



DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[NON-FEDERAL SPONSORS NAMES]
FOR
DESIGN
FOR THE
**LONGWHARF FAIRFIELD/NEW HAVEN
COASTAL STORM RISK MANAGEMENT**

THIS AGREEMENT is entered into this ____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for **New England District** (hereinafter the “District Commander”) and the [Non-Federal Sponsors Names] (hereinafter the “Non-Federal Sponsor”), represented by the [Title].

WITNESSETH, THAT:

WHEREAS, Federal funds were provided in Disaster Relief Supplemental Appropriations Act (DRSAA) to initiate design of The Recommended Plan consists of a structural coastal storm risk management system that parallels the existing Interstate 95 embankment in New Haven, CT. The plan includes approximately 5,800 linear feet of floodwall with a top elevation of +15 feet North Atlantic Vertical Datum of 1988 (NAVD88), along with 475 linear feet of deployable flood gates (closure structures); five deployable road closure structures, and one pump station.

WHEREAS, **Section 103** of the Water Resources Development Act of 1986, as amended **33 U.S.C. 2213** , specifies the cost-sharing requirements applicable to construction of the Project, and Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215(c)), provides that the costs of design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project’s primary purpose of **coastal storm risk management**, the parties agree that the Non-Federal Sponsor shall contribute **coastal storm risk management, 35**percent of the design costs under this Agreement; and

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “Project” means [DESCRIBE FEATURES OF THE PROJECT], as generally described in the Fairfield and New Haven Counties, Connecticut Coastal Storm Risk Management Feasibility Study and Environmental Assessment, dated [October 2020] and

approved by [INSERT TITLE OF APPROVING OFFICIAL, e.g., Chief of Engineers, Division Commander for Mississippi Valley Division, etc.] on [MONTH DAY, YEAR].

B. The term “Design” means **i.e., PERFORM DETAILED PRE-CONSTRUCTION ENGINEERING AND DESIGN, UP THROUGH PREPARATION OF PLANS AND SPECIFICATIONS FOR THE INITIAL CONSTRUCTION CONTRACT ONLY**] for the Project.

C. The term “design costs” means the sum of all costs that are directly related to the Design and cost shared in accordance with the terms of this Agreement. Subject to the provisions of this Agreement, the term shall include the Government’s costs for engineering and design, including economic, real estate, and environmental analyses, a safety assurance review, if required, and supervision and administration; and the Non-Federal Sponsor’s creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsor in the Design Coordination Team to discuss significant issues and actions; audits; betterments; or the Non-Federal Sponsor’s cost of negotiating this Agreement.

D. The term “HTRW” means hazardous, toxic, and radioactive wastes, which includes any material listed as a “hazardous substance” (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”) (42 U.S.C. 9601-9675) and any other regulated material in accordance with applicable laws and regulations.

E. The term “in-kind contributions” means those creditable materials or services provided by the Non-Federal Sponsor that are identified as being integral to Design of the Project by the Division Commander for **North Atlantic Division** (hereinafter the “Division Commander”). To be integral, the material or service must be part of the work that the Government would otherwise have undertaken for Design of the Project. In-kind contributions also include any investigations performed by the Non-Federal Sponsor to identify the existence and extent of any HTRW as required for Design of the Project.

F. The term “betterment” means a difference in the Design of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to Design of the Project.

G. The term “fiscal year” means one year beginning on October 1st and ending on September 30th of the following year.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Design using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all requirements of applicable Federal laws and implementing regulations,

including but not limited to, if applicable, Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

B. The Non-Federal Sponsor shall contribute **35** percent of design costs in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall be responsible for undertaking any investigations that the Government determines are required for Design of the Project to identify the existence and extent of any HTRW.

2. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor to meet its cost share for the initial fiscal year of the Design. No later than 60 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.C.

3. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its cost share. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.C.

C. The Government shall include in design costs and credit towards the Non-Federal Sponsor's share of such costs, the cost of in-kind contributions performed by the Non-Federal Sponsor that are determined by the Government to be integral to Design of the Project. Creditable in-kind contributions may include costs for engineering, design, and supervision and administration, but shall not include any costs associated with betterments. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar days after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation for the Government to determine the costs that are creditable to the Non-Federal Sponsor's share of design costs. Failure to provide such documentation in a timely manner may result in denial of credit. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees.

