

SECTION 103 – WRDA 86, AS AMENDED

**MODEL PROJECT PARTNERSHIP AGREEMENT
FOR
SPECIFICALLY AUTHORIZED
STRUCTURAL FLOOD RISK MANAGEMENT
PROJECTS AND SEPARABLE ELEMENTS**

**JANUARY 10, 2006
REVISED – APRIL 19, 2006
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APPLICABILITY. – The attached model agreement is one of eight models for specifically authorized flood risk management projects or separable elements thereof. The other models address different combinations of structural flood risk management projects or separable elements thereof with added features for non-structural flood risk management, ecosystem restoration, or recreation. The following descriptions are provided to assist in determining the correct model to be used for your project. The models discussed below should not be used for any Continuing Authority Program projects or any specifically authorized projects that do not have structural flood risk management features. Models for Continuing Authority Program projects and other project purposes can be found in the approved model section of the Project Partnership Agreement (PPA) Web page. If there is no approved model posted in the approved model section of the PPA Web page that is applicable to your particular project or separable element, the District Project Delivery Team should consult with the appropriate HQ RIT for guidance on drafting the appropriate agreement.

Structural Flood Risk Management – The attached model should be used only for specifically authorized structural flood risk management projects (and separable elements thereof) that do not include any other project purposes.

Structural Flood Risk Management and Recreation – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management and recreation.

Structural Flood Risk Management and Ecosystem Restoration – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management and ecosystem restoration.

Structural Flood Risk Management, Ecosystem Restoration, and Recreation – Use only for specifically authorized projects (and separable elements thereof) with

costs allocable to structural flood risk management, ecosystem restoration, and recreation.

Structural Flood Risk Management and Non-Structural Flood Risk Management – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management and non-structural flood risk management.

Structural Flood Risk Management, Non-Structural Flood Risk Management, and Recreation – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management, non-structural flood risk management, and recreation.

Structural Flood Risk Management, Non-Structural Flood Risk Management, and Ecosystem Restoration – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management, non-structural flood risk management, and ecosystem restoration.

Structural Flood Risk Management, Non-Structural Flood Risk Management, Ecosystem Restoration, and Recreation – Use only for specifically authorized projects (and separable elements thereof) with costs allocable to structural flood risk management, non-structural flood risk management, ecosystem restoration, and recreation.

NOTES. – The following pages (iv – xvii) contain numbered notes to assist in drafting an agreement for your project using this model. Throughout the model agreement, there are references to the numbered notes (example: [SEE NOTE – 6]) to direct you to the appropriate note that provides explanation and guidance on use of optional language or information required to fill in the blanks. Several of the notes are general in nature and should be reviewed and discussed with the sponsor during preparation of the draft agreement for your project.

OPTIONAL LANGUAGE. – The use of optional language allows the model to be applicable to a larger universe of projects. Many of the numbered notes (example: [SEE NOTE – 9]) require you to choose between multiple versions of language or to choose whether or not to include a paragraph, sentence, or phrase depending on the specifics of your project. In many cases optional language to address a concept, such as a separable element, is required in numerous locations throughout the agreement. Each of these locations has been identified with numbered notes; however, it is important to ensure that, if the optional language addressing a certain concept is included in one location, it is also included in all other appropriate locations. Correct use of the optional language is not considered a deviation from the model.

BLANKS. – There are numerous locations where information specific to your project is required to fill in a blank. All of the blanks must be filled in, except the date in the first paragraph, prior to forwarding the agreement for review. Including the information required to fill in a blank is not considered a deviation from the model.

DEFINED TERMS SHOWN IN ITALICS. – Throughout the agreement the terms defined in Article I are shown in italics. Do not remove any of the *italics* from the agreement.

NOTES:

1. FORMAT. - Remove the cover pages, notes section, all bold type references to notes, and any bold type text from the agreement prior to forwarding for review. Reminder: Do not remove any of the *italics* from the agreement.

2. TERMINOLOGY. - The terms “flood risk management”, “flood damage reduction”, and “flood control” often are used interchangeably in law, policy, and common usage. If the text in the statute authorizing your project refers to a project for “flood control” or “flood damage reduction” instead of “flood risk management”, it is acceptable, although not required, to replace the phrase “flood risk management” with “flood damage reduction” or “flood control” throughout the agreement. This change is not considered a deviation from the model. If this change is made in one location, ensure that all other locations, including defined terms, are similarly changed.

3. MULTIPLE SPONSORS.

A. No division of responsibilities between or among multiple sponsors in agreement. - In the event there are two or more entities serving as the sponsors for the project, and there is no division of responsibilities between or among them, the agreement can be modified to identify all the entities collectively as the “Non-Federal Sponsors”. However, it should be explained to all entities that the term “Non-Federal Sponsors” is construed to hold multiple sponsors jointly and severally responsible for compliance with all agreement obligations. The changes outlined in paragraphs A.1., A.2., and C. of this note are required to identify all entities collectively as “Non-Federal Sponsors” and are not considered a deviation from the model.

1. Modify first paragraph to include name of each entity serving as a sponsor. (Example: ... Magoffin County Fiscal Court represented by the Magoffin County Judge and the City of Salyersville, Kentucky represented by its Mayor (hereinafter the “Non-Federal Sponsors”))

2. Change “Non-Federal Sponsor” to “Non-Federal Sponsors” throughout the agreement. There are several paragraphs where this change will require additional grammatical changes immediately following the phrase “Non-Federal Sponsors” to reflect multiple sponsors (i.e. “its” to “their” or “assumes” to “assume”, etc.).

B. Division of responsibilities between or among multiple sponsors required in agreement. - While it is preferred to have only one sponsor or, when multiple sponsors are necessary, to designate them collectively as “Non-Federal Sponsors” (see paragraph A. of this note), we do recognize there are instances where there are two or more entities serving as the sponsors for the project and there is a need for a division of responsibilities between or among them in the body of the agreement

(such as - one sponsor can only provide the LERRD and the other sponsor performs all other responsibilities or one sponsor can only serve as sponsor for one purpose and another sponsor is required as sponsor for other purposes). It is important that each obligation in the agreement is reviewed and assigned to the appropriate party and that all obligations of the agreement are addressed. We have found that modifying an agreement to address a division of responsibilities can be very cumbersome and it offers many opportunities for inadvertent omissions. Therefore, at a minimum, the division of responsibilities in the drafted agreement for your project must be coordinated with the vertical team (PDT, MSC, HQ, and, if necessary OASA(CW)) to ensure that the proposed division of obligations is acceptable and that all obligations are addressed. The changes outlined in paragraphs B.1., B.2., and C. of this note are required for multiple sponsors where such approach was documented fully in the approved decision document or otherwise was approved in writing by the HQ RIT. When so approved, such changes to address multiple sponsors are not considered a deviation from the model.

1. Modify first paragraph to identify each entity separately using the identifier preferred by the sponsor (see note 5) and then collectively as the “Non-Federal Sponsors”. (Example: ... The State of California (hereinafter the “State”), represented by the President of The Reclamation Board, and the Sacramento Area Flood Control Agency (hereinafter “SAFCA”) represented by its Chair of the Board (the State and SAFCA when referred to collectively are referred to as the “Non-Federal Sponsors”))

2. Review each occurrence of “Non-Federal Sponsor” and change it to the identifier for the sponsor that will be responsible for that obligation. If all sponsors collectively will be responsible for an obligation, then change “Non-Federal Sponsor” to “Non-Federal Sponsors”. There are several paragraphs where this change will require additional grammatical changes immediately following the phrase “Non-Federal Sponsors” to reflect multiple sponsors (i.e. “its” to “their” or “assumes” to “assume”, etc.).

C. The changes below are required for all agreements with multiple sponsors, regardless of whether you followed paragraph A. or B. above. These changes are not considered a deviation from the model.

