

SECTION 105(c) – WRDA 86

**MODEL AGREEMENT
FOR
DESIGN**

**APRIL 12, 2006
REVISED – SEPTEMBER 12, 2012**

APPLICABILITY. – The attached model agreement should be used for all Preconstruction Engineering and Design (PED) activities funded by General Investigations (GI) or Flood Control, Mississippi River and Tributaries (MR&T) appropriations and all Engineering and Design (E&D) activities funded by either Construction, General (CG), MR&T, or Operation and Maintenance, General (O&M) appropriations, except for the following:

A. PED and E&D for an inland waterway project; a dam safety assurance, seepage correction, or static instability correction project; a major rehabilitation project; or a deficiency correction at a Federally operated project.

B. A project or separable element for which the non-Federally financed portion of pre-Project Partnership Agreement (PPA) engineering and design costs alone would exceed the total non-Federal cash share for the project or element; the non-Federal share of the project or element is reduced under ability to pay rules; or pre-PPA engineering and design costs are less than \$100,000.

C. PED initially funded prior to FY 1997 or E&D initially funded prior to FY 1998.

D. Continuing Authority Programs (Sections 14, 103, 107, 111, 204, 205, 206, 208, and 1135), Critical Restoration Project Programs (Sections 514, 542, 544, etc.), and Environmental Infrastructure Programs (Sections 108, 130, 132, 154, 219, 304, 313, 340, 510, 531, 552, 566, 569, 570, 571, 592, 593, 594, 595, etc.).

NOTES. – The following pages (iii – xv) 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 – 6]) 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 the type of project that is being designed, 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. 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. 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 4) 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.

3. 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)

4. 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.

5. 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)

6. PROJECT OR AN ELEMENT OF A PARENT PROJECT. - For each location that requires a choice between two options - Choose Option (1) if the project in the agreement is the entire project or Option (2) if the project in the agreement is an element of the parent project. The Whereas clause options each contain two Whereas clauses. Delete, in its entirety, the option not used.

7. TYPE OF FUNDING. – Choose Option (1) if the allocation of CG funds triggered the requirement for a design agreement; Option (2) if the allocation of O&M funds triggered the requirement for a design agreement; Option (3) if the allocation of MR&T funds triggered the requirement for a design agreement; or Option (4) if the allocation of GI funds for PED triggered the requirement for a design agreement. Delete, in their entirety, the options not used.

8. NONPROFIT ENTITY AS A SPONSOR.

A. A nonprofit entity can be the sole sponsor for design of single purpose ecosystem restoration projects. For design of any project other than a single purpose ecosystem restoration project (such as recreation, flood risk management, or a multi-purpose project, etc) a nonprofit entity can be a sponsor but only if a legally constituted public body (including a Federally recognized Indian tribe) will also act as sponsor for the design.

1. To be eligible to act as sponsor, the nonprofit entity must be an organization incorporated under the applicable laws of the State in which it operates as a nonprofit organization, exempt from paying Federal income taxes under section 501 of the Internal Revenue Code (26 U.S.C. 501), and whose purposes include and are directly related to the purpose of the potential project.

2. In addition, the affected local government must consent, in writing, to the nonprofit entity acting as sponsor. The written consent must be received prior to processing the DA for approval, with the date of the written consent(s) included in the Whereas clause. Typically, the affected local government will be the smallest unit of government that has jurisdiction over the area impacted by the potential project. For larger or more complex projects, multiple jurisdictions may be involved and written consent must be obtained from the affected local government in each jurisdiction.

B. Optional Whereas clauses.

1. If the sponsor is a nonprofit entity or if there are multiple sponsors and one of them is a nonprofit entity, the two Whereas clauses following the reference to this note should be included in the agreement.

a. In the first Whereas clause fill in the appropriate State. 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 study is not considered a deviation from the model.

b. In the second Whereas clause, fill in the blanks as indicated. In those cases with multiple jurisdictions that requires more than one consent letter, modification of the Whereas clause to identify the additional letters is not considered a deviation from the model. The civilian format of the date should be used. (EXAMPLE: January 22, 2012)

2. If the sponsor is not a nonprofit entity, delete the two Whereas clauses following the reference to this note. Deletion of the two Whereas clauses following the reference to this note is not considered a deviation from the model.

