

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Guidance Letter No. 20, Reimbursement for Advance Non-Federal Construction of Authorized Federal Harbor and Inland Harbor Improvements

I. References:

a. ER 1165-2-120, 15 June 1988, Reimbursement for Advance Non-Federal Construction of Authorized Federal Harbor and Inland Harbor Improvements.

b. EC 1105-2-176, 31 March 1989, Maximum Cost of Projects.

2. ER 1165-2-120 provides guidance implementing Section 204(e) of the 1986 Water Resources Development Act (P.L. 99-662). Topics covered include the timing of Federal reimbursement, limitations imposed by Section 902 of P.L. 99-662, and the need for a statement of financial condition of the local sponsor prior to an agreement between the Assistant Secretary of the Army (Civil Works) and the local sponsor. Experience with Section 204(e) has demonstrated the need for changes in the existing policies and changes or clarifications to the draft model agreement, Appendix B of ER 1165-2-120. This memorandum discusses the policy changes and provides, in Enclosures one, two and three, revisions to the "Whereas" clauses, and two Articles, 7 and 9, of the draft model agreement.

3. Paragraph 5(f) of ER 1165-2-120 states that the work for which reimbursement is requested must be completed before any reimbursement can be made. This precludes partial reimbursement during construction, but leaves open the question of the timing of reimbursement in cases when construction is physically complete, but a final accounting cannot be made because of outstanding construction claims.

4. With respect to the claims issue, we have concluded that we can be flexible with regard to the timing of reimbursement. At the same time, we will retain the principle that the amount eligible for reimbursement should be established at a single point in time. Certification required by Section 204(e)(3) can be made upon completion of physical construction, even if there are claims outstanding. The amount eligible for reimbursement will, however, be limited to the cost of completed construction, including all settled claims at the time of certification. Unsettled claims would be a non-Federal responsibility. Obviously, this policy permits the non-Federal interest to wait until all claims are settled before reimbursement is made.

5. This policy requires that Article 9(d) of the draft model agreement be modified to include the following:

"At any time after completion of physical construction of the project, the [local sponsor] can request that certification be made, even if there are outstanding claims. In such circumstances, the full costs of any outstanding claims at the time of certification become the responsibility of the [local sponsor]."

6. Paragraph 7(b) of ER 1165-2-120 sets the maximum cost of the project at the 902 limit for projects authorized in P.L. 99-662. As a result of Section 3b of P.L. 100-676, this limit applies to all subsequently authorized projects Article 9(b) of the Model Agreement has been modified to reflect this change.

7. The Model Agreement, Article 9(b), also states that if project costs, computed after bid opening, exceed the 902 limit, the Government will not approve awarding of the contract. The possibility that the 902 limit might be exceeded after contract award (during construction or as the result of claims) was not addressed in either the subject ER or the model agreement. Article 9(b) has also been revised, therefore, to define the consequences of the Section 902 limit more completely. We have retained the requirement that a contract cannot be awarded if the estimated project costs after bid opening exceed the 902 limit (unless and until the limit is modified by law). We have added the requirement that no reimbursement can be made if subsequent to contract award, total project costs exceed the 902 limit (unless the limit is modified). We believe this approach is in conformity with the goals of Congress to be informed whenever total project costs exceed the 902 limit, and to require specific congressional action before Federal money is spent in these cases. Procedures for calculating the limit are described in general terms in the revised Article. A complete enumeration of the procedures has been published in EC 1105-2-176. Article 9(b) has also been amended to include the criteria for use of Federal funds by sponsors in constructing these projects.

8. As a further protection to the Federal interest, the need for a statement of financial capability has been reassessed. We now believe that such documentation is necessary. Our reason for this policy is that while the non-Federal sponsor bears the risk of financing and completing construction before receiving reimbursement, by signing the 204(e) agreement, we are concurring in the feasibility of the 204(e) work and the sponsor may be using the signed agreement in acquiring financing for the project. The financing plan should therefore be included in the list of required documents in paragraph 6(g) of the subject ER, and be submitted in accordance with procedures established for processing Local Cooperation Agreements (LCA's).

9. Finally, we have revised Article 7 of the draft agreement for clarity, and revised the "Whereas" clauses in the model agreement to make the language conform more closely to the language of Section 204(e).

