

**SECTION 221 – FCA 1970, AS AMENDED**

**MODEL MOU  
FOR  
IN-KIND CONTRIBUTIONS PROVIDED OR PERFORMED  
BY A NON-FEDERAL INTEREST PRIOR TO EXECUTION OF A  
PROJECT PARTNERSHIP AGREEMENT**

**MAY 30, 2008**

**APPLICABILITY.** – The attached model MOU is one of two model MOUs for in-kind contributions to be provided or performed by a non-Federal interest prior to execution of the applicable cost sharing agreement. The following descriptions are provided to assist in determining the correct model to be used.

*IN-KIND MOU for PPA* – The attached model MOU should be used if the non-Federal interest intends to provide or perform construction activities prior to execution of a Project Partnership Agreement (PPA) for a specifically authorized project. In addition, it should be used if the non-Federal interest intends to provide or perform design and construction activities or construction activities for authorities (Continuing Authorities Program and regional authorities) that use a PPA that addresses performance of design and construction in one agreement.

*IN-KIND MOU for Design* – The *In-Kind MOU for Design* should be used if the non-Federal interest intends to provide or perform design activities prior to execution of a Design Agreement for a specifically authorized project. In addition, it should be used if the non-Federal interest intends to provide or perform design activities only prior to execution of a PPA for those authorities (Continuing Authorities Program and regional authorities) that use a PPA that addresses performance of both design and construction in one agreement. If the sponsor intends to provide or perform in-kind contributions consisting of both design and construction activities for those authorities that use a PPA that addresses performance of design and construction in one agreement, use the *IN-KIND MOU for PPA*.

**NOTES.** – The following pages (ii – iii) contain numbered notes to assist in drafting a MOU using this model. Throughout the model MOU, there are references to the numbered notes (example: [SEE NOTE – 2]) to direct you to the appropriate note that provides explanation and guidance on information required to fill in the blanks.

**BLANKS.** – There are several 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 MOU for review. Including the information required to fill in a blank is not considered a deviation from the model.

**NOTES:**

- 1. FORMAT. - Remove the cover pages, notes section, all bold type references to notes, and any bold type text from the MOU prior to forwarding for review.**
  
- 2. MULTIPLE NON-FEDERAL INTERESTS. - In the event there are two or more entities that wish to jointly provide or perform in-kind contributions prior to execution of the applicable cost sharing agreement, the MOU can be modified to identify all the entities collectively as the “Non-Federal Interests”. The changes outlined below are required to identify all entities collectively as “Non-Federal Interests” and are not considered deviations from the model.**
  - A. Modify title to include name of each non-Federal entity.**
  
  - B. Modify first paragraph to include name of each non-Federal entity. (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 Interests”))**
  
  - C. Change “Non-Federal Interest” to “Non-Federal Interests” throughout the MOU. There are several paragraphs where this change will require additional grammatical changes immediately following the phrase “Non-Federal Interests” to reflect multiple entities (i.e. “understands” to “understand”, etc.).**
  
  - D. On the signature page, a separate signature block will be required for each non-Federal entity.**
  
  - E. A separate Certificate of Authority will be required for each non-Federal entity.**
  
- 3. REFERENCE TO NON-FEDERAL INTEREST. - Use “Non-Federal Interest”, “State”, “County”, “Commonwealth”, “Territory” or other identifier as preferred by the non-Federal entity in the parenthetical phrase and consistently throughout the MOU. 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.**
  
- 4. NON-FEDERAL INTEREST REPRESENTATIVE. – Insert the title of the non-Federal entity’s representative signing the MOU. Do not include the name, only the title. The title shown for the non-Federal entity’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 non-Federal entity’s representative. (Example: the Mayor)**
  
- 5. WHEREAS CLAUSE. - Choose Option (1) if the project or separable element toward which the in-kind contributions will apply contains a structural flood damage reduction component or Option (2) if the project or separable element**

toward which the in-kind contributions will apply does not contain a structural flood damage reduction component. Delete in its entirety, the option not used.

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

**7. DESCRIPTION OF PROPOSED WORK.** – Describe the Proposed Work in enough detail to ensure what is to be provided or performed.

**8. CERTIFICATE OF AUTHORITY.**

A. If applicable, choose Option (1) if the non-Federal entity is not a non-profit entity or Option (2) if the non-Federal entity is a non-profit entity. Delete, in its entirety, the option not used.

B. If Option (2) is chosen, fill in the appropriate State in the 5<sup>th</sup> line. The phrase “State of \_\_\_\_\_” is used in the model; 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.

