

APPENDIX B

MODEL AGREEMENT  
UNDER SECTION 204(e)  
OF PUBLIC LAW 99-662  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
[THE NON-FEDERAL INTEREST]  
FOR CONSTRUCTION OF THE  
[NAME OF PROJECT]

THIS AGREEMENT entered into this \_\_\_\_\_ day of 19\_\_, by and between the United States of America (hereinafter referred to as the "GOVERNMENT") represented by the Assistant Secretary of the Army, Civil Works, and (name of Non-Federal Interest) (hereinafter referred to as the "[local sponsor]"); (Throughout this document the term "local sponsor" is included in square brackets. This is to indicate that this phrase can be replaced by either an abbreviated name for the non-Federal interest such as the "City" or the "Port" or by the term "[local sponsor]<sup>1</sup>");

WHEREAS, a (harbor, inland harbor) project (hereinafter referred to as the "Authorized Project") at \_\_\_\_\_ described in [relevant documents such as House (Senate) Document No. \_\_\_\_\_, \_\_\_ th Congress, \_\_\_ Session], was authorized by Section \_\_\_\_\_ of the \_\_\_\_\_ Act of \_\_\_\_\_ ;

WHEREAS, the [local sponsor] has proposed to perform certain work which falls within the work required under the Authorized Project;

WHEREAS, Section 204(e) of Public Law 99-662 (33 U.S.C. Section 2232 (e) ) provides that the Secretary of the Army may enter into an agreement to reimburse the costs of certain work accomplished by local interests which is, or is later incorporated into, the authorized project, when it is determined that such reimbursement is in the public interest;

WHEREAS, the Secretary of the Army has determined that reimbursement to the [local sponsor] in this instance is in the public interest; and

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<sup>1</sup> - Throughout this document the term "local sponsor" is included in the square brackets. This is to indicate that this phrase can be replaced by either an abbreviated name for the non-Federal interest such as the "City" or the "Port" or by the term "local sponsor".

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WHEREAS, the [general designs and plans for prosecution of the work have] [or equivalently: General Design Memorandum has] been approved by the Division Commander, U.S. Army Engineer Division \_\_\_\_\_;

NOW THEREFORE, it is agreed between the Government and the [local sponsor] that:

Article 1 - Definitions.

For purposes of this Agreement:

a. The term "general navigation features of the project" shall mean the following project features assigned to commercial navigation: [here describe the work to be performed, e.g., "dredging to a depth of 40 feet below mean low water a channel from x to x ..."].

b. The term "total cost of construction of general navigation facilities assigned to commercial navigation" shall mean all costs incurred by the [local sponsor] and the Government directly related to construction of the general navigation features of the project. Such costs shall include, but not necessarily be limited to: actual construction costs; continuing planning, engineering and design costs incurred after project authorization; review of proposed plans to assure conformity to the requirements for reimbursement under Section 204(e); relocation of highway and railroad bridges; supervision and administrative costs; inspection and auditing costs; and costs of contract dispute settlements or awards; but shall not include the value of lands, easements, rights-of-way, and dredged material disposal areas, relocations, dredging of non-Federal public or private channels and berthing areas, and aids to navigation.

c. The term "total project costs" shall mean the total costs of construction of general navigation features plus the value of lands, easements, rights of way, relocations and dredged material disposal areas provided for the project by the [local sponsor] plus other project features that are included in the authorization document as part of the Federal project or as a non-Federal requirement, the cost of which has been included in the estimate of project costs. This is the current version of the cost estimate used in the benefit cost analysis in the authorization documentation.

d. The term "Contracting Officer" shall mean the Commander of the U.S. Army Engineer District, \_\_\_\_\_, or the Commander's designee.

Article 2- Work to be Accomplished.

(Describe the work to be performed.)

Article 3 - Review of Designs, Detailed Plans and Specifications, and Arrangements for Prosecution of the Work.

