

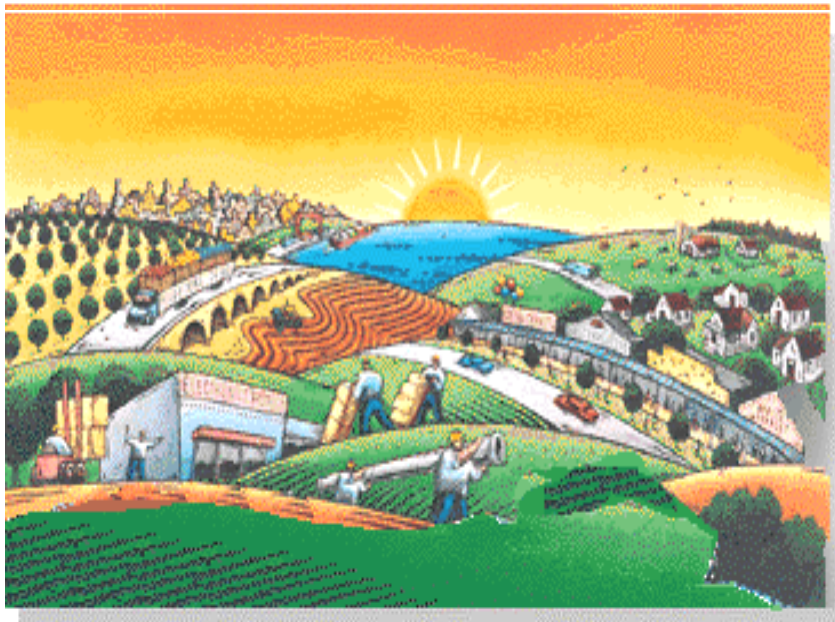
**Rural Development**  
**United States Department of Agriculture**

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# **RURAL UTILITIES SERVICE**

***RUS Bulletin 1738-2***

## **Rural Broadband Access Loan and Loan Guarantee Advance and Construction Procedures Guide**





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## GENERAL

This bulletin implements and explains the provisions of the loan documents containing the requirements and procedures to be followed by a borrower for constructing broadband facilities using RUS broadband loan funds. A borrower shall maintain accounting and plant records sufficient to document the cost and location of all construction and to support loan fund advances and disbursements. The standard Loan Documents also contain provisions regarding advances and disbursement of broadband loan funds by borrowers. This bulletin also implements certain provisions by setting forth requirements and procedures to be followed by the borrowers in obtaining advances and making disbursements of loan funds.

## ABBREVIATIONS

For purpose of this bulletin:

- *CFR* stands for Code of Federal Regulations.
- *FRS* stands for RUS Form 481 (OMB control number 0572-0023), *Financial Requirement Statement*.
- *GFR* stands for RUS general field representative.
- *P&S* stands for plans and specifications.
- *Pub. L.* stands for Public Law.
- *RE Act of 1938* stands for Rural Electrification Act of 1938.
- *RUS* stands for Rural Utilities Service.
- *U.S.C.* stands for United States Code.

## DEFINITIONS

For purposes of this bulletin:

- *Accept; Acceptance* means RUS' determination that a product meets RUS requirements in accordance with RUS regulations. Accepted products are included in the List of Materials.
- *Advance* means transferring funds from RUS to the borrower's deposit account.
- *Architect* means a person registered as an architect in the state where construction is performed.

- *Bid guarantee* means a bid bond or certified check required of contractors bidding on construction work to ensure that the bidder, if successful, will furnish a performance bond.
- *Borrower* means any organization with an outstanding loan made or guaranteed by RUS, or that is seeking such financing.
- *Buy American Requirement* means RUS' requirements for compliance with the "Buy American" provision of the Rural Electrification Act of 1938 (June 21, 1938, Ch. 554, Title IV 401, 52 Stat. 818), as amended.
- *Broadband Service* means a minimum transmission rate as defined in the current NOFA applicable to the Broadband Loan Program.
- *Closeout documents* mean the documents required to certify satisfactory completion of all obligations under a contract.
- *Construction* means purchase and installation of broadband facilities in a borrower's system.
- *Contract* means the agreement between the borrower and an independent contractor covering the purchase and installation of broadband facilities for a borrower's system using an RUS contract form.
- *Contract forms* mean RUS requirements to use standard forms of contracts for construction, procurement, engineering services, and architectural services, if the construction, procurement or services are financed by RUS.
- *Contract construction* means construction performed using an RUS contract form.
- *Core network and access equipment* mean any switching or transmission equipment used primarily for the delivery of broadband service.
- *Deposit account* means an account required by the loan contract into which all RUS loan funds are advanced.
- *Disbursement* means payment by the borrower out of the deposit account for approved loan purposes.
- *Domestic product* means a product that is manufactured in the United States or in any eligible country, substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States or in any eligible country. An "eligible country" is any country that applies with respect to the United States an agreement ensuring reciprocal access for United States products and services and United States suppliers to the market of that country, as determined by the United States Trade Representative.

- *Engineer* means a person registered as an engineer in the state where construction is performed, or a person on the borrower's staff authorized by RUS to perform engineering services.
- *In-house engineering* means any preloan or postloan engineering services performed by the borrower's staff.
- *Installation* means the act of setting up or placing in position equipment for service or use in the borrower's system.
- *Interim construction* means the construction, improvement, or acquisition of facilities and equipment after RUS determines that an application is complete, but prior to release of loan funds.
- *Labor and materials* means all the labor and materials required for construction.
- *Large-scale construction* means any construction project, excluding buildings or structures that are estimated to cost more than \$500,000 including all labor and materials.
- *List of Materials* means collectively, the latest edition, as supplemented, of RUS Informational Publication 344-2, "List of Materials Acceptable for Use on Telecommunications Systems of RUS Borrowers." The List of Materials is published in January of every other year with supplements published every other month. The List of Materials is available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20250. The List of Materials is also available on the Internet at <http://www.usda.gov/rus/telecom/materials/lstomat.htm>. This electronic version is updated after each Committee A meeting in which products are considered for acceptance or deletion from the List of Materials.
- *Loan* means any broadband loan made or guaranteed by RUS.
- *Loan documents* mean the documents covering a loan made by RUS, including the loan contract, note and mortgage or other security documents between the borrower and RUS.
- *Loan funds* means funds provided by RUS through a loan.
- *Non-domestic product* means any product other than a domestic product.
- *Outside plant* means the part of the telecommunications network that is physically located outside of telecommunication buildings. This includes cable, conduits, poles and other supporting structures and certain other associated equipment items.
- *Performance bond* means a surety bond on a form satisfactory to RUS guaranteeing the contractor's faithful performance of a contract. (See 7 CFR Part 1788.)

- *Plans and specifications* means an RUS contract form, the appropriate specifications, and such additional information and documents needed to provide a clear, accurate, and complete understanding of the construction to be performed.
- *Responsive bid* means a bid that complies with the plans and specifications.
- *RUS* means the Rural Utilities Service; an agency of the United States Department of Agriculture and successor to the Rural Electrification Administration.
- *Small-scale construction* means any construction project that is estimated to cost \$500,000, or less, including all labor and materials.
- *Subcontract* means a secondary contract undertaking some of the obligations of a primary contract. Under RUS contract forms, the primary contractor bears the full responsibility for the performance of the subcontractor.
- *System design* means supporting data for a loan application.
- *Technical acceptance* means a letter given to a manufacturer by Committee A upon determining that a nondomestic product meets RUS requirements for financing upon meeting the Buy American requirement. Under this requirement, a nondomestic bid is in compliance with the “Buy American” provision of 1938, as amended, if the bid is lower than the lowest domestic bid by at least 6% of its material content.
- *Work order construction* means any construction performed by the borrower's employees, pursuant to its work order procedure, with the borrower furnishing all materials, equipment, tools, and transportation.

