

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE SAN MATEO COUNTY HARBOR DISTRICT
FOR DESIGN AND CONSTRUCTION
OF THE
OYSTER POINT HARBOR PROJECT



THIS AGREEMENT is entered into this 21st day of JUNE, 2007, by and between the Department of the Army (hereinafter the "Government") represented by the U.S. Army Engineer, San Francisco District and the San Mateo County Harbor District (hereinafter the "Non-Federal Sponsor"), represented by it's General Manager.

WITNESSETH, THAT:

WHEREAS, the Oyster Point Harbor Project (hereinafter the "*Project*", as defined in Article I.A. of this Agreement) at Oyster Point Marina in South San Francisco, CA was approved for design and construction by the South Pacific Division Engineer pursuant to the authority contained in Section 107 of Public Law 86-645, as amended (33 U.S.C. 577);

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for design and construction of the *Project*;

WHEREAS, Section 101 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2211), specifies the cost-sharing requirements applicable to the *Project*;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 101 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2211), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, Section 107 of Public Law 86-645, as amended, (33 U.S.C. 577) provides that no more than \$4,000,000 shall be allotted for the Government's participation in planning, design, and construction of a small river and harbor improvement project at a single locality;

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the

Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

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

ARTICLE I - DEFINITIONS

A. The term “*Project*” shall mean the *general navigation features*; all *removals* accomplished in accordance with Article II of this Agreement; and all lands, easements, rights-of-way, and *relocations* that the Government, in accordance with Article III of this Agreement, determines to be necessary for construction or operation and maintenance of the *general navigation features*, but shall not include aids to navigation.

B. The term “*general navigation features*” shall mean the removal of the existing wingwall portion of the breakwater and the construction of a new breakwater wall, as generally described in the Oyster Point Harbor Detailed Project Report dated May 16, 2007 and approved by the South Pacific Division Engineer on May 18, 2007. The term does not include any lands, easements, rights-of-way, *relocations*; *removals*; *betterments*; aids to navigation.

C. The term “*period of design and construction*” shall mean the time from the effective date for this Agreement to the date that construction of the *general navigation features* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

D. The term “*total costs of construction of the general navigation features*” shall mean all costs incurred by the Non-Federal Sponsor or the Government in accordance with the terms of this Agreement directly related to design and construction of the *general navigation features*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s Preconstruction Engineering and Design costs; the Government’s costs of preparation of environmental compliance documentation in accordance with Article II.A.2. of this Agreement; the Government’s engineering and design costs during construction; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Articles XVII.A.1. and XVII.C.1. of this Agreement; the Government’s actual construction costs (including the costs of alteration, lowering, raising, or replacement and attendant demolition of any *bridge over navigable waters of the United States*); the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; in accordance with Article II.L.3. of this Agreement, incidental costs incurred by the Non-Federal Sponsor in accomplishing *removals*; direct and incidental costs of *removals* accomplished by the Government in accordance with Article II.K. of this Agreement; and the Non-Federal Sponsor’s and the Government’s costs of audit in

accordance with Articles X.B. and X.C. of this Agreement. The term does not include the value of any lands, easements, rights-of-way, or *relocations*; any costs incurred by the Non-Federal Sponsor in accomplishing *removals* other than incidental costs; any financial obligations for operation and maintenance of the *general navigation features*; any costs allocated by the Government to a preexisting Federal or non-Federal navigation project in accordance with Article II.C. of this Agreement; any costs of additional work under Article II.M. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; any costs of aids to navigation; or the Non-Federal Sponsor's costs of negotiating this Agreement.

E. The term "*financial obligations for design and construction*" shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total costs of construction of the general navigation features*.

F. The term "*non-Federal proportionate share*" shall mean the ratio of the Non-Federal Sponsor's total contribution of funds required by Article II.D. of this Agreement to total *financial obligations for design and construction*, as projected by the Government.