C. The attorney signing the Certificate of Authority cannot be the signatory to the MOU. The attorney signing the Certificate of Authority is certifying that the signatory to the MOU has the authority to obligate the non-Federal entity. Do not forget to fill in the name in the first line prior to execution of the MOU.

**9. PREPARING MOU FOR SIGNATURE.**

A. When printing the MOU for execution: 1) remove the cover page, notes section, bold type references to notes, and any bold type text from the MOU; 2) ensure that the appropriate information has been included in all blanks in the MOU and the Certificate of Authority; 3) ensure that there are no page breaks which allow half empty pages; and 4) since this is a civilian document use the civilian version of the District Engineer’s signature block.

B. Before signature by the District Engineer, the district must ensure that the sponsor signs and dates a minimum of two copies of the MOU 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 District Engineer, not the non-Federal entity.

C. The Government should retain one copy of the fully executed MOU. All other copies should be provided to the non-Federal entity. A photocopy or a pdf file (as determined by the MSC and the appropriate HQ RIT) of the fully executed MOU should be provided to the MSC and to the appropriate HQ RIT within 7 days after execution of the MOU.

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND THE  
**[FULL NAME OF NON-FEDERAL INTEREST]**  
FOR WORK PROVIDED OR PERFORMED  
PRIOR TO EXECUTION OF  
A  
PROJECT PARTNERSHIP AGREEMENT  
FOR  
**[FULL NAME OF PROJECT]**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter the “MOU”) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the Department of the Army (hereinafter the “Government”), represented by the U.S. Army Engineer \_\_\_\_\_ District (hereinafter the “District Engineer”) and **[FULL NAME OF NON-FEDERAL INTEREST]** **[SEE NOTE - 3]** (hereinafter the “Non-Federal Interest”), represented by **[SEE NOTE - 4]**.

WITNESSETH, THAT:

WHEREAS, Section 221(a) of the Flood Control Act of 1970, as amended by Section 2003 of the Water Resources Development Act of 2007, provides that a cost sharing partnership agreement may provide credit for the value of materials or services provided before the execution of such cost sharing partnership agreement if the Secretary and the non-Federal interest enter into an agreement under which the non-Federal interest shall carry out such work and only work carried out following the execution of such agreement shall be eligible for credit;

**[SEE NOTE - 5]**

**OPTION 1**

WHEREAS, the Non-Federal Interest understands and acknowledges that any credit for eligible in-kind contributions will be afforded only toward the required non-Federal contribution of funds (i.e. cash contribution) under the Project Partnership Agreement for the project or separable element of the project except such credit will not be afforded toward the non-Federal requirement to provide in cash 5 percent of the costs allocated to structural flood damage reduction; and

**OPTION 2**

WHEREAS, the Non-Federal Interest understands and acknowledges that any credit for eligible in-kind contributions will be afforded only toward the required non-Federal contribution of funds (i.e. cash contribution) under the Project Partnership Agreement for the project or separable element of the project; and

WHEREAS, by letter dated [SEE NOTE - 6] \_\_\_\_\_, the Non-Federal Interest stated its intent to perform certain work (hereinafter the “Proposed Work”, as defined in Paragraph 1 of this MOU) prior to the execution of the Project Partnership Agreement for the [FULL NAME OF PROJECT] at [SPECIFIC LOCATION OF THE PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY].

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

1. The Non-Federal Interest shall provide or perform the Proposed Work in accordance with the terms and conditions of this MOU. The Proposed Work shall consist of [SEE NOTE - 7] \_\_\_\_\_ as generally described in the letter from the Non-Federal Interest.
2. The Non-Federal interest shall develop all necessary engineering plans and specifications for the Proposed Work.
3. The Non-Federal Interest shall complete all necessary environmental coordination and obtain all applicable Federal, State, and local permits required for the performance of the Proposed Work.
4. The Non-Federal Interest shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy 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 and subsequent operation and maintenance of the Proposed Work, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.
5. Nothing in this MOU creates any duty, obligation, or responsibility for the Government. Any activity undertaken by the Non-Federal Interest for the implementation of the Proposed Work is solely at the Non-Federal Interest’s own risk and responsibility.
6. The Non-Federal Interest shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this MOU to the extent and in such detail as will properly reflect total costs for the Proposed Work and the Non-Federal Interest shall make such evidence available for inspection and audit by authorized representatives of the Government.
7. The Non-Federal Interest understands that any costs incurred for the clean-up of hazardous material regulated by the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”; 42 U.S.C. Sections 9601-9675), that may exist in, on, or under lands, easements, or rights-of-way required for the Proposed Work are a Non-Federal Interest responsibility and that no credit shall be afforded for such clean-up costs. In addition, the Non-Federal Interest understands that as between the Government and the Non-Federal Interest, the Non-Federal Interest shall

be considered the operator of the Proposed Work for the purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Interest shall operate, maintain, repair, replace, and rehabilitate the Proposed Work in a manner that will not cause liability to arise under CERCLA.