C. For each location that requires a choice between three options - Choose Option (1) if the sponsor is not a nonprofit entity or if there are multiple sponsors, none of them are nonprofit entities; Option (2) if the sponsor is a nonprofit entity; or Option (3) if there are multiple sponsors and one of them is a nonprofit entity. Delete, in their entirety, the options not used. If Option (2) or Option (3) is selected, then all other optional language regarding a nonprofit entity must be selected for inclusion elsewhere in the agreement (see paragraph A. of this note and note 34).

9. FEDERALLY RECOGNIZED INDIAN TRIBE AS A SPONSOR.

A. To be eligible to act as a sponsor, the tribe must be a Federally recognized Indian tribe; that is, any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and listed as such in the most recent Federal Register listing of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs by the Department of Interior, Bureau of Indian Affairs.

B. If the sponsor is a Federally recognized Indian tribe, the Whereas clause following the reference to this note should be included in the agreement. If the sponsor is not a Federally recognized Indian tribe, delete the Whereas clause following the reference to this note. Deletion of the Whereas clause following the reference to this note is not considered a deviation from the model.

C. ARTICLE XV – TRIBAL SOVEREIGN IMMUNITY. – Optional Article XV must be included in the DA if the sponsor is a Federally recognized Indian 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 second blank should be the date of the instrument named in the first blank - use civilian format for date (Example: January 22, 2012). The information to be included in the fourth blank should be the title of the sponsor’s representative (see note 5). Deletion of the Article XV, when the sponsor is not a Federally recognized Indian tribe, is not considered a deviation from the model.

10. PROJECT AUTHORIZATION. – Include the optional Whereas clause in the agreement only if this agreement is for the design of a project or separable element of a project that has been specifically authorized for construction or implementation by Congress. When citing the authority for construction be sure to include the full name of the public law with the section and paragraph numbers. (Example: Brunswick Harbor, Georgia navigation project authorized in the Water Resources Development Act (WRDA) of 1999 – the correct reference is Section 101(a)(19) of the Water Resources Development Act of 1999, Public Law 106-53)

11. COST SHARING PERCENTAGE. – It is Army policy to only request Federal funding of design for those projects that the sponsor has agreed to contribute a portion of the design costs during the design phase. Pursuant to this policy, the sponsor contributes 25 percent of the costs for design during the design phase of the project. These design costs are included in the amount of total project costs or total cost of construction of the general navigation features, as applicable, in a PPA for construction of the project and the contributions made by a non-Federal interest under the Design Agreement are credited towards the non-Federal share of total project costs or total cost of construction of the general navigation features, as applicable, where they are ultimately cost shared in the same percentage as the purpose of the project in accordance with Section 105(c) of WRDA 86. In the rare instance in which a project is authorized for design only and the project authorization specifies a cost sharing percentage other than 75/25 for design, the cost sharing percentage specified in the project authorization should be used in the agreement. Concurrence to use any cost sharing percentage other than 25 percent non-Federal must be obtained from your HQ RIT. Once concurrence to use a different percentage is received and this change is made in one location, ensure that all locations are similarly changed. The phrase “25 percent” is located in the Whereas Clause following the reference to this note and Articles II.B., II.B.1., and II.B.2. of the model. (Example: Section 528 of WRDA 99, Public Law 106-53, provided that the Secretary may provide technical assistance, including planning, engineering, and design for reconstruction of Mayo’s Bar Lock and Dam, Rome, Georgia and the non-Federal share of this assistance shall be 50 percent.)

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

A. Describe the project features to be undertaken pursuant to this agreement in detail sufficient to avoid any confusion over what is or is not included.

B. The title and date of the decision document that describes the project to be designed should be included (such as a Chief's Report, Feasibility Report with Engineering Appendix, General Reevaluation Report, Limited Reevaluation Report, etc.). For those decision documents other than the Chief's Report include the title of the approving official (such as Assistant Secretary of the Army (Civil Works); Chief of Engineers; Commander, _____ Division; or Commander, _____ District) and the date of approval. Note: If the project in the agreement was a Congressionally added project for which there is no current decision document that describes the project to be designed, the decision document would be the Limited Reevaluation Report or other such report prepared after receipt of the add.

C. The civilian format for any dates included in the agreement should be used. (Example: January 22, 2012)

13. SCOPE OF DESIGN ACTIVITIES.

A. Design Products. – There are numerous types of design products that may be undertaken during the period of design depending on the type of project being designed. The types of design products could be plans and specifications, engineering documentation reports, design documentation reports, Limited Reevaluation Reports, General Reevaluation Reports, letter reports, environmental documentation, and any other decision or implementation document required for the project.

