



**MODEL AGREEMENT
FOR
ENVIRONMENTAL INFRASTRUCTURE
DESIGN ASSISTANCE UNDER
SECTION 219 – WATER RESOURCES DEVELOPMENT ACT OF 1992, AS AMENDED
JUNE 22, 2020**

APPLICABILITY AND INSTRUCTIONS:

1. The attached model cost sharing agreement must be used for all agreements for the provision of design assistance for non-Federal water-related environmental infrastructure and resource protection and development projects, including waste water treatment and related facilities and water supply, storage treatment, and distribution facilities, under Section 219 of the Water Resources Development Act (WRDA) of 1992, as amended. Implementation guidance for Section 219 is provided in CECW-PD memorandum, dated December 12, 2001, subject: Implementation of Projects Under Section 219 of the Water Resources Development Act of 1992, as Amended. As required by Section 219(a), design or engineering assistance provided by the Government must be obtained by procurement from private sources, unless the service would require the use of a new technology unavailable in the private sector, or a solicitation or request for proposal has failed to attract two or more bids or proposals. This limitation does not apply to analysis and documentation to address NEPA requirements.
2. The scope of the agreement will initially be limited to an increment of work that can be designed within available funds. However, if additional funds are provided in a subsequent fiscal year for additional increment(s) of work, the additional increment(s) of work may be undertaken without an amendment to the original agreement if all of the following conditions are met: (a) the additional increment of work can be designed within such available additional funds and using the same Section 219 project authority; (b) the additional increment of work is for the provision of design assistance only; (c) the additional increment of work involves the same Non-Federal Sponsor(s) and the work is documented in a subsequent Letter Report; (d) the Letter Report includes written concurrence from the Non-Federal Sponsor(s) supporting design of the additional increment of work, including self-certification(s) of financial capability to satisfy the non-Federal obligations for the additional increment of work; and (e) the Letter Report is approved by the Division Commander, or District Commander if such approval authority has been delegated, prior to design of such work.
3. Authority to approve an agreement that does not deviate from the approved model has been delegated to the Division Commander. Division Counsel concurrence that the agreement does not deviate from the subject model, and is appropriate for use for the particular project, is required prior to approval. In addition, authority to approve non-substantive deviations to the model agreement also has been delegated to the Division Commander. Division Counsel concurrence that a deviation is non-substantive, with the recommendation to approved the deviation, is required prior to approval by the Division Commander. An agreement with substantive deviations, including deviations involving policy issues, unique circumstances, or controversial matters, must be forwarded for Division review and then transmitted to the appropriate HQUSACE RIT, with Division Commander recommendations, for review and approval by the Director of Civil Works. The District Commander is authorized to execute the agreement after its approval.
4. The following options, including language for the agreement, are addressed in the Attachment:
 - a. Option 1: Not An Obligation of Future Appropriations (page A-1).
 - b. Option 2: Multiple Sponsors (page A-2).
5. Reminder: Make all required insertions, including language associated with an option; remove this cover page; remove the open and close brackets and any instructional text; ensure the page numbers, spacing and page breaks throughout the agreement are appropriate; if more than one option is used, ensure the Article and paragraph numbering and references therein are correct; and delete the Attachment.
6. The Certificate of Authority for Environmental Infrastructure Assistance, Certification Regarding Lobbying, and the Non-Federal Sponsor's Self-Certification of Financial Capability should be included as a part of the agreement package. These certificates can be found on the Corps' "Project Partnership Agreements" website under the "Forms" tab.

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[INSERT FULL NAME OF NON-FEDERAL SPONSOR]
FOR
DESIGN ASSISTANCE
FOR THE
[INSERT FULL NAME OF PROJECT]

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 **[Insert Name of USACE District, e.g., New Orleans District]** (hereinafter the “District Commander”) and the **[FULL NAME OF THE NON-FEDERAL SPONSOR]** (hereinafter the “Non-Federal Sponsor”), represented by its **[INSERT TITLE]**.

