

**SECTION 219 – WRDA 92, AS AMENDED
ENVIRONMENTAL INFRASTRUCTURE**

**MODEL AGREEMENT
FOR
DESIGN AND CONSTRUCTION
ASSISTANCE**

**JANUARY 10, 2006
(REVISED – APRIL 27, 2006)**

APPLICABILITY. – The attached model agreement is one of three models for Section 219 of the Water Resources Development Act of 1992, Public Law 102-580, as amended, (Section 219) projects. The following descriptions of the three models are provided to assist in determining the correct model to be used for your project. None of the models discussed below should be used for any other environmental infrastructure assistance programs. Models for the other environmental infrastructure assistance programs can be found in the approved model section of the PCA Web page. If there is no approved model posted in the approved model section of the PCA Web page that is applicable to your particular program, the District Project Delivery Team should consult with the appropriate HQ RIT for guidance on drafting the appropriate agreement.

Section 219 Design and Construction - The attached model should be used for all Section 219 projects and elements of Section 219 projects when the sponsor requests both design and construction of the project be undertaken in one agreement. An agreement using this model may be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370e) and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341). However, the necessary compliance with all applicable environmental laws and regulations will be performed during the design portion of the agreement and must be completed prior to initiation of construction.

Section 219 Design – Use only for Section 219 projects and elements of Section 219 projects when the sponsor requests only design for the project be undertaken in the agreement. Since this agreement is limited to design, compliance with all applicable environmental laws and regulations is not required prior to or during the agreement.

Section 219 Construction – Use only for Section 219 projects and elements of Section 219 projects when the sponsor requests only construction of the project be undertaken in the agreement and the Government completed the design for the

project pursuant to a *Section 219 Design* agreement. If the sponsor intends to provide a design, or a portion thereof, for use by the Government in constructing the project, then either the *Section 219 Design and Construction* model or the *Section 219 Design* model should be used. Further, an agreement using this model may not be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, NEPA (42 U.S.C. 4321-4370e) and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

NOTES. – The following pages (iii – xvi) 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 – 7]) 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 – 8]) 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 constructing an element of the Section 219 Assistance project, 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. SECTION 219 TERMINOLOGY. - Section 219 projects can consist of a wide array of different types of measures, some of which do not fit the typical description of construction. However, to ensure consistency throughout this and all other models, the terms “construction” and “construct” are used throughout the agreement regardless of whether the project consists of structural or nonstructural measures.

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). 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. SECTION 219 ASSISTANCE PROJECT OR AN ELEMENT OF THE SECTION 219 ASSISTANCE PROJECT.

A. For each location that requires a choice between two options - Choose Option (1) if the project in the agreement is the entire Section 219 Assistance Project identified in Section 219 or Option (2) if the project in the agreement is an element of the Section 219 Assistance Project. Delete, in its entirety, the option not used. Reminder: For Article XVII.B.2. - The choice of options is for Article XVII.B.2. only. Article XVII.B.3. should be included in your agreement regardless of which option of Article XVII.B.2. is chosen.

B. Whereas Clauses - The Whereas clause options each contain two Whereas clauses. Regardless of which option is selected, when citing the authority for the project to be performed pursuant to Section 219 be sure to include the correct subsection and paragraph number. Although many projects were added by amendments to Section 219 (Section 504 of WRDA 96, Section 502 of WRDA 99, etc.), the correct reference should be to the appropriate subsection and paragraph number of Section 219.

1. For projects authorized for design assistance in Section 219(c) and authorized for construction assistance in Section 219(e), the text of the Whereas should be modified to reference both subsections. Modification of the Whereas to reference both subsections is not a deviation from the model. (Example: for the Jackson County, Mississippi project that was authorized for design in Section 219(c)(5) and the authorization for construction was added to Section 219 by Section 504 of WRDA 96 – the correct reference should be Section 219(c)(5) and Section 219(e)(1))

2. For projects authorized for both design and construction assistance in Section 219(f), fill in the correct subsection and paragraph number of Section 219(f). (Example: for the DeSoto County, Mississippi project that was added to Section 219 by Section 502 of WRDA 99 – the correct reference should be Section 219(f)(30))

8. AMOUNT AUTHORIZED TO BE APPROPRIATED. The amount indicated as the amount authorized to be appropriated is not the maximum amount of total costs for a Section 219 Assistance Project but rather it is the maximum amount of Federal participation (Federal share of total costs) in the Section 219 Assistance Project. Further, if you are constructing several elements of a Section 219 Assistance Project under separate agreements, the sum of the Federal participation in all the elements of the Section 219 Assistance Project cannot exceed the amount authorized to be appropriated for that Section 219 Assistance Project.