## **CONSTRUCTION PROCEDURES**

### **1 GENERAL**

All construction must conform to the approved system design and shall be covered by an Environmental Report prepared in accordance with 7 CFR Part 1794 and approved by RUS. No construction shall commence until all necessary local, state and federal requirements have been satisfied.

Materials and equipment purchased or construction performed prior to a determination by RUS that the loan application is complete will not be eligible for financing. Only new materials and equipment may be financed with loan funds, unless otherwise approved in writing by RUS.



a. Buy American

All materials and equipment financed with loan funds are subject to the “Buy American” provisions (7 U.S.C. 901 *et seq.* as amended in 1938), as amended.

For RUS financing of a product, RUS requires that the product complies with the “Buy American” provision of the RE Act of 1938, as amended. A product complying with both of the provisions listed below complies with this “Buy American” provision and is considered a domestic product by RUS. If the product does not meet either of the two conditions, the product is then classified as nondomestic for purposes of RUS financing. These conditions are:

- (1) Final assembly or manufacture of the product, as the product would be used by an RUS borrower, is completed in the United States or eligible countries; and
- (2) The cost of the United States and eligible countries’ components (in any combination) within the product is more than 50 percent of the total cost of all components utilized in the product. The cost of non-domestic components (components not manufactured within the United States or eligible countries) which are included in the finished product must include all duties, taxes, and delivery charges to the point of assembly or manufacture.

A bid for a nondomestic product is considered to be in compliance with the “Buy American” provision by RUS if the nondomestic bid is lower than the lowest domestic bid by at least six percent of the cost of the material content of the nondomestic bid. This six percent cost differential is added to the nondomestic bid for the purpose of determining the low bid only.

b. List of Materials

RUS will only finance equipment or materials that have been accepted and included in Informational Publication 344-2, “*List of Materials Acceptable for Use on Telecommunications Systems of RUS Borrowers*” (List of Materials) or equipment that has received RUS technical acceptance, unless otherwise approved by RUS in writing prior to its purchase. The borrower may use loan funds for equipment that has not been accepted or technically accepted by RUS when the List of Materials does not include similar equipment to the equipment proposed by the borrower. When purchasing a product not listed on Informational Publication 344-2, the borrower shall be responsible for ensuring that this equipment meets the RUS Buy American requirement.

If the borrower wishes to use a non-listed product when similar products are listed on the List of Materials, a written request shall be submitted to RUS stating the

cost of the product to be purchased along with the justification for a waiver. This waiver must be granted prior to commencing any construction activities including entering into an agreement with the supplier.

c Interim Construction

Once RUS has determined that an application is complete, the loan applicant may proceed with interim construction for construction that must be performed immediately. This should not be construed as a commitment that RUS will make loan funds available. To ensure that interim construction is eligible for reimbursement with loan funds the borrower must comply with the following requirements:

- (1) Equal employment opportunity requirements in RUS Bulletin 320-15;
- (2) Interim construction is covered by an Environmental Report approved by RUS prior to construction;
- (3) Plans and specifications for the interim construction include RUS Form 375, found in Exhibit A, notifying the contractors or manufactures that RUS loan funds have not been approved and that other sources of financing are available.
- (4) All RUS construction procedures in this bulletin (RUS Bulletin 1738-2) are followed to complete the construction.

d Insurance

A performance bond is required for construction exceeding \$250,000, as indicated in 7 CFR Part 1788, Subpart C.

The borrower is responsible for ensuring that its contractor and engineer comply with all the insurance and bond requirements of 7 CFR Part 1788, Subpart C.

e Title Clearance

For any building construction over \$250,000, the borrower shall determine that title to the real estate has been approved by RUS before releasing the invitations to bid.

f Software License

As part of the equipment purchase, the contractor may require that the borrower enter into a software license agreement for the use of the equipment. For such agreement, RUS requires the use of RUS Form 390, *Software License Agreement – Special Equipment Contract*, found in Exhibit A.

g Subcontracts

RUS construction contract Forms 257, 397, and 515 contain provisions for subcontracting. The contractor should refer to the individual contracts for the amounts and conditions on subcontracting.

RUS Form 282, Subcontract, shall be used for subcontracts. Minor modifications or additions may be made to the subcontract form, as long as they do not change the terms and conditions of the primary contract. Any alterations to the subcontract shall be initialed and dated by the parties executing the subcontract. These alterations shall be noticeable by using italic print or any other means that accomplished this purpose.

Subcontracts shall be prepared in triplicate. All copies shall be executed by the contractor and subcontractor and consented to by the borrower and surety, if applicable. Subcontracts are not subject to RUS approval provided that they are in accordance with the provisions of the appropriate RUS construction contract. Upon execution, one copy each will be sent to the borrower, contractor, and subcontractor.

As stated in RUS Forms 257, 397, and 515, the contractor shall bear full responsibility for the acts and omissions of the subcontractor and is not relieved of any of the contractual obligations to the borrower and to the Government.

h Amendments

The borrower shall obtain RUS approval before execution of any amendment to a contract if:

- (1) The amendment alters the terms and conditions of the contract or changes the scope of the project covered by the contract regardless of the amount of the contract before amendment;
- (2) The amendment by itself (or together with preceding amendments) increases the original contract price by 20% or more. In this case, a bond extension will be required to bring the penal sum of the bond to the total amended contract price; or
- (3) The amendment causes an unbonded contract to require a contractor's performance bond. This would occur when an amendment increases the contract price to an amount requiring a performance bond per 7 CFR Part 1788, Subpart C.

Advance RUS approval to execute other contract amendments is not required. These amendments may be submitted to RUS at any time prior to closeout. To receive an advance of funds based on an amended contract amount, the borrower

may submit three copies of the amendment to RUS for approval. For each amendment executed, the borrower shall make certain that:

- (1) The contractor's bond covers the additional work to be performed; and
- (2) The contractor is licensed to do business in the county and state where the construction is proposed.

i Records

Records supporting construction financed by RUS shall be retained until audited and approved by RUS.

Records related to plant in service must be retained until the facilities are permanently removed from utility service, all removal and restoration activities are completed, and all costs are retired from the accounting records unless accounting adjustments resulting from reclassification and original costs studies have been approved by RUS or other regulatory body having jurisdiction.

Life and mortality study data for depreciation purposes must be retained for 25 years or for 10 years after plant is retired, whichever is longer.

2 ENGINEERING AND ARCHITECTURAL SERVICES

a General

Borrowers shall obtain architectural and engineering services only from persons or firms who are not affiliated with, and have not represented a contractor, vendor or manufacturer who may provide labor, materials, or equipment to the borrower under any current loan.

All engineering services required by a borrower, including inspection and certification, shall be rendered by an engineer selected by the borrower and licensed in the where the facilities will be located or by qualified employees on the borrower's staff authorized by RUS to perform such services.

b. Engineering Services from an Outside Consultant

Engineering services performed by an outside consultant shall be covered under an RUS Form 217, *Postloan Engineering Services Contract - Telecommunications*, or RUS Form 245, *Engineering Service Contract – Special Services*.

Three copies of RUS Form 245 or 217, executed by the borrower and the engineer, shall be forwarded to RUS for approval. RUS will not approve the contract if, in RUS' judgment:

- (1) Unacceptable modifications have been made to the contract form;
- (2) The contract will not accomplish loan purposes;
- (3) The engineering service fees are unreasonable; or
- (4) The contract presents unacceptable loan security risk to RUS.

