required to enable the Borrower to develop a Funding Agreement, an Escrow Agreement and an Indemnification Agreement (the "agreements").

(4) The Borrower shall develop and submit to RUS for approval executed originals of:

(i) the agreements; and
(ii) a certified copy of a resolution of the board of directors authorizing the Borrower to enter into the agreements and to take such other action as is necessary to effect the purposes of the agreements.

(5) Upon receiving written RUS approval of the agreements and the form and substance of the board resolution, the Borrower shall:

(i) establish and fund the Escrow Account; and
(ii) provide written notice to RUS of the Escrow Account number, the funding thereof, and such other information as required pursuant to the agreements.

(6) After the Borrower has funded the Escrow Account, RUS shall issue Task Order(s) for consultant services in accordance with the terms and conditions of the applicable Retainer Contract.

§ 1789.159 Contract administration.

RUS shall be solely responsible for the administration of a Consulting

Contract and shall have complete control over the scope, content, timeliness, and quality of the Consultant's work and the approval of payment Invoices.

§ 1789.160 Access to information.

The Borrower shall not have rights in nor right of access to the work product of the Consultant. All analyses, studies, opinions, memoranda, and other documents and information provided by the Consultant pursuant to a Consulting Contract with RUS may be released and made available to the Borrower only with the approval of RUS. This section does not restrict release of information by RUS pursuant to the Freedom of Information Act (5 U.S.C. 552(a)(2)) or other legal process.

§ 1789.161 Conflicts of interest.

(a) Disclosure requirements incorporated in procurements under this part shall provide that Consultants disclose all business relationships with current or former RUS Borrowers at the time proposals to offer consulting services are made to RUS and in the event additional business relationships are entered into subsequent to the original disclosure.

(b) Certification requirements incorporated in procurements under this part shall provide that Consultants certify, at the time a proposal is made to provide consulting services to RUS, to the best of their knowledge and belief, that no Organizational Conflict of Interest exists and there are no relevant facts or circumstances which could give rise to an Organizational Conflict of Interest, or the Consultant has disclosed all such relevant information. The representations in the certificate shall be deemed reaffirmed upon the execution of the Consultant Contract and upon the undertaking of each Task Order by the Contractor.

(c) The determination of whether or not an Organizational Conflict of Interest exists shall rest with the Administrator in his sole discretion; RUS shall not award a contract or task order, as the case may be, to a Consultant if an Organizational Conflict of Interest exists.

(d) The Administrator may waive an Organizational Conflict of Interest pursuant to § 1789.163 hereof; such waivers must be in writing to be effective.

(e) Consultant Contracts with all Legal Consultants, all Financial Consultants and such other Consultants as the RUS may determine on a case by case basis (selected other Consultants) shall provide that such Consultants agree not to undertake during the term of the

applicable contract, inclusive of option or renewal periods, to represent any RUS Borrower on the same or other matters, without the express written consent of RUS.

(f) Consultant Contracts with all Legal Consultants, all Financial Consultants and selected other Consultants shall provide that such Consultants agree not to undertake, for a period of not less than four years from the contract expiration date, to represent any RUS Borrower or G&T affiliate thereof, including a Borrower which may prepay outstanding RUS indebtedness subsequent to the Consultant undertaking to represent RUS, on any matter in which RUS has a significant interest in the outcome, where such Borrower(s) were the subject of consulting services rendered by that Consultant during the tenure of the applicable contract, without the express written consent of RUS. G&T affiliate in this context shall refer to all members of the applicable generation and transmission cooperative and the cooperative(s) in which the Borrower was itself a member. Representation includes any retainer or advisory contract and is not limited to representation relating to negotiations with or Applications before RUS.

§ 1789.162 Indemnification agreement.

As a condition of approving Borrower funding, RUS will require the Borrower to enter into an Indemnification Agreement, in form and substance satisfactory to RUS, providing that the Borrower will indemnify and hold harmless the government and any officers, agents or employees of the government from any and all liability, including costs, fees, and settlements arising out of, or in any way connected with the administration and supervision of, the contract funded by the Borrower for consultant services relating to the Borrower's Application.