No construction shall commence under this agreement until the designs, detailed plans and specifications, and arrangements for the prosecution of the work have been approved by the Contracting Officer. Proposed changes in approved designs, plans and specifications also must be reviewed and approved by the Contracting Officer in advance of construction.

Article 4- Method and Manner of Performing the Work.

The [local sponsor] may pursue the work described in Article 2 with its own work forces, or by contract. The [local sponsor] shall secure competitive bids by advertising for all work to be performed by contract, and shall award to the lowest cost responsible bidder. In the event, the [local sponsor] prosecutes the work by contract, all bids received and the proposed provisions of any contract shall be subject to review and approval by the Government prior to award. Any subsequent contract modification shall be the subject of review and approval by the Government.

Article 5 - Inspection of Work.

The Government may inspect any work that is performed under this agreement and the [local sponsor] hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which the [local sponsor] owns or controls for access to the project for purposes of inspection.

Article 6 - Obligations of the [local sponsor].

The [local sponsor] agrees to:

- a. perform the work to be accomplished under the agreement as described in Article 2.
- b. provide at its expense, all lands, easements, and rights-of-way, including dredged material disposal areas, and perform all relocations or alterations of facilities (other than utilities and highway and railroad bridges), as determined to be necessary for construction of the general commercial navigation facilities of the project. The value of such lands and facilities is to be determined in accordance with Article

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8 hereof);

c. provide and maintain at its own expense, all commercial navigation facilities other than those for general navigation.

d. perform or assure performance of all relocations or alterations of utilities, and make necessary arrangements to ensure that one half of utility relocations or alterations determined to be necessary for construction, operation, or maintenance of the project is borne by the local sponsor and one half is borne by the utility owner; and

e. [Add any additional language to describe fully portions of the project for which the local sponsor will be responsible including 100 percent of all costs associated with project purposes other than commercial navigation.]

f. [Add additional paragraphs as needed to reflect special requirements in the authorizing documents.]

#### Article 7 - Basis of Reimbursement.

[Determine the amount eligible for reimbursement using Section 101 of Public Law 99-662, which is based on project depth. For example, if the project described in Article 2 requires dredging from the existing depth of 25 feet to a new depth of 30 feet:] The amount eligible for reimbursement will equal the total cost of construction of general navigation facilities assigned to commercial navigation, less the amounts of non-Federal cost-sharing that would be required by P.L. 99-662, less all costs incurred by the Government necessary for completion of the project (review of plans, inspection of work, etc.). The non-Federal share for the general navigation facilities [of this example project] equals 25 percent of the actual total cost of construction of the general navigation features of the project, plus an additional 10 percent of such actual costs. The additional 10 percent requirement may be offset by a credit for lands, easements, rights-of-way, relocations, and dredged material disposal area provided by the [local sponsor] for the general navigation features of the project.

#### Article 8 - Value of Lands and Facilities.

a. The value of lands, easements, and rights-of-way to be credited toward the additional 10 percent of costs of the general navigation features of the project which are part of the non-Federal share of the project pursuant to Article 6(b) will be determined in accordance with the following procedures:

(1) The credit for lands, easements, or rights-of-way shall be the fair market value of the interest at the time such interest is used in the construction of the Project. The fair market value shall be determined by an appraisal, to be obtained by the [local sponsor], which has been prepared by an independent and qualified appraiser who is acceptable to both the [local sponsor] and the Government. The appraisal shall be reviewed and approved by the Government.

(2) For those lands, easements, or rights-of-way that are acquired by the [local sponsor] after the date this agreement is signed, if the [local sponsor] pays an amount in excess of the appraised fair market value, it may be entitled to a credit for the excess, if the [local sponsor] has secured prior written approval from the Government of its offer to purchase such interest.

(3) If the [local sponsor] acquires more lands, easements, or rights-of-way than are necessary for project purposes, as determined by the Government, then only the value of such portions of those acquisitions as are necessary for project purposes shall be creditable.

(4) Credit for lands, easements, and rights-of-way in the case of involuntary acquisitions made within one year preceding the date this agreement is signed or any time after the date this agreement is signed will be based on court awards, or on stipulated settlements that have received prior Government approval.