B. Activities under the design agreement are limited to those that are subsequent to the feasibility phase. If a feasibility study has not been completed for the project or element, the normal project development process should be followed, including a reconnaissance-level analysis, if needed, and a feasibility study under a 50/50 feasibility study cost sharing agreement (FCSA). Likewise, even if a feasibility study for a project or element has been completed, the normal project development process (reconnaissance analysis and feasibility study under a FCSA) should be followed for any substitute plan, or for any expansion, extension, or additional project or element that can be implemented separately, and this work should not be carried out under the design agreement for the original project or element. For additional explanation, see the annual Budget EC.

C. The district should not perform any work under the design agreement that should only be performed under a PPA to support actual construction of the project. While this list is not all inclusive, some examples of work that should not be performed under a design agreement are: 1) review of sponsor's credit appraisals for lands, easements, or rights-of-way and 2) performance of mitigation activities, including data recovery activities, associated with historic preservation.

14. PROJECT PURPOSE. – Choose Option (1) if the purpose, or one of the purposes, of the project in the agreement is navigation, flood risk management, or hurricane and storm damage reduction; or otherwise select Option (2). Delete in its entirety, the option not used.

15. BETTERMENTS. - A betterment is a difference in quality of an element of the project to be designed, not a difference in kind. The term “betterment” does not include any design 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 anything/everything requested by the sponsor.

16. 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.I. in the agreement. Please note that any contracts awarded by the Government for design work cannot use the continuing contracts clause and must be fully funded prior to award.

A. If optional Article I.I. is included, Option (2) of Article IV.B. must be selected (see note 22) and Option (3) in Articles IV.B.1., IV.B.2., and IV.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.I. 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 IV 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.

17. INCLUSION OF CONGRESSIONAL ADD PARAGRAPH. – Include optional Article II.A.5. in the agreement for any project or separable element that does not comply with Army budget policy as of the date of the agreement, even if the project has received all of the Federal funds estimated to be needed to complete design of the project. Verify the need for inclusion of this language and the amount to be included in the blank(s) with your Programs Management Team.

A. Optional Article II.A.5. - Choose Option (1) if the project in the agreement is the parent project or Option (2) if the project in the agreement is a separable element of the parent 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 6).

B. 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. For the choice of text in the first sentence - choose Option (1) if the funds provided for the project are for design only or Option (2) if the funds provided for the project are to be used for design and construction, such as a congressional add providing funds to be used for both design and construction.

C. Option 2. - The dollar amount to be included in the first blank should be the total funds provided by Congress for the parent 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 parent project funds that the district projects to be available for the project in this agreement as of the effective date of the agreement. For the choice of text in the first sentence - choose Option (1) if the funds provided for the project are for design only or Option (2) if the funds provided for the project are to be used for design and construction, such as a congressional add providing funds to be used for both design and construction.

18. PROJECT PURPOSE. – Choose Option (1) if the purpose, or one of the purposes, of the project in the agreement is navigation; Option (2) if the purpose, or one of the purposes, of the project in the agreement is flood risk management or hurricane and storm damage reduction; or otherwise select Option (3). Delete in their entirety, the options not used.

19. CREDIT TO BE AFFORDED IN FUTURE AGREEMENT.

A. Article II.F. - Delete Article II.F. of the agreement only in the rare instance when, at the time of execution of the Design Agreement, the project is specifically authorized for design only. If Article II.F. is not included, reletter the remaining paragraphs in Article II and verify all previous and subsequent references to paragraphs in Article II throughout the agreement and correct, as necessary. Relettering the remaining paragraphs in Article II and correction of all references to paragraphs in Article II are not considered a deviation from the model.

B. Articles IV.C.2 and IV.D.3.b. – Delete the last sentence, only if Article II.F. is not included in the agreement.

20. PROJECT PURPOSE.

A. For each location that requires a choice between two options – Choose Option (1) if the purpose, or one of the purposes, of the project in the agreement is navigation or Option (2) for all other project purposes (flood risk management, hurricane and storm damage reduction, ecosystem restoration, etc). Delete in its entirety, the option not used.

B. For each location where an optional paragraph or optional sentence is provided, include in your agreement the optional paragraph or optional sentence, as applicable, only if the purpose of the project in the agreement is structural flood risk management.

