

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY AND COUNTY OF SAN FRANCISCO
FOR
DESIGN AND CONSTRUCTION
FOR THE
SAN FRANCISCO, CALIFORNIA
PIER 36 REMOVAL WORK

THIS AGREEMENT is entered into this _____ day of **SEP 29 2010**, _____, by and between the Department of the Army (hereinafter the "Government"), represented by the District Engineer, San Francisco Engineer District and the City and County of San Francisco acting by and through the Port of San Francisco (hereinafter the "Non-Federal Sponsor"), represented by the Executive Director.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized, in cooperation with the Port of San Francisco, California, to carry out the project for repair and removal as appropriate, of Piers 30-32, 35, 36, 70 (including Wharves 7 and 8), and 80, substantially in accordance with the Port's redevelopment plan (hereinafter the "Section 5051 Work") pursuant to Section 5051 of the Water Resources Development Act (WRDA) of 2007, Public Law 110-114 (hereinafter "Section 5051");

WHEREAS, Section 5051 provides that \$25,000,000 in Federal funds are authorized to be appropriated for the Section 5051 Work;

WHEREAS, the Secretary shall undertake actions to repair or remove piers and wharves under Section 5051 if such work is primarily for the purpose of drift and debris removal;

WHEREAS, the U.S. Army Engineer, San Francisco District (hereinafter the "District Engineer") has determined that San Francisco, California Pier 36 Removal Work at San Francisco, San Francisco County, California (hereinafter the "*Pier 36 Work*", as defined in Article I.A. of this Agreement) is eligible for implementation under Section 5051;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the "Agreement") for design and construction of the *Pier 36 Work*;

WHEREAS, Section 202 of the Water Resources Development Act of 1976, Public Law 94-587, specifies the cost-sharing requirements applicable to the *Pier 36 Work*;

WHEREAS, the Non-Federal Sponsor may offer in writing to accelerate provision to the Government of all or a portion of its required contribution of funds for immediate use by the Government for design and construction of the *Pier 36 Work*;

WHEREAS, the Non-Federal Sponsor intends to provide a design or portion thereof, at o cost to the *Pier 36 Work*, for use by the Government in constructing the *Pier 36 Work* if such design, or portion thereof, is determined by the Government to be acceptable for such purpose;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Pier 36 Work* 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 *Pier 36 Work*.

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

ARTICLE I – DEFINITIONS

A. The term “*Pier 36 Work*” shall mean demolition and removal of the entire Pier 36 and its supporting structures to the mud line, including the Marginal Wharf, as generally described in the Pier 36 Removal Project Letter Report, April 2010, and approved by the Division Commander, U.S. Army Corps of Engineers, South Pacific Division on August 2, 2010.

B. The term “*total costs of work*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to design and construction of the *Pier 36 Work*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s design costs not incurred pursuant to any other agreement for the *Pier 36 Work*; the Government’s costs of preparation of environmental compliance documentation in accordance with Article II.A.4. of this Agreement; the Government’s costs of review and modifications to the design, or any portion thereof, provided by the Non-Federal Sponsor in accordance with Article II.A.1. of this Agreement; 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 XIII.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Article XVI.A. and Article XVI.B.1. of this Agreement; the Government’s actual construction costs; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Coordination Team in accordance with Article IV of this Agreement; the Government’s costs of contract dispute settlements or awards; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article IX.B. and Article IX.C. of this Agreement. The term does not include any value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined by the Government to be required or necessary for construction, operation, and maintenance of the *Pier 36 Work*; any costs of offsite disposal for the *Pier 36 Work*; any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Pier 36 Work*; any costs of *betterments* under Article II.I.2. of this Agreement; any costs of dispute

resolution under Article VI of this Agreement; the Government's costs for data recovery activities associated with historic preservation in accordance with Article XVI.B.2. and Article XVI.B.3. of this Agreement; or the Non-Federal Sponsor's costs of negotiating this Agreement. The term also shall not include any costs incurred by the Non-Federal Sponsor, its contractors, or others on behalf of the Non-Federal Sponsor for preparing or providing a design, or any portion thereof, for the *Pier 36 Work* in accordance with Article II.A.1. of this Agreement.