G. The term "*highway*" shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

H. The term "*bridge over navigable waters of the United States*" shall mean a lawful bridge over the navigable waters of the United States, including approaches, fenders, and appurtenances thereto, which is used and operated for the purpose of carrying railroad traffic, or both railroad and *highway* traffic, or if a state, county, municipality, or other political subdivision is the owner or joint owner thereof, which is used and operated for the purpose of carrying *highway* traffic.

I. The term "*relocation*" shall mean providing a functionally equivalent facility to the owner of a *utility*, cemetery, *highway*, railroad (including any bridge thereof), or public facility, excluding any *bridge over navigable waters of the United States*, when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

J. The term "*removal*" shall mean eliminating an obstruction (other than a *bridge over navigable waters of the United States*) where the Government determines, after consultation with the Non-Federal Sponsor, that: 1) elimination is necessary for construction or operation and maintenance of the *general navigation features*, including the borrowing of material or the disposal of dredged or excavated material associated therewith; and 2) the Non-Federal Sponsor, the State of California, or the Government has the legal capability to accomplish elimination of the obstruction at the expense of the owner or operator thereof.

K. The term "*betterment*" shall mean a difference in the engineering and design or construction of an element of the *general navigation features* that results from the application of standards that the Government determines exceed those that the Government would otherwise

apply to the engineering and design or construction of that element. The term does not include features in addition to the *general navigation features*.

L. The term “*over-depth*” shall mean additional dimensions associated with a given depth that are required to accomplish advance maintenance, if any, and to compensate for dredging inaccuracies at that depth.

M. The term “*utility*” shall mean that which is defined as a public utility pursuant to generally applicable law of the State of California.

N. 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 therefore.

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

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, shall expeditiously design and construct the *general navigation features* (including alteration, lowering, raising, or replacement and attendant demolition of any *bridge over navigable waters of the United States*), applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for design of the *general navigation features* or commence design of the *general navigation features* using the Government’s own forces until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project*.

2. The Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the *Project* in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347; hereinafter “NEPA”). However, the Government shall not issue the solicitation for the first construction contract for the *general navigation features* or commence construction of the *general navigation features* using the Government’s own forces until all applicable environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

3. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government’s issuance of such solicitations. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on

all proposed contract modifications, including change orders. In any instance where providing the Non-Federal Sponsor with notification of a contract modification is not possible prior to execution of the contract modification, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts or commencement of design or construction using the Government's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *general navigation features* shall be exclusively within the control of the Government.

4. At the time the U.S. Army Engineer for the San Francisco District (hereinafter the "District Engineer") furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract for the *general navigation features*, the District Engineer shall furnish the Non-Federal Sponsor with a copy thereof.

B. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those necessary for the borrowing of material or the disposal of dredged or excavated material, that the Government determines the Non-Federal Sponsor must provide for construction or operation and maintenance of the *general navigation features*, and shall perform or ensure performance of all *relocations* that the Government determines to be necessary for construction or operation and maintenance of the *general navigation features*.

C. The Government shall allocate *total costs of construction of the general navigation features* to the final dredged depth, excluding associated *over-depth* and entrance channel wave allowances. Further, the Government shall allocate to any preexisting Federal or non-Federal navigation project all costs associated with the dredging, excavation, and disposal of material from the dimensions, including associated *over-depth* and entrance channel wave allowances, of such project.

D. The Non-Federal Sponsor shall contribute 10 percent of *total costs of construction of the general navigation features*. If the Government projects that the Non-Federal Sponsor's contributions under paragraph L.3. of this Article and under Articles V, X, and XIV.A. of this Agreement that are allocated by the Government to *total costs of construction of the general navigation features* will be less than the Non-Federal Sponsor's share required by this paragraph, the Non-Federal Sponsor, in accordance with Article VI.B. of this Agreement, shall provide additional funds in the amount necessary to meet the Non-Federal Sponsor's share required by this paragraph.