21. ARTICLE IV.A. – BREAKDOWN OF PROJECT COSTS.

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

B. To determine the sponsor’s contribution of funds required by Article II.B.1.: Step (1) determine the sponsor’s share of total design costs; Step (2) subtract from the sponsor’s share of total design costs the costs of the sponsor’s participation in the Design Coordination Team (Article III) and the costs of audits performed by the sponsor (Article VII). 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 third blank in Article IV.A.1. If the result of Step 2 is equal to or less than zero, then “0” should be shown in the third blank in Article IV.A.1.

Example:

**total design costs = \$1,000,000
sponsor’s costs for Articles III and VII = \$20,000
Step 1 - (\$1,000,000 x .25) = \$250,000
Step 2 - \$250,000 – \$20,000 = \$230,000**

C. To determine the percentage of the sponsor’s proportionate share of financial obligations for design: Step (1) determine the financial obligations for design by subtracting from total design costs the costs of the sponsor’s participation in the Design Coordination Team (Article III) and the costs of audits performed by the sponsor (Article VII); Step (2) divide the sponsor’s contribution of funds shown in the third blank in Article IV.A.1. by the financial obligations for design. This is the percentage that should be shown in the fourth blank in Article IV.A.1.

Example:

**total design costs = \$1,000,000
sponsor’s costs for Articles III and VII = \$20,000
sponsor’s contribution of funds required by Article II.B.1. = \$230,000
Step 1 - \$1,000,000 - \$20,000 = \$980,000
Step 2 - \$230,000/\$980,000 = 23.47 percent**

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

22. 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 design work; therefore, all contracts awarded by the Government for work on design 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 16 and 25).

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

23. PAYMENT MECHANISMS. – Both Option (1) and Option (2) of Article IV.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.

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.I. is included in the agreement (see note 16). 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 design work on the project cannot use the continuing contracts clause and must be fully funded prior to award.

26. ARTICLE IV.C. - FINAL ACCOUNTING.

A. When a final accounting cannot be conducted in a timely manner because of outstanding claims and appeals, 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.

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

27. TIMING OF FIRST REQUEST FOR SPONSOR'S FUNDS. - 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 pursuant to Article IV.D. of the agreement (for additional work/betterments). 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.

28. ARTICLE VI – HOLD AND SAVE. - Include the optional language after the colon only if optional Article XIV - Obligations of Future Appropriations (see note 31) is included in the agreement and the sponsor requests this optional language be added to Article VI 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 XI - 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.

30. ARTICLE XIII – THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES. - Article XIII 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 VI (see note 28), verify the reference contained in Article VI 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.

31. ARTICLE XIV – OBLIGATIONS OF FUTURE APPROPRIATIONS. - Reminder: Use of this article is limited to a sponsor that is a State agency or a political subdivision of the State. It cannot be used by a non-profit entity.

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

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

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

32. 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.

33. 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 3).

34. CERTIFICATE OF AUTHORITY.

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

used. If Option (2) is selected, then all other optional language regarding a non-profit entity must be selected for inclusion elsewhere in the agreement (see note 8). Further, if Option (2) is selected, fill in the appropriate State. 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.

B. 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.

35. 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 3) should be “U.S. Army Engineer, _____ District”; 2) the title of the Government representative in the last paragraph (see note 33) 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 3) 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.

DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF NON-FEDERAL SPONSOR]
FOR
DESIGN
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 - 3]** and **[FULL NAME OF NON-FEDERAL SPONSOR]** **[SEE NOTE - 4]** (hereinafter the “Non-Federal Sponsor”), represented by **[SEE NOTE - 5]**.

WITNESSETH, THAT:

[SEE NOTE - 6]

OPTION 1 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, **[SEE NOTE – 7 – CHOOSE: (1) Federal Construction, General funds (2) Federal Operation and Maintenance, General funds (3) Federal Flood Control, Mississippi River and Tributaries funds (4) Federal General Investigations funds]** for Fiscal Year _____, included funds for the Government to initiate design of the **[FULL NAME OF PROJECT]** (hereinafter the “*Project*” as defined in Article I.A. of this Agreement) at **[LOCATION OF PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]**;

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

OPTION 2 – (FOLLOWING TWO WHEREAS CLAUSES)

