

RD AN No. 4658 (1942-A)
May 31, 2012

TO: Rural Development State Directors

ATTN: Community Facilities Program Directors
Rural Development Area and Local Offices
State Architects, Engineers, Construction Analysts and
Inspectors

FROM: Tammye Treviño *(Signed by Tammye Treviño)*
Administrator
Housing and Community Facilities Programs

SUBJECT: Unacceptable Bidders

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to assist the Rural Development (RD) staff in the identification of unacceptable bidders for Community Facilities projects.

This AN supplements and clarifies the requirements in RD Instruction 1942-A, (7 C.F.R. §1942.18 (j) (1) Owner's procurement regulations: Code of conduct, and 7 C.F.R. §1942.18 (j) (7) (iii) Unacceptable bidders.

COMPARISON WITH PREVIOUS AN:

This RD AN supplements and revises AN No. 4479 (1942-A) dated November 20, 2009, which expired on November 30, 2010, which was issued previously on the same subject to further clarify which entities are unacceptable bidders, including pro bono service providers of preliminary project development services.

EXPIRATION DATE:
May 31, 2013

FILING INSTRUCTIONS:
Preceding RD Instruction 1942-A

BACKGROUND:

RD Instruction 1942-A, specifically 7 C.F.R. §1942.18(j)(1) and 7 C.F.R. §1942.18(j)(7), refer to “agents” for the owner. In these paragraphs, the term “agent” refers to any person or entity that represents the owner in the development and construction of projects. Any entity that is contracted or involved, either professionally or in a pro bono relationship, to assist the owner in making decisions related to project development, project financing and strategies for the design and/or construction implementation would be considered to be an agent of the owner. That entity would possess an advantage over other bidders that had not been afforded similar experiences. Additionally, entities considered to be an agent of the owner, are not eligible to bid for the construction phase of work.

IMPLEMENTATION RESPONSIBILITIES:

Rural Development staff, other participating lenders and RD applicants must consider organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. To ensure objective contractor performance and eliminate unfair competitive advantage, any individual/entity that had previously been involved in the development or drafting of specifications, requirements, statements of work, invitations for bids and/or requests for proposals, or other preliminary work related to the realization of a construction project, must be excluded from competing for such procurements as “agents” of the owner.

Individuals or entities in this position are commonly referred to as Owner’s Representative, Project Coordinator, Project Manager, Construction Manager, or Construction Advisor, but may have other titles or no title, especially if providing pro bono services. Additionally, if pro bono services are provided, the applicant must be alert to conflicts of interest when individuals are connected to the entity providing pro bono services and the entity are proposing to bid for construction. If there is insider knowledge, there is a conflict of interest and the entity would be an unacceptable bidder. None of these individuals or entities are eligible to bid for the construction phase work.

In addition, 7 C.F.R. §1942.18(j) (1) states that a conflict of interest would arise if an agent of the owner has “a financial interest, or other interest, in the firm selected for the award.” Individuals/entities that have a financial interest, or other interest, with the owner are not eligible to bid on any aspect of the construction phase of the project. Therefore, any attempt to bid on the construction contract(s), would be considered unacceptable and should be disqualified. This includes bidding on any type of construction contract, such as Design/Build or Construction Management, even where they are a third party Design/Builder, as in American Institute of Architects (AIA) contracts A141–2004, Standard form of Agreement between Owner and Design-Builder (and past or future versions) or a Construction Manager as in B801/CMa-1992 Standard Form of Agreement Between Owner/Construction Manager, Not as Constructor (and past or future versions) in the construction project. This is a conflict of interest and the individuals/entities described above would be considered unacceptable bidders on any construction contract.

In the course of application processing and construction monitoring, field and state offices will consider these requirements in the evaluation of acceptable bidders. These parties would be considered unacceptable bidders, and cannot be a party to any part of the construction contract.

Please direct all questions pertaining to this AN to Meghan Walsh, Architect, at (202) 205-9590, email: [Meghan.Walsh@wdc.usda.gov](mailto: Meghan.Walsh@wdc.usda.gov) or William Downs, Chief Architect, at (202) 720-1499, email: [William.Downs@wdc.usda.gov](mailto: William.Downs@wdc.usda.gov) the Rural Housing Service Program Support Staff.