(5) For lands, easements, or rights-of-way acquired by the local sponsor within a five year period preceding the date this agreement is signed, or any time after this agreement is signed, credits provided under this Article will also include the actual incidental costs of acquiring the interest, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for any relocation assistance provided in accordance with the obligation under this Agreement.

b. The costs of relocations or modifications of facilities (other than utilities and highway and railroad bridges) to be credited toward the additional 10 percent of total costs which are part of the non-Federal share of the project pursuant to Article 6(b) will be that portion of the actual costs incurred by the sponsor as set forth below:

(1) Highways: Only that portion of the costs as would be necessary to construct substitute highways to the design standard that the State

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of \_\_\_\_\_ would use in constructing a new highway under similar conditions of geography and traffic loads.

(2) Facilities: Actual relocation costs, less depreciation, less salvage value, plus the cost of removal, less the cost of betterments. With respect to betterments, new materials shall not be used in any relocation or alteration if materials of value and usability equal to those in the existing facility are available or can be obtained as salvage from the existing facility or otherwise, unless the provision of new material is more economical. If, despite the availability of used material, new material is used, where the use of such new material represents an additional cost, such additional cost will not be creditable.

c. No credit will be allowed for relocations and alterations of utilities.

#### Article 9 - Limitations on Reimbursement.

a. Reimbursement for the work performed by the [local sponsor] shall be subject to the availability of funds for that purpose and shall not take precedence over other pending work at the same or other improvement projects which the Government determines to be of higher priority.

b. [For projects subject to limitations imposed by Section 902, P.L. 99-662, add the following:] The [local sponsor] agrees that it has reviewed the provisions set forth in Section 902 of P.L. 99-662 and understands the limitation placed on the Government for reimbursement. For the purpose of this agreement, the 902 limit is \_\_\_\_\_ [figure to be derived by applying an appropriate cost index to 120 percent of the estimated project costs in P.L. 99-662, where the index reflects changes in construction costs from October 1985 to the time this agreement is signed]. If total project costs computed after bid opening, exceed the limit established by Section 902, the Government will not approve award of the contract and will not provide any reimbursement unless the limit is modified by law.

c. Any construction undertaken by the [local sponsor] prior to the effective date of this agreement shall not be subject to reimbursement.

d. No reimbursement shall be made until the Secretary of the Army has certified that the work subject to reimbursement has been completed and performed in accordance with applicable permits and approved plans.

e. This agreement shall not be construed as authorizing the Government to assume any responsibilities placed on the [local sponsor] or any other non-Federal body by the conditions of project authorization.

f. Reimbursement shall not be made for any work which does not conform to the description set forth in Article 2 above, or approved plans.

g. The amount of reimbursement to the [local sponsor] is not subject to adjustment for interest charges, nor is it subject to adjustment to reflect changes in price levels between the dates of completion and reimbursement.

h. Determination of costs eligible for reimbursement will be made in accordance with Office Of Management and Budget Circular No. A-87, "Cost Principles for State and Local Governments".

#### Article 10- Operation and Maintenance.

[If the proposed construction is for the authorized project or for a modification of the authorized project that represents the NED plan or an alternative plan that has been approved by the Secretary (the "Federal project"), or if the proposed construction is a separable element of the Federal project, use the following:] Upon completion of the project, the Government shall operate and maintain the general navigation features of the project. [If the proposed construction is for any other work other than the Federal project as defined above, add the following:] The [local sponsor] shall pay to the Government the costs of operating and maintaining the general navigation features which exceed the costs which the Government and the [local sponsor] jointly determine would be incurred for operation and maintenance of [describe the Federal project]. [In the case of a deep draft project, add the following: The [local sponsor] shall pay to the Government one half of the excess of the cost of operation and maintenance of the general navigation features of the project over the cost which the Secretary determines would be incurred for operation and maintenance if the project had a depth of 45 feet.] [For all agreements add:] The [local sponsor] shall provide to the Government all lands, easements, rights-of-way, or dredged material disposal areas, and perform all relocations required for project operation and maintenance. Operation and maintenance will remain a Federal responsibility unless the Secretary finds that the project is no longer economically justified or environmentally acceptable.