WITNESSETH, THAT:

WHEREAS, the provision of design assistance for the non-Federal project for **[INSERT NAME OF THE SECTION 219 PROJECT]** at **[GENERAL LOCATION OF PROJECT, INCLUDING STATE OR COMMONWEALTH]** was authorized by Section 219 **[INSERT SPECIFIC AUTHORIZATION CITE UNDER SECTION 219 FOR THE PROJECT, e.g., (c)(1)]** of the Water Resources Development Act of 1992, Public Law 102-580, as amended;

WHEREAS, the Government will provide design assistance by undertaking increment(s) of work, as defined in Article I.A. of this Agreement;

WHEREAS, Section 219(b) of the Water Resources Development Act of 1992, Public Law 102-580, as amended, specifies applicable cost-sharing requirements; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement and acknowledge that this Agreement shall be enforceable in the appropriate district court of the United States.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “increment of work” means design assistance, as generally described in a Letter Report, and approved by the **[INSERT TITLE OF APPROVING OFFICIAL, i.e., Division Commander for Mississippi Valley Division, or District Commander, if such approval authority has been delegated]**. The initial increment of work consists of **[DESCRIBE DESIGN ASSISTANCE TO BE PROVIDED]**, as generally described in the Letter Report, approved by the **[INSERT TITLE OF APPROVING OFFICIAL, i.e., Division Commander for Mississippi Valley Division, or District Commander, if such approval authority has been**

delegated], on [Month, Day, Year]. Each additional increment of work, if any, will be described in a separate Letter Report, which will specify the amount of Federal funds available for such work.

B. The term “design costs” means 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 an increment of work and cost shared. The term includes, but is not necessarily limited to: the Government’s costs of engineering and design, including preparation of Letter Reports and conducting environmental compliance activities; the Government’s supervision and administration costs; and the Non-Federal Sponsor’s creditable costs for providing in-kind contributions, if any. The term does not include any costs for dispute resolution; participation by the Government and the Non-Federal Sponsor in the Coordination Team to discuss significant issues and actions; audits; betterments; or the Non-Federal Sponsor’s cost of negotiating this Agreement.

C. The term “in-kind contributions” means those services or materials provided after the date of approval of the Letter Report for the increment of work by the Non-Federal Sponsor that are identified as being integral to an increment of work, and approved in writing, by the Division Commander for [INSERT NAME OF CORPS DIVISION, e.g., Mississippi Valley Division] (hereinafter the “Division Commander”). To be integral, the material or service must be part of work that the Government would otherwise need to undertake for the increment of work.

D. The term “betterments” means a difference in design of an increment of work that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to design or construction of that work.

E. 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 PARTIES

A. In accordance with Federal laws, regulations, and policies, the Government shall design each increment of work 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. The amount of Federal funds for each increment of work is limited to the amount identified in the Letter Report for that increment of work, with the Non-Federal Sponsor responsible for all costs in excess of that amount.

B. The Non-Federal Sponsor shall contribute for each increment of work at least 25 percent of design costs, as follows:

1. After considering the estimated amount of credit that will be afforded to the Non-Federal Sponsor pursuant to paragraph C. of this Article, the Government shall determine the estimated amount of funds required from the Non-Federal Sponsor to meet its minimum 25 percent cost share for the then-current fiscal year. No later than 60 calendar days after receipt of

notification from the Government, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.

2. No later than August 1st prior to each subsequent fiscal year, the Government shall provide the Non-Federal Sponsor with a written estimate of the full 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.

3. If all Federal funds available for an increment of work will be exhausted prior to completion of such work, the Government shall notify the Non-Federal Sponsor of the full amount of funds required to complete the increment of work, and the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III within 60 days of such notification or shall complete such work as in-kind contributions in accordance with paragraph C. of this Article.

C. The Government shall include in design costs for an increment of work, and credit towards the Non-Federal Sponsor's share of such costs, the value of in-kind contributions that are integral to that work. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability of such costs.