A. The Government's financial participation for design assistance for projects under Section 219(c) is limited to \$30,000,000 pursuant to the limit established by Section 219(d). Since Section 219 is a nationwide authority, verify with your MSC and your HQ RIT to determine if the design assistance to be performed for your project will be impacted by this limitation.

B. For each location that requires a choice between two options – Choose Option (1) if the project in the agreement was authorized for design assistance in Section 219(c) and was authorized for construction assistance in Section 219(e) or Option (2) if the project in the agreement was authorized for design and construction assistance in Section 219(f). Delete, in its entirety, the option not used.

C. Fifth Whereas clause.

1. Option 1. - Complete the reference to the appropriate paragraph of Section 219(e) that authorized the construction assistance for the project and fill in the blank with the total amount authorized to be appropriated for construction assistance for the Section 219 Assistance project in Section 219(e). Be sure to use the latest amount as some of the earlier amounts have been increased in amendments to Section 219. (Example: for Jackson County, Mississippi – the reference would be Section 219(e)(1) and the amount authorized for construction assistance, as of 2005, is \$20,000,000)

2. Option 2. - Complete the reference to the appropriate paragraph of Section 219(f) that authorized the design and construction assistance for the project and fill in the blank with the total amount authorized to be appropriated for the design and construction assistance for the Section 219 Assistance project in Section 219(f). Be sure to use the latest amount as some of the earlier amounts have been increased in amendments to Section 219. (Example: for DeSoto County, Mississippi – the reference would be Section 219(f)(30) and the amount authorized for design and construction assistance, as of 2005, is \$55,000,000)

D. Article I.J.

1. Option 1. - Fill in the blank with the total amount authorized to be appropriated for construction assistance for the Section 219 Assistance project in

Section 219(e). The amount shown should be the same as the amount shown in the fifth Whereas clause.

2. Option 2. - Fill in the blank with the total amount authorized to be appropriated for the design and construction assistance for the Section 219 Assistance project in Section 219(f). The amount shown should be the same as the amount shown in the fifth Whereas clause.

9. SPONSOR INTENDS TO PROVIDE A DESIGN, OR PORTION THEREOF, FOR USE BY GOVERNMENT IN CONSTRUCTING THE PROJECT.

A. Section 219 provides authority for the Secretary of the Army to assist non-Federal interests in the design or construction of water-related infrastructure and resource protection projects. In many cases, the non-Federal interests have already begun work on the infrastructure or resource protection project so the Secretary's assistance may consist of completing the design or constructing the project using a non-Federal interest's design. Because Section 219 does not specifically state that a sponsor may receive credit for any design or construction work it performs, we cannot afford credit toward a sponsor's share of project costs for any design, or a portion thereof, provided by the sponsor or any construction work performed by the sponsor.

B. However, a sponsor may propose to provide to the Government a design, or a portion thereof, for use by the Government in constructing the project. Such proposal shall be in writing and clearly describe the design, or specific portion thereof, proposed to be provided. The Government shall conduct a Bidability, Constructability, Operability, and Environmental review of the design, or portion thereof, provided by the sponsor prior to accepting it for use. The Government shall use the description of the design, or specified portion thereof, proposed to be provided by the sponsor to estimate the costs of the remaining design and construction work. No costs shall be included in total project costs, no credit shall be afforded toward the sponsor's share of total project costs, and no reimbursement shall be made for the costs incurred by or on behalf of the sponsor for preparing or providing the design, or any portion thereof.

C. If the sponsor intends to provide a design, or any portion thereof, for use by the Government in constructing the project, the sponsor must provide a written certification and warranty to the Government that the design provided by the sponsor is free from any legal encumbrances and use restrictions, including but not limited to, any intellectual property rights (including but not limited to proprietary rights, patents, trademarks, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of the design) and outstanding licensing requirements.

D. For each location where optional language, an optional paragraph, or an optional Whereas clause is provided, include in your agreement all of the optional

language after the colon or the optional paragraph or the optional Whereas clause, as applicable, only if the sponsor intends to provide a design, or any portion thereof, for use by the Government in constructing the project.

E. For each location that requires a choice between two options – Choose Option (1) if the sponsor does not intend to provide a design, or any portion thereof, for use by the Government in constructing the project or Option (2) if the sponsor intends to provide a design, or any portion thereof, for use by the Government in constructing the project. Delete, in its entirety, the option not used.