C. The term "*period of design and construction*" shall mean the time from the effective date of this Agreement to the date that construction of the *Pier 36 Work* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article II.D. or Article XII or Article XIII.C. of this Agreement, whichever is earlier.

D. 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 work*.

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

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

G. The term "*relocation*" shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, *highway*, railroad, or public facility 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.

H. The term "*betterment*" shall mean a difference in the design or construction of an element of the *Pier 36 Work* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design or construction of that element. The term does not include any design or construction for features not included in the *Pier 36 Work* as defined in paragraph A. of this Article.

I. The term "*Federal program funds*" shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

J. The term "*Section 5051 Work Limit*" shall mean the the amount of Federal funds authorized to be appropriated for the Section 5051 Work as specified in Section 5051 of WRDA 2007, Public Law 110-114. As of the effective date of this Agreement, such amount is \$25,000,000.

K. 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, expeditiously shall design and construct the *Pier 36 Work* utilizing the portion of the design provided by the Non-Federal Sponsor that the Government determines to be acceptable in accordance with paragraph A.1. of this Article, and applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Non-Federal Sponsor expeditiously shall prepare and provide to the Government a design, or the portion thereof that the Non-Federal Sponsor has specified in writing that it intends to provide, for use in constructing the *Pier 36 Work*. The Government shall review such design, or portion thereof, to ensure compliance with applicable Federal laws, regulations, and policies including those related to bidability, constructability, operability and environmental acceptability. The Government, in its sole discretion, may accept, modify, or reject such design, or any portion thereof, for use in constructing the *Pier 36 Work*. Prior to commencement of review by the Government of such design, the Non-Federal Sponsor shall provide a written certification and warranty to the Government that the design provided by the Non-Federal Sponsor is free from any legal encumbrances and use restrictions, including but not limited to, any intellectual property rights and outstanding licensing requirements.

2. If the Non-Federal Sponsor fails to provide a design, or the specified portion thereof, for the *Pier 36 Work*, or the Government determines that the design, or any portion thereof, provided by the Non-Federal Sponsor is inadequate for any reason, the Government, subject to the availability of funds and the *Section 5051 Work Limit*, may design the *Pier 36 Work* or complete the design of the *Pier 36 Work*.

3. The Government shall not issue the solicitation for the first contract for design of the *Pier 36 Work*, commence design of the *Pier 36 Work* using the Government’s own forces, or commence review of a design, or any portion thereof, provided by the Non-Federal Sponsor in accordance with paragraph A.1. of this Article, until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Pier 36 Work*.

4. 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 *Pier 36 Work* in accordance with the National Environmental Policy Act of 1969 (hereinafter “NEPA”) (42 U.S.C. 4321–4370e). However, the Government shall not issue the solicitation for the first construction contract for the *Pier 36 Work* or commence construction of the *Pier 36 Work* 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).

5. 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 *Pier 36 Work* shall be exclusively within the control of the Government.

6. At the time the District Engineer furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract awarded by the Government for the *Pier 36 Work*, the District Engineer shall furnish a copy thereof to the Non-Federal Sponsor.

B. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide, at no cost to the Government, all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, and shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *Pier 36 Work*. However, the Non-Federal Sponsor may choose, in its discretion, to pay offsite disposal costs for use of an offsite disposal site approved by the Government, in lieu of acquiring lands, easements, and rights-of-way required for disposal of dredged or excavated material.

C. The Non-Federal Sponsor shall contribute one-third of *total costs of work* in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall provide funds in accordance with Article V.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's required share of one-third of *total costs of work* if the Government projects at any time that the value of Non-Federal Sponsor's contributions under Article IV, Article IX, and Article XIII.A. of this Agreement will be less than such required share.