E. In accordance with Article VI.B. of this Agreement, the Non-Federal Sponsor shall pay 100 percent of the costs allocated by the Government pursuant to paragraph C. of this Article to a preexisting non-Federal navigation project. The Non-Federal Sponsor shall have no obligation under this Agreement to pay any costs allocated by the Government pursuant to paragraph C. of this Article to a preexisting Federal navigation project.

F. In accordance with Article VI.D. of this Agreement, the Non-Federal Sponsor shall pay an additional amount equal to 10 percent of *total costs of construction of the general navigation features* less the amount of credit afforded by the Government for the value of the lands, easements, rights-of-way, and *relocations*. The Non-Federal Sponsor shall not be entitled to reimbursement for any value of lands, easements, rights-of-way, and *relocations* provided or performed pursuant to Article III of this Agreement that exceeds 10 percent of *total costs of construction of the general navigation features*.

G. In accordance with Section 107 of Public Law 86-645, as amended (33 U.S.C. 577), the Government's total financial obligations for planning, design, and construction of the *Project* (except for costs incurred on behalf of the Non-Federal Sponsor in accordance with II.M. of this Agreement) shall not exceed \$4,000,000. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall be responsible for all costs in excess of this amount and shall pay any such costs in accordance with Article VI.B. of this Agreement.

H. The District Engineer shall promptly notify the Non-Federal Sponsor in writing of the conclusion of the *period of design and construction*. Upon providing such notification, the Government shall conduct an accounting, in accordance with Article VI of this Agreement, and furnish the results to the Non-Federal Sponsor.

I. The Government, as it determines necessary, shall operate and maintain the *general navigation features* in accordance with Article VIII of this Agreement subject to the availability of funds.

J. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

K. The Government shall accomplish all *removals* that neither the Non-Federal Sponsor nor the State of California has the legal capability to accomplish where both the Non-Federal Sponsor and the State of California make a written request for the Government to accomplish such *removals*.

1. All costs incurred by the Government in accomplishing *removals* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. However, in the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such *removal* shall be reclassified as part of the Non-Federal Sponsor's responsibility to provide lands, easements, and rights-of-way, or to perform or ensure performance of *relocations*, as applicable, pursuant to paragraph B. of this Article.

L. The Non-Federal Sponsor shall accomplish all *removals*, other than those *removals* specifically assigned to the Government by paragraph K. of this Article, in accordance with the provisions of this paragraph.

1. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *removals*, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with accomplishing such *removals*. Unless the Government agrees to a later date in writing, prior to the issuance of the solicitation for each Government contract for construction or operation and maintenance of the *general navigation features*, or prior to the Government incurring any financial obligation for construction or operation and maintenance of the *general navigation features* using the Government's own forces, the Non-Federal Sponsor shall accomplish all *removals* set forth in such descriptions that the Government determines to be necessary for that work.

2. In the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such *removal* shall be reclassified as part of the Non-Federal Sponsor's responsibility to provide lands, easements, and rights-of-way, or to perform or ensure performance of *relocations*, as applicable, pursuant to paragraph B. of this Article.

3. The documented incidental costs incurred by the Non-Federal Sponsor in accomplishing *removals* shall be included in *total costs of construction of the general navigation features*, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs, and shared in accordance with the provisions of this Agreement. Incidental costs may include legal and administrative costs (such as owner or operator notification costs, public notice or hearing costs, attorney's fees, and litigation costs) incurred by the Non-Federal Sponsor in accomplishing *removals*, but shall not include any costs that the Non-Federal Sponsor or the State of California has the legal capability to require of, assign to, or recover from the owner or operator of the obstruction.

M. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the "additional work") described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.E. of this Agreement.

1. Acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *general navigation features*. Notwithstanding the acquisition of lands, easements, or rights-of-way or performance of *relocations* by the Government, the Non-Federal

Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

2. Inclusion of *betterments* in the engineering and design or construction of the *general navigation features*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *general navigation features* that include *betterments* between *total costs of construction of the general navigation features* and the costs of the *betterments*.