FOR THE DIRECTOR OF CIVIL WORKS:

3 Encls

JIMMY F. BATES
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APPENDIX B

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

THIS AGREEMENT entered into this _____ day of 19__, by and between the United States of America (hereinafter referred to as the "GOVERNMENT") represented by the Assistant Secretary of the Army, Civil Works, and (name of Non-Federal Interest) (hereinafter referred to as the "[local sponsor]1");

WHEREAS, a (harbor, inland harbor) project (hereinafter referred to as the "Authorized Project") at _____ described in [relevant documents such as House (Senate)

Document No. _____, ____th Congress, __ Session], was authorized by Section _____ of the _____ Act of _____;

WHEREAS, the General Design memorandum [or equivalently, the report prepared by the District Engineer describing the project] has been approved by the Division Commander, U.S. Army Engineer Division _____.

WHEREAS, Section 204(e) of the Water Resources Development Act of 1986 (33 U.S.C. Section 2232(e)) authorizes the Secretary of the Army, subject to certain limitations contained therein to reimburse any non-Federal interest an amount equal to the estimate of the Federal share, without interest, of the cost of any authorized harbor or inland harbor improvement or separable element thereof, constructed by the non-Federal interest; and

WHEREAS, the [local sponsor] has proposed to construct the Authorized Project [or a separable element of an authorized project] in accordance with the General Design Memorandum [or equivalently, the report prepared by the District Engineer describing the project], [name and location of project];

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

_____ 1- Throughout this document the term “local sponsor” is included in square brackets. This is to indicate that this phrase can be replaced by either an abbreviated name for the non-Federal interest such as the “City” or the “Port” or by the term “local sponsor”. Article 7 - Reimbursement for Work Performed.

[Determine the amount eligible for reimbursement using Section 101 of Public Law 99-662, which is based on project depth. For example, if the project described in Article 2 requires dredging from the existing depth of 25 feet to a new depth of 30 feet:]

Subject to the limitations described in Article 9, the Government will reimburse the [local sponsor] for the Federal share of the total cost of construction of general navigation facilities assigned to commercial navigation, less all costs incurred by the Government prior to reimbursement, necessary for completion of the project (review of plans, inspection of work, etc.). The non-Federal share for the general navigation facilities [of this example project] equals 25 percent of the actual total cost of construction of the general navigation features of the project, plus an additional 10 percent of such actual costs. The additional 10 percent requirement may be offset by a credit for lands, easements, rights-of-way, relocations, and dredged material disposal area provided by the [local sponsor] for the general navigation features of the project.

Article 9 - Limitations on Reimbursement.

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

b. [For projects subject to limitations imposed by Section 902, P.L. 99-662 as amended by Section 3(b) of P.L. 100-676, add the following:] The [local sponsor] agrees that it has reviewed the provisions set forth in Section 902 of the Water Resources Development Act of 1986, P.L. 99-662 and understands the limitation placed on the Government for reimbursement. For the purpose of this agreement, the Section 902 cost limit (including estimated inflation through construction) is _____ as computed at _____ [date of latest computation, figure to be derived by applying appropriate cost indices to the estimated project costs in the authorizing legislation, where the indices reflects changes in construction and real estate costs from the date of the authorized cost estimate, plus (if the project has been modified since project authorization) 20 percent of the amount specified in the authorizing legislation, plus any increases which are the result of changes in Federal law which require modification to the project]. This figure shall be adjusted to allow for appropriate increases for inflation and cost changes in the project as provided by Section 902. Therefore, notwithstanding any other provision of this Agreement, if total project costs computed after bid opening, exceed the limit established by Section 902, the Government will not approve award of the contract. In addition, the Government will not provide any reimbursement if total project costs exceed the Section 902 limit, unless and until the limit is modified by law.

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

d. No reimbursement shall be made until the Secretary of the Army has certified that the work subject to reimbursement has been completed and performed in accordance with applicable permits and approved plans. At any time after completion of physical construction of the project, the [local sponsor] can request that certification be made, even if there are outstanding claims. In such circumstances, the full costs of any outstanding claims at the time of certification become the responsibility of the [local sponsor].

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

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

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

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

i. No Federal funds may be used to meet the Local Sponsor share of project costs under this Agreement unless the expenditure of such funds is expressly authorized by statute as verified in writing by the granting agency.