10. 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. If the project features to be undertaken pursuant to this agreement are an element of a countywide or statewide environmental infrastructure system, only the features to be undertaken in this agreement should be included in the description of the project. **Reminder: Do not include any LERR 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 Scope of Work, etc.). Also include the title of the approving official (such as Commander, _____ Division or Commander, _____ District) and the date of approval. The civilian format for any dates included in the agreement should be used. (Example: January 22, 2004)

11. BETTERMENTS. – A betterment is a difference in quality of an element of the project to be designed or constructed, not a difference in kind. (Example: install a larger pipe than needed) The term “betterment” does not include any design or 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 design or construct anything/everything requested by the sponsor.

12. FISCAL YEAR OF THE NON-FEDERAL SPONSOR. – If the sponsor requests that the timing of the sponsor’s payments for work performed using the Government’s own forces (in-house labor) be on the sponsor’s fiscal year basis, include optional Article I.L. in the agreement. Please note that any contracts awarded by the Government for work (design or construction) on environmental infrastructure assistance projects cannot use the continuing contracts clause and must be fully funded prior to award.

A. If optional Article I.L. is included, Option (2) of Article VI.B. must be selected (see note 21) and Option (3) in Articles VI.B.1., VI.B.2., and VI.B.3. must be

selected (see note 25). 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)

B. 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 using 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.

C. 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.

13. VOLUNTARY DEFERRAL OF DESIGN AND CONSTRUCTION PARAGRAPH. - Include the optional paragraph following this note in the agreement upon the written request of the sponsor.

A. This deferral will allow the Government and sponsor to evaluate whether to continue with design and construction, modify design and construction to reduce costs, or defer design and construction up to three years to allow the sponsor time to budget for additional funding for its share. However, this deferral cannot exceed three years.

B. The sponsor may specify the dollar amount to be included in this paragraph; however, the dollar amount shown cannot be less than total project costs shown in Article VI.A.1. of the agreement. Further, it is recommended that the amount shown be somewhat greater than total project costs since any increase in total project costs would inevitably lead to invoking the terms of this paragraph.

C. Inclusion of this paragraph does not set a maximum amount of the sponsor's contributions for total project costs nor does it enable the sponsor to terminate the project.

14. ARTICLE II.C. - LIMITS ON FEDERAL PARTICIPATION.

A. Choose Option (1) if the project in the agreement is the entire Section 219 Assistance Project identified in Section 219 or Option (2) if the project in the agreement is an element of the Section 219 Assistance 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). The district, through the Project Coordination Team (Article V), shall work closely with each sponsor to plan

execution of the project so that useful portions can be designed and constructed as funds are made available. Verify the amount to be included in the blank(s) with your Programs Management Team.

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

2. Option 2. - The dollar amount to be included in the first blank should be the total funds provided by Congress for the Section 219 Assistance 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 Section 219 Assistance Project funds that the district projects to be available for the project in this agreement as of the effective date of the agreement.

B. Article II.C.3. - The Government will not issue work allowances for the project beyond the amount authorized to be appropriated for the project in Section 219.

15. COMPLETED PORTION OF THE PROJECT.

A. Because Section 219 authorizes the provision of design and construction assistance, the concept of functional portions of the project has been deleted. The district should use its best judgment to determine when construction of a portion of the project is complete so that the sponsor can commence its operation and maintenance responsibility.

B. The district should work closely with the sponsor during the period of design and 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.

16. ARTICLE II.H. - 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.

17. 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 upon which the agreement is based. Carefully review the items of non-Federal cooperation in the decision document 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. (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.

18. 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.

19. 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.

20. 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 Article II.B.2.: Step (1) determine the sponsor’s share of total project costs; Step (2) subtract from the sponsor’s share of total project costs the value of LERR 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.). If the result of Step 2 is greater than zero, this amount is the sponsor’s contribution of funds that should be shown in the second blank in Article VI.A.1. If the result of Step 2 is equal to or less than zero, then “0” should be shown in the second blank in Article VI.A.1.

Example:

total project costs = \$10,000,000

value of LERR = \$1,000,000

sponsor’s costs for Articles V, X, and XIV.A.1. = \$125,000

Step 1 - $(\$10,000,000 \times .25) = \$2,500,000$

Step 2 - $\$2,500,000 - (\$1,000,000 + \$125,000) = \$1,375,000$

C. To determine the percentage of the sponsor’s proportionate share of financial obligations for design and construction: Step (1) determine the financial obligations for design and construction by subtracting from total project costs the sum of the value of LERR 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 sponsor's contribution of funds shown in the second blank in Article VI.A.1. by the financial obligations for design and construction. This is the percentage that should be shown in the third blank in Article VI.A.1.