ARTICLE III - LANDS, RELOCATIONS, AND COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way necessary for construction or operation and maintenance of the *general navigation features*, including those necessary for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, and including those that the Government determines to be subject to the navigation servitude. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the issuance of the solicitation for each Government contract for construction or operation and maintenance of the *general navigation features*, or prior to the Government initiating construction or operation and maintenance of a portion of the *general navigation features* using the Government's own forces, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *period of design and construction*, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way necessary for construction or operation and maintenance of the applicable *general navigation features*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. For so long as the *Project* remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the *general navigation features* and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the *relocations* necessary for construction or operation and maintenance of the *general navigation features*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *relocations* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with such *relocations*. Prior to the issuance of the solicitation for each Government contract for

construction or operation and maintenance of the *general navigation features*, or prior to the Government initiating construction or operation and maintenance of a portion of the *general navigation features* using the Government's own forces, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Government determines to be necessary for that work. Furthermore, prior to the end of the *period of design and construction*, the Non-Federal Sponsor shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way necessary for construction or operation and maintenance of the *general navigation features*, including those necessary for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - CREDIT FOR VALUE OF LANDS AND RELOCATIONS

A. To determine the additional amount owed by the Non-Federal Sponsor pursuant to Article II.F. of this Agreement, the Government shall afford credit toward an amount equal to 10 percent of *total costs of construction of the general navigation features* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III of this Agreement, and for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III of this Agreement. However, no credit shall be afforded for the value of any lands, easements, rights-of-way, or *relocations* that have been provided previously as an item of cooperation for another Federal project. In addition, no credit shall be afforded for the value of lands, easements, rights-of-way, or *relocations* that were acquired or performed using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that affording credit for the value of such items is expressly authorized by Federal law.

B. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A. or III.B. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions for the purpose of determining the amount of credit to be afforded in accordance with the provisions of this Article.

C. For the sole purpose of determining the amount of credit to be afforded in accordance with this Agreement and except as otherwise provided in paragraph D. of this Article, the value of lands, easements, and rights-of-way, including those necessary for the *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph C.3. or C.5. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with the provisions of this paragraph.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide the Government with the appraisal no later than 6 months after the Non-Federal Sponsor provides the Government with an authorization for entry for such real property interest. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor, prior to instituting such proceedings, shall submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60

calendar days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60 day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with paragraph C.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are necessary for construction or operation and maintenance of the *general navigation features*, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. In the event the Government modifies its determination made pursuant to Article III.A. of this Agreement, the Government shall afford credit for the documented incidental costs associated with preparing to acquire the lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but are not necessarily limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.C. of this Agreement, and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the Non-Federal Sponsor in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals prepared for crediting purposes pursuant to paragraph C.2.a. of this Article, as determined by the

Government, and subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

5. Waiver of Appraisal. Except as required by paragraph C.3. of this Article, the Government may waive the requirement for an appraisal for the purpose of determining the value of a real property interest for crediting purposes if it determines that an appraisal is unnecessary because the valuation is uncomplicated and that the estimated fair market value of the real property interest is \$10,000 or less based upon a review of available data. In such event, the Government and the Non-Federal Sponsor must agree in writing to the value of such real property interest in an amount not in excess of \$10,000.

D. For the sole purpose of determining the amount of credit to be afforded in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, that the Government acquires on behalf of the Non-Federal Sponsor pursuant to Article II.M.1. of this Agreement shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. The fair market value of such real property interests shall be the amount paid by the Government.

2. The value of the interest shall include the documented incidental costs of acquiring the interest. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, and actual amounts expended for payment of any relocation assistance benefits in accordance with Public Law 91-646, as amended.

