



Rural Development

RD AN No. ____ (1942-A)

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Telephone: (202) 692-0268

TO: State Directors
Rural Development

ATTN: Community Program Directors, and Staff, PSS Architects
and State Engineers

FROM: Joaquin Altoro
Administrator
Rural Housing Service

SUBJECT: Design/Build and Construction Management Proposals for
Community Facilities Projects

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to provide guidance to Rural Development staff and to streamline the process of requesting and obtaining National Office concurrence in the use of design/build or construction management proposals. This AN clarifies the requirements in RD Instruction 1942-A, sections 1942.9 and 1942.18(j)(k), and (l).

COMPARISON WITH PREVIOUS AN:

This AN replaces RD AN No. 4863 (1942-A) dated December 6, 2018, which expired on December 31, 2019.

BACKGROUND:

Section 1942.18 (l) states in part, "...Procurement methods which combine or rearrange design, inspection or construction services (such as design/build or construction management) may be used with Rural Development written approval. If the contract exceeds \$250,000, PSS National Office prior concurrence must be obtained under section 1942.9(b) of this subpart." The number of requests for approval of the use of design/build and construction management proposals in Community Programs has increased significantly in recent years.

EXPIRATION DATE:
May 31, 2023

FILING INSTRUCTIONS:
Preceding RD Instruction 1942-A

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Contract reviews: (1942.5, 1942.9(b), 1942.18(e)(I))

PSS will also review contracts less than \$250,000 when requested by Program staff.

Construction Management(1942.18(I)): A Construction Management/constructor (CMc) acts in the capacity of a General Contractor and is financially and professionally 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 subcontracts for some or all of the work. The CMc selection must be based on a competitive, open and free philosophy for the Request for Qualifications (RFQ) and Request for Proposal (RFP) and the contractor selection. The total cost of services in a firm-fixed-price contract agreement or guaranteed maximum price (GMP) agreement, provided to RD for review and evaluation should include, as a minimum, all direct costs (reimbursables, general conditions) indirect costs, overhead and profit for the CMc. The cost proposal should be provided as a detailed itemized spread sheet listing the proposed services of labor, materials and associated resources. Generally, these fees will fall in the range of 2-7% of the cost of construction, (market conditions may cause higher or lower percentages and should be evaluated against the project jurisdiction market) depending on the scope of work and its complexity. A percentage for the cost of services including overhead and profit is acceptable only when accompanied with a detailed list of services and costs. The CMc will need to carry the Rural Development required 100% surety and insurance, typically required of the general contractor of a project. Inspections provided by the Architect of Record or an independent third party are required. The agency shall be consulted and provide concurrence on the credentials of the inspector(s) and on the extent of services proposed. A CMc can be hired prior to the completion of the design phase in order to add value to the project. Discussions on the contracting procedures are at the end of this AN.

A CMa acts in an advisory capacity to the owner on issues related to construction management. The actual contract for construction services should be between the owner and a general contractor or CMc. With RD funding, the Construction Management/Advisor (CMa) can only serve the project in an administrative capacity. (inspections, schedule and cost monitoring, change order analyses and substitution requests are some of the services that can be provided by the CMa). This entity should be independent financially from the designer and constructor. The contract for the role of CMa can be acquired similarly as the project designer or the constructors, depending on the complexity and magnitude of the project. Total cost of services including, but not limited to, all direct costs (reimbursables, general conditions) indirect costs, overhead and profit for a CMa should be in the range of 2-4% of the construction cost (market conditions may cause higher or lower percentages and should be evaluated against the project jurisdiction market). The cost proposal should be provided as a detailed itemized spread sheet listing the proposed services of labor, materials and associated resources. CMa compensation shall be stated as a firm fixed price established for the bid proposal. The accepted cost of the CMa work will be dependent on the scope of services and complexity of the project and the bidding environment. The overhead and profit due to the CMa shall be applied by a reasonable percentage of the work performed by the CMa and not applied to the cost of construction.

The Rural Development requirements for surety and insurance cannot be held by the CMa. Full surety and insurance should be provided by the general contractor. Duplication of services among the architect and the CMa should be avoided and adjustments to fees should be made accordingly.

The Rural Housing Service Administrator may approve the alternative contract method, CMA, on a case-by-case basis, allowing for relief of some of the expected criteria, when the project is documented with an adequate justification and recommendation from the State Office. The recommendation shall indicate the circumstances which prove this method advantageous to the applicant and the government.