Example:

total project costs = \$10,000,000

value of LERR = \$1,000,000

sponsor's costs for Articles V, X, and XIV.A.1. = \$125,000

sponsor's contribution of funds required by Article II.B.2. = \$1,375,000

Step 1 - \$10,000,000 - (\$1,000,000 + \$125,000) = \$8,875,000

Step 2 - \$1,375,000/\$8,875,000 = 15.49 percent

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

21. 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. Continuing contracts authorities are not available for use on environmental infrastructure assistance projects; therefore, all contracts awarded by the Government for work (design or construction) on environmental infrastructure assistance projects must be fully funded prior to award. Option (2) can be selected if the project will be implemented using a combination of contracts and the Government's own forces (in-house labor). While the sponsor must provide its required share of each contract in full prior to the award of such contract it may provide its share for any work performed by the Government's own forces (in-house labor) in periodic payments by fiscal year, quarter, or fiscal year of the Non-Federal Sponsor (see notes 12 and 25).

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.

22. 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.

23. 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.

24. 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.

25. TIMING OF SPONSOR’S PAYMENT FOR WORK PERFORMED USING THE GOVERNMENT’S OWN FORCES (IN-HOUSE LABOR). – Choose Option (1) if the timing of the payments from the sponsor for work performed using the Government’s own forces (in-house labor) will be on the Federal fiscal year basis; Option (2) if the timing of the payments from the sponsor for work performed using the Government’s own forces (in-house labor) will be on a quarterly basis; or Option (3) if the timing of the payments from the sponsor for work performed using the Government’s own forces (in-house labor) will be on the fiscal year of the Non-Federal Sponsor’s basis. 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 using 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 12). Reminder: The sponsor’s payments provided pursuant to these options only cover work performed by the Government’s own forces (in-house labor). Any contracts awarded by the Government for work (design or construction) on environmental infrastructure assistance projects cannot use the continuing contracts clause and must be fully funded prior to award.

26. 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 design and construction.

27. INSPECTION OF COMPLETED WORKS. – Due to the wide variety of potential projects to be undertaken in the future pursuant to this authority, the district may want to inspect some completed projects during the O&M phase. While this inspection is not mandatory, the decision to perform any inspection should be based on the specifics of the project. Reminder: Article VIII.B. is not an optional paragraph. It must be included in all agreements regardless of the level of inspections proposed to be performed.

28. ARTICLE IX – HOLD AND SAVE. - Include all the optional language after the colon only if optional Article XIX - Obligations of Future Appropriations (see note 33) 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.

29. 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.

30. 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.

31. 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.

32. ARTICLE XVIII – THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES. - Article XVIII is optional and can be deleted if requested by the sponsor. If the article is 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 Obligations of Future Appropriations is included in the agreement, and the sponsor requests the optional language in Article IX (see note 28), 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.

33. ARTICLE XIX – OBLIGATIONS OF FUTURE APPROPRIATIONS. - Include optional Article XIX in the agreement only if the sponsor requests this language and only after your District Counsel determines, in writing after review of information supporting the request from the sponsor, that the sponsor is a State agency or a political subdivision of the State that derives its funds for the project directly from appropriations and the sponsor has constitutional or statutory limitations prohibiting it from committing future appropriations. The information to be added in the first three blanks in Article XIX.A. should identify the body that makes the appropriations. (Example: Legislature of the State of Ohio or City Council of the City of Cleveland)

34. ARTICLE XIX.A. - ADDITIONAL RESTRICTION ON OBLIGATIONS OF FUTURE APPROPRIATIONS. - Include all the optional language after the colon if requested by the sponsor. The information to be included in the blanks must provide more detailed information on the location of the obligation of future appropriations restriction. (Example: Section 7 of the City Charter of the City of Cleveland)

35. 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.

36. ARTICLE XX – TRIBAL SOVEREIGN IMMUNITY. – Include optional Article XX 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).

37. 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).

38. 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.

39. 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 37) 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.