E. After consultation with the Non-Federal Sponsor, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

1. For a *relocation* other than a *highway* or a *utility*, the value shall be only that portion of *relocation* costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the State of California would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. For a *relocation* of a *utility*, the value shall be only that portion of *relocation* costs borne by the Non-Federal Sponsor that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

4. *Relocation* costs shall include, but not necessarily be limited to, actual costs of performing the *relocation*; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the *relocation*, as determined by the Government. *Relocation* costs shall not include any costs due to *betterments*, as determined by the Government, nor any additional cost of using new material when suitable used material is available. *Relocation* costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

F. Any credit afforded for the value of *relocations* performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 calendar days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the *period of design and construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

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

C. Until the end of the *period of design and construction*, the Project Coordination Team shall generally oversee the *Project*, including but not necessarily limited to matters related to: engineering and design; completion of all necessary environmental coordination and documentation; plans and specifications; scheduling; real property, *relocation*, and *removal* requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for *relocations*; the Government's cost projections; final inspection of the entire *Project* or portions thereof; preparation of the management plan for proposed dredged or excavated material disposal; anticipated requirements for operation and maintenance of the *general navigation features*; and other matters related to the *Project*. The Project Coordination Team shall also

generally oversee the coordination of schedules for the *Project*. Oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the *general navigation features*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

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

ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, and credit afforded for the value of lands, easements, rights-of-way, and *relocations*.

1. As of the effective date of this Agreement, *total costs of construction of the general navigation features* are projected to be \$1,607,988, the Non-Federal Sponsor's contribution of funds required by Articles II.D. and II.G. of this Agreement is projected to be \$229,996, the *non-Federal proportionate share* is projected to be 80 percent, the costs allocated by the Government to a preexisting non-Federal navigation project and the Non-Federal Sponsor's contribution of funds required by Article II.E. of this Agreement are projected to be \$0, the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.M. of this Agreement are projected to be \$0, 10 percent of *total costs of construction of the general navigation features* is projected to be \$160,799, the credit to be afforded for the value of lands, easements, rights-of-way, and *relocations* is projected to be \$12,700, and the additional amount required by Article II.F. of this Agreement is projected to be \$160,799. 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 September 1, 2007, and by each quarterly anniversary thereof until the conclusion of the *period of design and construction* and resolution of all relevant claims and

appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total costs of construction of the general navigation features*; the Non-Federal Sponsor's total contribution of funds required by Article II.D. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's total contribution of funds required by Article II.G. of this Agreement; the costs allocated by the Government to a preexisting non-Federal navigation project and the Non-Federal Sponsor's contribution of funds required by Article II.E. of this Agreement; the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.M. of this Agreement; 10 percent of *total costs of construction of the general navigation features*; the credit to be afforded for the value of lands, easements, rights-of-way, and *relocations*; the additional amount required by Article II.F. of this Agreement; and the annual installments calculated in accordance with paragraph D. of this Article.

B. The Non-Federal Sponsor shall provide the contributions of funds required by Articles II.D., II.E., and II.G. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for design of the *general navigation features* or commencement of design of the *general navigation features* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet its projected share under Articles II.D., II.E., and II.G. of this Agreement. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the *non-Federal proportionate share of financial obligations for design and construction* incurred prior to the commencement of the *period of design and construction*; (b) the *non-Federal proportionate share of financial obligations for design and construction* as *financial obligations for design and construction* are incurred; and (c) the full amount of financial obligations for costs allocated by the Government to a preexisting non-Federal navigation project as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 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.

