

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