2. The Government, subject to the availability of funds and as limited by the *Section 5051 Work Limit*, shall refund to the Non-Federal Sponsor any contributions in excess of one-third of *total costs of work* if the Government determines at any time that the collective value of the following contributions has exceeded one-third of *total costs of work* : (a) the value of the Non-Federal Sponsor's contributions under paragraph C.1. of this Article; and (b) the value of the Non-Federal Sponsor's contributions under Article IV, Article IX, and Article XIII.A. of this Agreement.

3. The Government shall not include in *total costs of work* any costs that were incurred by the Non-Federal Sponsor, its contractors, or others on behalf of the Non-Federal Sponsor for preparing or providing a design, or any portion thereof, to the Government in

accordance with paragraph A.1. of this Article and the Non-Federal Sponsor shall not be entitled to any credit, refund, or reimbursement for such costs. In addition, the Government shall not include in *total costs of work* any value for the Non-Federal Sponsor's acquisition of lands, easements, and rights-of-way; performance of *relocations*; construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material; or costs of offsite disposal provided under paragraph B. of this Article and the Non-Federal Sponsor shall not be entitled to any credit, refund, or reimbursement for such value or costs.

D. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Pier 36 Work* is limited by the following provisions of this paragraph.

1. As of the effective date of this Agreement, \$4,800,000 of Federal funds have been provided by Congress for the Section 5051 Work of which \$4,700,000 is currently projected to be available for the *Pier 36 Work*. The Government makes no commitment to request Congress to provide additional Federal funds for the Section 5051 Work or the *Pier 36 Work*. Further, the Government's financial participation in the *Pier 36 Work* is limited to the Federal funds that the Government makes available to the *Pier 36 Work*.

2. In the event the Government projects that the amount of Federal funds the Government will make available to the *Pier 36 Work* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Pier 36 Work* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total costs of work* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVI.B.2. and Article XVI.B.3. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Pier 36 Work* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Pier 36 Work*, future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article XII.B. of this Agreement.

3. If the Government determines that the total amount of Federal funds provided by Congress for all work implemented pursuant to Section 5051 has reached the *Section 5051 Work Limit*, and the Government projects that the Federal funds the Government will make available to the *Pier 36 Work* within the *Section 5051 Work Limit* will not be sufficient to meet the Federal share of *total costs of work* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVI.B.2. and Article XVI.B.3. of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Pier 36 Work* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Pier 36 Work* within the *Section 5051 Work Limit*, the parties shall terminate this Agreement and proceed in accordance with Article XII.E. of this Agreement.

E. When the District Engineer determines that the entire *Pier 36 Work*, or a portion thereof, is complete, the District Engineer shall so notify the Non-Federal Sponsor in writing and

furnish the Non-Federal Sponsor with a final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Pier 36 Work* or such completed portion. Upon such notification, the Government also shall furnish to the Non-Federal Sponsor a copy of all final as-built drawings for the entire *Pier 36 Work* or such completed portion if such drawings are available. Not later than 6 months after such notification by the Government that the entire *Pier 36 Work* is complete, the Government shall furnish the Non-Federal Sponsor with the final OMRR&R Manual and all final as-built drawings for the entire *Pier 36 Work*. In the event the final OMRR&R Manual or all final as-built drawings for the entire *Pier 36 Work* cannot be completed within the 6 month period, the Government shall provide written notice to the Non-Federal Sponsor, and the Government and the Non-Federal Sponsor shall negotiate an acceptable completion date for furnishing such documents. Further, after completion of all contracts for the *Pier 36 Work*, copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the *Pier 36 Work* that have not been provided previously shall be provided to the Non-Federal Sponsor.

F. Upon notification from the District Engineer in accordance with paragraph E. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Pier 36 Work*, or the completed portion thereof as the case may be, in accordance with Article VII of this Agreement.