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF NON-FEDERAL SPONSOR]
FOR
DESIGN AND CONSTRUCTION
ASSISTANCE
FOR THE
[FULL NAME OF PROJECT OR 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:

WHEREAS, the Secretary of the Army is authorized to provide design and construction assistance for designated water-related environmental infrastructure and resource protection and development projects pursuant to Section 219 of the Water Resources Development Act of 1992, Public Law 102-580, as amended (hereinafter the “Section 219 Program”);

[SEE NOTE – 7]

OPTION 1 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, the provision of design and construction assistance for the **[FULL NAME OF PROJECT]** (hereinafter the “*Project*”, as defined in Article I.A. of this Agreement) at **[SPECIFIC LOCATION OF PROJECT, INCLUDING STATE OR COMMONWEALTH]** was authorized by Section 219()() of the Water Resources Development Act of 1992, Public Law 102-580, as amended;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the “Agreement”) for the provision of design and construction assistance for the *Project*;

OPTION 2 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, the provision of design and construction assistance for the **[FULL NAME OF PROJECT]** (hereinafter the “Section 219 Assistance Project”) at **[SPECIFIC LOCATION OF PROJECT, INCLUDING STATE OR COMMONWEALTH]** was authorized by Section 219()() of the Water Resources Development Act of 1992, Public Law 102-580, as amended;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the “Agreement”) for the provision of design and construction assistance for the [NAME OF THE ELEMENT] (an element of the Section 219 Assistance Project and hereinafter the “Project”, as defined in Article I.A. of this Agreement);

WHEREAS, Section 219 of the Water Resources Development Act of 1992, Public Law 102-580, as amended, specifies the cost-sharing requirements applicable to the *Project*;

[SEE NOTE – 8]

OPTION 1

WHEREAS, Section 219(d) of the Water Resources Development Act of 1992, Public Law 102-580, as amended, provides that \$30,000,000 in Federal funds is authorized to be appropriated for providing technical, planning, and design assistance for all projects listed in Section 219(c) of such Act; and Section 219(e)(_) of the Water Resources Development Act of 1992, Public Law 102-580, as amended, provides that _____ in Federal funds is authorized to be appropriated for providing construction assistance for the [SEE NOTE - 7 - CHOOSE: (1) *Project* (2) Section 219 Assistance Project];

OPTION 2

WHEREAS, Section 219(f)(_) of the Water Resources Development Act of 1992, Public Law 102-580, as amended, provides that _____ in Federal funds is authorized for design and construction assistance for the [SEE NOTE - 7 - CHOOSE: (1) *Project* (2) Section 219 Assistance Project];

[SEE NOTE – 9]

WHEREAS, the Non-Federal Sponsor intends to provide a design or portion thereof, at no cost to the *Project*, for use by the Government in constructing the *Project* if such design, or portion thereof, is determined by the Government to be acceptable for such purpose;

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 - 10]

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

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 design and construction of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s design costs not incurred pursuant to any other agreement for the *Project*; the Government’s costs of preparation of environmental compliance documentation in accordance with [SEE NOTE – 9 - CHOOSE: (1) Article II.A.2. (2) Article II.A.4.] of this Agreement; [SEE NOTE – 9: the Government’s costs of review and modifications to the design, or any portion thereof, provided by the Non-Federal Sponsor in accordance with Article II.A.1. of this Agreement;] 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; 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, and *relocations* for which the Government affords credit in accordance with Article IV of this Agreement but not to exceed 25 percent of total project costs; 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.H.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. [SEE NOTE – 9: The term also shall not include any costs incurred by the Non-Federal Sponsor, its contractors, or others on behalf of the Non-Federal Sponsor for preparing or providing a design, or any portion thereof, for the *Project* in accordance with Article II.A.1. of this Agreement.]

C. The term “*period of design and construction*” shall mean the time from the effective date of this Agreement 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 II.C. or Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

D. The term “*financial obligations for design and 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, and the performance of *relocations*.

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.2. of this Agreement to *financial obligations for design and 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, or public facility when such action is authorized in accordance with applicable legal principles of just compensation. 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.

[SEE NOTE - 11]

H. The term “*betterment*” shall mean a difference in the design or 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 design or construction of that element. The term does not include any design or construction for features not included in the *Project* as defined in paragraph A. of this Article.

I. 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.

[SEE NOTE – 8]

OPTION 1

J. The term “*Section 219 Project Limit*” shall mean the statutory limitations on the Government’s financial participation in the design and construction of the **[SEE NOTE - 7 - CHOOSE: (1) Project (2) Section 219 Assistance Project]** as specified in Section 219(d) and Section 219(e) of the Water Resources Development Act of 1992, Public Law 102-580, as amended. As of the effective date of this Agreement, the limitation for design is that portion of the \$30,000,000 of Federal funds authorized to be

appropriated in such Section 219(d) that the Government assigns to the [SEE NOTE - 7 - CHOOSE: (1) *Project* (2) Section 219 Assistance Project] and the limitation for construction is \$_____.

OPTION 2

J. The term “*Section 219 Project Limit*” shall mean the statutory limitation on the Government’s financial participation in the design and construction of the [SEE NOTE - 7 - CHOOSE: (1) *Project* (2) Section 219 Assistance Project] as specified in Section 219(f) of the Water Resources Development Act of 1992, Public Law 102-580, as amended. As of the effective date of this Agreement, such limitation is \$_____.