2. No credit shall be afforded for the following: interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; any items provided or performed prior to the effective date of this Agreement unless covered by an In-Kind Memorandum of Understanding; any items not

identified as integral in the integral determination report; or costs that exceed the Government's estimate of the cost for such in-kind contributions.

3. No reimbursement will be provided for any in-kind contributions that exceed the Non-Federal Sponsor's share of the design costs under this Agreement.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on contracts solicitations prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

E. The Non-Federal Sponsor shall not use Federal program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. In addition to the ongoing, regular discussions between the parties regarding Design delivery, the Government and the Non-Federal Sponsor may establish a Design Coordination Team to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be included in the design costs. The Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be paid solely by the Non-Federal Sponsor without reimbursement or credit.

G. The Non-Federal Sponsor may request in writing that the Government include betterments in the Design of the Project. Each request shall be subject to review and written approval by the Division Commander. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article III.F., must provide funds to cover the difference in the costs for design of such work, as determined by the Government, in advance of the Government performing the work.

H. If the Government and Non-Federal Sponsor enter into a Project Partnership Agreement for construction of the Project, the Government shall include the design costs in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

ARTICLE III - PAYMENT OF FUNDS

A. As of the effective date of this Agreement, design costs are projected to be \$_____, with the Government's share of such costs projected to be \$_____, and the Non-Federal Sponsor's share of such costs projected to be \$_____, which includes creditable in-kind contributions projected to be \$_____ and the amount of funds required to meet its cost share projected to be \$_____. Costs for betterments are projected to be

\$ _____. These amounts 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.

B. The Government shall provide the Non-Federal Sponsor with monthly reports setting forth the estimated design costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Design.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, **New England District (E6)**" to the District Commander, 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 providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of the design costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of the design costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon completion of the Design and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds by delivering a check payable to "FAO, USAED, **New England District (E6)**" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsor, apply the excess amount towards the non-Federal share of the cost of construction of the Project in the event a Project Partnership Agreement is executed for the Project. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of design costs, including contract claims or any other liability that may become known after the final accounting.

F. If the Government agrees to include betterments on the Non-Federal Sponsor's behalf, the Government shall provide written notice to the Non-Federal Sponsor of the amount of funds required to cover such costs. No later than 30 calendar days after receipt of such written notice, the Non-Federal Sponsor shall make the full amount of such required funds available to the

Government through either payment method specified in Article III.E. If at any time the Government determines that additional funds are required to cover any such costs, as applicable, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government. If the Government determines that funds provided by the Non-Federal Sponsor exceed the amount required for the Government to complete such work, the Government shall refund any remaining unobligated amount.

ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate Design unless the Assistant Secretary of the Army (Civil Works) determines that continuation of the Design 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 at any time that the Federal funds made available for the Design are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing within 30 calendar days, and upon exhaustion of such funds, the Government shall suspend Design until there are sufficient Federal funds appropriated by the Congress and funds provided by the Non-Federal Sponsor to allow Design to resume.

C. In the event of termination, the parties shall conclude their activities relating to the Design and conduct an accounting in accordance with Article III.E. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

D. Any suspension or termination shall not relieve the parties of liability for any obligation incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement 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 V - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from the Design, except for damages due to the fault or negligence of the Government or its contractors.

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 the 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 - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Design. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Design shall not be included in design costs.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the Non-Federal Sponsor's request, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The Non-Federal Sponsor shall pay the costs of non-Federal audits without reimbursement or credit by the Government.

ARTICLE VIII - RELATIONSHIP OF PARTIES

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. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE IX - 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 mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor(s):

[TITLE (NOT the name of the individual)]

[NON-FEDERAL SPONSORS NAMES]

[ADDRESS]

If to the Government:

District Commander

U.S. Army Corps of Engineers, New England District

696 Virginia Rd

Concord, MA 01472

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

ARTICLE X - 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 XI - 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.