If RUS approves the contract, RUS will send one copy to the borrower and one copy to the engineer.

c Closeout

Upon completion of all services required under the RUS Form 217 contract, the borrower shall obtain from the engineer three copies of RUS Form 506, *Final Statement of Engineering Fee*. For RUS Form 245, the borrower shall obtain three copies of a final statement of fees from the engineer. If the statement is satisfactory, the borrower shall sign all copies and send three to RUS for approval. After RUS approval of the final statement of fees, RUS shall send one copy to the borrower and one copy to the engineer.

d In-House Engineering

When the proposed construction is such that the engineering involved is within the capabilities of employees on the borrower's staff, borrowers may request RUS approval to provide such services. The request shall include:

- (1) A description of services to be performed;
- (2) The name and qualifications of the employee to be in charge. RUS requires this employee to meet the experience requirements for registered engineers. In the absence of specific experience requirements, this employee should have at least eight years experience in the design and construction of telecommunication facilities, with at least two years of the work experience at a supervisory level. RUS does not require professional registration of this employee, but this does not relieve the borrower from compliance with applicable state registration requirements, which may require a licensed individual to perform such service;

- (3) The names, qualifications, and responsibilities of other principal employee(s) who will be associated with providing the engineering services; and
- (4) A letter signed by an authorized representative of the borrower requesting in-house engineering approval and certifying the supporting information.

RUS shall notify the borrower by letter of approval or disapproval to perform in-house engineering. The letter shall set forth any conditions associated with an approval or the reasons for disapproval. RUS approval of in-house engineering for construction shall be only for the specific projects named in the notice of approval.

e Architectural Services

The borrower shall be responsible for selecting an architect, licensed in the state where the building will be located, to perform the architectural services required in the design and construction of buildings.

The borrower shall use either RUS Form 220 or RUS Form 217 when contracting for architectural services.

Three copies of RUS Form 220 or Form 217, executed by the borrower and the architect, shall be forwarded to RUS for approval. RUS will not approve the contract if, in RUS' judgment:

- (1) Unacceptable modifications have been made to the contract form;
- (2) The contract will not accomplish loan purposes;
- (3) The architectural service fees are unreasonable; or
- (4) The contract presents unacceptable loan security risk to RUS.

If RUS approves the contract, RUS will send one copy to the architect and one copy to the borrower.

f. Closeout

RUS borrowers shall obtain two copies of a completed RUS Form 284, *Final Statement of Architect's Fees*, when all services and obligations required under the architectural services contract have been completed.

If RUS Form 284 and supporting data are satisfactory, the borrower shall approve the statement, sign both copies, and send one copy to RUS.

### 3 SMALL-SCALE CONSTRUCTION

#### a General

Construction may be performed using the work order method or by an outside contractor. When using an outside contractor, either RUS Contract Form 773, *Miscellaneous Construction Work and Maintenance Services*, or an appropriate RUS contract (RUS Form 257, 397, or 515) shall be used. When using an RUS Form (257, 397, or 515), the procedures noted in the large-scale construction section shall be followed. The inspection and reimbursement procedures for work order and RUS Form 773 construction are the same and are listed at the end of this section.

Unless otherwise approved by RUS, a borrower shall finance small-scale construction with general funds and obtain reimbursement with loan funds when construction is completed and properly executed closeout documents have been submitted to RUS. If a borrower satisfies RUS of its inability to finance the construction temporarily with general funds, RUS may establish, on a case-by-case basis, a work order fund in an amount not exceeding \$500,000, for specific construction projects. The work order fund will be closed upon receipt of an FRS and the executed Forms 771a for the specific projects for which the work order fund was established.

#### b Buildings other than Towers

For unattended buildings that are estimated to cost \$50,000, or less, the borrower shall use RUS Form 773 contract construction procedures that are discussed in this section of this bulletin. For all other buildings, unattended or attended, the borrower must use RUS Form 257, *Contract to Construct Building*. Procedures for construction under RUS Form 257 are included under Large-scale construction, in the building section.

#### c Towers

For all tower construction, the borrower shall use RUS Form 773 contract construction procedures.

#### d. RUS Form 773 Contract Construction Procedures

The borrower shall prepare RUS Contract Form 773, without modifications, and attach any diagrams, sketches, and tabulations necessary to specify clearly the work to be performed and who shall provide which materials.

RUS recommends that borrowers obtain quotations from several contractors before entering into a contract to ensure obtaining the lowest cost. The borrower shall ensure that the contractor selected meets all federal and state licensing requirements, as well as bonding requirements, and that the contractor maintains the insurance coverage required by the contract for the duration of the work. (See 7 CFR Part 1788.)

e Work Order Construction Procedures

Work order construction shall be performed according to all local, state and federal requirements.

As construction is performed, the borrower shall keep daily time and material reports, referenced by the work project number, to record labor and materials used.

f Inspection and Certification

Upon completion and prior to closeout, the borrower shall obtain the engineer's certification on RUS Form 771a. An authorized official of the borrower shall execute the borrower's certification on RUS Form 771a.

g Reimbursement

To request funds for construction completed under the work order construction procedures or RUS Form 773 contract construction procedures, the borrower shall submit an original RUS Form 771a signed or initialed by the GFR, a description of each project, and RUS Form 481, *Financial Requirement Statement (FRS)*. RUS Form 771a should be submitted only with the FRS that it supports.

4 LARGE-SCALE CONSTRUCTION

a General

The borrower shall use RUS Forms 257, 397, and 515 for large-scale construction, except for tower construction. RUS Form 773 contract construction procedures contract shall be used for all tower construction. The construction procedures in this section shall apply to small-scale construction when the borrower chooses to use 257, 397, or 515 contract forms for such construction.

Two methods of procurement are discussed in this section: bidding and negotiated purchase. The borrower shall use bidding when using RUS Form 257 and 515. For purchases on RUS Form 397 the borrower may use either method: bidding or negotiated purchase. Bidding is discussed in the sections describing the RUS Form 257 and 515. The bidding procedures are repeated in each section for the



convenience of the reader. Negotiated purchase is discussed in the section describing the RUS Form 397 construction procedures.

b Building Construction

(1) General

RUS Form 257, *Contract to Construct Buildings*, shall be used for RUS-financed construction of all buildings estimated to cost more than \$50,000. All construction pertaining to the building structure shall be performed under one contract. Separate contracts may be used for planting shrubbery, surfacing of roads and parking areas, and other identifiable parts of the project not pertaining to the building structure. These separate contracts shall also be subject to RUS approval.

If during construction of the building, changes to the P&S results in a cost increase of 20% or more, the borrower shall submit to RUS for approval an amendment to the contract detailing all the changes along with an extension to the contractor's bond covering the increased cost.

The site location, design, and construction of the facilities shall comply with all applicable laws and regulations, including:

- (a) Pub. L. 90-480 (42 U.S.C. 4151) (Access to Physically Handicapped), which requires certain buildings financed with Federal funds be designed and constructed to be accessible to the physically handicapped;
- (b) Pub. L. 91-596 (29 U.S.C. 651) the Occupational Safety and Health Act of 1970. OSHA issues rules and regulations covering occupational safety and health standards for buildings. These regulations are codified in 29 CFR Chapter XVII;
- (c) 7 CFR Part 1794, which provides for compliance with the National Environmental Policy Act (NEPA) and Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508) implementing the procedural provisions of NEPA, as well as RUS conformance with other laws, regulations, and Executive Orders regarding environmental protection; and
- (d) 7 CFR Part 1792, Subpart C, which requires that the building design comply with applicable seismic design criteria. Prior to the design of buildings, borrowers shall submit to RUS a written acknowledgement from the architect or engineer that the design will comply.

The borrower shall prepare P&S for construction of all buildings. The P&S shall include:

- (a) RUS Contract Form 257, *Contract to Construct Buildings*;
- (b) Complete and detailed specifications covering materials and workmanship;
- (c) A detailed building plan. Where the building is to house electronic apparatus, the detailed plan or specifications shall include the equipment environmental requirements and network equipment required; and
- (d) A site plan for each building showing the building location and giving the legal description of the site. Sufficient information shall be provided for the site to allow RUS to identify this site as the same property for which the borrower submitted a title opinion to RUS. The legal description shall be typed on the site plan. The borrower shall also furnish topographical information and a description of any proposed site development work and show proposed connections for public utilities.