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

[SEE NOTE - 12]

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

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

[SEE NOTE – 9]

OPTION 1 – (PARAGRAPHS A., AND A.1. – A.5.)

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 design and construct the *Project*, 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 design of the *Project* or commence design 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 develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the *Project* in accordance with the National Environmental Policy Act of 1969 (hereinafter “NEPA”) (42 U.S.C. 4321–4370e). However, the Government shall not issue the solicitation for the first construction contract for the *Project* or commence construction of the *Project* using the Government’s own forces

until all applicable environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

3. 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 design or 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.

4. At the time the U.S. Army Engineer, _____ District (hereinafter 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 - 13]

5. Notwithstanding paragraph A.3. of this Article, if the award of any contract for design or construction of the *Project*, or continuation of design or construction of the *Project* using the Government's own forces, would result in *total project costs* exceeding \$_____, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for design or construction of the *Project*, and continuation of design or construction of the *Project* using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of design or construction of the *Project* using the Government's own forces, but in no event shall the award of contracts or the continuation of design or construction of the *Project* using the Government's own forces be deferred for more than three years. Notwithstanding this general provision for deferral, in the event the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of design or construction of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with design or construction of the *Project* using the Government's own forces.

OPTION 2 – (PARAGRAPHS A., AND A.1. – A.7.)

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 design and construct the *Project* utilizing the portion of the design provided by the Non-Federal Sponsor that the Government determines to be acceptable in accordance with paragraph A.1. of this Article, and applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Non-Federal Sponsor expeditiously shall prepare and provide to the Government a design, or the portion thereof that the Non-Federal Sponsor has specified in writing that it intends to provide, for use in constructing the *Project*. The Government shall review such design, or portion thereof, to ensure compliance with applicable Federal laws, regulations, and policies including those related to bidability, constructability, operability and environmental acceptability. The Government, in its sole discretion, may accept, modify, or reject such design, or any portion thereof, for use in constructing the *Project*. Prior to commencement of review by the Government of such design, the Non-Federal Sponsor shall provide a written certification and warranty to the Government that the design provided by the Non-Federal Sponsor is free from any legal encumbrances and use restrictions, including but not limited to, any intellectual property rights and outstanding licensing requirements.

2. If the Non-Federal Sponsor fails to provide a design, or the specified portion thereof, for the *Project*, or the Government determines that the design, or any portion thereof, provided by the Non-Federal Sponsor is inadequate for any reason, the Government, subject to the availability of funds and the *Section 219 Project Limit*, may design the *Project* or complete the design of the *Project*.

3. The Government shall not issue the solicitation for the first contract for design of the *Project*, commence design of the *Project* using the Government’s own forces, or commence review of a design, or any portion thereof, provided by the Non-Federal Sponsor in accordance with paragraph A.1. of this Article, until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project*.

4. The Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the *Project* in accordance with the National Environmental Policy Act of 1969 (hereinafter “NEPA”) (42 U.S.C. 4321–4370e). However, the Government shall not issue the solicitation for the first construction contract for the *Project* or commence construction of the *Project* using the Government’s own forces until all applicable environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

5. 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 design or 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.

6. At the time the U.S. Army Engineer, _____ District (hereinafter 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 - 13]

7. Notwithstanding paragraph A.5. of this Article, if the award of any contract for design or construction of the *Project*, or continuation of design or construction of the *Project* using the Government's own forces, would result in *total project costs* exceeding \$_____, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for design or construction of the *Project*, and continuation of design or construction of the *Project* using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of design or construction of the *Project* using the Government's own forces, but in no event shall the award of contracts or the continuation of design or construction of the *Project* using the Government's own forces be deferred for more than three years. Notwithstanding this general provision for deferral, in the event the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of design or construction of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with design or construction of the *Project* using the Government's own forces.

B. The Non-Federal Sponsor shall contribute 25 percent of *total project costs* in accordance with the provisions of this paragraph.

1. 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, and shall perform or ensure performance of all *relocations* that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *Project*.

2. The Non-Federal Sponsor shall provide funds in accordance with Article VI.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's required share of 25 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 share: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.1. of this Article, as determined in accordance with Article IV of this Agreement that do not exceed 25 percent of *total project costs*; and (b) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

3. The Government, subject to the availability of funds and as limited by the *Section 219 Project Limit*, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 25 percent of *total project costs* if the Government determines at any time that the collective value of the following contributions has exceeded 25 percent of *total project costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.2. of this Article; (b) the value of the Non-Federal Sponsor's contributions under paragraph B.1. of this Article, as determined in accordance with Article IV of this Agreement that do not exceed 25 percent of *total project costs*; and (c) the value of the Non-Federal Sponsor's contributions under Article V, Article X, and Article XIV.A. of this Agreement.