#### Article 11 - Disputes.

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Before any party to this Agreement may bring suit in any court concerning an issue relating to this Argument, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

Article 12- Release of Claims.

The [local sponsor] shall hold and save the Government free from all damages arising from the construction, operation, and maintenance of the project, except for damages due to the fault or negligence of the Government or its contractors in connection with Federal responsibilities for operation and maintenance of the project, subsequent to its completion.

Article 13 - Maintenance of Records.

The Government and the [local sponsor] shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement to the extent and in such detail as will properly reflect total project costs. The Government and the local sponsor shall maintain such books, records, documents, and other evidence for a minimum of three years after completion of construction of the project and resolution of all claims arising therefrom, and shall make available at their offices at reasonable times, such books, records, documents, and other evidence for inspection and audit by authorized representatives of the parties to this Agreement.

Article 14 - Officials Not to Benefit.

No member of or any delegate to Congress, or Resident Commissioner, or any other public official representing the [local sponsor] shall be admitted to any share or part of this agreement, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

Article 15 - Covenant Against Contingent Fees.

The [local sponsor] warrants that no person or selling agent has been employed or retained to solicit or secure this agreement upon an agreement of understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the [local sponsor] for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this agreement without liability or, in its discretion, to subtract from reimbursement price

the full amount of such commission, percentage, brokerage, or contingent fee.

Article 16 - Federal and State Laws.

In acting pursuant to its rights and obligations hereunder, the [local sponsor] agrees to comply with all applicable Federal and state laws and regulations, including but not limited to, the Uniform Relocations Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), section 601 of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and Department of Defense Directive 5500.II issued pursuant thereto and published in part 300 of Title 32, Code of Federal Regulations, as well as Army Regulation 500-7 entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army." In addition, the [local sponsor] agrees to apply and include provisions consistent with the following statutes in all construction contracts:

- a. Buy American, 41 U.S.C. Section 10a;
- b. Clean Air Act, 42 U.S.C. Section 7606;
- c. Clean Water Act, 33 U.S.C. Section 1368;
- d. Contract Work Hours, 40 U.S.C. Section 327 et. seq;
- e. Convict Labor, 18 U.S.C. Section 4082;
- f. Copeland Anti-Kickback, 40 U.S.C. Section 276c;
- g. Davis Bacon Act, 40 U.S.C. Section 276, et. seq;
- h. Equal Opportunity, 42 U.S.C. Section 2000d;
- i. Jones Act, 46 U.S.C. Section 292;
- j. Rehabilitation Act (1973), 29 U.S.C. Section 794;
- k. Shipping Act, 46 U.S.C. Section 883;
- l. Utilization of Small Business, 15 U.S.C. Section 631, 644;
- m. Vietnam Veterans, 38 U.S.C. Section 2012;
- n. Walsh-Healey, 41 U.S.C. Section 35, et. seq.

Article 17 - Relationship of Parties.

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The parties to this Agreement act in an independent capacity in the performance of their respective functions under this Agreement, and neither party is to be considered the officer, agent, or employee of the other.

Article 18 - Notices:

a. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage-prepaid), registered, or certified mail, as follows:

If to the [local sponsor]:

(ADDRESS)

If to the Government:

(ADDRESS)

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

c. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at such time as it is personally delivered or on the third business day after it is mailed, as the case may be.

Article 19 - Expiration of Agreement.

This agreement shall expire and become null and void if the work described herein is not undertaken within \_\_\_\_\_ (years, months) of the effective date of this agreement and completed within \_\_\_\_\_ (years, months) thereafter.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement as of the day and year first above written.

THE DEPARTMENT OF THE ARMY

THE LOCAL SPONSOR

BY: \_\_\_\_\_  
Assistant Secretary of  
the Army (Civil Works)

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_