1. Modify title to include name of each entity serving as a sponsor.

2. On the signature page, a separate signature block will be required for each entity serving as a sponsor.

3. A separate Certificate of Authority will be required for each entity serving as a sponsor.

4. A Certification Regarding Lobbying must be signed by each signatory to the agreement.

4. GOVERNMENT REPRESENTATIVE. – Insert the title of the Government representative signing the agreement. Do not include the name, only the title. (Example: U.S. Army Engineer, Mobile District)

5. REFERENCE TO NON-FEDERAL SPONSOR. - Use “Non-Federal Sponsor”, “Local Sponsor”, “State”, “County”, “Commonwealth”, “Territory” or other identifier as preferred by the sponsor in the parenthetical phrase and consistently throughout the agreement. This change is not considered a deviation from the model. If this change is made in one location, ensure that all other locations are similarly changed.

6. NON-FEDERAL SPONSOR REPRESENTATIVE. – Insert the title of the sponsor’s representative signing the agreement. Do not include the name, only the title. The title shown for the sponsor’s representative should match the title shown on the signature page and should be preceded by “the” or “its”, as appropriate, to match the title of the sponsor’s representative. (Example: the Mayor)

7. AUTHORIZED PROJECT OR SEPARABLE ELEMENT OF AN AUTHORIZED PROJECT.

A. For each location that requires a choice between two options - Choose Option (1) if the project in the agreement is the authorized project or Option (2) if the project in the agreement is a separable element of the authorized project. Delete, in its entirety, the option not used.

B. Whereas clauses. - The Whereas clause options each contain two Whereas clauses. In addition, when citing the authority for construction in the Whereas clause be sure to include the full name of the public law with the section and paragraph numbers. (Example: for the Bluegrass Creek, Kentucky project authorized in the Water Resources Development Act of 1999 – the correct reference is Section 101(a)(20) of the Water Resources Development Act of 1999, Public Law 106-53)

8. ABILITY TO PAY. - If the sponsor is entitled under Section 103(m) of the Water Resources Development Act of 1986, as amended, (33 U.S.C. 2213(m)) to a reduction in its required flood risk management share, pursuant to an approved decision document that documents the calculation of the sponsor’s ability to pay, the Whereas clause following this note should be modified by deleting “not” in the first line. If this Whereas clause is modified to state the sponsor is entitled to a reduction in its required flood risk management share, Option (3) in Articles II.B. and XVII.B.3. must be selected (see note 21).

9. SECTION 902 MAXIMUM COST OF PROJECT. Section 902 of the Water Resources Development Act (WRDA) of 1986, as amended, imposes a cap on increases in project costs when the estimated total project costs for the project are specified in the law that authorized the project. Such laws typically include the

authorized costs of entire projects; rarely do they include separate costs for separable elements of projects. In other words, Section 902 applies to the sum of the elements. See ER 1105-2-100, Exhibit G-10, for additional information and the method for calculating the maximum amount.

A. Include the optional Whereas clause, optional phrase in Article VI.A.2., and optional Article XX in the agreement only for projects and separable elements that are subject to the maximum cost limitations of Section 902 of WRDA 1986, Public Law 99-662, as amended (33 U.S.C. 2280). If the project was authorized prior to WRDA 86 or the project was authorized without project costs specified in the law, then Section 902 does not apply. **Reminder: If optional Article XX is not included, renumber the remaining articles in the agreement and verify all previous and subsequent references to the remaining articles throughout the agreement and correct, as necessary. Renumbering the remaining articles in the agreement and correction of all references to the remaining articles are not considered a deviation from the model.**

B. **Optional Article XX. - Choose Option (1) if the project in the agreement is the authorized project or Option (2) if the project in the agreement is a separable element of the authorized project. Delete, in its entirety, the option not used. If Option (2) is selected, then Option (2) of the first two Whereas Clauses must be selected (see note 7).**

C. **The dollar amount shown in optional Article XX should be calculated in accordance with ER 1105-2-100, Appendix G addressing Section 902 limit calculations and should use the same price levels and inflation allowances as the costs shown in Article VI.A.1. of the agreement.**

10. PED/DESIGN AGREEMENT AND DESIGN COORDINATION TEAM ACTIVITIES.

A. **Whereas clause. - Include the optional Whereas clause in the agreement only if a Preconstruction Engineering and Design (PED) or Design Agreement for the project was executed. The term “Design Agreement” is used throughout the text of the agreement regardless of which type of agreement (PED or Design) was executed.**

B. Articles I.B., II.B.3., and II.B.4.

1. **Choose, if applicable, Option (1) if a PED Agreement or Design Agreement was executed or Option (2) if a PED Agreement or Design Agreement was not executed but a PED Coordination Team or Design Coordination Team was established with the sponsor and costs were incurred on or after October 1, 1996 (pursuant to Policy Guidance Letter (PGL) 55). The term “Design Coordination Team Activities” is used throughout the text of the agreement regardless of type of coordination team (PED or Design) established. Delete, in its entirety, the option**

not used. If neither of the choices above applies, do not include the language from either Option (1) or Option (2) in the agreement.

2. If neither of the choices described in paragraph B.1. of this note applies in Articles II.B.3. and II.B.4., then delete the choices and reletter the remaining items in these paragraphs. Relettering the remaining items in these paragraphs is not considered a deviation from the model.

C. Optional Articles I.M. and I.N. - If Option (2) described in paragraph B.1. of this note was selected elsewhere in the agreement, these optional articles must be included in the agreement.

D. Article VI.B. (either option) - Include all the optional language after the colon only if a PED Agreement or Design Agreement for the project was executed and all other optional language addressing an executed PED Agreement or Design Agreement is selected for inclusion elsewhere in the agreement (see paragraph B.1. of this note and note 16).

E. For those projects or separable elements thereof where the sponsor for the Design Agreement (Design sponsor) is not the same as the sponsor for this agreement (PPA sponsor), the PPA sponsor shall receive credit toward the non-Federal share required by this agreement for the Design sponsor's contributions made under the Design Agreement.

F. For those projects (or separable elements thereof) where there was a Design Agreement, cash contributions made by the Design sponsor toward total design costs under the Design Agreement shall be counted toward the PPA sponsor's 5% cash required by Article II.B.1. of this agreement. **Reminder:** The value of the Design sponsor's non-cash contributions for Design Coordination Team and audits (Articles III and VII of the Design Agreement) cannot be counted toward the PPA sponsor's 5% cash requirement.

11. **FORMAT FOR DATE.** – The civilian format for any dates included in the agreement should be used. (Example: January 22, 2004)

12. **DESCRIPTION OF THE PROJECT.** – The input required for the description of the project is described below.

A. Describe the project features to be undertaken pursuant to this agreement in detail sufficient to avoid any confusion over what is or is not included. **Reminder:** Do not include any LERRD requirements of the project in this description because these are not construction items for which the Government has performance responsibility.

B. The title and date of the decision document that describes the project should be included (such as Feasibility Report with Engineering Appendix, General Reevaluation Report, etc.). Also include the title of the approving official (such as

Assistant Secretary of the Army (Civil Works); Chief of Engineers; Commander, _____ Division; or Commander, _____ District) and the date of approval.

13. TOTAL PROJECT COSTS. - See ER 1165-2-131, PGL 55, and Project Management Guidance Letters 4, 10 and 11 (revised) for details on which costs and values are included in total project costs and see the project decision document for further project specific cost information.

14. CONTINUING PLANNING AND ENGINEERING. – Include the optional language after the colon only if the project in the agreement was funded by Continuing Planning and Engineering Funds (CP&E) in FY 1986 or 1987. Since this would apply only to older projects, verify the need for inclusion of this language with your Programs Management Team.

15. ADVANCED ENGINEERING AND DESIGN. - Include the optional language after the colon only if the project in the agreement was funded by Advanced Engineering and Design Funds (AE&D) before FY 1988. Since this would apply only to older projects, verify the need for inclusion of this language with your Programs Management Team.

16. CONTRIBUTIONS FOR PED. - Choose Option (1) if a PED Agreement or Design Agreement was executed or Option (2) if a PED Agreement or Design Agreement was not executed. Delete, in its entirety, the option not used. If Option (1) is selected, then all other optional language addressing an executed PED Agreement or Design Agreement must be selected for inclusion elsewhere in the agreement (see note 10).

17. RAILROAD BRIDGE.

A. The Government will perform any necessary alterations or replacements of existing railroad bridges for flood risk management projects. Therefore, the flood risk management models exclude alterations or replacements of existing railroad bridges from the definition of relocation. Such work is considered a construction item to be performed by the Government with the costs shared in accordance with the terms of this agreement. For additional explanation, see ER 1105-2-100, Appendix E, Section III and PGL 45.