WHEREAS, **[SEE NOTE – 7 – CHOOSE: (1) Federal Construction, General funds (2) Federal Operation and Maintenance, General funds (3) Federal Flood Control, Mississippi River and Tributaries funds (4) Federal General Investigations funds]** for Fiscal Year _____, included funds for the Government to initiate design of the **[FULL NAME OF PROJECT]** (hereinafter the “Parent Project”) at **[LOCATION OF PROJECT, INCLUDING STATE, COMMONWEALTH, OR TERRITORY]**;

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

[SEE NOTE – 8 – FOLLOWING TWO WHEREAS CLAUSES]

WHEREAS, the **[FULL NAME OF NONPROFIT ENTITY]** is an organization that is 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);

WHEREAS, by letter dated _____, the **[FULL NAME OF AFFECTED LOCAL GOVERNMENT]**, the affected local government has consented to the **[FULL NAME OF NON-FEDERAL SPONSOR]**, serving as a non-Federal sponsor for the feasibility study;

[SEE NOTE – 9 - FOLLOWING ONE WHEREAS CLAUSE]

WHEREAS, the **[FULL NAME OF TRIBE]**, is a Federally recognized Indian tribe and listed in the most recent Federal Register listing of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs by the Department of Interior, Bureau of Indian Affairs;

[SEE NOTE - 10]

WHEREAS, construction or implementation of the *Project* is authorized by **[CITE AUTHORITY INCLUDING PUBLIC LAW NUMBER]** _____ ;

WHEREAS, Section 105(c) of the Water Resources Development Act of 1986, Public Law 99-662 (33 U.S.C. 2215), provides that the costs of design of a water resources project shall be shared in the same percentage as the purposes of such project;

[SEE NOTE - 11]

WHEREAS, the Government and the Non-Federal Sponsor agree that, during the *period of design*, the Non-Federal Sponsor shall contribute 25 percent of *total design costs* and that, if a Project Partnership Agreement for construction of the *Project* is executed between the Government and a non-Federal interest, such non-Federal interest shall contribute any remaining portion of the non-Federal share of the costs of design in accordance with the provisions of such Project Partnership Agreement;

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 design and implementation of the *Project*.

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

ARTICLE I - DEFINITIONS

[SEE NOTE - 12]

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

[SEE NOTE - 13]

B. The term “*total design 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 of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s costs of engineering and design, economic and environmental analyses, and evaluation performed after a feasibility report whether performed prior to or after the effective date of this Agreement that were not previously shared with a non-Federal interest pursuant to any other agreement; the Government’s costs of review processes required by the Government; the Government’s costs of Independent External Peer Review, if required, except for the costs of any contract for an Independent External Peer Review panel; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Design Coordination Team in accordance with Article III of this Agreement; the Government’s costs of contract dispute settlements or awards; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article VII.B. and Article VII.C. of this Agreement. The term does not include any costs of [SEE NOTE - 14 - CHOOSE: (1) additional work (2) *betterments*] under Article II.E. of this Agreement; any costs of dispute resolution under Article V of this Agreement; any costs incurred as part of reconnaissance studies for the *Project*; any costs incurred as part of feasibility studies under any other agreement for the *Project*; the Non-Federal Sponsor’s costs of negotiating this Agreement; any costs of a contract for an Independent External Peer Review panel; or any costs of negotiating a project partnership agreement for the *Project* or separable element thereof.

C. The term “*period of design*” shall mean the time from the effective date of this Agreement to the date that a Project Partnership Agreement for construction of the *Project*, or a separable element thereof, is executed between the Government and a non-Federal interest or the date that this Agreement is terminated in accordance with Article X of this Agreement, whichever is earlier.

D. The term “*financial obligations for design*” shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total design costs*.

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

[SEE NOTE - 15]

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

G. 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.

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

[SEE NOTE - 16]

I. 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**

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 the *Project*, applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. To the extent possible, the Government shall design the *Project* in accordance with the Project Management Plan for the *Project* developed and updated as required by the Government after consultation with the Non-Federal Sponsor.

2. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant scopes of work, 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 using the Government's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Government.

3. At the time the 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.

4. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all design products that are developed by contract or by Government personnel during the *period of design*. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the final approval of all design products shall be exclusively within the control of the Government.