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

DEPARTMENT OF THE ARMY

[NON-FEDERAL SPONSORS NAMES]

BY: _____
[TYPED NAME]
[Insert Rank], U.S. Army
District Commander

BY: _____
[TYPED NAME]
[Full Title]

DATE: _____

DATE: _____

Option 1: Not An Obligation of Future Appropriations. Section 221(a) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b), provides that an agreement may reflect that it does not obligate future appropriations when doing so is inconsistent with constitutional or statutory limitations of a State or political subdivision thereof. However, section 221(a) does NOT provide that the Non-Federal Sponsor's performance and payments are subject to appropriations of funds. The Government retains the right to exercise any legal rights it has to protect the Government's interests. If applicable and requested by the Non-Federal Sponsor, insert into the DA as the last Article the following:

“ARTICLE XII - OBLIGATIONS OF FUTURE APPROPRIATIONS

The Non-Federal Sponsor intends to fulfill fully its obligations under this Agreement. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the **[Insert name of the legislative body that makes the appropriations, e.g., legislature of the State of New York or the New York City Council]**, where creating such an obligation would be inconsistent with **[Insert the specific citation to the constitutional or statutory limitation on committing future appropriations]**. If the Non-Federal Sponsor is unable to, or does not, fulfill its obligations under this Agreement, the Government may exercise any legal rights it has to protect the Government's interests.”

Option 2: Multiple Non-Federal Sponsors.

1. It is strongly preferred that there is one party only as the Non-Federal Sponsor for the DA. Nonetheless, it is permissible to have more than one Non-Federal Sponsor if the Non-Federal Sponsors are jointly and severally responsible for all non-Federal obligations and responsibilities under the DA. **The DA should be modified to use the term “Non-Federal Sponsors” throughout along with the necessary modifications to change, as appropriate, verbs and pronouns from singular to plural.** In addition, insert into the DA as the last Article the following:

**“ARTICLE XII – JOINT AND SEVERAL RESPONSIBILITY OF THE
NON-FEDERAL SPONSORS**

The obligations and responsibilities of the Non-Federal Sponsors shall be joint and several, such that each Non-Federal Sponsor shall be liable for the whole performance of the obligations and responsibilities of the Non-Federal Sponsors under the terms and provisions of this Agreement. The Government may demand the whole performance of said obligations and responsibilities from any of the entities designated herein as one of the Non-Federal Sponsors.”

2. If one of the Non-Federal Sponsors is a non-profit entity, in accordance with ASA(CW) Memorandum, dated April 5, 2012, Subject: Implementation Guidance for Section 2003(b) of the Water Resources Development Act of 2007 - Definition of Non-Federal Interest, confirm eligibility of the non-profit entity to serve as one of the Non-Federal Sponsors and ensure that a legally constituted public body is also serving as one of the Non-Federal Sponsors on the agreement. This memorandum can be found on the Corps’ “Project Partnership Agreements” website under the “Guidance” tab. Also, for the non-profit entity that is serving as one of the Non-Federal Sponsors, use the Certificate of Authority for a Non-Profit Entity as provided on the Corps’ PPA website under the “Forms” tab.

In addition to the DA changes in paragraph 1. above, when one of the Non-Federal Sponsors is a non-profit entity also make the following changes to the DA:

Delete the “and” at the end of the third WHEREAS clause and insert the following WHEREAS clauses after the third WHEREAS clause in the agreement:

“WHEREAS, the [FULL NAME OF NONPROFIT ENTITY] is an organization that is incorporated under the applicable laws of the [State of _____ or Commonwealth of _____] as a non-profit organization, exempt from paying Federal income taxes under Section 501 of the Internal Revenue Code (26 U.S.C. 501);

WHEREAS, by letter dated [MONTH DAY, YEAR], the [FULL NAME OF AFFECTED LOCAL GOVERNMENT], the affected local government has consented to the [FULL NAME OF NON-PROFIT ENTITY], serving as a Non-Federal Sponsor for the Study; and”

Option 3: Accelerated Funds, following Committee notification. Following completion of the Committee notification process, the DA may include the following changes:

Guidance on Accelerated Funds is provided in CECW-P (2020-01) Director's Policy Memorandum FY 2020, dated December 19, 2019, Subject: Acceptance of Contributed Funds, Advanced Funds, and Accelerated Funds. This memorandum can be found on the Corps' "Project Partnership Agreements" website.