The P&S shall show the identification and date of the model code used for seismic safety design considerations, and the seismic factor used. See 7 CFR Part 1792, Subpart C.

One set of P&S shall be furnished to RUS for approval. RUS shall approve the P&S in writing or notify the borrower of any reason for withholding approval. Upon RUS approval of the P&S, the borrower shall solicit bids from at least three prospective bidders.

The bid documents shall consist of a copy of the approved P&S, including RUS Form 257. The bid document shall set the time for the bid opening.

(2) Bidding

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Awards shall be made to the bidder whose bid is responsive to the P&S and is most advantageous to the recipient, price, quality and other factors considered. The P&S shall clearly set forth all requirements including all other factors to be used in evaluating bids or proposals that the bidder shall fulfill in order for the bid to be evaluated by the borrower. Any and all bids may be rejected when it is in the borrower's interest to do so. Bidding includes:

(a) Bid Opening Date

The borrower will schedule the bid opening date. The borrower shall wait until receiving RUS approval of the P&S before setting the date. Sufficient time should be allowed for the bidders to examine the project site and prepare their bids. The borrower shall invite the GFR to attend.

(b) Invitations to Bid

The borrower should obtain from its engineer a list of prospective bidders and a recommendation indicating which bidders are considered qualified.

(c) Qualifying Bidders

If the notice and instructions to bidders require that bidders show evidence of meeting certain requirements, the borrower shall qualify bidders before issuing P&S to them.

(d) Review of Bids

The borrower shall review all bids to determine that:

- (1) The bid guarantees are adequate;
- (2) The bids are responsive to the P&S;
- (3) All minor errors or irregularities made through inadvertence are corrected or waived. Failing this, the bid shall be rejected as nonresponsive; and
- (4) In the event of non-minor errors or irregularities, the bid is rejected and the bid price not disclosed.

(e) Evaluating Bids

The borrower shall consider the same alternates in all bids in determining the low bid.

(f) Rejection

The borrower shall reject:

- (1) All bids if quoted prices are not acceptable or if the specifications were ambiguous and resulted in bidders having different interpretations of the requirements.
- (2) Any bid that is not responsive, or is incomplete, or submitted by an unqualified bidder, or unbalanced between labor and materials or other respects.

(g) Award of Contract

The engineer will review all bids for compliance to the P&S. The borrower shall obtain from the engineer the determination of the selected bid, a tabulation of all bids and the engineer's recommendation for award of the contract. The borrower may award the contract immediately if the following conditions are met:

- (1) The project is included in an approved loan and adequate funds were budgeted in the loan and are available;
- (2) All applicable RUS procedures were followed, including those in the *Notice and Instructions to Bid* in the standard forms of contract; and
- (3) The award is to the lowest responsive bidder.

If the above conditions are not satisfied, the quotes along with the engineer's bid recommendation and bid tabulations must be submitted to RUS for approval. In this case, contracts cannot be executed until RUS has notified the borrower of approval of the bid.

(h) Execution of Contract

The borrower shall submit to RUS three original counterparts of the contract executed by the contractor and borrower. If RUS

approves the contract, it shall return one copy to the borrower and send one copy to the contractor.

### 3 Closeout

Upon completion of construction, the borrower shall complete, with the assistance of its architect or engineer, the documents listed in the following table.

Documents Required to Closeout Construction of Buildings						
RUS Form	Description	Copies prepared by		Distribution		
		Contractor	Architect/Engineer	Borrower	Contractor	RUS
238	Construction or Equipment Contract Amendment (if not previously submitted, send to RUS for approval)	---	3	---	---	3
181 <sup>1</sup>	Certificate of Completion (contract construction)	---	2	1	1	---
231	Certificate of Contractor	1	---	1	---	---
224	Waiver and Release of Lien from each Supplier	1	---	1	---	---
213	Certificate (Buy American)	1	---	1	---	---
---	"As Built" Plans and Specifications <sup>2</sup>	---	1	1	---	---
---	Guarantees, Warranties, Bonds, Operating or Maintenance Instructions, etc.	1	---	1	---	---

<sup>1</sup> RUS has issued a proposed rule in the Federal Register in which it proposes to replace RUS Form 181 with RUS 187. RUS Form 181 will be eliminated. When the proposed rule becomes final, the borrower shall then use RUS Form 187 instead of RUS Form 181.

<sup>2</sup> When only minor changes were made during construction, one copy of a statement to that effect from the Architect will be accepted instead of the "as built" P&S.

If the final cost of the buildings differs from the cost of the approved contract and any amendments, a final amendment reflecting any changes must be submitted to RUS.

Upon completion of the project, the borrower shall obtain from the architect or engineer the closeout certification stating that the project and all required documentation are satisfactory and complete. Use RUS Form 756 in Exhibit A.

After all required RUS approvals are obtained, the borrower shall make final payment under Article III of RUS Form 257.

c Core Network and Access Equipment

(1) General

When purchasing core network and access equipment, borrowers shall use RUS Contract Form 397, *Special Equipment Contract (Including Installation)*. For core network and access equipment RUS will not finance large-scale construction contracts that do not include installation. The borrower may purchase the equipment using either method: negotiated purchase or bidding.

Under the terms of RUS Form 397, the prices do not include any amounts that are or may be payable by the supplier or the borrower on account of taxes imposed upon the sale, purchase or use of equipment, material and software covered by the contracts. If any such tax is paid by the supplier, the contract requires that the amount is to be stated separately on all invoices and paid by the borrower.

The engineer prepares P&S consisting of performance specifications, installation requirements, and application engineering requirements. The borrower shall send one copy of the P&S to RUS for approval. RUS shall approve the P&S in writing or notify the borrower of any reason for withholding approval.

(2) Negotiated Purchase

Following approval of the P&S, the borrower should solicit quotes from at least three suppliers of equipment of different manufacturers. To negotiate for a single quote requires prior written RUS approval. To request RUS approval the borrower may send a letter to RUS, which includes a justification for such sole-source negotiation.

Based upon the engineer's recommendation, the borrower may award the contract if the following conditions are met:

- (a) The project is included in an approved system design; adequate funds were budgeted in the loan; and are available;
- (b) All applicable RUS procedures were followed; and
- (c) The award is to the lowest responsive quote.

If the above conditions are not satisfied, the quotes must be submitted to RUS along with the engineer's recommendation for approval. In this case, contracts cannot be executed until RUS has notified the borrower of approval of the quote.

The borrower shall send three executed contracts to RUS for approval. After RUS approval of the contract, RUS will return one copy to the borrower and one copy to the supplier.

(3) Closeout

Upon completion of the equipment installation, the borrower and their engineer shall arrange with the supplier for acceptance testing of the equipment. After completion of the acceptance tests by the borrower and the supplier, the borrower and its engineer should review the test results to ensure that the equipment is in conformance with the P&S. All deficiencies must be documented and corrected before the contract can be closed out.

Once the equipment has been accepted, the borrower:

- (a) Assembles and distributes the documents listed in the following table. These documents are required for the closeout of the RUS Form 397 contract.

Documents REQUIRED FOR Closeout of RUS Form 397 Contract						
RUS Form	Description	Copies Prepared by		Distribution		
		Supplier	Engineer	Borrower	Supplier	RUS
238	Construction or Equipment Contract Amendment (If not previously submitted, send to RUS for approval.)	---	3	---	---	3
396	Certificate of Completion—Special Equipment Contract (Including Installation).	---	2	1	---	1
744	Certificate of Contractor and Indemnity Agreement	1	---	1	---	---
213	Certificate (Buy American)	1	---	1	---	---
---	Report in writing, including all measurements and other information required under Part II of the applicable specifications	1	---	1	---	---
---	Set of maintenance recommendations for all equipment furnished under the contract	1	---	1	---	---

- (b) Obtains the contract close out certification from the engineer that the project and all required documentation are satisfactory and complete. (See RUS Form 756 in Exhibit A.)
- (c) Submits a copy of the engineer's RUS Form 756 within 30 days of completion of the project.
- (d) Makes final payment under the payment terms of the contract.

d Outside Plant Construction

(1) General

All large scale outside plant projects must be bid to be eligible for funding. Only outside plant project that qualify for the small-scale construction procedures can be negotiated with a contractor on RUS Form 773.

