

RD AN No. 4704 (1942-A)
October 15, 2012

TO: State Directors
Rural Development

ATTN: Community Program Directors, All Community Facilities
Staff, State Architects and Engineers

FROM: Tammye Treviño /s/ *Cristina Chiappe* for
Administrator
Housing and Community Facilities Programs

SUBJECT: Design/Build and Construction Management Proposals

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. 4566 (1942-A) dated April 7, 2011, which will expire on April 30, 2012. Language is added to emphasize the concern for the qualifications of prospective bidders and sample strategies for bidding prior to the submittal of completed construction documents.

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 amount exceeds \$250,000, National Office prior concurrence must be obtained under section 1942.9(b) of this subpart."

EXPIRATION DATE:
August 31, 2013

FILING INSTRUCTIONS:
Preceding RD Instruction 1942-A

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. With the increase in the number of proposals submitted to the National Office for concurrence, the time required to complete the concurrence process increased as well. In order to expedite the process for design/build or construction management contracts exceeding \$250,000, the guidance outlined in this AN may be used. The State Office will continue to approve contracts less than \$250,000.

There are two types of Construction Managers: Construction Manager as Constructor (CMc) and Construction Manager as Advisor (CMA). A 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 Proposal and the contractor selection. The total cost of services as stated in a firm-fixed-price contract agreement or guaranteed maximum price agreement including, but not limited to, all direct costs (reimbursables, general conditions) indirect costs, overhead and profit for the CMc. Generally these fees will fall in the range of 2-7% of the cost of construction, depending on the scope of work and its complexity. The CMc will need to carry the Rural Development required 100% surety and insurance, typically required of the general contractor of a project. A CMc can be hired prior to the completion of the design phase in order to add value, from a contractor's perspective, to the project. Discussion 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. The contract for the role of CMA is subject to the criterion of free and open competition, similar to contracts for construction services by the general contractor and CMc. 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. 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 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.

Rural Development and owners should expect that an experienced CMA can establish an estimated cost for reimbursables for purposes of the bid submittal. Rural Development and owners should also expect that the actual reimbursable costs may differ from the bid.

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.

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.

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 the CMA contract. The remaining aspects of this 1942.18 section are applicable.

All projects over \$250,000 using Construction Management, whether DB, CMc or CMA, must be submitted to the National Office for review using the guidance outlined in this AN.

All DB or Construction Management projects 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 CMc or CMA are usually needed prior to a completed set of design documents is available for the RD State Architect to review. The loan cannot close until the contract documents 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, CMc and CMA services can be developed with the owner's/applicant's budget 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. The contract/loan can be finalized once a GMP/contract is established. The RFP should indicate that cost is part of the selection process but that the contract amount will not exceed the proposed bid or the GMP indicated in the RFP. As much design or program information that exists on the project should be made available for the prospective bidders.

IMPLEMENTATION:

RD Instruction 1942-A requires prior concurrence by the National Office before a design/build or construction management proposal over \$250,000 may be approved by the Agency. Information, as outlined in Section 1942.18(j)(k)(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 State Architect or Engineer in his/her review of the proposal to use design/build or construction management. The State Architect or 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 Staff (PSS), 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 State Architect or Engineer should only be sent to the National Office if you want them to be reviewed. The memorandum should include a return fax number.

Information may be: (1) mailed to USDA/RHS/PSS, Room 6900, Mail Stop 0761, 1400 Independence Ave. SW, Washington, DC, 20250-0761; (2) faxed to 202-690-4335; or (3) emailed to william.downs@wdc.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 State Architect or Engineer. Any questions or concerns regarding the material reviewed or submitted should be included in the "Comments" section of the checklist. The checklist, if acceptable, will be concurred in by Community Programs. A copy of the concurrence checklist will be sent by fax or e-mail to the State Office prior to mailing back the signed documents.

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

Attachment 1

**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 National Office:

1. State Director's and Agency Architect / Engineer's comments and recommendations and if noncompetitive negotiation, per section 1942.18(k)(4) is accepted by the Agency, submit an evaluation of previous work of the proposed construction firm.)
2. Regional attorney's opinion and comments 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.)*
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 CM or DB services.
- _____ 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 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: _____

Program Support Staff
Date: _____

The proposal to use the design / build or construction management method is concurred in by:

Community Programs
Date: _____