1. Delete the "and" at the end of the next to last WHEREAS clause and insert the following WHEREAS clause after the next to last WHEREAS clause in the DA:

"WHEREAS, the Non-Federal Sponsor proposes to accelerate its provision of funds (hereinafter "accelerated funds") for the immediate use by the Government for the Design; and"

2. Add a new paragraph H. to Article I as follows:

"H. The term "accelerated funds" means non-Federal funds out of proportion with Federal funds but within the ultimate non-Federal cash contribution."

3. Add new paragraph I. to Article II as follows.

"I. In addition to providing the funds required by paragraph B. of this Article, the Non-Federal Sponsor may provide accelerated funds for immediate use by the Government. The Non-Federal Sponsor understands that use of accelerated funds shall not constitute any commitment by the Government to budget, or the Congress to appropriate, funds for this Design or to match any accelerated funds provided by the Non-Federal Sponsor; that any accelerated funds will be credited toward the Non-Federal Sponsor's cost share only to the extent matching Federal funds are provided; and that the Non-Federal Sponsor is not entitled to any repayment for any accelerated funds obligated by the Government even if the Design ultimately is not completed."

Option 4: Contributed Funds, following Committee notification. The cost of work funded with Contributed Funds is included in design costs subject to cost sharing. Contributed Funds are applied toward the Federal cost share.

Guidance on Contributed Funds is provided in CECW-P (2020-01) Director's Policy Memorandum FY 2020, dated December 19, 2019, Subject: Acceptance of Contributed Funds, Advanced Funds, and Accelerated Funds. This memorandum can be found on the Corps' "Project Partnership Agreements" website.

Following completion of the Committee notification process, the DA may include the following changes:

1. Delete the "and" at the end of the next to last WHEREAS clause and insert the following WHEREAS clause after the next to last WHEREAS clause in the DA:

"WHEREAS, in addition to providing the required non-Federal cost share, the Non-Federal Sponsor considers it to be in its own interest to contribute funds voluntarily (hereinafter the "Contributed Funds") to be used by the Government for the Design, as authorized pursuant to 33 U.S.C. 701h; and"

2. Add as the third sentence in Article I.C. the following:

"The term also includes the cost of work funded with Contributed Funds."

3. Add a new paragraph H. to Article I as follows:

"H. The term "Contributed Funds" means those funds above any statutorily required non-Federal cost share that are provided voluntarily by the Non-Federal Sponsor for funding the Design, with no credit or repayment authorized for such funds."

4. Add a new paragraph I. to Article II as follows:

"I. In addition to providing the funds required pursuant to paragraph B. of this Article, the Non-Federal Sponsor will be providing Contributed Funds currently estimated at \$_____, for the Design. The Non-Federal Sponsor shall make the full amount of such funds available to the Government by delivering a check payable to "FAO, USAED, [**Insert District and EROC code, e.g., New Orleans (B2)**]" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. No credit or repayment is authorized, nor shall be provided, for any Contributed Funds provided by the Non-Federal Sponsor that are obligated by the Government. In addition, acceptance and use of Contributed Funds shall not constitute, represent, or imply any commitment to budget or appropriate funds for the Design in the future."

Attachment

Option 5: Additional Work. If additional work for design is requested by the Non-Federal Sponsor and approved by the Division Commander, the DA should include the following changes:

1. Delete the “and” at the end of the next to last WHEREAS clause and insert the following WHEREAS clause after the next to last WHEREAS clause in the DA:

“WHEREAS, 33 U.S.C. 701h authorizes the Government to undertake, at the Non-Federal Sponsor’s full expense, additional work while the Government is carrying out the Design; and”

2. Replace the last sentence in Article I.C. with the following:

“The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsor in the Design Coordination Team to discuss significant issues and actions; audits; betterments; additional work; or the Non-Federal Sponsor’s cost of negotiating this Agreement.”