Design Build(1942.18(l)): (Treat “Developer Method” and “Integrated” as Design Build). The Design/Build (DB) method of construction is one in which 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 DB firm, a joint venture between an architectural firm and a construction firm, or a company providing pre-engineered buildings and design services. The entity (company or individual) that is the DB firm, with whom the Owner has the contract, must have 100% surety (typically bonding) and insurance, including professional liability insurance and errors & omissions insurance, in its own name, rather than in the name of other firms it hires to execute any part of the work of design or construction. Independent third-party inspections are required. Inspections by the “Design” entity of the DB team is not considered independent. (see also Inspection requirements below) The selection of the DB must be selected by an open and free competition resulting in a selection based on qualifications and cost. It is most acceptable to have the Designer and Builder selected as a single entity (one solicitation, one procurement). There have been occasions of the Designer selected independent of the Builder and then combined into one contract. This outcome is typically the result of an applicant with little understanding of the best method to implement. In this case steer them toward Design-Bid-Build. Otherwise, the “Unacceptable Bidders” clause may come into play. Section 1942.18(j)(7) “Unacceptable bidders,” states: “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;...” The borrower’s architect and sister corporations cannot bid on any CM or inspection related services necessary for the contract. The value of Design Build is having the two, willing, established partners who understand each other’s working styles, which foster collaboration from day 1 to achieve a favorable, owner project solution that can be constructed based on permit quality drawings, hence, speeding up the process. The remaining aspects of this 1942.18 section are applicable.

All projects over \$250,000 using Alternative contract methods, whether DB or CM must be submitted to the National Office for review using the guidance outlined in this AN.

All projects considering alternative contract methods, must comply with the requirements for “maximum open and free competition” in Section 1942.18(j)(2). Further information on procurement methods which must be followed is provided in Section 1942.18(k). The services of the Design Build firm, CM or other contract arrangement are often needed under contract prior to a completed set of design documents, which must be made available for the RD Architect to review. The loan cannot close until the contract documents (Design Development phase or later) have been reviewed and accepted by RD. Interim financing will be necessary to pay for design phase tasks implemented prior to Agency funds becoming available. One example procurement solution: The Request for Proposals of the DB, and CMc services can be developed with the owner’s/applicant’s budget (what they are capable and willing to pay including a contingency percentage) as a Guaranteed Maximum Price, “Not to Exceed” or Firm Fixed Price parameter. The selection criteria for the RFP cost proposal must express the cost parameters and expectations. This helps prevent bid busts and redesign to some degree. The contract/loan can be finalized once a GMP is

established. A firm project cost commitment from each bidder is required prior to selecting the winning contractor.

Inspections: Rural Development Instruction 1942-A, sections 1942.18 (o)(3), 1942.18 (o)(4) (i)(ii)(iii)(iv), and 1942.18 (o)(5) outlays the complete requirements for the resident inspector. A resident inspector is considered a full-time daily service that serves a construction project with professional inspections covering all major trades and tasks anticipated and scheduled by a building contractor. When warranted, the Agency, may allow the owner and the consulting project architect to determine and agree to a lesser extent of inspections required within performance of the Owner-Architect contract or for and/or services provided by a competent, independent third party inspector to comply with agency inspection requirements. The determination on the extent of inspections, by the parties, should result in adequate inspections and evaluation by a competent professional to address the complexity and scope of the project. Rural Development may consult, advise and concur on the extent of inspections necessary. In accordance with RD Instruction 1942-A, §1942.18 (o)(3) a full-time resident inspection is required for all construction unless a written exception is made by Rural Development upon written request of the owner. A simple written statement recording the justification/determination is all that is required for the exception request to Rural Development. Also required for review by Rural Development is the resume of knowledge and experience prepared by and for the anticipated service provider. Rural Development will review and provide a response to the owner's inspection services proposal.

IMPLEMENTATION:

RD Instruction 1942-A requires prior concurrence by Program Support Services (PSS) National Office before a design/build or construction management proposal over \$250,000 may be approved by the Agency. Information, as outlined in Sections 1942.18(j)(k), and (l), must be reviewed by the Agency (State Office) as part of the concurrence process.