C. Upon conclusion of the *period of design and construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The final or interim accounting, as applicable, shall determine *total costs of construction of the general navigation features*, the costs allocated by the Government for operation and maintenance of any preexisting non-Federal navigation project, and the costs in excess of \$4,000,000 pursuant to Article II.G. of this Agreement as of the date of such accounting. In addition, for each set of costs, the final or interim 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 final or interim accounting, as applicable, show that the Non-Federal Sponsor's total required shares of *total costs of construction of the general navigation features*, the costs allocated by the Government to a preexisting non-Federal navigation project, and the costs in excess of \$4,000,000 pursuant to Article II.G. of this Agreement exceed the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the final or interim accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total costs of construction of the general navigation features*, for the costs allocated by the Government to a preexisting non-Federal navigation project, and for the costs in excess of \$4,000,000 pursuant to Article II.G. of this Agreement exceed the Non-Federal Sponsor's total required shares thereof, 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 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. To the extent that such appropriations are not received, the Government shall apply the un-refunded excess amount toward the Non-Federal Sponsor's upcoming installment payment, if any, in accordance with paragraph D. of this Article.

D. The Non-Federal Sponsor shall pay, with interest, any additional amount required by Article II.F. of this Agreement in accordance with the provisions of this paragraph.

1. When the Government conducts the final accounting or any interim accounting for the *period of design and construction*, the Government shall determine:

a. an amount equal to 10 percent of *total costs of construction of the general navigation features* as of the date of such accounting;

b. the value, in accordance with Article IV of this Agreement, of the lands, easements, rights-of-way, and *relocations* provided or performed pursuant to Article III of this Agreement as of the date of such accounting; and

c. the additional amount to be paid by the Non-Federal Sponsor as of the date of such accounting. The additional amount is equal to the amount determined pursuant to paragraph D.1.a. of this Article reduced by the credit afforded for the value of the lands, easements, rights-of-way, and *relocations* determined pursuant to paragraph D.1.b. of this Article. In the event the result of the aforesaid calculation is a negative number, the additional amount shall be zero.

2. At the time of the final accounting or the first interim accounting in which the Government determines that the additional amount is greater than zero, the Government shall calculate annual installments for payment of the additional amount, and such annual installments shall be substantially equal. To calculate the annual installments, the Government shall amortize the additional amount over a period of 30 years (hereinafter the "payment period"), beginning on the date the Government notifies the Non-Federal Sponsor of the additional amount, using an interest rate determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the *fiscal year* in which the *period of design and construction* commences, plus a premium of one-eighth of one percentage point for transaction costs. The Government shall notify the Non-Federal Sponsor in writing of the additional amount and the annual installments.

3. Thereafter, at the time of the final accounting or any additional interim accounting conducted prior to the end of the payment period, the Government shall recalculate the annual installments by amortizing the outstanding portion of the additional amount over the remaining portion of the payment period using an interest rate determined by the Secretary of the Treasury, taking into consideration such average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the remaining portion of the payment period during the month preceding the *fiscal year* in which the recalculation is made, plus a premium of one-eighth of one percentage point for transaction costs. The Government shall notify the Non-Federal Sponsor in writing of the recalculated additional amount and the recalculated annual installments and the Non-Federal Sponsor shall pay the recalculated annual installments in lieu of the previous annual installments.

4. Thereafter, at the time of the final accounting or any additional interim accounting conducted after the payment period has elapsed, the Government shall notify the Non-Federal Sponsor in writing of the recalculated additional amount. If the Government determines that the Non-Federal Sponsor's payments towards the additional amount are less than

the recalculated additional amount, the Non-Federal Sponsor, not later than 90 days from receipt of such notice, shall pay to the Government the outstanding portion of the additional amount by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

5. In addition to any recalculation of the annual installments in accordance with paragraph D.3. of this Article, the Government, until the end of the payment period, shall recalculate the annual installments at five year intervals by amortizing the outstanding portion of the additional amount over the remaining portion of the payment period using an interest rate determined by the Secretary of the Treasury, taking into consideration such average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the *fiscal year* in which the recalculation is made, plus a premium of one-eighth of one percentage point for transaction costs. The Government shall notify the Non-Federal Sponsor in writing of the recalculated annual installments and the Non-Federal Sponsor shall pay the recalculated annual installments in lieu of the previous annual installments.