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

H. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Pier 36 Work* 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.

I. 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 V.D. of this Agreement.

1. The Non-Federal Sponsor may request the Government to acquire lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Pier 36 Work*; to perform *relocations* necessary for construction, operation, and maintenance of the *Pier 36 Work*; or to construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for the *Pier 36 Work*. Notwithstanding acquisition of

lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements 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 XIII.C. of this Agreement.

2. Inclusion of *betterments* in the design or construction of the *Pier 36 Work*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *Pier 36 Work* features that include *betterments* between *total costs of work* and the costs of the *betterments*.

J. The Non-Federal Sponsor may offer in writing to accelerate provision to the Government of all or a portion of its contribution of funds required by paragraph C.2. of this Article for immediate use by the Government for design and construction of the *Pier 36 Work*. Upon receipt of any such offer from the Non-Federal Sponsor, the Government shall seek the approval and acknowledgement required to accept and use the accelerated funds. Upon receipt of such approval and acknowledgement, the Government shall notify the Non-Federal Sponsor in writing of receipt of such approval and acknowledgement. Upon receipt of such accelerated funds, the Government shall use such funds for design and construction of the *Pier 36 Work*. However, in no event shall the amount of funds accepted and used by the Government pursuant to this paragraph exceed the estimate of the Non-Federal Sponsor's contribution of funds required by paragraph C.2. of this Article minus any funds previously contributed by the Non-Federal Sponsor as of the date the Government accepts the offered funds.

K. As Federal appropriations are made available to pay the Federal share of design and construction of the *Pier 36 Work*, the Government shall afford credit for the funds provided in accordance with paragraph J. of this Article toward the Non-Federal Sponsor's contribution of funds required by paragraph C.2. of this Article.

ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY, 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 required for construction, operation, and maintenance of the *Pier 36 Work*, including those required for *relocations*, the borrowing of material, and 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 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 of the *Pier 36 Work*, or prior to the Government incurring any *financial obligations for design and construction* of a portion of the *Pier 36 Work* 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 required for construction, operation, and maintenance of the *Pier 36 Work*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. The Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the *Pier 36 Work* and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the *Pier 36 Work*.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the *relocations* necessary for construction, operation, and maintenance of the *Pier 36 Work*, 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 of the *Pier 36 Work*, or prior to the Government incurring any *financial obligations for design and construction* of a portion of the *Pier 36 Work* 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 Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the *Pier 36 Work*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such improvements 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 construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the *Pier 36 Work*, or prior to the Government initiating construction of a portion of the *Pier 36 Work* using the Government's own forces, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications. Furthermore, prior to the end of the *period of design and construction*, the Non-Federal Sponsor shall provide all improvements set forth in such descriptions.

D. 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 required for construction, operation, and maintenance of the *Pier 36 Work*, including those required 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 - 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 Coordination Team. Thereafter, the 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 Coordination Team.

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

C. Until the end of the *period of design and construction*, the Coordination Team shall generally oversee the *Pier 36 Work*, including matters related to: design; completion of all necessary environmental coordination and documentation; plans and specifications; scheduling; real property and *relocation* 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 investigations to identify the existence and extent of hazardous substances in accordance with Article XIII.A. of this Agreement; historic preservation activities in accordance with Article XVI of this Agreement; the Government's cost projections; final inspection of the entire *Pier 36 Work* or completed portions thereof as the case may be; preparation of the proposed OMR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Pier 36 Work* including issuance of permits; and other matters related to the *Pier 36 Work*. This oversight of the *Pier 36 Work* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Coordination Team may make recommendations to the District Engineer on matters related to the *Pier 36 Work* that the Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Coordination Team. The Government, having the legal authority and responsibility for design and construction of the *Pier 36 Work*, has the discretion to accept or reject, in whole or in part, the Coordination Team's recommendations.