When performing outside plant construction, borrowers shall use RUS Form 515, *Telecommunications System Construction Contract* using the sealed competitive bidding.

The engineer prepares P&S consisting of the RUS Form 515 and the applicable construction specifications listed below:

- (a) RUS Form 515a (Bulletin 1753F-150), *Specifications and Drawings for Construction of Direct Buried Plant*;
- (b) RUS Form 515b (Bulletin 1753F-151), *Specifications and Drawings for Construction of Underground Plant*;
- (c) RUS Form 515c (Bulletin 1753F-152), *Specifications and Drawings for Construction of Aerial Plant*; and/or
- (d) RUS 515d (Bulletin 1753-153), *Specifications and Drawings for Service Installation at Customer Access Locations*;

In addition the P&S must also include the following items:

- (a) Description of special assembly units and guide drawings, if any;
- (b) Key, detail, and cable layout maps; and
- (c) If applicable, a list of any owner-furnished materials and the associated unit cost, using RUS Form 787.

When the borrower furnishes materials under RUS Form 787, *Supplement A to Construction Contract (RUS Form 515)*, these steps should be followed:

- (a) Materials on hand to be furnished by the borrower shall be released to the contractor at the start of construction. Materials on order, but not yet received, shall be provided to the contractor as they become available. The borrower shall obtain from the contractor a written receipt for all such materials delivered.



- (b) Materials on hand, until released to the contractor, shall be covered by fire and either wind-storm or extended coverage insurance, exclusive of materials in the open and not within 100 feet of any building. Poles, wherever stored, shall be covered by fire insurance. All insured values must be at least 80 percent of the cash value of the property insured.
- (c) Subject to adjustment at the time of final settlement, the borrower shall obtain from the contractor monthly invoices that show credit to the borrower, at the prices quoted in RUS Form 787 for all materials furnished by the borrower and installed by the contractor the preceding month.
- (d) Any materials furnished by the borrower remaining as surplus at the completion of construction shall be returned to the borrower. For such materials, the borrower shall furnish a written receipt to the contractor and credit the contractor at the prices quoted in RUS Form 787.”

The borrower shall send one set of P&S for approval. RUS shall approve the P&S in writing or notify the borrower of any reason for withholding approval.

Upon RUS approval of the P&S, the borrower shall solicit bids from at least six prospective bidders. The bid documents shall consist of a copy of the approved P&S, including RUS Form 515.

(2) Bidding

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Awards shall be made to the bidder whose bid is responsive to the P&S and is most advantageous to the recipient, price, quality and other factors considered. The P&S shall clearly set forth all requirements including all other factors to be used in evaluating bids or proposals that the bidder shall fulfill in order for the bid to be evaluated by the borrower. Any and all bids may be rejected when it is in the borrower's interest to do so. Bidding includes:

(a) Bid opening date

The borrower will schedule the bid opening date. The borrower shall wait until receiving RUS approval of the P&S before setting the date. Sufficient time should be allowed for the bidders to examine the project site and prepare their bids. The borrower shall invite the GFR to attend.

(b) Invitations to bid

The borrower should obtain from its engineer a list of prospective bidders and a recommendation indicating which bidders are considered qualified.

(c) Qualifying bidders

If the notice and instructions to bidders require that bidders show evidence of meeting certain requirements, the borrower shall qualify bidders before issuing P&S to them.

(d) Review of bids

The borrower shall review all bids to determine that:

- (1) The bid guarantees are adequate;
- (2) The bids are responsive to the P&S;
- (3) All minor errors or irregularities made through inadvertence are corrected or waived. Failing this, the bid shall be rejected as nonresponsive; and
- (4) In the event of non-minor errors or irregularities, the bid is rejected and the bid price not disclosed.

(e) Evaluating Bids

The borrower shall consider the same alternates in all bids in determining the low bid.

(f) Rejection

The borrower shall reject:

- (1) All bids if quoted prices are not acceptable or if the specifications were ambiguous and resulted in bidders having different interpretations of the requirements.
- (2) Any bid that is not responsive, or is incomplete, or submitted by an unqualified bidder, or unbalanced between labor and materials or other respects.

(g) Award of Contract

The engineer will review all bids for compliance to the P&S. The borrower shall obtain from the engineer the determination of the selected bid, a tabulation of all bids and the engineer's recommendation for award of the contract. The borrower may award the contract immediately if the following conditions are met:

- (1) The project is included in an approved loan and adequate funds were budgeted in the loan and are available;
- (2) All applicable RUS procedures were followed, including those in the *Notice and Instructions to Bid* in the standard forms of contract; and
- (3) The award is to the lowest responsive bidder.

If the above conditions are not satisfied, the quotes along with the engineer's bid recommendation must be submitted to RUS for approval. In this case, contracts cannot be executed until RUS has notified the borrower of approval of the bid.

(h) Execution of Contract

The borrower shall submit to RUS three original counterparts of the contract executed by the contractor and borrower. If RUS approves the contract, it shall return one copy to the borrower and send one copy to the contractor.

(3) Closeout

After construction has been completed per the P&S, and acceptance tests have been made, the borrower shall arrange the time for a final inspection to be conducted by the borrower's engineer, the contractor, the GFR and a representative of the borrower. The steps for closeout of the contract are included in the following table.

Step-by-Step Procedure for Closeout of RUS Form 515 Construction Contract			
Sequence		By	Procedure
Step	When		
1	Upon Completion of Construction	Borrower's Engineer	Prepares the following: a set of Detail Maps and a set (when applicable) of Key Maps which show in red the work done under the 515 contract; a Tabulation of Staking Sheet; and a tentative Final Inventory, RUS Forms 724 and 724a.
2	After acceptance tests are made	Borrower's Engineer	Forwards letter to the borrower with copies to the GFR stating that the project is ready for final inspection. Schedules inspection date.
3	Upon receipt of letter from Borrower's Engineer	GFR	Advises borrower whether attending the final inspection will be possible.
4	By inspection date	Borrower's Engineer	Obtains and makes available the following documents: a set of ``as constructed" detail maps and (when applicable) ``as built" key maps; a list of construction change orders; the final staking sheets; the tabulation staking sheets; the treated forest products inspection reports or certificates of compliance; the tentative final inventory, RUS Forms 724 and 724a; the tentative tabulation, and, a report of results of acceptance tests.
5	During inspection	Borrower's Engineer	Issues instructions to contractor covering corrections to be made in construction as a result of inspection.
6	During inspection	Contractor	Corrects construction on basis of instructions from the borrower's engineer. The corrections should proceed closely behind the inspection in order that the borrower's engineer can check the corrections before leaving the system.
7	During inspection	Borrower's Engineer	Inspects and approves corrected construction. Marks inspected areas on the key map, if available, otherwise on the detail maps.

When the total inventory price exceeds the contract by more than 20 percent, the borrower shall submit for RUS approval an amendment and an extension to the contractor's bond.

When the acceptance tests and inspections have been completed and all deficiencies have been corrected, the borrower:

- (a) Assembles and distributes the documents listed in the following table that are required for the closeout of the RUS Form 515 contract.