B. Delete the word “existing” if the project in this agreement requires construction of a “new” railroad bridge and the authorizing documentation for the project in this agreement complies with PGL 45 in stating that construction of the “new” railroad bridge over flood risk management channels constructed in fast lands or along a new channel alignment (that is, work that undercuts a railroad track that causes the need for a “new” railroad bridge) will be treated as a construction item to be performed by the Government (not a relocation to be performed by the sponsor) with the costs shared in accordance with the terms of this agreement.

18. BETTERMENTS. – A betterment is a difference in quality of an element of the project to be constructed, not a difference in kind. (Example: install concrete floodwall instead of sheetpile floodwall for aesthetics) The term “betterment” does not include any construction for features not included in the definition of the project as defined in the agreement. “Betterment” should not be viewed as a catch-all solution to allow the Government to construct anything/everything requested by the sponsor.

19. FISCAL YEAR OF THE NON-FEDERAL SPONSOR. – If requested by the sponsor include optional Article I.L. in the agreement indicating that the timing of payments from the sponsor will be on the sponsor’s fiscal year basis. If optional Article I.L. is included, Option (2) of Article VI.B. must be selected (see note 28) and Option (3) in Articles VI.B.1., VI.B.2., and VI.B.3. must be selected (see note 32). Fill in blanks with the beginning and ending dates of the sponsor’s fiscal year. (Example – beginning date July 1 and ending date June 30) Reminder: If optional Article I.L. is not included, reletter the remaining paragraphs in Article I and verify all previous and subsequent references to paragraphs in Article I throughout the agreement and correct, as necessary. Relettering the remaining paragraphs in Articles I and correction of all references to paragraphs in Articles I are not considered a deviation from the model.

A. Regardless of whose fiscal year is used for timing of the payments in the agreement, the timing of the payments cannot be such that they, in any way, adversely effect the Government’s ability to perform the work, whether by contract or in-house labor. Also, the payments from the sponsor and the availability of Federal funds must be managed to ensure that the proportional cash financing required by the agreement is maintained throughout the life of the agreement.

B. The term “fiscal year” occurs in numerous locations throughout the agreement. If optional Article I.L. is included in the agreement, do not execute a “change all” command to change all occurrences of the term “fiscal year” to “fiscal year of the Non-Federal Sponsor”. Only those occurrences of the term “fiscal year” which are highlighted as optional text in Article VI should be changed. The other occurrences of the term “fiscal year” should not be modified since they are referring to the fiscal year of the Government.

20. INCLUSION OF CONGRESSIONAL ADD PARAGRAPH. – Include optional Article II.A.4. in the agreement for any project or separable element that does not comply with Army budget policy as of the date of the agreement, even if the project has received all of the Federal funds estimated to be needed to complete construction of the project. Verify the need for inclusion of this language and the amount to be included in the blank(s) with your Programs Management Team.

A. Optional Article II.A.4. - Choose Option (1) if the project in the agreement is the authorized project or Option (2) if the project in the agreement is a

separable element of the authorized project. Delete, in its entirety, the option not used. If Option (2) is selected, then Option (2) of the first two Whereas Clauses must be selected (see note 7).

B. Option 1. - The dollar amount to be included in the blank should be the total funds provided by Congress for the design and construction (GI and CG) of the project in this agreement, minus any rescissions and reductions for savings and slippages, as of the effective date of the agreement.

C. Option 2. - The dollar amount to be included in the first blank should be the total funds provided by Congress for the design and construction (GI and CG) of the authorized project, minus any rescissions and reductions for savings and slippages, as of the effective date of the agreement. The dollar amount to be included in the second blank should be that portion of available authorized project funds that the district projects to be available for the project in this agreement as of the effective date of the agreement.

21. STRUCTURAL FLOOD RISK MANAGEMENT COST SHARE PERCENTAGE.

A. Choose Option (1) if the project in the agreement was authorized after October 12, 1996; Option (2) if the project in the agreement was authorized on or prior to October 12, 1996; or Option (3) if the required cost share percentage has been reduced as a result of ability to pay calculations. Delete, in their entirety, the options not used. Reminders: For any project authorized in WRDA 96, Public Law 104-303, use Option (2). To select Option (3), the Whereas clause addressing ability to pay must have been modified (see note 8).

B. If your project is a deficiency correction, then either Option (1) or Option (3) must be selected regardless of when the project was authorized. Deficiency corrections are cost shared at the current cost sharing for the project purpose. For additional explanation, see DAEN-CWR-R memorandum, dated 13 February 1987, subject: Cost Sharing for Correction of Design or Construction Deficiencies.

22. PROVISION OF ITEMS NEEDED FOR SPONSOR OMRR&R OF PROJECT. - The district should work closely with the sponsor during the period of construction to ensure that the district can promptly provide to the sponsor, upon completion of construction of the project, or a functional portion of the project, those items necessary for sponsor performance of operation, maintenance, repair, rehabilitation, and replacement of the project, or such functional portion of the project, including the Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual, as-built drawings, and necessary permits.

23. ARTICLE II.G. - ADDITIONAL WORK. - The Government should not accept any requests for 1) acquisition of LER necessary for betterments or 2) performance of relocations necessary for betterments.

24. ADDITIONAL ITEMS OF COOPERATION. - Include any additional paragraphs in the agreement necessary to reflect special requirements of non-Federal cooperation specified in the decision document or Chief's Report upon which the agreement is based. Carefully review the items of non-Federal cooperation in the decision document or Chief's Report to ensure that all items of cooperation are covered in the agreement. When including any additional items of cooperation in the agreement, name the responsible party then include the item of cooperation contained in the decision document or Chief's Report. (Example: The Non-Federal Sponsor shall ...) Including the additional items of non-Federal cooperation in the agreement is not considered a deviation from the model unless additional language is required elsewhere in the agreement to further address the added item of cooperation.

25. GUIDANCE ON APPRAISALS. - See Chapter 12 of ER 405-1-12 for guidance on applicable rules including use of Federal versus State rules in preparing an appraisal.

26. LOCATION OF PROJECT. - Fill in the appropriate State. The phrase "State of _____" is used in the agreement; however, the substitution of "Commonwealth of" or "Territory of", as appropriate, based on the location of the project is not considered a deviation from the model.

27. ARTICLE VI.A. – BREAKDOWN OF PROJECT COSTS.

A. The costs shown in Article VI.A.1. should be the current estimate of the costs at current price levels and inflated through the estimated mid-point of construction.

B. To determine the sponsor's contribution of funds required by Articles II.B.1. and II.B.3.: Step (1) determine the sponsor's share of total project costs; Step (2) subtract from the sponsor's share of total project costs an amount equal to 5% of total project costs, the value of LERRD to be provided or performed for the project, the costs of the sponsor's participation in the Project Coordination Team (Article V), the costs of audits performed by the sponsor (Article X), the costs of investigations for hazardous substances performed by the sponsor (Article XIV.A.1.), and the value of the sponsor's contributions pursuant to the Design Agreement, if any; Step (3) if the result of Step 2 is greater than zero, add the result of Step 2 to the amount equal to 5% of total project costs and the result is the sponsor's contribution of funds that should be shown in the fourth blank in Article VI.A.1. If the result of Step 2 is equal to or less than zero, then an amount equal to 5% of total project costs should be shown in the fourth blank in Article VI.A.1.

Example:

Project was authorized in WRDA 2000

total project costs = \$10,000,000

5% of total project costs = \$500,000

value of LERRD = \$1,000,000
sponsor's costs for Articles V, X, and XIV.A.1. = \$125,000
sponsor's contributions pursuant to Design Agreement = \$250,000
Step 1 - (\$10,000,000 x .35) = \$3,500,000
Step 2 - \$3,500,000 - (\$500,000 + \$1,000,000 + \$125,000 + \$250,000) = \$1,625,000
Step 3 - \$1,625,000 + \$500,000 = \$2,125,000

C. To determine the percentage of the sponsor's proportionate share of financial obligations for construction: Step (1) determine the financial obligations for construction by subtracting from total project costs the sum of the value of LERRD to be provided or performed for the project, the costs of the sponsor's participation in the Project Coordination Team (Article V), the costs of audits performed by the sponsor (Article X), and the costs of investigations for hazardous substances performed by the sponsor (Article XIV.A.1.); Step (2) divide the sum of the sponsor's contribution of funds shown in the fourth blank in Article VI.A.1. plus the sponsor's contributions pursuant to the Design Agreement by the financial obligations for construction. This is the percentage that should be shown in the fifth blank in Article VI.A.1.