3. Add a new paragraph H. to Article I as follows:

“H. The term “additional work” means items of work related to, but not cost shared as a part of, the Design that the Government will undertake on the Non-Federal Sponsor’s behalf while the Government is carrying out the Design, with the Non-Federal Sponsor responsible for all costs and any liabilities associated with such work.”

4. Replace the first sentence in Article II.G. with the following:

“The Non-Federal Sponsor may request in writing that the Government include betterments in the Design of the Project or perform additional work.”

5. Replace the second sentence in Article III.A. with the following:

“Costs for betterments are projected to be \$_____ and costs for additional work are projected to be \$_____.”

6. Replace the first sentence in Article III.F. with the following:

“If the Government agrees to include betterments or perform additional work on the Non-Federal Sponsor’s behalf, the Government shall provide written notice to the Non-Federal Sponsor of the amount of funds required to cover such costs.”

Option 6: Tribal Partnership Program with Ability to Pay Adjustment.

This option will be used for design of a project under the Tribal Partnership Program, Section 203 of the Water Resources Development Act of 2000, as amended (33 U.S.C. 2269), if the tribe qualifies for the ability to pay adjustment provided by 33 U.S.C. 2269(d)(1). The following changes below to the DA should be made:

Note: To determine the Non-Federal Sponsor's cash contribution for design of a project, first calculate the non-Federal cost share based on the ability to pay adjustment by multiplying the cost share for the Project's primary purpose by 25 percent factor (if the cost share for the Project's primary purpose is 35 percent, $35 \text{ percent} \times 0.25 = 8.75 \text{ percent}$). Next determine the Non-Federal Sponsor's share of design costs ($\$1,000,000 \times 0.0875$). Last, subtract the creditable in-kind contributions from that resulting amount to determine the amount of funds required from the Non-Federal Sponsor to meet its ability to pay cost share. For example, if design costs are projected to be \$1,000,000 and creditable in-kind contributions are projected to be \$50,000, the Non-Federal Sponsor's cash contribution for design would be \$37,500.

Design costs:	\$1,000,000
Non-Federal ability to pay cost share percentage:	8.75% ($35\% \times 0.25$)
Non-Federal Sponsor share of design costs:	\$87,500 ($\$1,000,000 \times 0.0875$)
Creditable in-kind contributions:	\$50,000
Cash Contributions:	\$37,500

1. Replace the WHEREAS clauses in their entirety with the following:

“WHEREAS, Federal funds were provided in **[Insert appropriations cite]** to initiate design of **[Insert short description of the project or separable element]**;

WHEREAS, Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215(c)), provides that the costs of design shall be shared in the same percentages as construction of the Project, and the cost share for the Project's primary water resources related purpose of **[Insert, as appropriate, commercial navigation, flood risk management, coastal storm risk management, or ecosystem restoration]** is **[Insert cost sharing percentage for primary project purpose, e.g., commercial navigation, use 10, 25, or 50, depending on the maximum depth of the project; coastal storm risk management, ecosystem restoration, or nonstructural flood risk management, use 35; and structural flood risk management, use 35 or if current estimate of project costs shows the non-Federal cost share will be 50 percent, use 50]** percent of the design costs;

WHEREAS, pursuant to Section 203(d)(1) of the Water Resources Development Act of 2000, as amended (33 U.S.C. 2269(d)(1)), the Government has determined that the Non-Federal Sponsor has met the criteria for an ability to pay adjustment consisting of the application of a 25 percent factor (hereinafter the “ability to pay adjustment”) that reduces the Non-Federal Sponsor's required cost share to **[Insert 25 percent of the cost sharing percentage identified in the 2nd Whereas clause, e.g., if the cost sharing for the primary purpose is 35 percent, insert 8.75]** percent of the design costs; and

Attachment

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.”