Documents Required to Closeout RUS Form 515 Contract						
RUS Form	Description	Copies prepared by		Distribution		
		Contractor	Engineer	Borrower	Contractor	RUS
724	Final Inventory--Certificate of Completion	---	2	1	1	---
724a	Final Inventory--Assembly Units	---	2	1	1	---
None	Contractor's Bond Extension (send to RUS when required)	3	---	---	---	3
213	Certificate (Buy American)	1	---	1	---	---
---	Listing of Construction Change Orders	---	1	1	---	---
224	Waiver and Release of Lien (from each supplier)	1	---	1	---	---
231	Certificate of Contractor	1	---	1	---	--
527	Final Statement of Construction	---	2	1	1	---
---	Reports on Results of Acceptance Tests	---	1	1	1	---
---	Set of Final Staking Sheets	---	1	1	---	---
---	Tabulation of Staking Sheets	---	1	1	---	---
---	Correction Summary (legible copy)	---	1	1	---	---
---	Treated Forest Products Inspection Reports or Certificates of Compliance (prepared by inspection company or supplier).	---	---	1	---	---
---	Final Key Map (when applicable)	---	1	1	---	---
---	Final Central Office Area and Town Maps	---	1	1	---	---

- (b) Obtains the contract closeout certifications from the engineer that the project and all required documentation are satisfactory and complete. (See RUS Form 756 in Exhibit A.)
- (c) Submits a copy of the engineer's RUS Form 756 within 30 days of completion of the project.
- (d) Makes final payment in accordance with the payment terms of the contract.

When the total inventory price exceeds the contract by more than 20 percent, an amendment and an extension to the contractor's bond are required.

## ADVANCE AND DISBURSEMENT OF BROADBAND LOAN FUNDS

### 1 GENERAL

The standard loan documents contain provisions regarding advances and disbursement of loan funds by broadband borrowers. This section implements certain provisions by setting forth requirements and procedures to be followed by the borrowers in obtaining advances and making disbursements of loan funds.

RUS is under no obligation to make or approve advances of loan funds unless the borrower complies with all terms and conditions of the loan documents. The borrower shall use funds in its construction funds only to make disbursements approved by RUS.

### 2 BROADBAND LOAN BUDGET

When the loan is approved, RUS provides the borrower a broadband loan budget. This budget divides the loan into accounts that are associated with the proposed projects, such as electronic equipment and engineering. When an advance is requested, it must be requested against the appropriate account.

### 3 BUDGET ADJUSTMENTS

If more funds are required than are available in an account, the borrower may request RUS' approval of a budget adjustment to use funds from another account. The request shall include an explanation of the change, the account to be used and a description of how the adjustment will affect loan purposes. RUS will not approve a budget adjustment unless the borrower can demonstrate that all loan purposes can be completed. RUS may make a budget adjustment without a formal request when a budget account is insufficient to encumber funds for a contract that otherwise would be approved by RUS.

### 4 DEPOSIT ACCOUNT

The borrower shall establish and maintain a deposit account primarily to hold advances until disbursed. All loan fund advances shall be deposited in the deposit account.

The deposit account shall only be established in a bank or depository whose deposits are insured by the Federal Deposit Insurance Corporation or other federal agency acceptable to RUS. Moneys in the deposit account shall be used solely for the purpose approved in the loan application and shall be withdrawn from time to time only as agreed to by RUS.

RUS may require that other funds be deposited into the deposit account. These may include equity or general fund contributions to construction, proceeds from the sale of property, interest received on loan funds and similar types of receipts. Deposit slips for any deposits to the deposit account shall show the source and amount of funds deposited and be executed by an authorized representative of the bank. All advances will be deposited into the deposit account by electronic transfers.

Funds shall be disbursed only up to the amount approved for advance as indicated on the financial requirement statement.

The disbursement of nonloan funds deposited into the deposit account requires the same RUS approvals as loan funds.

Disbursements must be evidenced by canceled checks. Disbursements to reimburse general funds shall be documented by a reimbursement schedule to be retained in the borrower's file that lists the deposit account check number, date, and an explanation of amounts reimbursed by construction project.

## 5 FINANCIAL REQUIREMENT STATEMENT (FRS)

To request advances the borrower must submit to RUS an FRS (REA Form 481), a description of the advances desired, and other related information to the transactions as required by RUS.

The borrower shall request funds in the first advance of loan funds to repay any interim financing indebtedness. RUS may not make further advances of loan funds until the borrower has submitted evidence, in form and substance satisfactory to the Administrator, that (1) any indebtedness created by the interim financing and any liens associated therewith have been fully discharged of record and (2) the borrower has satisfied all other conditions on the advance of additional loan funds.

If the source of funds for interim financing is the borrower's internally generated funds, the borrower may request reimbursement of those funds along with advances for other purposes on the first Financial Requirement Statement submitted to RUS.

The FRS is used by RUS and the borrower to record and control transactions in the deposit account. Approved contracts and other items are shown on the FRS under "Approved Purposes." Funds are approved for advance as follows:

### a Construction

- (1) *Construction contracts*: Ninety percent of the encumbered amount (95 percent for outside plant), with the final 10 percent (5 percent for outside plant) approved when RUS approves the closeout documents.

- (2) *Work orders*: The portion of the work order summary determined by RUS to be for approved loan purposes.
- (3) *Work order fund*: Based on the borrowers request to establish a work order fund and RUS' approval of this request.
- (4) *Real estate*: Upon request of the borrower after submission of evidence of a valid title.
- (5) *Right of way procurement*: Based on the borrower's itemized costs. These costs cannot include any costs for acquiring right of way.

b Engineering

- (1) *Preloan engineering*: The final itemized invoice from the person or firm that completed the system design.
- (2) *Postloan engineering contracts*: Ninety percent of the amount of the RUS approved engineering contract. The balance is approved when the engineering contract is closed.
- (3) *In-house engineering*: Ninety percent of the amount of the RUS approved in-house engineering proposal. The balance is approved when the final statement of fees is received.
- (4) *Office equipment, vehicles, and work equipment*: Based on copies of invoices.
- (5) *Refinancing*: Based on the amount in the approved budget.
- (6) *Acquisitions*: Based on the final itemized costs, but cannot exceed the approved budget.

Funds other than loan funds that are deposited in the deposit account are reported as a credit under total disbursements. Disbursements of these funds are subject to the same RUS approvals as loan funds.

The borrower shall request advances as needed to meet its obligations promptly. Generally, RUS does not approve an advance requested more than 60 days before the obligation is payable.

Funds should be disbursed for the item for which they were advanced. If the borrower needs to pay an invoice for which funds have not been advanced, and disbursement of advanced funds for another item has been delayed, the latter funds may be disbursed to pay the invoice for up to the amount approved for advance for that item on the FRS. The borrower shall make entries on the next FRS showing the changes under "Total Advances to Date" and shall explain the changes in writing before RUS will process the next FRS.



The certification on each of the three copies of the FRS sent to RUS shall be signed by a corporate officer or manager authorized to sign such statements. RUS Form 675, *Certificate of Authority*, shall be submitted to RUS indicating the names of all persons authorized to sign a FRS. RUS will not process a FRS signed by an individual whose name is not included on the most recent Form 675.

The documentation required for the FRS transactions are the deposit slip, the cancelled deposit account checks and the supporting invoices or reimbursement schedules. These shall be kept for in the borrower's files for periodic audits by RUS.

## 6 TEMPORARY EXCESS CONSTRUCTION FUNDS

When unanticipated events delay the borrower's disbursement of advanced funds, the funds may be used for other approved purposes or must remain in the deposit account. If the deposit account is an interest bearing account, all interest earned must remain in the deposit account and cannot be disbursed without RUS approval.

## 7 METHOD OF ADVANCES FOR BROADBAND LOAN FUNDS

### a Direct Cost-of-money and Direct 4% Loans

The first or subsequent advances may be conditioned on the satisfaction of certain requirements stated in the borrower's loan contract.

All advances shall be made electronically using the Automatic Clearing House (ACH). Normally, for advance of funds ACH only makes one payment per FRS.