Example:

Project was authorized in WRDA 2000
total project costs = \$10,000,000
value of LERRD = \$1,000,000
sponsor's costs for Articles V, X, and XIV.A.1. = \$125,000
sponsor's contribution of funds required by Articles II.B.1. and II.B.3. = \$2,125,000
sponsor's contributions pursuant to Design Agreement = \$250,000
Step 1 - \$10,000,000 - (\$1,000,000 + \$125,000) = \$8,875,000
Step 2 - (\$2,125,000 + \$250,000)/\$8,875,000 = 26.76 percent

D. The blank in Article VI.A.2. should be filled in with the date (month day, year) of the first quarterly report of costs to be provided to the sponsor.

28. PAYMENT BY LUMP SUM.

A. For each location that requires a choice between two options - Choose Option (1) if the sponsor elects to provide its cash share in one lump sum or Option (2) if the sponsor elects to provide its share in periodic payments. Delete, in its entirety, the option not used. If Option (2) is selected (sponsor elects to provide its share in periodic payments) and a continuing contract will not be used, the sponsor must provide its required share of the contract in full in accordance with the procedures and timing of payments outlined in Articles VI.B.1. and VI.B.2. of the agreement. The use of continuing contracts is governed by Federal laws, regulations, and policies. Therefore, discuss and verify the use of continuing contracts with your Programs Management Team. Any work performed by the Government's own forces (in-house labor) may be provided in periodic payments.

B. For each location where optional language is provided, include in your agreement all of the optional language after the colon only if the sponsor elects to provide its share in periodic payments.

29. PAYMENT MECHANISMS. – Both Option (1) and Option (2) of Article VI.B.1. offer the sponsor four mechanisms from which to choose in deciding how to provide its required monetary contribution to the Government. The sponsor should indicate its choice during the course of negotiating the agreement. However, the sponsor may use any of the methods or a combination of them, during the life of the agreement in accordance with guidance governing the use of electronic funds transfers, escrow agreements, and irrevocable letters of credit. Do not delete any of the four mechanisms.

30. TIMING OF FIRST REQUEST FOR SPONSOR’S FUNDS.

A. Article VI.B.1. - Insert the number of days (must be 30 or more).

B. Article VI.D.1. - Recommend the amount of days shown be at least 60. The last sentence of this paragraph states that the sponsor is required to provide the requested funds no later than 30 calendar days prior to the Government incurring any financial obligations for additional work. Therefore any number less than 60 will give the sponsor less than 30 days notice prior to when the funds must be provided to the Government.

31. LENGTH OF TIME TO PROVIDE ADDITIONAL FUNDS. – Insert the number of days. The period of time should not exceed the time shown unless the District Engineer approves a longer period of time after determining that the longer period of time will not result in delays to the project (including contract modifications) or the Government using its funds to meet a shortfall in the sponsor’s funds. The district must determine the need for additional funds from the sponsor far enough ahead of time to permit the sponsor full use of the specified period of time. Neither party’s funds should be used to meet any shortfall in the other party’s funds.

32. TIMING OF SPONSOR’S PAYMENT. – Choose Option (1) if the timing of the payments from the sponsor will be on the Federal fiscal year basis; Option (2) if the timing of the payments from the sponsor will be on a quarterly basis; or Option (3) if the timing of the payments from the sponsor will be on the basis of the Non-Federal Sponsor’s fiscal year. Delete, in their entirety, the options not used. Whichever option is chosen it should be used consistently throughout the agreement. However, do not choose an option if that option would adversely effect the Government’s ability to perform the work, whether by contract or in-house labor. Also, the payments from the sponsor and availability of Federal funds must be managed to ensure that the proportional cash financing required by the agreement is maintained throughout the life of the agreement. Option (3), may be selected only if optional Article I.L. is included in the agreement (see note 19).

When the sponsor is reviewing this item and making their selection for timing of their payments, the district should ensure they have a full understanding of when payments would be required.

33. ARTICLE VI.C. - FINAL ACCOUNTING.

A. When a final accounting cannot be conducted in a timely manner because of outstanding claims and appeals or eminent domain proceedings, an interim accounting should be conducted. The district should use its best judgment in determining whether to conduct an interim accounting or wait for final resolution of outstanding claims and appeals or eminent domain proceedings.

B. Nothing in the agreement, prevents any interim accountings from being conducted prior to the end of the period of construction.

34. ARTICLE IX – HOLD AND SAVE. - Include all the optional language after the colon only if optional Article XXI - Obligations of Future Appropriations (see note 39) is included in the agreement and the sponsor requests this optional language be added to Article IX of the agreement. In addition, if this language is included, delete the “The”. Reminder: The entire article is not optional, only the phrase shown in the brackets is optional.

35. ARTICLE XIV - HAZARDOUS SUBSTANCES. – In accordance with paragraph A. of this Article, the sponsor is to perform or ensure performance of investigations to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) on lands, easements, and rights-of-way necessary for the project. It is Army policy that the sponsor either perform these investigations in-house or contract for their performance with a third party. The Government should not perform these investigations on behalf of the sponsor. However, as stated in this article, the Government performs, or instructs the sponsor to perform investigations required on lands, easements, and rights-of-way that are subject to navigation servitude. For additional explanation, refer to ER 1165-2-132.

36. ARTICLE XV - NOTICES. – Insert the full address of the sponsor and Government - including titles or office title/symbol of individuals to receive the notices. Do not include the name of the individual to receive the notices as it may change throughout the life of the agreement.

37. ARTICLE XVII – HISTORIC PRESERVATION. – For additional explanation, refer to paragraph C-4 of ER 1105-2-100. In the event, additional LER must be acquired for the performance of any mitigation activities, the sponsor will be required to provide such LER in accordance with Article III of the agreement.

38. ARTICLES XVIII and XIX – THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES and NON-LIABILITY OF OFFICERS AND EMPLOYEES. -

Articles XVIII and XIX are optional and either can be deleted if requested by the sponsor. If one or both of the articles are deleted, renumber the remaining articles in the agreement and verify the references throughout the agreement to the remaining articles. In particular, if the article addressing the Section 902 Maximum Cost of Project is required for the agreement, verify the reference to that article contained in Article VI.A.2. of the agreement and correct, as necessary. Similarly, if the article addressing Obligations of Future Appropriations is included in the agreement, and the sponsor requests the optional language in Article IX (see note 34), verify the reference contained in Article IX to the article addressing Obligations of Future Appropriations and correct, as necessary. Renumbering the remaining articles in the agreement and correction of all references to the remaining articles are not considered a deviation from the model.

39. ARTICLE XXI – OBLIGATIONS OF FUTURE APPROPRIATIONS.

A. Include optional Article XXI in the agreement only if the sponsor requests this language and the District Counsel determines, by written legal opinion identifying the specific statutes or constitutional provisions, that the sponsor meets the Federal statutory criteria for inclusion of this paragraph. See Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b).

B. The information to be added in the first three blanks in Article XXI.A. must identify the legislative body that makes the appropriations. If the name of the legislative body that makes the appropriations is difficult to determine, then this article is probably not applicable for the agreement. (Example: Legislature of the State of Ohio or City Counsel of the City of Cleveland)

C. The information to be included in the fourth - sixth blanks of Article XXI.A. must identify the specific citation to the constitutional or statutory limitation on committing future appropriations. (Example: Article 16 Section 12 of the Constitution of the State of Arkansas)

40. SPONSOR’S BUDGET CYCLE. - Choose Option (1) if the sponsor has a 1 year budget cycle or Option (2) if the sponsor has a 2 year budget cycle.

41. ARTICLE XXII – TRIBAL SOVEREIGN IMMUNITY. – Include optional Article XXII only if the sponsor is a Native American Tribe. The information to be included in the first and third blanks should be the name of the instrument (resolution, ordinance, etc) where the sponsor has waived sovereign immunity. The information to be included in the fourth blank should be the title of the sponsor’s representative (see note 6).