2. Replace Article II.B. in its entirety with the following:

“B. Based on the ability to pay adjustment, the Non-Federal Sponsor shall contribute **[Insert 25 percent of the cost sharing percentage identified in the 2nd Whereas clause, e.g., if the cost sharing for the primary purpose is 35 percent, insert 8.75]** percent of design costs (hereinafter the “ability to pay cost share”) in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall be responsible for undertaking any investigations that the Government determines are required for Design of the Project to identify the existence and extent of any HTRW.

2. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor to meet its ability to pay cost share for the initial fiscal year of the Design. No later than 60 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.C.

3. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its ability to pay cost share. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.C.”

3. Replace Article III.A. in its entirety with the following:

“A. As of the effective date of this Agreement, design costs are projected to be \$_____, with the Government’s share of such costs, which is increased by the amount of the Non-Federal Sponsor’s ability to pay adjustment, projected to be \$_____, and the Non-Federal Sponsor’s share of such costs, based on the ability to pay adjustment, projected to be \$_____, which includes creditable in-kind contributions projected to be \$_____, and the amount of funds required to meet its ability to pay cost share projected to be \$_____. Costs for betterments are projected to be \$_____. These amounts 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.”

Option 7: Design of a Locally Preferred Plan (LPP). If the LPP, in lieu of the national economic development (NED) plan, is approved by the Assistant Secretary of Army (Civil Works) and the costs for such design are in excess of that required for the NED Plan, make the following changes to the DA:

1. Replace the WHEREAS clauses in their entirety with the following:

“WHEREAS, Federal funds were provided in Disaster Relief Supplemental Appropriations Act (DRSAA) to initiate design of **coastal storm risk reduction**;

WHEREAS, the locally preferred plan (LPP) for **[Insert Full Name of the Project]** (hereinafter the “Project”, as defined in Article I.A. of this Agreement) was approved by the Assistant Secretary of the Army (Civil Works) on **[MONTH DAY, YEAR]**;

WHEREAS, **[Insert Section 101, if commercial navigation, or Section 103, if other than commercial navigation]** of the Water Resources Development Act of 1986, as amended **[Insert (33 U.S.C. 2211), if commercial navigation, or (33 U.S.C. 2213), if other than commercial navigation]**, specifies the cost-sharing requirements applicable to construction of the Project, and Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215(c)), provides that the costs of design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project’s primary purpose of **[Insert, as appropriate, commercial navigation, flood risk management, coastal storm risk management, or ecosystem restoration]**, the parties agree that the Non-Federal Sponsor shall contribute **[Insert cost sharing percentage for primary project purpose, e.g., commercial navigation, use 10, 25, or 50, depending on the maximum depth of the project; coastal storm risk management, ecosystem restoration, or nonstructural flood risk management, use 35; and structural flood risk management, use 35 except if authorized prior to October 13, 1996, use 25 or if current estimate of project costs shows the non-Federal cost share will be 50 percent, use 50]** percent of the NED Plan design costs under this Agreement;

WHEREAS, the Non-Federal Sponsor is responsible for 100 percent of costs in excess of that required for design of the national economic development plan (hereinafter the “NED Plan”, as defined in Article I.B.); and

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.”

2. Replace Article I its entirety with the following:

“A. The term “Project” means the LPP, which includes **[DESCRIBE FEATURES OF THE PROJECT]**, as generally described in the **[FULL TITLE OF DECISION DOCUMENT]**, dated **[MONTH YEAR]** and approved by the **[TITLE OF APPROVING OFFICIAL, e.g., Chief of Engineers, Division Commander for Mississippi Valley Division, etc.]** on **[MONTH DAY, YEAR]** (hereinafter the “Decision Document”).

B. The term “NED Plan” means the national economic development plan, which includes **[DESCRIBE FEATURES OF THE NED PLAN]**, as generally described in the Decision Document.

C. The term “Design” means **[INSERT DESCRIPTION OF THE DESIGN WORK FOR THE PROJECT, i.e., PERFORM DETAILED PRE-CONSTRUCTION ENGINEERING AND DESIGN, UP THROUGH PREPARATION OF PLANS AND SPECIFICATIONS FOR THE INITIAL CONSTRUCTION CONTRACT ONLY]** for the Project.