1. The value shall be equivalent to the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurred to provide the in-kind contributions. Such costs shall include, but not necessarily be limited to, actual engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the in-kind contributions. As in-kind contributions are completed and no later than 60 calendar day after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation, including invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Failure to provide such documentation in a timely manner may result in denial of credit.

2. No credit shall be afforded for interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; for any in-kind contributions performed prior to the date of approval of the Letter Report for an increment of work; for the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; or for costs that exceed the Government's estimate of the cost for such in-kind contributions if they had been provided by the Government.

3. Although design performed by the Non-Federal Sponsor prior to approval of the Letter Report for an increment of work is not creditable as in-kind contributions under this Agreement, the Non-Federal Sponsor, at no cost to the Government, may voluntarily provide such design to the Government. The Government, in its sole discretion, may accept, modify, or reject such design, or any portion thereof, for use in constructing that increment of 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 such design is free from any

legal encumbrances and use restrictions, including but not limited to, any intellectual property rights and outstanding licensing requirements.

4. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall not be entitled to credit for the value of in-kind contributions that exceeds 25 percent of design costs for each increment of work.

D. To the extent practicable and in accordance with Federal law, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on solicitations for contracts, including relevant plans and specifications, 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 increment of work. 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 of the parties, the Government and the Non-Federal Sponsor may establish a Coordination Team to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsor's costs for participation on the Coordination Team shall be included in design costs for cost-sharing purposes.

G. The Non-Federal Sponsor may request in writing that the Government perform betterments on behalf of the Non-Federal Sponsor. 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 must provide funds sufficient to cover the costs of the betterments in advance of the Government performing the work. No later than 60 calendar days of receiving written notice from the Government of the costs of betterments, the Non-Federal Sponsor shall make the full amount of such required 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. If at any time the Government determines that additional funds are required to cover such costs, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government.

ARTICLE III – PAYMENT OF FUNDS

A. As of the effective date of this Agreement, design costs for the initial increment of work are projected to be \$ _____, with the amount of Federal funds available for such work limited to \$ _____ [INSERT AMOUNT OF FEDERAL FUNDS]. The Non-Federal Sponsor's share of design costs for the initial increment of work is projected to be \$ _____, which includes creditable in-kind contributions projected to be \$ _____, and

the amount of funds required to meet its minimum 25 percent cost share projected to be \$_____. The Letter Report for each additional increment of work will include information on the Federal funds available for the increment of work and the Non-Federal Sponsor's share of design costs for such work. These amounts are estimates only that are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Non-Federal Sponsor.

B. For each increment of work, 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 amount of funds required from the Non-Federal Sponsor during the upcoming fiscal year.

C. The Non-Federal Sponsor shall provide the funds required to meet its share of design costs by delivering a check payable to "FAO, USAED, **[INSERT DISTRICT AND EROC CODE, e.g., New Orleans (B2)]**" 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 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 such design costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds 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.

E. Upon completion of each increment of work, including 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 such final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of receipt of written notice from the Government, shall provide the Government with the full amount of such additional required funds. 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.

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.

B. In the event of termination, the parties shall conclude their activities relating to design and conduct a final 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 the costs of termination, including any costs of resolution contract claims and contract modifications.

C. 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 any design under this Agreement, 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 AUDITS

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. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits 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 request of the Non-Federal Sponsor, 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 costs of non-Federal audits shall be paid solely by the Non-Federal Sponsor 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:

[TITLE]
[FULL NAME OF NON-FEDERAL SPONSOR]
[ADDRESS]

If to the Government:

District Commander
_____ District
[ADDRESS]

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 a 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

[INSERT FULL NAME OF SPONSOR]

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

BY: _____
[INSERT TYPED NAME]
[Insert Full Title]

DATE: _____

DATE: _____

Attachment

Option 1: Not An Obligation of Future Appropriations. 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, inclusion of this option 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 agreement 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 Maryland]**, 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.”

Attachment

Option 2: Multiple Non-Federal Sponsors. It is strongly preferred that there is one party only as the Non-Federal Sponsor for the agreement. 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 agreement. **The agreement 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 agreement 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.”