[SEE NOTE – 9]

4. The Government shall not include in *total project costs* any costs that were incurred by the Non-Federal Sponsor, its contractors, or others on behalf of the Non-Federal Sponsor for preparing or providing a design, or any portion thereof, to the Government in accordance with paragraph A.1. of this Article and the Non-Federal Sponsor shall not be entitled to any credit, refund, or reimbursement for such costs.

[SEE NOTE - 14]

C. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Project* is limited by the following provisions of this paragraph.

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

1. 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*.

2. 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 and the parties shall proceed in accordance with Article XIII.B. of this Agreement.

3. If the Government determines that the total amount of Federal funds provided by Congress for the *Project* has reached the *Section 219 Project Limit*, and the Government projects that the Federal funds the Government will make available to the *Project* within the *Section 219 Project Limit* will not be 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, 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* within the *Section 219 Project Limit*, the parties shall terminate this Agreement and proceed in accordance with Article XIII.E. of this Agreement.

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

1. As of the effective date of this Agreement, \$_____ of Federal funds have been provided by Congress for the Section 219 Assistance 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 Section 219 Assistance 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*.

2. 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 and the parties shall proceed in accordance with Article XIII.B. of this Agreement.

3. If the Government determines that the total amount of Federal funds provided by Congress for the Section 219 Assistance Project has reached the *Section 219 Project Limit*, and the Government projects that the Federal funds the Government will make available to the *Project* within the *Section 219 Project Limit* will not be 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, 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* within the *Section 219 Project Limit*, the parties shall terminate this Agreement and proceed in accordance with Article XIII.E. of this Agreement.

[SEE NOTE - 15]

D. When the District Engineer determines that the entire *Project*, or a portion thereof, 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.

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

F. Upon conclusion of the *period of design and 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.

G. 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 Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

[SEE NOTE - 16]

H. 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 or performance of *relocations* for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way or performance of *relocations* 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 design or 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*.

[SEE NOTE - 17]

ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS, 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 design and 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 design and 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 design and 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 design and construction*, the Non-Federal Sponsor shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. 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, AND RELOCATIONS

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 and 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. However, no amount shall be included in *total project costs* and no credit shall be afforded for the value of any lands, easements, rights-of-way, or *relocations* 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* and no credit shall be afforded for the value of lands, easements, rights-of-way, or *relocations* that were acquired or performed using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that affording credit for the value of such items is expressly authorized by Federal law. Finally, no amount shall be included in *total project costs*, no credit shall be afforded pursuant to this Article, and no reimbursement shall be provided to the Non-Federal Sponsor, for any value in excess of 25 percent of *total project costs*.

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. or Article III.B. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions and include in *total project costs* the amount of such value that does not exceed 25 percent of *total project costs*.

C. For the purposes of determining the value to be included in *total project costs* and the amount of credit to be afforded in accordance with this Article and except as otherwise provided in paragraph E. 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 - 18] 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.C. 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 - 19] 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.

4. Any credit afforded under the terms of this Agreement for the value of *relocations* 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 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.

E. Where the Government, on behalf of the Non-Federal Sponsor pursuant to Article II.H.1. of this Agreement, acquires lands, easements, or rights-of-way, or performs *relocations*, the value to be included in *total project costs* and the amount of credit to be afforded 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 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.H.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 design and 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 design and 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 design and construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; 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*; 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 completed portions thereof as the case may be; 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 design and 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 - 20]

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, and *relocations* 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 Non-Federal Sponsor's contribution of funds required by Article II.B.2. 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 \$_____; the value included in *total project costs* for lands, easements, rights-of-way, and *relocations* determined in accordance with Article IV 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.H. 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 design and 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 Non-Federal Sponsor's total contribution of funds required by Article II.B.2. 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 - 21: the total contribution of funds required from the Non-Federal Sponsor for the upcoming contract and upcoming *fiscal year*;] the value included in *total project costs* for lands, easements, rights-of-way, and *relocations* determined in accordance with Article IV 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.H. of this Agreement.