D. The term “design costs” means the sum of all costs incurred by the Government and Non-Federal Sponsor in accordance with the terms of this Agreement that are directly related to Design of the Project. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s costs for engineering and design, including real estate, economic, and environmental analyses, a safety assurance review, if required, and supervision and administration; the Non-Federal Sponsor’s creditable costs for in-kind contributions, if any; the Non-Federal Sponsor’s costs for any design work allocated by the Government to the LPP incremental design costs; and the Government’s costs of review and oversight of any design work undertaken by the Non-Federal Sponsor. The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsor in the Design Coordination Team to discuss significant issues and actions; audits; betterments; or the Non-Federal Sponsor’s cost of negotiating this Agreement.

E. The term “NED Plan design costs” means that portion of design costs, as determined by the Government, that would have been incurred by the Government and Non-Federal Sponsor had the NED Plan been designed.

F. The term “LPP incremental design costs” means that portion of design costs, as determined by the Government, that are in excess of the NED Plan design costs.

G. The term “HTRW” means hazardous, toxic, and radioactive wastes, which includes any material listed as a “hazardous substance” (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”) (42 U.S.C. 9601-9675) and any other regulated material in accordance with applicable laws and regulations.

H. The term “in-kind contributions” means those creditable materials or services provided by the Non-Federal Sponsor for the NED Plan that are identified as being integral to Design of the Project by the Division Commander for the **[Insert Name of USACE Division, e.g., Mississippi Valley Division]** (hereinafter the “Division Commander”). To be integral to Design of the Project, the material or service must be part of the work that the Government would otherwise have undertaken for design of the NED Plan. In-kind contributions also include any investigations performed by the Non-Federal Sponsor for the NED Plan to identify the existence and extent of any HTRW as required for Design of the Project.

Attachment

I. The term “betterment” means a difference in the Design of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the Design of the Project.

J. The term “fiscal year” means one year beginning on October 1st and ending on September 30th of the following year.”

3. Replace Article II.B. in its entirety with the following:

“B. The Non-Federal Sponsor shall contribute **[Insert same cost sharing percentage as identified in the 4th Whereas clause]** percent of the NED Plan design costs in accordance with the provisions of this paragraph. In addition, the Non-Federal Sponsor is responsible for 100 percent of the LPP incremental design costs.

1. The Non-Federal Sponsor shall be responsible for undertaking any investigations that the Government determines are required for Design of the Project to identify the existence and extent of any HTRW.

2. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor for the initial fiscal year of the Design to meet its cost share for the NED Plan design costs. In addition, the Government shall determine the funds required from the Non-Federal Sponsor to cover the LPP incremental design costs that will be incurred by the Government. No later than 60 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.C.

3. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its cost share. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.C.”

4. Replace the first sentence in Article II.C. with the following:

“The Government shall include in NED Plan design costs and credit towards the Non-Federal Sponsor’s share of such costs, the cost of in-kind contributions performed by the Non-Federal Sponsor that are determined by the Government to be integral to design of the NED Plan.”

5. Replace Articles III.A. and III.B. in their entirety with the following:

“A. As of the effective date of this Agreement, design costs are projected to be \$_____, with NED Plan design costs projected to be \$_____, and LPP incremental design costs projected to be \$_____. The Government’s share of the NED Plan design costs are projected to be \$_____, and the Non-Federal Sponsor’s share of such costs are projected to be \$_____, which includes creditable in-kind contributions projected to be

Attachment

\$_____, and the amount of funds required to meet its cost share projected to be \$_____. The LPP incremental design costs are projected to be \$_____, which includes the amount of funds to cover the LPP incremental design costs that will be incurred by the Government projected to be \$_____. **[NOTE: Even if the Non-Federal Sponsor plans to perform all the design work related to the LPP incremental design costs, the Government still has review and oversight responsibilities related to such work so, the amount of funds to be provided to the Government cannot be \$0]** Costs for betterments are projected to be \$_____. These amounts 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.

B. The Government shall provide the Non-Federal Sponsor with monthly reports setting forth the estimated design costs, NED Plan design costs, LPP incremental design costs, and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Design."