[SEE NOTE - 17]

OPTION 1

5. As of the effective date of this Agreement, \$_____ of Federal funds for **[SEE NOTE – 17 – CHOOSE: (1) design (2) design and construction]** is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

OPTION 2

5. As of the effective date of this Agreement, \$_____ of Federal funds for **[SEE NOTE – 17 – CHOOSE: (1) design (2) design and construction]** have been provided by Congress for the Parent 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 Parent Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

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

1. The Non-Federal Sponsor shall provide funds in accordance with Article IV.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's share of 25 percent of *total design costs* if the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement will be less than such share.

2. The Government, subject to the availability of funds, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 25 percent of *total design costs* if the Government determines at any time that the collective value of the following contributions has exceeded 25 percent of *total design costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.1. of this Article; and (b) the value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement.

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

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

[SEE NOTE - 18]

OPTION 1 – (PARAGRAPHS E., AND E.1. – E.3.)

E. 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 IV.D. of this Agreement.

1. Inclusion of *betterments* in the design of the general navigation features of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of designing the general navigation features of the *Project* that include *betterments* between *total design costs* and the costs of the additional work.

2. Design of local service facilities in connection with design of the general navigation features of the *Project*.

3. Design of a dredged or excavated material placement facility necessary for the *Project* to provide additional capacity for dredged or excavated material from outside the general navigation features of the *Project*. In the event the Government elects to include such capacity, the Government shall allocate the costs of designing the dredged or excavated material placement facility between *total design costs* and the costs of the additional work.

OPTION 2 – (PARAGRAPHS E., AND E.1. – E.2.)

E. 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 IV.D. of this Agreement.

1. Inclusion of *betterments* in the design of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of designing the features of the *Project* that include *betterments* between *total design costs* and the costs of the additional work.

2. Preparation of a floodplain management plan, required by Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), in connection with design of the flood risk management features or hurricane and storm damage reduction features of the *Project*.

OPTION 3 – (PARAGRAPH E. ONLY)

E. The Non-Federal Sponsor may request the Government to include *betterments* in the design of the *Project*. Such requests shall be in writing and shall describe the *betterments* requested to be included in the design of the *Project*. If in its sole discretion the Government elects to include such *betterments* or any portion thereof in the design of the *Project*, 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 Government shall allocate the costs of the *Project* features that include *betterments* between *total design costs* and the costs of the *betterments*. The Non-Federal Sponsor shall be solely responsible for all costs of design of the *betterments* by the Government under this paragraph and shall pay all such costs in accordance with Article IV.D. of this Agreement.

[SEE NOTE – 19]

F. If the Government and a non-Federal interest enter into a Project Partnership Agreement for construction of the *Project*, or a separable element thereof, the Government, in accordance with the provisions of this paragraph, shall include the amount of *total design costs* in **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** for the *Project*, or separable element thereof. Further, the Government, in accordance with the provisions of this paragraph, shall afford credit toward the non-Federal interest's share of **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** for the *Project*, or separable element thereof, for the Non-Federal Sponsor's contributions toward *total design costs* under this Agreement.

1. If the Government and a non-Federal interest enter into a Project Partnership Agreement for construction of the entire *Project*, the Government shall include the amount of *total design costs* in **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** for the *Project*. Further, the Government shall afford credit toward the non-Federal interest's share of **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** for the Non-Federal Sponsor's contributions toward *total design costs*, including any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement that was not refunded or reimbursed by the Government.

2. If the Government and a non-Federal interest enter into a Project Partnership Agreement for construction of a separable element of the *Project*, the Government shall determine the portion of *total design costs* that are allocable to such separable element and include such amount in **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** for such separable element. Further, the Government shall determine the amount of the Non-Federal Sponsor's contributions toward *total design costs*, including any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement that was not refunded or reimbursed by the Government, that are allocable or attributable to such separable element and shall afford credit for such amount toward the non-Federal interest's share of **[SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs]** of such separable element.

3. If the Government and a non-Federal interest do not enter into a Project Partnership Agreement for construction of the *Project* or a separable element thereof, the Government shall not be obligated to refund or reimburse the Non-Federal Sponsor, in whole or in part, for any of the Non-Federal Sponsor's contribution toward *total design costs*. Further, refund or reimbursement by the Government for any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement is subject to the availability of funds.

[SEE NOTE – 20]

4. Notwithstanding any other provision of Article II.F. of this Agreement, any amount credited for the value of the Non-Federal Sponsor's contributions toward *total design costs* provided in accordance with Articles III and VII of this Agreement shall not be applied toward the 5 percent cash share required by Section 103(a)(1) (A) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(a)(1)(A)).