E. The Non-Federal Sponsor's costs of participation in the Coordination Team shall be included in *total costs of work* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article IX.C. of this Agreement to determine

reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Coordination Team shall be included in *total costs of work* and shared in accordance with the provisions of this Agreement.

ARTICLE V - 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, and contributions provided by the parties.

1. As of the effective date of this Agreement, *total costs of work* are projected to be \$7,117,850; the value of the Non-Federal Sponsor's contributions under Article IV, Article IX, and Article XIII.A. of this Agreement is projected to be \$160,000; the Non-Federal Sponsor's contribution of funds required by Article II.C.1. of this Agreement is projected to be \$2,212,600; the *non-Federal proportionate share* is projected to be 32 percent; the Non-Federal Sponsor's contribution of funds required by Article XVI.B.3. of this Agreement is projected to be \$0; and the Government's total financial obligations for the additional work to be incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement are projected to be \$0. 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 December 1, 2010 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 work*; the value of the Non-Federal Sponsor's contributions under Article IV, Article IX, and Article XIII.A. of this Agreement; the Non-Federal Sponsor's total contribution of funds required by Article II.C.1. of this Agreement; the *non-Federal proportionate share*; the Non-Federal Sponsor's total contribution of funds required by Article XVI.B.3. of this Agreement; the credit afforded pursuant to Article II.K. of this Agreement; the total contribution of funds required from the Non-Federal Sponsor for the upcoming contract and upcoming *fiscal year*; and the Government's total financial obligations for additional work incurred and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.I. of this Agreement.

B. The Non-Federal Sponsor shall provide the contributions of funds required by Article II.C.1. and Article XVI.B.3. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for: (a) issuance of the solicitation for the first contract for review of the design, or portion thereof, provided by the Non-Federal Sponsor; (b) commencement of review of the design, or portion thereof, provided by the Non-Federal Sponsor using the Government's own forces; (c) issuance of the solicitation for the first contract for design of the *Pier 36 Work*; or (d) commencement of design of the *Pier*

36 *Work* using the Government's own forces, whichever is scheduled to first occur, 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: (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 projected *non-Federal proportionate share of financial obligations for design and construction* to be incurred for such contract; (c) the projected *non-Federal proportionate share of financial obligations for design and construction* using the Government's own forces through the first *fiscal year*; (d) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement to be incurred for such contract; and (e) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement using the Government's own forces through the first *fiscal year*. 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. Thereafter, until the construction of the *Pier 36 Work* is complete, the Government shall notify the Non-Federal Sponsor in writing of the funds the Government determines to be required from the Non-Federal Sponsor, and the Non-Federal Sponsor shall provide such funds in accordance with the provisions of this paragraph.

a. The Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the scheduled date for issuance of the solicitation for each remaining contract for the *Pier 36 Work*, of the funds the Government determines to be required from the Non-Federal Sponsor, after consideration of the credit the Government affords pursuant to Article II.K. of this Agreement, to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* to be incurred for such contract and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement to be incurred for such contract. No later than such scheduled date, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

b. The Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each *fiscal year* in which the Government projects that it will incur *financial obligations for design and construction* of the *Pier 36 Work* using the Government's own forces or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement using the Government's own forces, of the funds the Government determines to be required from the Non-Federal Sponsor, after consideration of the credit the Government affords pursuant to Article