To expedite the National Office concurrence process under Section 1942.9, the attached checklist will be completed by the PSS Architect or State Engineer in his/her review of the proposal to use design/build or construction management. The PSS Architect or State Engineer will initial each item listed on the checklist indicating that he/she has reviewed that item and sign the checklist. The contact person submitting the form will sign as well. A copy of the checklist will be submitted to the National Office, Program Support Services (PSS Architecture Branch), along with a cover memorandum and the required supporting documentation listed in the checklist under Section 1942.9. Documentation for those items initialed by the PSS Architect or State Engineer should only be sent to the National Office if you want them to be reviewed. The memorandum should include a return email address for the response.

A National Office, PSS Architect can provide concurrence for the alternative contract request, as the reviewing official.

When the reviewing official is the State Engineer, information may be: (1) mailed to USDA/RHS/PSS, Room 5155, Mail Stop 0761, 1400 Independence Ave. SW, Washington, DC, 20250-0761; or (2) emailed to william.downs@usda.gov. All information related to a request should be submitted via the same method. If information is emailed, initials and signatures on the checklist may be typed, with a signed copy maintained in the official Agency file. Please be

advised that regular mail will add additional time for the review, since mail to the South Building must be irradiated prior to delivery.

National Office program and PSS staff will review the memorandum, documentation, and checklist provided, including any comments entered by the RD Architect or State Engineer. Any questions or concerns regarding the material reviewed or submitted should be included in the "Comments" section of the checklist. A copy of the concurrence checklist will be sent by e-mail to the Program Specialist prior to mailing back the signed documents.

Please direct all questions pertaining to this AN to William Downs, Architect, Program Support Services at (202) 720-1499.

Attachment

**COMMUNITY FACILITIES
DESIGN/BUILD OR CONSTRUCTION MANAGEMENT
CONCURRENCE CHECKLIST**

(Comments may be attached or entered on this form. Items in italics are explanatory in nature.)

Section 1942.9(b) requires the following items be submitted to the PSS National Office, Architecture Services Branch:

1. State Director's comments and recommendations and if, by rare occurrence or after a competitive solicitation was unsuccessful, when noncompetitive negotiation, per section 1942.18(k)(4) is accepted by the Agency, submit an evaluation of previous work of the proposed construction firm, including the solicitation package and selection criteria.
2. Regional attorney's opinion and comments (when necessary) regarding the legal adequacy of the proposed procurement method and proposed contract documents. *(If this review is being requested concurrently to expedite the process, please so indicate. Submittal to OGC should follow a discussion and evaluation of the contract with the PSS Architect.)*
3. A copy of the owner's written request and description of the procurement method proposed along with a description of the competitive selection process undertaken to acquire the CM or DB services.. *(This may be the same "written request" listed as #1 below.)*
4. A copy of the proposed contract(s).

Section 1942.18(l) states the owner should provide the following information to the Agency. State Architect / Engineer will initial each item reviewed: *(To be sent to N.O. if indicated*)*

- _____ 1*. The owner's written request to use an unconventional contracting method with a description of the proposed method and the selection process used to acquire the designer and/or builder services (alternative contracts, RFQ and RFP as applicable).
- _____ 2. *A proposed scope of work describing in clear, concise terms the technical requirements for the contract. It should include such items as:
 - _____ a) A non-technical statement summarizing the work to be performed by the contractor and the results expected.
 - _____ b) The sequence in which the work is to be performed and a proposed construction schedule.
- _____ 3. *A proposed firm-fixed-price or guaranteed maximum price contract for the entire project which provides that the contractor shall be responsible for:
 - _____ a) Any extra cost that may result from errors or omissions in the services provided under the contract.
 - _____ b) Compliance with all Federal, State, and local requirements effective on the contract execution date.
- _____ 4. *Where noncompetitive negotiation is accepted by the Agency, an owner's statement regarding the process and attempts to comply with the Agency's Free and Open Competition requirements and an evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.
- _____ 5. 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.
- _____ 6. Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.
- _____ 7. Preliminary plans and outline specifications.
- _____ 8. *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.

COMMENTS: _____

The State Office has reviewed the above materials and makes a recommendation for concurrence of the use of the **design / build** or **construction management** method (*circle one or the other*) of development for this proposal.

Project: _____

Submitted by: _____

Date: _____

Fax Number: _____

NATIONAL OFFICE REVIEW

CP / PSS Comments on Submittal: _____

PSS Architecture Services Branch
Date: _____