The following information shall be included with each advance:

- (1) Name and address of borrower's bank. If the borrower's bank is not a member of the Federal Reserve System, the name and address of its correspondent bank that is a member of the Federal Reserve System;
- (2) ACH routing information;
- (3) Borrower's bank account title and number; and
- (4) Any other necessary identifying information.

b. Private Loan Guarantee.

The first advance or subsequent advances may be conditioned on the satisfaction of certain requirements stated in the borrower's loan contract.

Upon review and processing of the FRS, RUS will notify the private lender of the amount of loan funds to be advanced to the borrower. The private lender will advance loan funds based on the terms and conditions agreed to by the private lender, RUS and the borrower.

With each FRS submitted to RUS the borrower shall include any information that the private lender requires to make an advance of funds.

EXHIBIT A: FORMS



*According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0572-XXXX. The time required to complete this information collection is estimated to average .05 of a minute per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.*

### INTERIM FINANCING ADDENDUM

If this project is financed in part by the Rural Telephone Bank, an agency of the United States of America, the references in the contract documents to "the United States of America and the Government" shall mean the "Rural Telephone Bank", as well, and the references to the "Administrator" shall mean the "Governor" of the Rural Telephone Bank as well. If the project is financed wholly by the Rural Telephone Bank, the reference to "the United States of America" and the "Government" shall mean the Rural Telephone Bank and the references to the "Administrator" shall mean the "Governor" of the Rural Telephone Bank. References to RUS loans or loan contracts shall include RUS guarantees of loans by others.

The Owner, notwithstanding the references in the contract documents to the RUS or Rural Telephone Bank financing of the work herein provided for, plans to use funds other than RUS or Rural Telephone Bank loan funds initially and expects to be reimbursed subsequently with RUS or Rural Telephone Bank loan funds in whole or in part. It is understood that:

1. An RUS  , RTB  , or FFB  loan has  , has not  been made and has not been released. (Owner checks applicable boxes.)
2. Arrangements have been made for other funds so that invoices may be paid promptly in accordance with the contract provisions.
3. Approval of the contract by RUS or the Rural Telephone Bank shall not be construed as a commitment to make a loan for this purpose.

Date \_\_\_\_\_  
OWNER'S NAME

BY \_\_\_\_\_  
PRESIDENT

Date \_\_\_\_\_  
CONTRACTOR'S NAME

BY \_\_\_\_\_  
TITLE



According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0572-XXXX. The time required to complete this information collection is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

## U.S. Department of Agriculture Rural Utilities Service

### Software License Agreement

*Addendum to RUS Form 397, Special Equipment Contract (including installation),  
RUS Form 398, Special Equipment Contract (not including installation), and RUS Form 773,  
Miscellaneous Construction Work and Maintenance Services Contract*

(Use only when the Contractor requires a software license agreement.)

(1) **Definitions.** For the purpose of this Software License Agreement --

Contract means the RUS Form 397, *Special Equipment Contract (including installation)*, RUS Form 398, *Special Equipment Contract (not including installation)*, or RUS Form 773, *Miscellaneous Construction Work and Maintenance Services Contract* dated \_\_\_\_\_, between \_\_\_\_\_ (the Licensee) and \_\_\_\_\_ (the Licensor).

Days mean calendar days.

Licensed Software means the computer programs, furnished for the operation of the System(s) provided under the Contract, whether contained on a tape, disc, semiconductor device, or other memory device or system memory consisting of logic instructions and instruction sequences in machine-readable object code, which manipulate data in the central processor, control and perform input/output operations, perform error diagnostic and recovery routines, control call processing, and perform peripheral control, administrative and maintenance functions; as well as Licensor's standard customer documentation, excluding source code, used to describe, maintain and use the programs provided under the Contract.

Licensee and Licensor, respectively, mean the parties signing the software license agreement as the licensee and licensor.

Right-to-Use Fee is defined in Section (2).

Specifications means the respective RUS specification such as the RUS Form 397b, *Trunk Carrier System Specifications*; RUS Form 397c, *Subscriber Carrier Specifications*; RUS Form 397d, *Design Specifications for Point-to-Point Microwave Radio Systems*; RUS Form 397g, *Performance Specifications for Line Concentrators*; and RUS Form 397h, *Design Specifications for Digital Lightwave Transmission Systems*; or when an RUS does not have an specification covering the product, the consulting engineer's prepared specification; which is part of the Contract.

System means the stored program controlled central office and associated remote switching terminal or terminals which use the Licensed Software covered by this License.

(2) **Software License Provisions.** The Licensor may charge a fee, herein referred to as a Right-to-Use Fee, for use of the Licensed Software. The Right-to-Use Fee shall be included in the Total Base Bid as defined in the Contract. In consideration of the Right-to-Use Fee, the Licensor hereby grants the Licensee the right to use all Licensed Software, solely in connection with the System provided under this Contract, so that the System performs in accordance with the Contract and the Specifications.

(i) The Licensee's right to use the Licensed Software is non-exclusive and limited to use or operation in the United States of America, including its Territories, the Federated States of Micronesia, the Marshall Islands, Palau and the Commonwealth of Puerto Rico, with the System for which the Licensed Software is provided by the Licensor. The Licensee may reuse the equipment and its accompanying Licensed Software at another location within the Licensee's System without obtaining additional approvals from Licensor, provided, however, that the Licensee notify the Licensor, within ten (10) days, of the change in location of the equipment and Licensed Software.

(ii) The Licensee and any successor to the Licensee's title in the System may, without further consent of the Licensor, transfer the Licensed Software and all of the Licensee's rights and interests under this Software License to any transferee who acquires legal title to the System, provided that such transferee first agrees in writing to the Licensor to abide by all of the terms and conditions of this License including, without limitation, the territorial limitation stated in Section (2)(i) and the restrictions on decompiling or reverse assembly stated in Section (2)(iii). Licensee shall give Licensor written notice thirty (30) days prior to any transfer. The Licensor shall not place any additional conditions on the transferee's use of the System or the Licensed Software. If the provisions of this Section (2) (ii) are satisfied, thereafter the Licensee shall bear no responsibility for transferee's failure to abide by the terms and conditions of this License.

(iii) The Licensee shall take reasonable steps to protect the confidentiality of the Licensed Software and shall not decompile or reverse assemble of all or any part of the Licensed Software to generate source code. The Licensee shall not make the Licensed Software available to any person except on a need to know basis. The obligations of the Licensee hereunder shall not extend to any information or data relating to the Licensed Software which is now available to the general public or becomes available by reason of the acts of the Licensor or third parties.

(iv) The Licensee may reproduce or copy the Licensed Software and related materials solely for the purpose of archival backup, in-house training and operating, maintaining, and administering the System provided under this Contract. In such reproduction, the Licensee shall include, upon all such copies of the Licensed Software, all proprietary notices, including the copyright notice within the Licensed Software program and related documentation in the form in which it is received from the Licensor.

(v) The Licensee acknowledges that the Licensed Software program is the property of the Licensor, and shall not do, or cause to be done, anything to activate any of the subsisting nonactivated computer instruction steps therein unless authorized in writing by the Licensor. The Licensor shall have the exclusive right to activate, or authorize the activation of, the subsisting nonactivated program instruction steps in the Licensed Software. In this event Licensee shall pay any additional Right-To-Use Fee(s) agreed to by Licensee and Licensor.

(vi) In the event the Licensor develops significant improvements to the Licensed Software, the Licensor may market the improvements as a separate offering requiring payment of an additional Right-to-Use Fee.



(vii) The Licensee shall not modify or otherwise change the Licensed Software other than at the direction of the Licensor. This provision shall not apply to:

(A) Changes to the Licensed Software which are necessary to preserve or restore service. Licensee shall use all reasonable efforts to contact Licensor before making any such changes. If the Licensor is unable to make the necessary changes promptly to the Licensed Software to preserve or restore service, then the Licensee may make only such changes to the Licensed Software as are necessary to preserve or restore service. In such event, Licensee shall promptly notify Licensor of the changes made by Licensee.