G. This Agreement shall not be construed as obligating either party to seek funds for, or to participate in, construction or implementation of the *Project* or a separable element thereof or as relieving the Non-Federal Sponsor of any future obligation under the terms of any Project Partnership Agreement.

ARTICLE III - DESIGN 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 Design Coordination Team. Thereafter, the Design Coordination Team shall meet regularly until the end of the *period of design*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Design Coordination Team.

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

C. Until the end of the *period of design*, the Design Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; scheduling of reports and work products; plans and specifications; real property and relocation requirements for construction of the *Project*; design contract awards and modifications; design contract costs; the Government's cost projections; 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 Design Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Design Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Design Coordination Team. The Government, having the legal authority and responsibility for design of the *Project*, has the

discretion to accept or reject, in whole or in part, the Design Coordination Team's recommendations.

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

ARTICLE IV - METHOD OF PAYMENT

[SEE NOTE - 21]

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, and the contributions provided by the parties.

1. As of the effective date of this Agreement, *total design costs* are projected to be \$_____; the value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement is projected to be _____; the Non-Federal Sponsor's contribution of funds required by Article II.B.1. of this Agreement is projected to be \$_____; the *non-Federal proportionate share* is projected to be _____ percent; and the Government's total financial obligations to be incurred **[SEE NOTE - 14 - CHOOSE: (1) for additional work (2) to include *betterments* in the design of the *Project*]** and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.E. 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 resolution of all relevant claims and appeals, 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 design costs*; the value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement; the Non-Federal Sponsor's contribution of funds required by Article II.B.1. of this Agreement; the *non-Federal proportionate share*; **[SEE NOTE - 22: the total contribution of funds required from the Non-Federal Sponsor for the upcoming contract and upcoming *fiscal year*;**] and the Government's total financial obligations to be incurred **[SEE NOTE - 14 - CHOOSE: (1) for additional work (2) to include *betterments* in the design of the *Project*]** and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.E. of this Agreement.

[SEE NOTE - 22]

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

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

[SEE NOTE – 23]

1. Not less than 7 calendar days after the effective date of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of the funds the Government determines to be required from the Non-Federal Sponsor to meet its projected share under Article II.B.1. of this Agreement. Within 30 calendar days of receipt of such notice, 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* incurred prior to the commencement of the *period of design*; and (b) the *non-Federal proportionate share of financial obligations for design as financial obligations for design* 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 contribution of funds required by Article II.B.1. of this Agreement in accordance with the provisions of this paragraph.

[SEE NOTE – 23]

1. Not less than 7 calendar days after the effective date of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of 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 incurred prior to the commencement of the *period of design*; (b) the projected *non-Federal proportionate share of financial obligations for design* to be incurred for such contract; and (c) the projected *non-Federal proportionate share of financial obligations for design* 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.]** Within 30 calendar days of receipt of such notice, 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 design 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 design of the *Project*, of the funds the Government determines to be required from the Non-Federal Sponsor to meet the projected *non-Federal proportionate share of financial obligations for design* 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* of the *Project* using the Government's own forces, of the funds the Government determines to be required from the Non-Federal Sponsor to meet the projected *non-Federal proportionate share of financial obligations for design* 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* incurred prior to the commencement of the *period of design*; and (b) the *non-Federal proportionate share of financial obligations for design* as *financial obligations for design* 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 resolution of all relevant claims and appeals, 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 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 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 design costs*. In addition, 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 share of *total design costs* exceeds 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 design costs* exceed the Non-Federal Sponsor's total required share thereof, the Government, subject to the availability of funds, shall refund or reimburse the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. 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. **[SEE NOTE – 19:** If such appropriations are not received or, if the Non-Federal Sponsor requests that the Government not refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall apply the excess amount toward the share of **[SEE NOTE – 20 – CHOOSE:** (1) total cost of construction of the general navigation features (2) total project costs] for the *Project* that is required of the non-Federal interest executing a Project Partnership Agreement or agreements for the *Project* or separable element thereof in accordance with Article II.F. of this Agreement.]

[SEE NOTE - 14]

OPTION 1 – (PARAGRAPHS D., D.1., D.2., D.3., AND D.3.a. – D.3.b.)