6. Subject to paragraphs C.2. and E.3.b. of this Article, the Non-Federal Sponsor shall pay the installments calculated or recalculated pursuant to paragraphs D.2., D.3., or D.5. of this Article each year on the anniversary of the date the Government notifies the Non-Federal Sponsor of the additional amount, over a period not to exceed the payment period, by delivering a check payable to "FAO, USAED, San Francisco District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

7. Notwithstanding paragraph D.6. of this Article, the Non-Federal Sponsor, in its sole discretion, may prepay the additional amount, in whole or in part, at any time. Notwithstanding paragraphs D.2., D.3., or D.5. of this Article, there shall be no charges for interest on any portion of the additional amount that is paid within 90 days after the Government notifies the Non-Federal Sponsor of the additional amount, nor shall there be interest charges on any portion of an increase to the additional amount that is caused by recalculation of the additional amount and that is paid within 90 days after the Government notifies the Non-Federal Sponsor of such recalculated additional amount.

8. If the Government determines that the Non-Federal Sponsor has made payments towards the additional amount that exceed the additional amount, the Government, subject to the availability of funds, shall refund the amount of the excess, without interest. In the event funds are not available to make such refund, the Government shall seek such appropriations as are necessary to make such refund.

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

1. Not less than 30 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 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 final or interim accounting, as applicable, or at the end of each *fiscal year* in which the Government incurs costs for additional work provided or performed prior to the *period of design and construction*, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred during the applicable period and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals and eminent domain proceedings prevent a final accounting of additional work incurred during such applicable period from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work incurred during such applicable period and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work incurred during such applicable period to complete the final accounting of additional work incurred during such applicable period and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such final or interim accounting, as applicable, shall determine the Government's total financial obligations for additional work incurred during the applicable period and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the final or interim accounting, as applicable, show that the total obligations for additional work incurred during the applicable period 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, San Francisco District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the final or interim accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work during the applicable period 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 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. To the extent that such appropriations are not received, the Government shall apply the unrefunded excess amount toward the Non-Federal Sponsor's upcoming installment payment, if any, in accordance with paragraph D. of this Article.

ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties each shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VIII - OPERATION AND MAINTENANCE

A. The Government, subject to the availability of funds and as it determines necessary, shall operate and maintain the *general navigation features*.

B. The Non-Federal Sponsor hereby authorizes the Government to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of operating and maintaining the *general navigation features*. However, nothing contained herein shall convey to the Government any interest in real property owned or controlled by the Non-Federal Sponsor.

ARTICLE IX - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, or operation and maintenance of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this

Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE XIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the *general navigation features* 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. If the Government determines that Federal funds for the *Project* are not sufficient to meet the Federal share of the costs of work on the *Project* in the then-current or upcoming *fiscal year*, the Government shall so notify the Non-Federal Sponsor in writing, and within 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient Federal funds for the *Project* or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement, whichever is earlier.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement.

D. If after completion of the design portion of the *general navigation features* the parties mutually agree in writing not to proceed with construction of the *Project*, the parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XIV.C. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became

delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE XIV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances that are determined by the Government to be attributable to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances that are determined by the Government to be attributable to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction or operation and maintenance of the *general navigation features*, or, if already in construction or operation and maintenance of the *general navigation features*, whether to continue with construction or operation and maintenance of the *general navigation features*, suspend future performance under this Agreement, or terminate this Agreement for the

convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction or operation and maintenance of the *general navigation features* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of *total costs of construction of the general navigation features*. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the *general navigation features*.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. To the maximum extent practicable, the Government and the Non-Federal Sponsor shall perform their responsibilities under this Agreement in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor: General Manager
San Mateo County Harbor District
400 Oyster Point Blvd. Suite 300
So. San Francisco, Ca 94080

If to the Government: District Engineer
USACE, San Francisco District
1455 Market St.
San Francisco, CA 94103

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

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVI - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVII - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the *Project*, shall perform any identification, survey, or evaluation of historic properties.