(B) Changes made by the Licensee to its own database; and

(C) Changes made by the Licensee in connection with the exercise of its rights under Section (2) (xi).

(viii) Within thirty (30) days after written notice that a program or a release thereof has been discontinued and is no longer required for the operation of the System and the Licensor has furnished the Licensee with a new program that is fully satisfactory to the Licensee, the Licensee agrees to return the original and all copies of the discontinued program and specified related documents. If such return is impossible or impractical, the Licensee shall destroy said program and documents and provide the Licensor with a written notice of such destruction.

(ix) The Licensor warrants to the Licensee that any Software licensed under this Software License shall function for a period of five (5) years from the warranty start date defined in the Contract in accordance with the Specifications and any written or printed technical material provided by the Licensor to explain the operation of the Licensed Software and aid in its use. The Licensor shall correct all deficiencies within thirty (30) days from the date of receipt by the Licensor of written notice of such deficiencies from the Licensee. An extension of this thirty (30) day period may be allowed only if agreed upon by the Licensee and RUS. It shall be the Licensor's obligation to insert and thoroughly test, at no charge to the Licensee, any software amendment or alteration provided to satisfy the obligations of this Section (2)(ix). If a deficiency is detected or a correction made within the final ninety (90) days of the warranty, the warranty shall be extended to a date ninety (90) days after the deficiency has been corrected.

(x) The Licensor shall hold harmless and indemnify the Licensee from any and all claims, suits, and proceedings for the infringement of any patent, copyright, trademark, or violation of trade secrets covering any Licensed Software used with the System, except for items of the Licensee's design or selection. If the Licensee's use of the Licensed Software is enjoined, the Licensor shall promptly, at its own expense, place the Licensee in a position where it is able to use the System in accordance with the Specifications, whether by: (A) modifying the Licensed Software or portion thereof so that it no longer infringes but remains functionally equivalent, (B) replacing the Licensed Software with noninfringing equivalent software, (C) obtaining for the Licensee a license or other right to use, or (D) such other actions as may be required. This shall be in addition to any other rights or claims which the Licensee may have. The Licensor shall, at its own expense, (and the Licensee agrees to permit the Licensor to do so) defend any suits which may be instituted by any party against the Licensee for alleged infringement of patents, copyright, trademark, or violation of trade secrets relative to the Licensor's performance hereunder. Either party shall notify the other promptly of any such claims, and the Licensee shall give to the Licensor full authority and opportunity to settle such claims, and shall reasonably cooperate with the Licensor in obtaining information relative to such claims.

(xi) In the event the Licensor becomes unwilling or unable to furnish support required by the Contract for the Licensed Software, the Licensor shall, upon written request of the Licensee, provide with the greatest possible dispatch all Licensed Software back-up documentation including proprietary information other than agreed excluded documentation. In this event,

(1) the Licensee shall be permitted full use of all Licensed Software and documentation as long as the System is operational and (2) the Licensee may modify, or have modified, the Licensed Software for feature enhancement or proper equipment operation and becomes the owner of such modifications for all purposes, including patenting, copywriting, sale, or license thereof. Agreed excluded documentation is Licensed Software back-up documentation described in the first sentence of this Section (2) (xi) which (A) is proprietary information of a third party, (B) was specifically described at the pre-bid technical session and individually identified in an attachment to the Bid, and (C) RUS and the Licensee agree, before bids are opened, may be excluded from the requirements of this Section (2) (xi). In the event the Licensor furnishes agreed excluded documentation and the Licensee exercises its rights under this Section (2)(xi), the Licensor shall use its best efforts to provide such agreed excluded information to the Licensee, or obtain continuing support agreements from the parties retaining legal rights to the excluded documentation. Licensor agrees that certain Licensed Software cannot be excluded from the requirements of this Section (2)(xi) including, but not limited to, software, the absence or improper operation of which would significantly impair the operation of the System, would significantly impair the ability of the Licensee to generate revenue, or would pose a risk to RUS loan security.

(xii) A breach of this License by the Licensor is a breach of the Contract. Therefore, the remedies specified in the Contract shall apply.

(xiii) The Licensee shall have thirty (30) days after receipt of written notice from the Licensor to correct any breach of this License. Damages payable by the Licensee for its breach of this License shall not exceed the total Contract price. The Licensor shall not terminate this License unless:

(A) The Licensor has given RUS sixty (60) days notice before termination; and  
(B) RUS agrees with the Licensor that termination is the only method available to prevent significant harm to the Licensor from additional Licensee defaults.

(xiv) The obligations of Licensee and Licensor and any successors in title under this Agreement shall survive the termination of this Agreement and continue after any termination of rights granted hereunder.

(xv) Licensee and Licensor agree that it will not, without the prior written permission of the other party, use in advertising, publicity, packaging, labeling, or otherwise, any trade name, trademark, trade device, service mark, symbol, or any other identification or any abbreviation, contraction, or simulation thereof owned by the other party or any of its affiliates or used by the other party or any of its affiliates to identify any of their products or services, unless otherwise agreed by the parties.

(xvi) This Software License Agreement shall prevail notwithstanding any conflicting terms or legends which may appear on or in the Licensed Software.

(xvii) If any Section or part thereof, in this Agreement shall be held to be invalid or unenforceable in any jurisdiction in which this Agreement is being performed, then the meaning of such Section or part shall be construed so as to render it enforceable, to the extent feasible; and if no feasible interpretation would save such Section or part, it shall be severed from this Agreement and the remainder shall remain in full force and effect. However, in the event such Section or part is considered an essential element of this Agreement, the parties shall promptly negotiate a replacement therefor.

(xviii) This Software License and any amendments thereto, or revisions thereof, are subject to RUS approval.

**LICENSOR**

**LICENSEE**

\_\_\_\_\_  
**Company Name**

\_\_\_\_\_  
**Company Name**

**By** \_\_\_\_\_

**By** \_\_\_\_\_

**Title** \_\_\_\_\_

**Title** \_\_\_\_\_

**Date** \_\_\_\_\_

**Date** \_\_\_\_\_

*According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0572-XXXX. The time required to complete this information collection is estimated to average .05 of a minute per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.*

**U.S. Department of Agriculture  
Rural Utilities Service**

**CONTRACT CLOSEOUT CERTIFICATION**

*(Submit an original and a copy to RUS Area Engineering Branch.)*

BORROWER'S NAME: \_\_\_\_\_  
PROJECT DESIGNATION: \_\_\_\_\_  
CONTRACT TYPE & NUMBER: \_\_\_\_\_  
CLOSEOUT AMOUNT: \_\_\_\_\_  
SALES TAXES (INCLUDED ABOVE): \_\_\_\_\_

In connection with the above construction contract, the undersigned certify that:

1. The construction is complete and was done in accordance with the RUS approved system design or layout or subsequent RUS approved changes;
2. The construction was for loan purposes;
3. Construction used RUS-accepted materials and was in accordance with specifications published by RUS covering the construction which were in effect when the contract was executed, or in the absence of such specifications, that it meets other applicable specifications and standards (specify), and that it meets all applicable national and local code requirements;
4. The construction complies with the "Buy American" provision ( 7 U.S.C. 903 note) of the Rural Electrification Act of 1938 (7 U.S.C. 901 et seq.), as amended;
5. All necessary approvals have been obtained from regulatory bodies and other entities with jurisdiction over the project;
6. All closeout documents required by this part have been examined and found complete such that the Contractor has fulfilled all obligations under the contract except for warranty coverage; and
7. The engineer or architect is not affiliated with and does not represent the contractor, vendor, or manufacturer who is a participant in the contract.

BORROWER

ENGINEER/ARCHITECT

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_  
CO.: \_\_\_\_\_