42. TITLE OF GOVERNMENT REPRESENTATIVE. – Insert the title of the Government representative signing the agreement. Do not include the name, only the title. If the signature authority is delegated to the district, the phrase “District Engineer” should be used in this location. If the signature authority is not

delegated, the title shown should match the title of the Government representative shown in the first paragraph (see note 4).

43. CERTIFICATE OF AUTHORITY. - The person signing the Certificate of Authority cannot be the signatory to the agreement. The person signing the Certificate of Authority is certifying that the signatory to the agreement has the authority to obligate the sponsor. Do not forget to fill in the name in the first line prior to execution of the agreement.

44. PREPARING AGREEMENT FOR SIGNATURE.

A. When printing the agreement for execution: 1) remove the cover page, notes section, bold type references to notes, and any bold type text from the agreement; 2) ensure that the appropriate information has been included in all blanks in the agreement and the Certificate of Authority; 3) ensure that titles of articles are not the last thing at the bottom of the page; and 4) ensure that there are no page breaks which allow half empty pages. Reminder: Do not remove any of the *italics* from the agreement.

B. If the signature authority has been delegated to the District Engineer: 1) the title of the Government representative in the first paragraph (see note 4) should be “U.S. Army Engineer, _____ District”; 2) the title of the Government representative in the last paragraph (see note 42) should be “District Engineer”; and 3) since this is a civilian document use the civilian version of the District Engineer’s signature block.

C. If the signature authority is not delegated, the title in the first paragraph (see note 4) and last paragraph should match the title of the Government representative shown in the signature block.

D. Before signature by the Government representative, ensure that the sponsor signs and dates a minimum of four copies of the agreement, and Certification Regarding Lobbying, and that the Certificates of Authority are signed and dated by the appropriate people. The date on the first page should be filled in by the Government representative signing the agreement, not the sponsor.

E. The Government should retain two copies of the fully executed agreement. All other copies should be provided to the sponsor. A photocopy or a pdf file (as determined by the MSC and the appropriate HQ RIT) of the fully executed agreement should be provided to the MSC and to the appropriate HQ RIT within 14 days after execution of the agreement.

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF NON-FEDERAL SPONSOR]
FOR
CONSTRUCTION
OF THE
[FULL NAME OF PROJECT OR SEPARABLE ELEMENT]

THIS AGREEMENT is entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the **[SEE NOTE - 4]** and **[FULL NAME OF NON-FEDERAL SPONSOR]** **[SEE NOTE - 5]** (hereinafter the “Non-Federal Sponsor”), represented by **[SEE NOTE - 6]**.

WITNESSETH, THAT:

[SEE NOTE – 7]

OPTION 1 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, construction of the **[FULL NAME OF THE AUTHORIZED PROJECT]** for flood risk management (hereinafter the “*Project*”, as defined in Article I.A. of this Agreement) at **[SPECIFIC LOCATION OF THE AUTHORIZED PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]** was authorized by **[CITE AUTHORITY INCLUDING PUBLIC LAW NUMBER]**;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Partnership Agreement (hereinafter the “Agreement”) for construction of the *Project*;

OPTION 2 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, construction of the **[FULL NAME OF THE AUTHORIZED PROJECT]** for flood risk management (hereinafter the “Authorized Project”) at **[SPECIFIC LOCATION OF THE AUTHORIZED PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]** was authorized by **[CITE AUTHORITY INCLUDING PUBLIC LAW NUMBER]**;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Partnership Agreement (hereinafter the “Agreement”) for construction of the **[NAME OF THE SEPARABLE ELEMENT OF THE AUTHORIZED PROJECT]** (a separable element of the Authorized Project and hereinafter the “*Project*”, as defined in Article I.A. of this Agreement);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, (33 U.S.C. 2213) specifies the cost-sharing requirements applicable to the *Project*;

[SEE NOTE - 8]

WHEREAS, the Non-Federal Sponsor does not qualify for a reduction of the non-Federal cost share for flood control pursuant to the guidelines that implement Section 103(m) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(m));

[SEE NOTE - 9]

WHEREAS, Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), establishes the maximum amount of costs for the **[SEE NOTE - 7 - CHOOSE: (1) *Project* (2) Authorized Project]** and sets forth procedures for adjusting such maximum amount;

[SEE NOTE - 10]

WHEREAS, the Government and a non-Federal interest entered into an agreement, dated **[SEE NOTE - 11]** _____, for engineering and design of the *Project* (hereinafter the “Design Agreement”), under the terms of which the non-Federal interest contributed a portion of the costs for engineering and design;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 103(j) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(j)), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I - DEFINITIONS

[SEE NOTE - 12]

A. The term “*Project*” shall mean _____ as generally described in the [FULL TITLE OF DECISION DOCUMENT], dated _____, ____ and approved by _____ on _____, ____.

[SEE NOTE - 13]

B. The term “*total project costs*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to construction of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: [SEE NOTE - 14: the Government’s Continuing Planning and Engineering costs incurred after October 1, 1985;] [SEE NOTE - 15: the Government’s Advanced Engineering and Design costs;] [SEE NOTE - 16 - CHOOSE: (1) the Government’s share of Preconstruction Engineering and Design costs pursuant to the terms of the Design Agreement; (2) the Government’s Preconstruction Engineering and Design costs;] [SEE NOTE - 10 - CHOOSE: (1) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; (2) the *costs of the Non-Federal Sponsor’s Design Coordination Team Activities*;] the Government’s engineering and design costs during construction; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.B.1. of this Agreement; the Government’s actual construction costs, including the costs of alteration, lowering, raising, or replacement and attendant removal of [SEE NOTE - 17] existing railroad bridges and approaches thereto; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for which the Government affords credit in accordance with Article IV of this Agreement or for which reimbursement by the Government is required pursuant to Article II.B.4. of this Agreement; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article X.B. and Article X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of *betterments* under Article II.G.2. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; the Government’s costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement; or the Non-Federal Sponsor’s costs of negotiating this Agreement.

C. The term “*period of construction*” shall mean the time from the date the Government issues the solicitation for the first construction contract for the *Project* or commences construction of the *Project* using the Government’s own forces, whichever is earlier, to the date that construction of the *Project* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

D. The term “*financial obligations for construction*” shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total project costs* except for obligations pertaining to the provision of lands, easements, and rights-of-way, the performance of *relocations*, and the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material.

E. The term “*non-Federal proportionate share*” shall mean the ratio of the Non-Federal Sponsor’s total contribution of funds required by Article II.B.1. and Article II.B.3. of this Agreement to *financial obligations for construction*, as projected by the Government.

F. The term “*highway*” shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

G. The term “*relocation*” shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, *highway*, railroad (excluding [SEE NOTE - 17] existing railroad bridges and approaches thereto), or public facility when such action is authorized in accordance with applicable legal principles of just compensation; or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for the *Project* or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

H. The term “*functional portion of the Project*” shall mean a portion of the *Project* for which construction has been completed and that can function independently, as determined by the U.S. Army Engineer, _____ District (hereinafter the “District Engineer”) in writing, although the remainder of the *Project* is not complete.

[SEE NOTE - 18]

I. The term “*betterment*” shall mean a difference in the construction of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the construction of that element. The term does not include any construction for features not included in the *Project* as defined in paragraph A. of this Article.

J. The term “*Federal program funds*” shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

K. The term “*fiscal year*” shall mean one year beginning on October 1 and ending on September 30.

[SEE NOTE - 19]

L. The term “*fiscal year of the Non-Federal Sponsor*” shall mean one year beginning on _____ and ending on _____.

[SEE NOTE - 10 – FOLLOWING TWO PARAGRAPHS]

M. The term “*Design Coordination Team Activities*” shall mean the oversight of matters related to design of the *Project* including: engineering and design, including scheduling of reports and work products; development of plans and specifications; real property and *relocation* requirements of the *Project*; contract awards and modifications; contract costs; the Government’s cost projections; anticipated requirements and needed capabilities for performance of operation and maintenance of the *Project*; and other matters related to design of the *Project*.