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

9. The Non-Federal Interest understands that to be eligible for credit for the costs of the Proposed Work:

a. The Government must make a determination that the Proposed Work is integral to the project;

b. The Proposed Work shall be subject to a review or on-site inspection, as applicable, and certification by the Government that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies;

c. The costs for the Proposed Work that may be eligible for credit shall be subject to an audit by the Government to determine the reasonableness, allocability, and allowability of such costs;

d. The costs incurred for the Proposed Work are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the Proposed Work is completed and the time that credit may be afforded;

e. The Non-Federal Interest shall not use Federal program funds (either funds or grants provided by a Federal agency as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant) for the Proposed Work 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;

f. Only the costs of the Proposed Work that do not exceed the Government's estimate of the cost of such work if the work been accomplished by the Government may be eligible for credit;

g. Any contract awarded for the Proposed Work shall include provisions consistent with all applicable Federal laws and regulations and the Non-Federal Interest 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, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army";

h. The Non-Federal Interest must comply 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)); and

i. Crediting for the costs of the Proposed Work may be withheld, in whole or in part, as a result of the Non-Federal Interest's failure to comply with the terms of this MOU.

10. If the parties agree to enter into a Project Partnership Agreement for the **[FULL NAME OF PROJECT]** at **[SPECIFIC LOCATION OF THE PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]**, then the Project Partnership Agreement will contain provisions regarding affording credit for costs of the Proposed Work, if the Secretary determines that the Proposed Work is integral to the project.

11. Execution of this MOU shall not be interpreted as a Federal assurance regarding later approval of any project; shall not commit the United States to any type of reimbursement or credit for the Proposed Work; does not alter any process to be followed by the Government in making a determination to execute a future Project Partnership Agreement; nor does it provide any assurance that any future agreement will ever be executed for the project, the Proposed Work, or any portion of the project. Further, this MOU shall not be interpreted to signify any Federal participation in or commitment to the project or the Proposed Work. Finally, this MOU shall not be construed as committing the Government to assume any responsibility placed upon the Non-Federal Interest or any other non-Federal entity or as preventing the Government from modifying the project that could result in the Proposed Work performed by the Non-Federal Interest no longer being an integral part of the design of the project.

IN WITNESS WHEREOF, the parties hereto have executed this MOU, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

**[FULL NAME OF NON-FEDERAL INTEREST]**

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

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

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

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

[SEE NOTE - 8]

CERTIFICATE OF AUTHORITY

**OPTION 1**

I, \_\_\_\_\_, do hereby certify that I am the principal legal officer of the **[FULL NAME OF NON-FEDERAL INTEREST]**, that the **[FULL NAME OF NON-FEDERAL INTEREST]** is a legally constituted public body with full authority and legal capability to perform the terms of the MOU between the Department of the Army and the **[FULL NAME OF NON-FEDERAL INTEREST]** in connection with the Proposed Work to be provided or performed prior to execution of a Project Partnership Agreement for the **[FULL NAME OF PROJECT]** at **[SPECIFIC LOCATION OF THE PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]** and that the persons who have executed this MOU on behalf of the **[FULL NAME OF NON-FEDERAL INTEREST]** have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

**OPTION 2**

I, \_\_\_\_\_, do hereby certify that I am the **[FULL TITLE OF ATTORNEY SIGNING CERTIFICATE OF AUTHORITY]** of the **[FULL NAME OF NON-FEDERAL INTEREST]**; that the **[FULL NAME OF INTEREST]** is a legally constituted non-profit entity incorporated under the applicable laws of the State of \_\_\_\_\_ as a non-profit organization, exempt from paying Federal income taxes under Section 501 of the Internal Revenue Code (26 U.S.C. 501); that the **[FULL NAME OF NON-FEDERAL INTEREST]** has the full authority and legal capability to perform the terms of the MOU between the Department of the Army and the **[FULL NAME OF NON-FEDERAL INTEREST]** in connection with the Proposed Work to be provided or performed prior to execution of a Project Partnership Agreement for the **[FULL NAME OF PROJECT]** at **[SPECIFIC LOCATION OF THE PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]** and that the persons who have executed this MOU on behalf of the **[FULL NAME OF NON-FEDERAL INTEREST]** have acted within their corporate authority.

IN WITNESS WHEREOF, I have made and executed this certification this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

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