II.K. of this Agreement, to meet: (a) the projected *non-Federal proportionate share of financial obligations for design and construction* using the Government's own forces for that *fiscal year* and (b) the Non-Federal Sponsor's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement using the Government's own forces for that *fiscal year*. No later than 30 calendar days prior to the beginning of that *fiscal year*, the Non-Federal Sponsor shall make the full amount of such required funds for that *fiscal year* available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the *non-Federal proportionate share of financial obligations for design 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; (c) the Non-Federal Sponsor's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVI.B.3. of this Agreement as those financial obligations are incurred; and (d) to the extent funds are offered and accepted in accordance with Article II.J. of this Agreement, any other *financial obligations for design and construction* in excess of the *non-Federal proportionate share* as they are incurred during the *period of design and construction*. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations for the current contract or to cover the Non-Federal Sponsor's share of such financial obligations for work performed using the Government's own forces in the current *fiscal year*, 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, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total costs of work* and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Non-Federal Sponsor's total required share of *total costs of work* and the costs of any data recovery activities associated with historic preservation 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" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total costs of work* and the costs of any data recovery activities associated with historic preservation exceed the Non-Federal Sponsor's total required shares thereof, the Government, subject to the availability of funds and as limited by the *Section 5051 Work Limit*, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund. However, if the final accounting is conducted prior to the end of the *period of design and construction* due to termination of the Agreement pursuant to Article XII.E. of this Agreement, and the Non-Federal Sponsor accelerated provision of its required contribution of funds in accordance with Article II.J. of this Agreement, the Government shall refund to the Non-Federal Sponsor only that portion of any such accelerated funds that were not obligated by the Government for work on the *Pier 36 Work*, subject to the availability of funds.

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

1. Not less than 60 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 interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred and furnish the Non-Federal Sponsor with written notice

of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of additional work from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work to complete the final accounting of additional work and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for additional work and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the total obligations for additional work exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, 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 interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VI - DISPUTE RESOLUTION

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

ARTICLE VII - OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

A. Upon receipt of the notification from the District Engineer in accordance with Article II.E. of this Agreement and for so long as the *Pier 36 Work* remains authorized, the Non-Federal Sponsor, pursuant to Article II.F. of this Agreement, shall operate, maintain, repair, rehabilitate,

and replace the entire *Pier 36 Work* or a completed portion thereof as the case may be, at no cost to the Government. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Pier 36 Work's* authorized purposes and in accordance with specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Pier 36 Work* for the purpose of inspection, if the Government determines an inspection to be necessary. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor.

ARTICLE VIII – HOLD AND SAVE

Subject to the provisions of Article XVIII of this Agreement, the Non-Federal Sponsor shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the *Pier 36 Work* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE IX - 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 *Project* shall be included in *total costs of work* 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 work* and shared in accordance with the provisions of this Agreement.

ARTICLE X - 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 XI - 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 XII - 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 *Pier 36 Work* is in the interest of the United States.

B. In the event future performance under this Agreement is suspended pursuant to Article II.D.2. of this Agreement, such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total costs of work* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVI.B.2. and Article XVI.B.3. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIII.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIII.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under Article XIII.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIII.C. of this Agreement; 3) the Government continues work on the *Pier 36 Work*; or 4) the Government terminates this Agreement in accordance with the provisions of Article XIII.C. of this Agreement.

D. If after completion of the design portion of the *Pier 36 Work* the parties mutually agree in writing not to proceed with construction of the *Pier 36 Work*, the parties shall conclude their activities relating to the *Pier 36 Work* and conduct an accounting in accordance with Article V.C. of this Agreement.

E. In the event that this Agreement is terminated pursuant to this Article or Article II.D. or Article XIII.C. of this Agreement, both parties shall conclude their activities relating to the *Pier 36 Work* and conduct an accounting in accordance with Article V.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Pier 36 Work* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.C.1. and Article XVI.B.3. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

F. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II.D. or Article XIII.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 XIII - 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 required for construction, operation, and maintenance of the *Pier 36 Work*. 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 shall be included in *total costs of work* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article IX.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total costs of work* 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 required for construction, operation, and maintenance of the *Pier 36 Work*, 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 of the *Pier 36 Work*, or, if already in construction, whether to continue with construction of the *Pier 36 Work*, 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 required for construction, operation, and maintenance of the *Pier 36 Work*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Pier 36 Work* 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, including 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 work*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or 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 *Pier 36 Work*.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article IV 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 to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Pier 36 Work* for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the *Pier 36 Work* in a manner that will not cause liability to arise under CERCLA.