N. The term “*costs of the Non-Federal Sponsor’s Design Coordination Team Activities*” shall mean the costs that are incurred by the Non-Federal Sponsor for *Design Coordination Team Activities* on or after October 1, 1996 and before the effective date of this Agreement, as determined by the Government and subject to an audit for reasonableness, allowability, and allocability in accordance with Article X.C. of this Agreement.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) and using those funds and funds provided by the Non-Federal Sponsor, expeditiously shall construct the *Project* (including alteration, lowering, raising, or replacement and attendant removal of **[SEE NOTE - 17]** existing railroad bridges and approaches thereto), applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for construction of the *Project* or commence construction of the *Project* using the Government’s own forces until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project*.

2. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Non-Federal Sponsor with notification of a contract modification is not possible prior to execution of the contract modification, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts or commencement of construction using the Government's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Government.

3. At the time the District Engineer furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract awarded by the Government for the *Project*, the District Engineer shall furnish a copy thereof to the Non-Federal Sponsor.

[SEE NOTE - 20]

OPTION 1

4. As of the effective date of this Agreement, \$_____ of Federal funds is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

OPTION 2

4. As of the effective date of this Agreement, \$_____ of Federal funds have been provided by Congress for the Authorized Project of which \$_____ is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Authorized Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

B. The Non-Federal Sponsor shall contribute **[SEE NOTE - 21 - CHOOSE: (1) a minimum of 35 percent, but not to exceed 50 percent, (2) a minimum of 25 percent, but not to exceed 50 percent, (3) ____ percent]** of *total project costs* in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall provide a contribution of funds equal to 5 percent of *total project costs* in accordance with Article VI.B. of this Agreement.

2. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *Project*.

3. The Non-Federal Sponsor shall provide additional funds in accordance with Article VI.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's required [SEE NOTE - 21 - CHOOSE: (1) minimum share of 35 percent (2) minimum share of 25 percent (3) share of ____ percent] of *total project costs* if the Government projects at any time that the collective value of the following contributions will be less than such required [SEE NOTE - 21 - CHOOSE: (1) minimum share (2) minimum share (3) share]: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.1. of this Article; (b) [SEE NOTE - 10 - CHOOSE: (1) the value of the cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement that exceeds the 5 percent amount required by paragraph B.1. of this Article and the value of the non-cash contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; (2) the *costs of the Non-Federal Sponsor's Design Coordination Team Activities*;] (c) the value of the Non-Federal Sponsor's contributions under paragraph B.2. of this Article, as determined in accordance with Article IV of this Agreement; and (d) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

4. The Government, subject to the availability of funds, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 45 percent of *total project costs* if the Government determines at any time that the collective value of the following contributions has exceeded 45 percent of *total project costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.3. of this Article; (b) [SEE NOTE - 10 - CHOOSE: (1) the value of the cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement that exceeds the 5 percent amount required by paragraph B.1. of this Article and the value of the non-cash contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; (2) the *costs of the Non-Federal Sponsor's Design Coordination Team Activities*;] (c) the value of the Non-Federal Sponsor's contributions under paragraph B.2. of this Article, as determined in accordance with Article IV of this Agreement; and (d) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *Project*, perform any remaining *relocations* necessary for the *Project*, or construct any remaining improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *Project* on behalf of the Non-Federal Sponsor. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-

way to enable the disposal of dredged or excavated material by the Government under this paragraph, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

[SEE NOTE – 22]

C. When the District Engineer determines that the entire *Project*, or a *functional portion of the Project*, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with a final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the “OMRR&R Manual”) or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Project* or such completed portion. Upon such notification, the Government also shall furnish to the Non-Federal Sponsor a copy of all final as-built drawings for the entire *Project* or such completed portion if such drawings are available. Not later than 6 months after such notification by the Government that the entire *Project* is complete, the Government shall furnish the Non-Federal Sponsor with the final OMRR&R Manual and all final as-built drawings for the entire *Project*. In the event the final OMRR&R Manual or all final as-built drawings for the entire *Project* cannot be completed within the 6 month period, the Government shall provide written notice to the Non-Federal Sponsor, and the Government and the Non-Federal Sponsor shall negotiate an acceptable completion date for furnishing such documents. Further, after completion of all contracts for the *Project*, copies of all of the Government’s Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided previously shall be provided to the Non-Federal Sponsor.

D. Upon notification from the District Engineer in accordance with paragraph C. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or the *functional portion of the Project* as the case may be, in accordance with Article VIII of this Agreement.

E. Upon conclusion of the *period of construction*, the Government shall conduct an accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

F. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Project*.

[SEE NOTE - 23]

G. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the “additional work”) described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or

any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement.

1. Acquisition of lands, easements, and rights-of-way; performance of *relocations*; or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

2. Inclusion of *betterments* in the construction of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *Project* features that include *betterments* between *total project costs* and the costs of the *betterments*.

H. Not less than once each year the Non-Federal Sponsor shall inform affected interests of the extent of protection afforded by the *Project*.

I. The Non-Federal Sponsor agrees to participate in and comply with applicable Federal floodplain management and flood insurance programs.

J. The Non-Federal Sponsor shall comply with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), which requires a non-Federal interest to prepare a floodplain management plan within one year after the date of signing this Agreement, and to implement such plan not later than one year after completion of construction of the *Project*. The plan shall be designed to reduce the impacts of future flood events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood protection provided by the *Project*. The Non-Federal Sponsor shall provide an information copy of the plan to the Government upon its preparation.

K. The Non-Federal Sponsor shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in adopting regulations, or taking other actions, to prevent unwise future development and to ensure compatibility with protection levels provided by the *Project*.

L. The Non-Federal Sponsor shall prevent obstructions or encroachments on the *Project* (including prescribing and enforcing regulations to prevent such obstructions or encroachments) such as any new developments on *Project* lands, easements, and rights-of-way or the addition of facilities which might reduce the level of protection the *Project*

affords, hinder operation and maintenance of the *Project*, or interfere with the *Project's* proper function.

[SEE NOTE - 24]

ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY,
RELOCATIONS, DISPOSAL AREA IMPROVEMENTS, AND
COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. The Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the *Project* and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the *relocations* necessary for construction, operation, and maintenance of the *Project*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *relocations* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with such *relocations*. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Government determines to be necessary for that work. Furthermore, prior to the end of the *period of*

construction, the Non-Federal Sponsor shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the *Project*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such improvements in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall provide all improvements set forth in such descriptions.

D. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - CREDIT FOR VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS, AND DISPOSAL AREA IMPROVEMENTS

A. The Government shall include in *total project costs* and afford credit toward the Non-Federal Sponsor's share of *total project costs* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III.A. of this Agreement; for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Non-Federal Sponsor must provide pursuant to Article III.C. of this Agreement. However, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of any lands, easements, rights-of-way, *relocations*, or improvements required on

lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that have been provided previously as an item of cooperation for another Federal project. In addition, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that were acquired or performed using *Federal program funds* unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Project*.

B. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A., Article III.B., or Article III.C. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions for the purpose of including such value in *total project costs* and for determining the amount of credit to be afforded or reimbursement to be provided in accordance with the provisions of this Agreement.

C. For the purposes of determining the value to be included in *total project costs* and the amount of credit to be afforded or reimbursement to be provided in accordance with this Agreement and except as otherwise provided in paragraph G. of this Article, the value of lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph C.3. or paragraph C.5. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with the provisions of this paragraph.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide the Government with the appraisal no later than 6 months after the Non-Federal Sponsor provides the Government with an authorization for entry for such real property interest. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. [SEE NOTE - 25] The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-

Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor, prior to instituting such proceedings, shall submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 calendar days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60 day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as

to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with paragraph C.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are required for construction, operation, and maintenance of the *Project*, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. In the event the Government modifies its determination made pursuant to Article III.A. of this Agreement, the Government shall afford credit for the documented incidental costs associated with preparing to acquire the lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.D. of this Agreement, and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the Non-Federal Sponsor in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals pursuant to paragraph C.2. of this Article, as determined by the Government, and subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

5. Waiver of Appraisal. Except as required by paragraph C.3. of this Article, the Government may waive the requirement for an appraisal pursuant to this paragraph if it determines that an appraisal is unnecessary because the valuation is uncomplicated and that the estimated fair market value of the real property interest is \$10,000 or less based upon a review of available data. In such event, the Government and the Non-Federal Sponsor must agree in writing to the value of such real property interest in an amount not in excess of \$10,000.