1. Any costs of identification, survey, and evaluation of historic properties determined by the Government to be attributable to construction of the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. Any costs of identification, survey, and evaluation of historic properties determined by the Government to be attributable to operation and maintenance of the *general navigation features* shall be considered financial obligations for operation and maintenance of the *general navigation features* and shared in accordance with Article II.I. of this Agreement.

B. The Government, as it determines necessary for the *Project*, shall perform any archeological data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 86-523, as renumbered and amended by Public Law 93-291 (16 U.S.C. 469c(a)), the costs of archeological data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in *total costs of construction of the general navigation features*, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the *general navigation features*.

C. The Government shall not incur costs for archeological data recovery activities that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit (and the Secretary of the Interior has concurred in the waiver) in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. 469c-2(3)).

1. Any costs of archeological data recovery activities that exceed the one percent limit and are determined by the Government to be attributable to construction of the *general*

navigation features shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. Any costs of archeological data recovery activities that exceed the one percent limit and are determined by the Government to be attributable to operation and maintenance of the *general navigation features* shall be considered financial obligations for operation and maintenance of the *general navigation features* and shared in accordance with Article II.I. of this Agreement.

ARTICLE XVIII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

ARTICLE XIX - NON-LIABILITY OF OFFICERS AND EMPLOYEES

No officer, agent, consultant, or employee of the Non-Federal Sponsor, nor any officer, agent, consultant, or employee of the Government, may be charged personally, or held liable, under the terms or provisions of this Agreement because of any breach, attempted breach, or alleged breach thereof, except as provided in Section 912(b) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (42 U.S.C. 1962d-5b note), or other applicable law.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

DEPARTMENT OF THE ARMY

BY: Craig W. Kiley

CRAIG W. KILEY
LIEUTENANT COLONEL, U.S. ARMY
COMMANDING

DATE: 21 JUNE 07

SAN MATEO COUNTY HARBOR
DISTRICT

BY: Peter Grenell

PETER GRENELL
GENERAL MANAGER

DATE: June 21, 2007

CERTIFICATION REGARDING LOBBYING

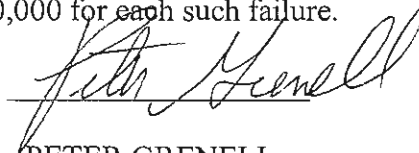
The undersigned certifies, to the best of his or her knowledge and belief that:

(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 Section 1352, Title 31, U.S. Code. 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.



PETER GRESELL
GENERAL MANAGER

DATE: June 21, 2007

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MICHAEL AARONSON

(1910-1998)

OF COUNSEL

MELVIN E. COHN

(Superior Court Judge/Retired)

KENNETH M. DICKERSON

Marc L. Zafferano

Direct Line: 650-593-5125 x215

E-mail: mlz@adcl.com


June 21, 2007

Peter Grenell
San Mateo County Harbor District
400 Oyster Point Blvd., Suite 300
So. San Francisco, CA 94080

Dear Mr. Grenell:

Enclosed is the original Certificate of Authority signed by Marc Zafferano.

Very truly yours,

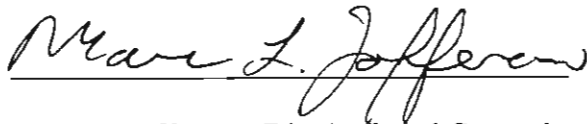

Jenn Briesach, Paralegal to
Marc L. Zafferano

:jb
Enclosure

CERTIFICATE OF AUTHORITY

I, Marc L. Zafferano, do hereby certify that I am the principal legal officer of the San Mateo County Harbor District, that the San Mateo County Harbor District 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 San Mateo County Harbor District in connection with the Oyster Point Harbor Project, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the San Mateo County Harbor District have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 21st day of June, 2007.

A handwritten signature in black ink, reading "Marc L. Zafferano", written over a horizontal line.

Marc L. Zafferano, District Legal Counsel