§ 1789.163 Waiver

RUS may waive any requirement or procedure of this subpart by determining that its application in a particular situation would not be in the government's interest.

§§ 1789.164–1789.165 [Reserved]

Subpart B—Escrow Account Funding and Payments

§ 1789.166 Terms and conditions of funding agreement.

Funding Agreements between the Borrower and a Consultant shall be in form and substance satisfactory to RUS and provide for, among other matters, the following:

(a) Specific reference by number to the applicable Consulting Contract entered into between RUS and the Consultant;

(b) Specific reference by number to the applicable Task Order (where applicable);

(c) A brief description of the Application;

(d) A requirement that Invoices make specific reference to:

(1) The applicable contract and Task Order(s); and

(2) The Escrow Account from which payment is to be made;

(e) A requirement that the Final Invoice for a Task Order be clearly identified as such;

(f) A description of the services to be provided by the Consultant to RUS and the applicable time frames for the provision of such services;

(g) Agreement that the Borrower shall pay for the Consultant services provided to RUS under the applicable contract through an Escrow Account established pursuant to an Escrow Agreement, the Consultant shall not provide services to RUS under the applicable contract unless there are sufficient funds in the Escrow Account to pay for such services, the Consultant shall seek compensation for services provided under the applicable contract from, and only from, funds made available through the Escrow Account, and the Consultant must submit all Invoices to RUS for approval.

(h) A form of Escrow Agreement satisfactory to the Borrower, Consultant and the designated Third-party Commercial Institution;

(i) A schedule setting forth when and in what amounts the Borrower shall fund the Escrow Account;

(j) Acknowledgment by the Consultant of the Indemnification Agreement provided by the Borrower to the government; and

(k) The Funding Agreement shall not be effective unless and until approved in writing by RUS.

§ 1789.167 Terms and conditions of escrow agreement.

Escrow Agreements between and among the Borrower, Consultant and Third-party Commercial Institution shall be in form and substance satisfactory to RUS and provide for, among other matters, the following:

(a) Specific reference by number to the applicable contract for services entered into between RUS and the Consultant;

(b) Specific reference by number to the applicable Task Order;

(c) Specific reference by number to the Escrow Account into which funds are to be deposited;

(d) Invoices to specifically identify the applicable contract and Task Order(s);

(e) Funds to be held in the Escrow Account by the escrow agent until paid to the Consultant pursuant to RUS direction;

(f) The Escrow Account to be closed and all remaining funds remitted to the Borrower after payment of the Final Invoice, or upon notice from RUS to the escrow agent that RUS is satisfied no further payments are required under the Funding Agreement; and

(g) RUS, the Consultant and the Borrower to have the right to be informed, in a timely manner and in such form as they may reasonably request, as to the status of and activity in the Escrow Account.

§§ 1789.168–1789.175 [Reserved]

Dated: December 21, 1995.

Jill Long Thompson,

Under Secretary, Rural Economic and Community Development.

[FR Doc. 95–31452 Filed 12–29–95; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

Meeting Regarding Onsite Fitness-for-Duty Testing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Open Meeting.

SUMMARY: The Nuclear Regulatory Commission (NRC) will conduct an open meeting to discuss regulatory options under the provisions of 10 CFR Part 26 for performing onsite screening tests by the Washington Public Power Supply System (WPPS) of urine specimens collected by the Utilities Service Alliance (USA) members. The WPPS requested the meeting to discuss its proposed approach to conduct initial screening tests of urine specimens sent to them by USA members to determine which specimens are negative and need no further testing at an HHS-certified laboratory. A summary of the meeting will be prepared and will be available upon request.

DATES: The meeting will be held at 9:30 a.m. on January 11, 1996.

ADDRESSES: The meeting will be in Room 1–F5 at NRC Headquarters, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

Dated at Rockville, Maryland this 26th day of December 1995.