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

1. Not less than **[SEE NOTE - 27]** 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 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 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. [SEE NOTE – 19: If such appropriations are not received or, if the Non-Federal Sponsor requests that the Government not refund the excess amount to the Non-Federal Sponsor, the Government shall apply the excess amount toward the share of [SEE NOTE – 20 – CHOOSE: (1) total cost of construction of the general navigation features (2) total project costs] for the *Project* that is required of the non-Federal interest executing a Project Partnership Agreement or agreements for the *Project* or separable element thereof in accordance with Article II.F. of this Agreement.]

OPTION 2 – (PARAGRAPHS D., D.1., D.2., D.3., AND D.3.a. – D.3.b.)

D. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.E. of this Agreement to include *betterments* in the design of the *Project* in accordance with the provisions of this paragraph.

1. Not less than [SEE NOTE - 27] calendar days prior to the scheduled date for the first financial obligation to include *betterments* in the design of the *Project*, 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 design of such *betterments*. No later than 30 calendar days prior to the Government incurring any financial obligation for design of such *betterments*, the Non-Federal Sponsor shall provide the Government with the full

amount of the funds required to cover the costs of design of such *betterments* 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 design of such *betterments* as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for design of such *betterments*, 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 to include *betterments* in the design of the *Project* and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals prevent a final accounting of design of such *betterments* from being conducted in a timely manner, the Government shall conduct an interim accounting of design of such *betterments* and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting of design of such *betterments* to complete the final accounting of design of such *betterments* 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 design of such *betterments* 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 including *betterments* in the design of the *Project* exceed the total contribution of funds provided by the Non-Federal Sponsor for design of such *betterments*, 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 including *betterments* in the design of the *Project* exceeds the total obligations for design of such *betterments*, 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. [SEE NOTE – 18: If such appropriations are not received or, if the Non-Federal Sponsor requests that the Government not refund the excess amount to the Non-Federal Sponsor, the Government shall apply the excess amount toward the share of total project costs for the *Project* that is required of the non-Federal interest executing a Project Partnership Agreement or agreements for the *Project* or separable element thereof in accordance with Article II.F. of this Agreement.]

ARTICLE V - 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 VI – HOLD AND SAVE

[SEE NOTE - 28: Subject to the provisions of Article XIV of this Agreement, the] The Non-Federal Sponsor shall hold and save the Government free from all damages arising from [SEE NOTE - 14 - CHOOSE: (1) design of the *Project* and design of any additional work pursuant to Article II.E. of this Agreement, (2) design of the *Project* and any *betterments*,] except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE VII - 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 [SEE NOTE - 8 - CHOOSE: (1) to State and Local Governments at 32 C.F.R. Section 33.20 (2) with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations, OMB Circular A-110 (3) to State and Local Governments at 32 C.F.R. Section 33.20 and the Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations, OMB Circular A-110]. 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 **[SEE NOTE - 8 - CHOOSE: (1) A-87 and A-133, (2) A-122 and A-133, (3) A-87, A-122, and A-133.]** and such costs as are allocated to the *Project* shall be included in *total design 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 **[SEE NOTE - 8 - CHOOSE: (1) OMB Circular A-87 (2) OMB Circular A-122 (3) OMB Circulars A-87 and A-122]** and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total design costs* and shared in accordance with the provisions of this Agreement.

ARTICLE VIII - 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 and Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

ARTICLE IX - 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 X - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless the Assistant Secretary of the Army (Civil Works) determines that continuation of design of the *Project* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Project*.

B. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total design costs* that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, future performance under this Agreement shall be suspended. Such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total design costs* 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 the Government determines that modifications to the *Project* are required and that additional authorization by Congress will be required before the Government may construct such modifications, the Government shall notify the Non-Federal Sponsor in writing of such determinations and shall terminate this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article IV.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.B.1. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article 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.

ARTICLE XI - 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 - 29]

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 XII - 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 – 30]

ARTICLE XIII - 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 - 31]

ARTICLE XIV - OBLIGATIONS OF FUTURE APPROPRIATIONS

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

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that [SEE NOTE - 32 - 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 - 9]

ARTICLE XV – 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 - 5] _____ 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 VI 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 - 33].

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 - 34]

CERTIFICATE OF AUTHORITY

OPTION 1

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 design of 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__.

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 SPONSOR]**; that the **[FULL NAME OF NON-FEDERAL SPONSOR]** 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 SPONSOR]** has the 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 feasibility study for the **[FULL NAME OF "STUDY"]**, 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 corporate 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 DA SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

DATE: _____