(a) This rule applies to procurement and construction for all projects which are financed, in whole or in part, with loans made or guaranteed by RUS, including reimbursable projects. REA Bulletin 40–6 contained the requirements for all procurement and construction, regardless of the source of funds.

(b) This rule eliminates the previous requirement that RUS approve subcontracts. (Subcontracts for generating projects were already exempt from RUS approval.)

(c) This rule changes the dollar thresholds that determine which procurement procedure is to be used for a project.

(d) This rule raises the dollar thresholds that determine whether RUS approval of a contract is required and eliminates the requirement of RUS approval of certain contract amendments.

(e) This rule eliminates the requirement of RUS approval of borrowers' contracts for headquarters facilities.

(f) This rule adds procedures for procurement of communication and control facilities.

(g) This rule simplifies the procedures for the closeout of construction contracts by reducing the number of forms to be submitted to RUS.

(h) This rule revises the RUS standard contract forms. The major changes in the contract forms are as follows:

(1) Change the forms to reflect the changes listed above.

(2) Change the insurance and bonding dollar limits as outlined in 7 CFR part 1788.

(3) Change the forms to require prequalification of all bidders.

(4) Change the interest rate on overdue accounts.

(5) Change the "Buy American" provision to include Mexico and Canada in accordance with the North American Free Trade Agreement Implementation Act of December 8, 1993, Pub. L. 103– 182.

(6) Change the indemnification clause (also called "hold harmless clause") to reflect RUS's current policy.

(7) Incorporate certain technical changes relating to wood treating and right-of-way clearing chemicals. In order to reduce printing cost and volume, the forms included in this part are condensed, especially the tables. Also, several forms refer to guide drawings, which do not contain requirements, and, hence, will not be included. RUS intends to reformat these forms similar to their current configuration (including the tables and drawings) and make them available in that format either from RUS or for purchase from the Government Printing Office. See § 1726.300 for a list of the standard forms of electric contracts and where each may be obtained.

This rule was published as a proposed rule at 59 FR 28924, June 3, 1994. In addition, "Permitted Contract Modifications—Indemnification," dealing with indemnification of the owner by the contractor in RUS's standard contract forms, was published as a proposed rule at 59 FR 4603, February 1, 1994. This rule incorporates the changes and addresses the comments resulting from the proposed rule "Permitted Contract Modifications—Indemnification."

### Comments

A total of 45 organizations submitted comments on the proposed rule, including 27 borrowers, the National Rural Electric Cooperative Association, 6 engineers and engineering organizations, the Power and Communication Contractors Association, two insurance companies, two state borrower associations, and 6 others. RUS considered all comments received. The more significant and most commonly made comments are addressed herein.

## Applicability

Many commenters suggested changes or clarification as to when this rule applies. This rule has been clarified to state that it applies when materials, equipment, and construction are financed, in whole or in part, with loans made or guaranteed by RUS, including reimbursable projects. A statement regarding jointly owned projects has also been added. Competitive bidding for new capacity resources, however, is outside the scope of this rule.

# Threshold Limits

There were many comments suggesting changes in the various dollar limits regarding forms to be used, bidding procedures to be followed, RUS approvals, etc. Several comments also suggested making the dollar limits more consistent. RUS has increased the contract approval limit for transmission construction and for load control, communication, and SCADA systems for power supply borrowers. RUS believes that the limits, as revised, are a reasonable balance that allows the borrower reasonable flexibility while assuring RUS that loan funds are being used properly. A number of clarifications have been added to avoid potential ambiguities.

Several commenters expressed concern about using a calendar year

limit, since one or two large procurements could consume the entire limit, and very small procurements thereafter would be subject to more stringent requirements. This situation is inherent in any calendar limit, and RUS expects each borrower to manage its procurement program by using the procurement procedure (e.g., formal competitive bidding) or the contract form not subject to the calendar year limit for large procurements and prudently utilizing the flexibility provided by this rule so that the calendar year limits are not exceeded.

### Bidders Qualifications and Competition

Several commenters suggested that a bidder's performance record, safety record, and similar factors should be considered when evaluating bids. RUS strongly disagrees with this. RUS believes that such factors can and should be considered when determining the bidder's qualifications to be invited to bid, but it is inappropriate and unacceptable to evaluate these factors when evaluating a bid from a qualified and invited bidder. Language has been added to the rule clarifying this position.

Other comments concerned how to deal with a potential conflict of interest with a bidder. This rule places primary responsibility on the borrower's board of directors to determine if a potential conflict of interest is significant, and RUS believes this is appropriate.

A number of commenters suggested that fewer than three bidders could represent adequate competition. RUS believes that, for most procurement, three or more bidders are needed to assure adequate competition. We have, however, eliminated the requirement that RUS concurrence be obtained prior to awarding a contract based on fewer than three bids, providing that the borrower documents that all reasonable measures were taken to assure adequate competition.

### Engineer

Many commenters noted that borrowers often utilize staff engineers, but the language of the rule generally implies that the engineer is an outside consultant. RUS agrees with this position and has revised the language accordingly.

One commenter noted that several engineering contract forms were not included in the list of RUS standard contract forms. Such forms are still available and in some cases mandatory, but are outside the scope of this rule and are contained in other RUS rules.