D. After consultation with the Non-Federal Sponsor, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

1. For a *relocation* other than a *highway*, the value shall be only that portion of *relocation* costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the [SEE NOTE - 26] State of _____ would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. *Relocation* costs shall include, but not necessarily be limited to, actual costs of performing the *relocation*; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the *relocation*, as determined by the Government. *Relocation* costs shall not include any costs due to *betterments*, as determined by the Government, nor any additional cost of using new material when suitable used material is available. *Relocation* costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

E. The value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to *betterments*, as determined by the Government.

F. Any credit afforded or reimbursement provided under the terms of this Agreement for the value of *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material, performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Notwithstanding any other provision of this Agreement, credit or reimbursement may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

G. Where the Government, on behalf of the Non-Federal Sponsor pursuant to Article II.G.1. of this Agreement, acquires lands, easements, or rights-of-way, performs *relocations*, or constructs improvements required on lands, easements, or rights-of-way to

enable the disposal of dredged or excavated material, the value to be included in *total project costs* and the amount of credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall be the costs of such work performed or provided by the Government that are paid by the Non-Federal Sponsor in accordance with Article VI.D. of this Agreement. In addition, the value to be included in *total project costs* and the amount of such credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall include the documented costs incurred by the Non-Federal Sponsor in accordance with the terms and conditions agreed upon in writing pursuant to Article II.G.1. of this Agreement subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 calendar days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the *period of construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the *period of construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: plans and specifications; scheduling; real property and *relocation* requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for *relocations* and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material; the investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; historic preservation activities in accordance with Article XVII of this Agreement; the Government's cost projections; final inspection of the entire *Project* or *functional portions of the Project*; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the *Project* has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE VI - METHOD OF PAYMENT

[SEE NOTE - 27]

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, and the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$_____; the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement is projected to be \$_____; the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement is projected to be \$_____; the Non-Federal Sponsor's contribution of funds required by Article II.B.1. and Article II.B.3. of this Agreement is projected to be \$_____; the *non-Federal proportionate share* is projected to be _____ percent; the Non-Federal Sponsor's contribution of funds required by Article XVII.B.3. of this Agreement is projected to be \$_____; and the Government's total financial obligations for the additional work to be incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.G. of this Agreement are projected to be \$_____. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By _____ and by each quarterly anniversary thereof until the conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement; the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement; the Non-Federal Sponsor's total contribution of funds required by Article II.B.1. and Article II.B.3. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's total contribution of funds required by Article XVII.B.3. of this Agreement; [SEE NOTE - 28: the total contribution of funds required from the Non-Federal Sponsor for the upcoming *fiscal year*;] [SEE NOTE - 9: the maximum amount determined in accordance with Article XX of this Agreement;] and the Government's total financial obligations for additional work incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.G. of this Agreement.

[SEE NOTE – 28]

OPTION 1 – (PARAGRAPHS B., AND B.1. - B.2.)

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.B.1., Article II.B.3., and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

[SEE NOTE – 29]

1. Not less than [SEE NOTE - 30] calendar days prior to the scheduled date for issuance of the solicitation for the first contract for construction of the *Project* or commencement of construction of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor [SEE NOTE - 10: , after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to meet its projected share under Article II.B.1., Article II.B.3., and Article XVII.B.3. of this Agreement. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, [APPROPRIATE USACE DISTRICT & EROC]" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary [SEE NOTE - 10: , after consideration of any contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to cover: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the *non-Federal proportionate share of financial obligations for construction* as *financial obligations for construction* are incurred; and (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within [SEE NOTE - 31 - NOT TO EXCEED 60] calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

OPTION 2 – (PARAGRAPHS B., AND B.1. – B.3.)

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.B.1., Article II.B.3., and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

[SEE NOTE – 29]

1. Not less than [SEE NOTE - 30] calendar days prior to the scheduled date for issuance of the solicitation for the first contract for construction of the *Project* or commencement of construction of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor [SEE NOTE - 10: , after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to meet: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the projected *non-Federal proportionate share of financial obligations for construction* to be incurred in the first [SEE NOTE - 32 - CHOOSE: (1) *fiscal year*; (2) *quarter*; (3) *fiscal year of the Non-Federal Sponsor*;] or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the projected *non-Federal proportionate share of financial obligations for construction* through the first [SEE NOTE - 32 - CHOOSE: (1) *fiscal year*; (2) *quarter*; (3) *fiscal year of the Non-Federal Sponsor*;] and (c) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred in the first [SEE NOTE - 32 - CHOOSE: (1) *fiscal year*; (2) *quarter*; (3) *fiscal year of the Non-Federal Sponsor*;] or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the Non-Federal Sponsor's

share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement through the first [SEE NOTE - 32 - CHOOSE: (1) *fiscal year*. (2) quarter. (3) *fiscal year of the Non-Federal Sponsor*.] Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to “FAO, USAED, [APPROPRIATE USACE DISTRICT & EROC]” to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. Thereafter, until the construction of the *Project* is complete, the Government shall notify the Non-Federal Sponsor in writing of the funds the Government determines to be required from the Non-Federal Sponsor, and the Non-Federal Sponsor shall provide such funds in accordance with the provisions of this paragraph.

a. Where the Government will use a continuing contract approved pursuant to Federal laws, regulations, and policies to make *financial obligations for construction* of the *Project* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each [SEE NOTE - 32 - CHOOSE: (1) *fiscal year* (2) quarter (3) *fiscal year of the Non-Federal Sponsor*] in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the Non-Federal Sponsor [SEE NOTE - 10: , after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* for that [SEE NOTE - 32 - CHOOSE: (1) *fiscal year* (2) quarter (3) *fiscal year of the Non-Federal Sponsor*] for such continuing contract and (b) the Non-Federal Sponsor’s share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement for that [SEE NOTE - 32 - CHOOSE: (1) *fiscal year* (2) quarter (3) *fiscal year of the Non-Federal Sponsor*] for such continuing contract. No later than 30 calendar days prior to the beginning of that [SEE NOTE - 32 - CHOOSE: (1) *fiscal year*, (2) quarter, (3) *fiscal year of the Non-Federal Sponsor*.] the Non-Federal Sponsor shall make the full amount of such required funds for that [SEE NOTE - 32 - CHOOSE: (1) *fiscal year* (2) quarter (3) *fiscal year of the Non-Federal Sponsor*] available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

b. For each contract for the *Project* where the Government will not use a continuing contract to make *financial obligations for construction* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the scheduled date for issuance

of the solicitation for such contract, of the funds the Government determines to be required from the Non-Federal Sponsor [**SEE NOTE - 10:** , after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* to be incurred for such contract and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement to be incurred for such contract. No later than such scheduled date, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

c. Where the Government projects that it will make *financial obligations for construction* of the *Project* using the Government's own forces or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each [**SEE NOTE - 32 - CHOOSE: (1) fiscal year (2) quarter (3) fiscal year of the Non-Federal Sponsor**] in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the Non-Federal Sponsor [**SEE NOTE - 10:** , after consideration of any cash contribution provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* using the Government's own forces for that [**SEE NOTE - 32 - CHOOSE: (1) fiscal year (2) quarter (3) fiscal year of the Non-Federal Sponsor**] and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement using the Government's own forces for that [**SEE NOTE - 32 - CHOOSE: (1) fiscal year. (2) quarter. (3) fiscal year of the Non-Federal Sponsor.**] No later than 30 calendar days prior to the beginning of that [**SEE NOTE - 32 - CHOOSE: (1) fiscal year, (2) quarter, (3) fiscal year of the Non-Federal Sponsor.**] the Non-Federal Sponsor shall make the full amount of such required funds for that [**SEE NOTE - 32 - CHOOSE: (1) fiscal year (2) quarter (3) fiscal year of the Non-Federal Sponsor**] available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary [**SEE NOTE - 10:** , after consideration of any contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement,] to cover: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the *non-Federal proportionate share of financial obligations for construction* as *financial obligations for construction* are incurred; and (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.B.3. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal

