

RD AN No. 4857 (4280-B)
March 13, 2018

TO: State Directors, Rural Development

ATTENTION: Business Programs Directors and
Energy Coordinators

SUBJECT: Rural Energy for America Program
Clarification on Leases

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to provide clarification on how various leases are treated under the Rural Energy for America Program (REAP).

COMPARISON WITH PREVIOUS AN:

There is no previous guidance.

IMPLEMENTATION RESPONSIBILITY:

Rural Development (Agency) has determined clarification is needed on the treatment of leasing arrangements proposed under the Rural Energy for America Program (REAP).

In accordance with 7 CFR Part 4280.112 (b) the applicant must (1) own or be the prospective owner of the project, and (2) own or control the site for the project described in the application at the time of application and, if an award is made, for the useful life of the project as described in the Financial Assistance Agreement.

“Prospective owner” means that the applicant might not own the project at the time of application. It does not imply the allowance of any financing through a lease structure whereby the applicant will not own title outright and have a vested interest in the assets purchased with REAP funds. REAP Regulation 7 CFR 4280.114 (d) (6) indicates that lease payments, including lease to own or capitalized lease projects are considered ineligible project costs. This is consistent with the rules under COFAR (Council on Financial Assistance Reform) where title to equipment or real property acquired with Federal funds vests in the recipient or Borrower upon acquisition. (See 2 CFR Part 200.311 and Part 200.313). Pursuant to REAP regulations and consistent with COFAR, the applicant may only use those financing mechanisms whereby the applicant finances the cost of the project and legally owns the assets financed.

EXPIRATION DATE:
March 31, 2019

FILING INSTRUCTIONS:
RD Instruction 4280-B

Various questions have arisen in regard to the ability of a REAP recipient to act as a lessor of assets improved with REAP funds. A REAP recipient may lease out the assets purchased with REAP funds to a third party if all REAP regulatory requirements are met, including the requirement that the recipient own and control the project for the entire useful life of the project (See 7 CFR 4280.112(b)). In addition, the REAP recipient must also control the revenues and expenses of the project, including its operation and maintenance (See 7 CFR 4280.112(c)). Examples of eligible projects involving a lease arrangement may include, but are not limited to, the following:

Example 1: A rural small business or agricultural producer owns and leases out a commercial building, improved with REAP funds, to various tenants.

Example 2. A rural small business owner or agricultural producer (grantee) owns and controls a REAP financed renewable energy system and leases the installed system to a third party such as a non-profit, school district, or municipal government. The grantee must maintain ownership and control including site, income and expenses via the lease agreement. Additionally, all other requirements in RD Instruction 4280-B, must be reviewed in this scenario to ensure complete eligibility is obtained with a lease in place. This includes, but is not limited to, project eligibility, including prohibitions on residential use and other prescribed eligible project costs.

Example 3: A rural small business owns an office complex in which a USDA program is a tenant. This is allowable as long as conflict of interest requirements are complied with pursuant to 7 CFR Part 4280.106.

REAP recipients may not derive rental income from illegal operations because such businesses involve ineligible project costs and thus are prohibited under 7 CFR 4280 Part 114(d). An example may include the following:

Example 1: A rural small business and REAP recipient is located in a State which allows the sale and distribution of marijuana and the REAP recipient intends to lease space to a marijuana dispensary. This would not be allowed because the REAP recipient or landlord would be receiving rental proceeds from the tenant's marijuana operation which is a violation of federal law since marijuana is a controlled substance under federal law and subject to federal prosecution under the Controlled Substances Act (21 USC 811). This would be an ineligible project cost under 7 CFR Part 4280.114 (d) (5) as the described scenario involves illegal activities.

If you have any questions concerning this AN please contact Will Dodson at (202) 768-0592, or via e-mail at will.dodson@wdc.usda.gov.

/s/ **Bette B. Brand**

Bette B. Brand
Administrator
Rural Business-Cooperative Service