[SEE NOTE – 21]

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.2. and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

[SEE NOTE – 22]

1. Not less than **[SEE NOTE - 23]** calendar days prior to the scheduled date **[SEE NOTE - 9 - CHOOSE: (1)** for issuance of the solicitation for the first contract for design of the *Project* or commencement of design of the *Project* using the Government’s own forces, **(2)** for: (a) issuance of the solicitation for the first contract for review of the design, or portion thereof, provided by the Non-Federal Sponsor; (b) commencement of review of the design, or portion thereof, provided by the Non-Federal Sponsor using the Government’s own forces; (c) issuance of the solicitation for the first contract for design of the *Project*; or (d) commencement of design of the *Project* using the Government’s own forces, whichever is scheduled to first occur,] 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 to meet its projected share under Article II.B.2. 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 to cover: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the *non-Federal proportionate share of financial obligations for design and construction as financial obligations for design and 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 - 24 - 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.2. and Article XVII.B.3. of this Agreement in accordance with the provisions of this paragraph.

[SEE NOTE – 22]

1. Not less than **[SEE NOTE - 23]** calendar days prior to the scheduled date **[SEE NOTE - 9 - CHOOSE: (1)** for issuance of the solicitation for the first contract for design of the *Project* or commencement of design of the *Project* using the Government’s own forces, **(2)** for: (a) issuance of the solicitation for the first contract for review of the design, or portion thereof, provided by the Non-Federal Sponsor; (b) commencement of review of the design, or portion thereof, provided by the Non-Federal Sponsor using the Government’s own forces; (c) issuance of the solicitation for the first contract for design of the *Project*; or (d) commencement of design of the *Project* using the Government’s own forces, whichever is scheduled to first occur,] 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 to meet: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the projected *non-Federal proportionate share of financial obligations for design and construction* to be incurred for such contract; (c) the projected *non-Federal proportionate share of financial obligations for design and construction* using the Government’s own forces through the first **[SEE NOTE - 25 - CHOOSE: (1) fiscal year; (2) quarter; (3) fiscal year of the Non-Federal Sponsor;**] (d) 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; and (e) 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 through the first **[SEE NOTE - 25 - 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. 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 each remaining contract for the *Project*, of the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and 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.

b. The Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each **[SEE NOTE - 25 - CHOOSE: (1) fiscal year (2) quarter (3) fiscal year of the Non-Federal Sponsor]** in which the Government projects that it will make *financial obligations for design and 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, of the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* using the Government's own forces for that **[SEE NOTE - 25 - 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 - 25 - 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 - 25 - 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 - 25 - 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 to cover: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the *non-Federal proportionate share of financial obligations for design and construction as financial obligations for design and 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 for the current contract or to cover the Non-Federal Sponsor's share of such financial obligations for work performed using the Government's own forces in the current **[SEE NOTE - 25 - 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 - 24 - 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 - 26]

C. Upon conclusion of the *period of design and 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 and as limited by the *Section 219 Project Limit*, shall refund or reimburse 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 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.H. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than **[SEE NOTE - 23]** 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 - 24 - 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.D. of this Agreement and for so long as the *Project* remains authorized, the Non-Federal Sponsor, pursuant to Article II.E. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project* or a completed portion thereof as the case may be, 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 specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

[SEE NOTE - 27]

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, if the Government determines an inspection to be necessary. 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.

ARTICLE IX – HOLD AND SAVE

[**SEE NOTE - 28:** Subject to the provisions of Article XIX of this Agreement, the] The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, 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 he determines that continuation of work on the *Project* is in the interest of the United States.

B. In the event future performance under this Agreement is suspended pursuant to Article II.C.2. of this Agreement, 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. If after completion of the design portion of the *Project* the parties mutually agree in writing not to proceed with construction of the *Project*, the parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement.

E. In the event that this Agreement is terminated pursuant to this Article or Article II.C. 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.2. 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.

F. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II.C. 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 - 29]

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 - 30]

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 - 31]

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.

[SEE NOTE – 7]

OPTION 1

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*.

OPTION 2

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 for this *Project* and all other elements of the Section 219 Assistance Project shall be borne entirely by the Government up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the Section 219 Assistance Project. None of the costs of data recovery activities associated

with historic preservation up to such one percent limit shall be included in *total project costs*.

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 cost sharing requirements for the Section 219 Program, as follows: 25 percent will be borne by the Non-Federal Sponsor and 75 percent will be borne by the Government.

C. If, during its performance of *relocations* 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* 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 – 32]

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.

[SEE NOTE - 33]

ARTICLE XIX - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the _____ of the _____ of _____ **[SEE NOTE - 34: ,** 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 - 35 - 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 - 36]

ARTICLE XX – 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 - 37]**.

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 - 38]

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 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 PCA SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

DATE: _____