Sponsor's share of such financial obligations in the current [**SEE NOTE - 32 - CHOOSE: (1) fiscal year, (2) quarter, (3) fiscal year of the Non-Federal Sponsor,**] the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within [**SEE NOTE - 31 - NOT TO EXCEED 60**] calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

[**SEE NOTE - 33**]

C. Upon conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs* and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Non-Federal Sponsor's total required shares of *total project costs* and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, [**APPROPRIATE USACE DISTRICT & EROC**]" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total project costs* and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total required shares thereof, the Government, subject to the availability of funds, shall refund or reimburse the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. However, the Non-Federal Sponsor shall not be entitled to any refund of the 5 percent cash contribution required pursuant to Article II.B.1. of this Agreement. In the event the Non-Federal Sponsor is due a refund or reimbursement and funds are not available to refund or reimburse the excess

amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

D. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.G. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than **[SEE NOTE - 30]** calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within **[SEE NOTE - 31 - NOT TO EXCEED 30]** calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. At the time the Government conducts the interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of additional work from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work to complete the final accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the total obligations for additional work exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later

than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to “FAO, USAED, [APPROPRIATE USACE DISTRICT & EROC]” to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

A. Upon receipt of the notification from the District Engineer in accordance with Article II.C. of this Agreement and for so long as the *Project* remains authorized, the Non-Federal Sponsor, pursuant to Article II.D. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project* or *functional portion of the Project*, at no cost to the Government. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Project's* authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, rehabilitating,

or replacing the *Project*. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of such written notice by the Government, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. No completion, operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE IX – HOLD AND SAVE

[**SEE NOTE - 34:** Subject to the provisions of Article XXI of this Agreement, the] The Non-Federal Sponsor shall hold and save the Government free from all damages arising from construction, operation, maintenance, repair, rehabilitation, and replacement of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be

allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; Army Regulation 600-7, entitled “Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army”; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE XIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this

Agreement or suspend future performance under this Agreement unless the Assistant Secretary of the Army (Civil Works) determines that continuation of work on the *Project* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Project*.

B. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, future performance under this Agreement shall be suspended. Such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.B.2. and Article XVII.B.3. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIV.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIV.C. of this Agreement; 3) the Government continues work on the *Project*; or 4) the Government terminates this Agreement in accordance with the provisions of Article XIV.C. of this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.B.1., Article II.B.3., and Article

XVII.B.3. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XIV.C. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

[SEE NOTE - 35]

ARTICLE XIV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the

Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the *Project*, or, if already in construction, whether to continue with construction of the *Project*, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of *total project costs*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the *Project*.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the *Project* in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

[SEE NOTE - 36]

If to the Non-Federal Sponsor:

If to the Government:

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVI - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

[SEE NOTE – 37]

ARTICLE XVII - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the *Project*, shall perform any identification, survey, or evaluation of historic properties. Any costs incurred by the Government for such work shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. The Government, as it determines necessary for the *Project*, shall perform or ensure the performance of any mitigation activities or actions for historic properties or that are otherwise associated with historic preservation including data recovery activities.

1. Any costs incurred by the Government for such mitigation activities, except for data recovery activities associated with historic preservation, shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

2. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c(a)), the costs of data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in *total project costs*, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the *Project*.

3. The Government shall not incur costs for data recovery activities associated with historic preservation that exceed the statutory one percent limit specified in paragraph B.2. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit and the Secretary of the Interior has concurred in the waiver in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. 469c-

2(3)). Any costs of data recovery activities associated with historic preservation that exceed the one percent limit shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government consistent with the [SEE NOTE - 21 - CHOOSE: (1) minimum cost sharing requirements for flood risk management, as follows: 35 percent will be borne by the Non-Federal Sponsor and 65 percent will be borne by the Government. (2) minimum cost sharing requirements for flood risk management, as follows: 25 percent will be borne by the Non-Federal Sponsor and 75 percent will be borne by the Government. (3) cost sharing requirements for flood risk management, as follows: ____ percent will be borne by the Non-Federal Sponsor and ____ percent will be borne by the Government.]

C. If, during its performance of *relocations* or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material in accordance with Article III of this Agreement, the Non-Federal Sponsor discovers historic properties or other cultural resources that have not been evaluated by the Government pursuant to this Article, the Non-Federal Sponsor shall provide prompt written notice to the Government of such discovery. The Non-Federal Sponsor shall not proceed with performance of the *relocation* or construction of the improvement that is related to such discovery until the Government provides written notice to the Non-Federal Sponsor that it should proceed with such work.

[SEE NOTE – 38 – FOLLOWING TWO ARTICLES]

ARTICLE XVIII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

ARTICLE XIX - NON-LIABILITY OF OFFICERS AND EMPLOYEES

No officer, agent, consultant, or employee of the Non-Federal Sponsor, nor any officer, agent, consultant, or employee of the Government, may be charged personally, or held liable, under the terms or provisions of this Agreement because of any breach, attempted breach, or alleged breach thereof, except as provided in Section 912(b) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (42 U.S.C. 1962d-5b note), or other applicable law.

[SEE NOTE – 9]

OPTION 1

ARTICLE XX - SECTION 902 MAXIMUM COST OF PROJECT

The Non-Federal Sponsor understands that Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280) establishes

the maximum amount of *total project costs* for the *Project*. On the effective date of this Agreement, the maximum amount of *total project costs* for the *Project* is estimated to be \$_____, as calculated in accordance with Engineer Regulation 1105-2-100, using October 1, 20___ price levels and including allowances for projected future inflation. The Government shall adjust such maximum amount of *total project costs* for the *Project*, in accordance with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), when necessary.

OPTION 2

ARTICLE XX - SECTION 902 MAXIMUM COST OF PROJECT

The Non-Federal Sponsor understands that Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280) establishes the maximum amount of total costs for the Authorized Project, of which the *Project* is a separable element. On the effective date of this Agreement, the maximum amount of total costs for the Authorized Project, which is the sum of *total project costs* for the *Project* and the costs for all other separable elements of the Authorized Project, is estimated to be \$_____, as calculated in accordance with Engineer Regulation 1105-2-100, using October 1, 20___ price levels, and including allowances for projected future inflation. The Government shall adjust such maximum amount of total costs for the Authorized Project, in accordance with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), when necessary.

[SEE NOTE - 39]

ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the _____ of the _____ of _____, where creating such an obligation would be inconsistent with _____ of the _____ of _____.

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that **[SEE NOTE - 40 - CHOOSE: (1) year, (2) biennium,]** and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

[SEE NOTE - 41]

ARTICLE XXII – TRIBAL SOVEREIGN IMMUNITY

By _____ dated _____, the Non-Federal Sponsor waived any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court related to the provisions, terms, and conditions contained in this Agreement. Further, such _____ authorized **[SEE NOTE - 6]** _____ to include such waiver as part of this Agreement. Accordingly, the Non-Federal Sponsor hereby waives any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court to: (1) enforce the terms and conditions of this Agreement; (2) recover damages for any breach of the terms and conditions of this Agreement; and (3) seek indemnification or contribution based on the Non-Federal Sponsor’s obligations under Article IX of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the **[SEE NOTE - 42]**.

DEPARTMENT OF THE ARMY

[FULL NAME OF NON-FEDERAL SPONSOR]

BY: **[SIGNATURE]**
 [TYPED NAME]
 [TITLE IN FULL]

BY: **[SIGNATURE]**
 [TYPED NAME]
 [TITLE IN FULL]

DATE: _____

DATE: _____

[SEE NOTE - 43]

CERTIFICATE OF AUTHORITY

I, _____, do hereby certify that I am the principal legal officer of the [FULL NAME OF NON-FEDERAL SPONSOR], that the [FULL NAME OF NON-FEDERAL SPONSOR] is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the [FULL NAME OF NON-FEDERAL SPONSOR] in connection with the [FULL NAME OF "PROJECT"], and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the [FULL NAME OF NON-FEDERAL SPONSOR] have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 20____.

[SIGNATURE]
[TYPED NAME]
[TITLE IN FULL]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[SIGNATURE OF PPA SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

DATE: _____