ARTICLE XIV - 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:

Port of San Francisco
Attention: Executive Director
Pier 1, The Embarcadero
San Francisco, CA 94111

If to the Government:

United States Army Corps of Engineers
San Francisco District
Pier 36 Removal Project Manager
1455 Market Street
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 XV - 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 XVI - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the *Pier 36 Work*, shall perform any identification, survey, or evaluation of historic properties. Any costs incurred by the Government for such work shall be included in *total costs of work* and shared in accordance with the provisions of this Agreement.

B. The Government, as it determines necessary for the *Pier 36 Work*, shall perform or ensure the performance of any mitigation activities or actions for historic properties or that are otherwise associated with historic preservation including data recovery activities.

1. Any costs incurred by the Government for such mitigation activities, except for data recovery activities associated with historic preservation, shall be included in *total costs of work* and shared in accordance with the provisions of this Agreement.

2. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c (a)), the costs of data recovery activities associated with historic preservation for this *Pier 36 Work* and all other work implemented under Section 5051 shall be borne entirely by the Government up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for implementation of work pursuant to Section 5051. None of the costs of data recovery activities associated with historic preservation up to such one percent limit shall be included in *total costs of work*.

3. The Government shall not incur costs for data recovery activities associated with historic preservation that exceed the statutory one percent limit specified in paragraph B.2. 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)). Any costs of data recovery activities associated with historic preservation that exceed the one percent limit shall not be included in *total costs of work* but shall be shared between the Non-Federal Sponsor and the Government consistent with the cost sharing requirements for the Section 5051, as follows: one-third will be borne by the Non-Federal Sponsor and two-thirds will be borne by the Government.

C. If, during its performance of *relocations* in accordance with Article III of this Agreement, the Non-Federal Sponsor discovers historic properties or other cultural resources that

have not been evaluated by the Government pursuant to this Article, the Non-Federal Sponsor shall provide prompt written notice to the Government of such discovery. The Non-Federal Sponsor shall not proceed with performance of the *relocation* that is related to such discovery until the Government provides written notice to the Non-Federal Sponsor that it should proceed with such work.

ARTICLE XVII - 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 XVIII - OBLIGATIONS OF FUTURE APPROPRIATIONS


A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the San Francisco Port Commission or the Board of Supervisors of the City and County of San Francisco, where creating such an obligation would be inconsistent with the Charter of the City and County of San Francisco, including but not limited to, Charter Section 3.105 and the budgetary and fiscal provisions of the Charter.

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

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

DEPARTMENT OF THE ARMY

PORT OF SAN FRANCISCO

BY: 
Torrey A. DiCiro
Lieutenant Colonel, U.S. Army
Commanding

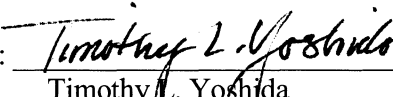
BY: 
Monique Moyer
Executive Director

DATE: 09/29/2010

DATE: 09/28/2010

APPROVED AS TO FORM:

Dennis J. Herrera
City Attorney

BY: 
Timothy L. Yoshida
Deputy City Attorney

CERTIFICATE OF AUTHORITY

I, Robert A. Bryan, do hereby certify that I am the Deputy City Attorney for the City and County of San Francisco, serving as the principal legal officer for the Port of San Francisco, that the City and County of San Francisco acting by and through the Port of San Francisco 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 City and County of San Francisco acting by and through the Port of San Francisco in connection with the San Francisco, California Pier 36 Removal Work, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed this Agreement on behalf of the City and County of San Francisco acting by and through the Port of San Francisco have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
28th day of September, 2010.



Robert A. Bryan
General Counsel
Port of San Francisco

CERTIFICATION REGARDING LOBBYING

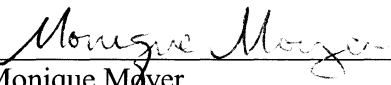
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



Monique Moyer
Executive Director
Port of San Francisco

DATE: 09/28/2010