

Rural Utilities Service, USDA

§ 1789.161

consulting services, RUS shall initiate a procurement request for a Consultant to provide the services. The government may either contract with a Consultant on a case by case basis or elect to use a Consultant pursuant to an outstanding Retainer Contract. The Borrower will not be informed of the Consultant selected until such time as the government provides the information set forth in paragraph (c)(3) of this section.

(b) If the government determines to contract with a Consultant on a case by case basis, the government shall notify the Borrower of the applicable procedures.

(c) If the government determines to contract with a Consultant under an outstanding Retainer Contract, the following procedures will normally apply:

(1) Pursuant to the terms of the contract, the government will prepare a draft Task Order requesting consultant services in connection with the review of the Borrower's Application. The draft Task Order shall set forth for the Consultant's review and acceptance, a description of the services to be provided and applicable time frames for the provision of such services.

(2) The government will request that the Consultant:

(i) Notify the government as to the acceptability of the form and substance of the draft Task Order;

(ii) Notify the government as to its ability to provide a satisfactory conflict of interest certification consistent with the requirements of the FAR (48 CFR ch. 1); and

(iii) Provide a cost estimate for the draft Task Order.

(3) When the government is satisfied with the response(s) received pursuant to paragraph (c)(2) of this section, the government shall promptly provide to the Borrower:

(i) A copy of the draft Task Order identifying the Consultant;

(ii) The Consultant's cost estimate for the draft Task Order; and

(iii) Contract information required to enable the Borrower to develop a Funding Agreement, an Escrow Agreement and an Indemnification Agreement (the "agreements").

(4) The Borrower shall develop and submit to the government for approval executed originals of:

(i) The agreements; and

(ii) A certified copy of a resolution of the board of directors authorizing the Borrower to enter into the agreements and to take such other action as is necessary to effect the purposes of the agreements.

(5) Upon receiving written RUS approval of the agreements and the form and substance of the board resolution, the Borrower shall:

(i) Establish and fund the Escrow Account; and

(ii) Provide written notice to the government of the Escrow Account number, the funding thereof, and such other information as required pursuant to the agreements.

(6) After the Borrower has funded the Escrow Account, the government shall issue Task Order(s) for consultant services in accordance with the terms and conditions of the applicable Retainer Contract.

§ 1789.159 Contract administration.

The government shall be solely responsible for the administration of a Consulting Contract and shall have complete control over the scope of the Consultant's work, the timetable for performance, the standards to be applied in determining the acceptability of deliverables and the approval of payment of Invoices.

§ 1789.160 Access to information.

The Borrower shall not have rights in nor right of access to the work product of the Consultant. All analyses, studies, opinions, memoranda, and other documents and information provided by the Consultant pursuant to a Consulting Contract may be released and made available to the Borrower only with the approval of RUS. This section does not restrict release of information by RUS pursuant to the Freedom of Information Act (5 U.S.C. 552(a)(2)) or other legal process.

§ 1789.161 Conflicts of interest.

The standard for determining organizational conflicts of interest shall be as set forth in the FAR subpart 9.5 (48 CFR part 9, subpart 9.5); however, the

identification of the existence of an organizational conflict of interest may be made by either the Administrator or the cognizant Contracting Officer. In the event an organizational conflict of interest is determined to exist, the cognizant Contracting Officer shall take the actions prescribed at FAR 9.504 (48 CFR 9.504) to attempt to avoid, neutralize or mitigate the conflict. Should these actions be deemed by the Administrator and the Contracting Officer to adequately resolve the conflict, the contracting action with the offeror/contractor may proceed. Should the Administrator or the Contracting Officer determine that an organizational conflict of interest still exists such that contract award or other contracting action cannot be taken (award of task/delivery order, etc.) the offeror/contractor shall be so informed by the Contracting Officer and be provided a reasonable opportunity to respond in accordance with FAR 9.504(e) (48 CFR 9.504(e)). After considering the contractor's response, if it is found by both the Administrator and Contracting Officer to remedy the conflict of interest, the contracting action may proceed. If the Administrator and Contracting Officer determine that the contractor's response does not resolve the conflict of interest, yet continuing with the contracting action with the offeror/contractor in question is considered in the best interest of the United States, a waiver in accordance with FAR 9.503 (48 CFR 9.503) may be executed. This waiver shall be submitted under the Contracting Officer's signature and approved by the Administrator. The Administrator has been delegated Head of Contracting Activity authority by the USDA Senior Procurement Executive solely for the purpose of waiver approval.

§ 1789.162 Indemnification agreement.

As a condition of approving Borrower funding, the government will require the Borrower to enter into an Indemnification Agreement, in form and substance satisfactory to RUS, providing that the Borrower will indemnify and hold harmless the government and any officers, agents or employees of the government from any and all liability, including costs, fees, and settlements

arising out of, or in any way connected with the payment of the Consultant's fee pursuant to the Consultant Contract. The Indemnification Agreement may recognize, as a condition of liability thereunder, the rights of the borrower to prompt notice, to use of counsel of its own choosing, and to participation in any settlement of a claim against which indemnification is sought.

§ 1789.163 Waiver.

RUS may waive any requirement or procedure of this subpart by determining that its application in a particular situation would not be in the government's interest, except that certain provision that the subject contracts are subject to the provisions of the FAR (48 CFR ch. 1) and AGAR (48 CFR ch. 4).

§§ 1789.164–1789.165 [Reserved]

Subpart B—Escrow Account Funding and Payments

§ 1789.166 Terms and conditions of funding agreement.

Funding Agreements between the Borrower and a Consultant shall be in form and substance satisfactory to RUS and provide for, among other matters, the following:

- (a) Specific reference by number to the applicable Consulting Contract entered into between the government and the Consultant;
- (b) Specific reference by number to the applicable Task Order (where applicable);
- (c) A brief description of the Application;
- (d) A requirement that Invoices make specific reference to:
 - (1) The applicable contract and Task Order(s); and
 - (2) The Escrow Account from which payment is to be made;
- (e) A requirement that the Final Invoice for a Task Order be clearly identified as such;
- (f) A description of the services to be provided by the Consultant to RUS and the applicable time frames for the provision of such services;
- (g) Agreement that the Borrower shall pay for the Consultant services