



**MODEL AGREEMENT
FOR
ENVIRONMENTAL INFRASTRUCTURE
DESIGN ASSISTANCE UNDER
SECTION 340 – WATER RESOURCES DEVELOPMENT ACT OF 1992, AS AMENDED
(WORK PERFORMED BY THE NON-FEDERAL SPONSOR)
NOVEMBER 5, 2020**

APPLICABILITY AND INSTRUCTIONS:

1. The attached model cost sharing agreement must be used where a non-Federal sponsor will be performing design work for a water-related environmental infrastructure or resource protection and development project in Southern West Virginia under Section 340 of the Water Resources Development Act (WRDA) of 1992, as amended. The agreement provides for Corps reimbursement of eligible design costs incurred by the non-Federal sponsor pursuant to the cost-sharing requirements of this agreement. If the proposal involves design and construction, use the separate model cost-sharing agreement provided for that purpose. Any proposal involving a grant, rather than reimbursement, or design performed by the Corps must be coordinated with the appropriate HQUSACE RIT.
2. Work covered by the agreement must be scoped so that Federal funds provided for design of the project are sufficient to cover all Corps' costs and reimbursements under the agreement. Although design will be undertaken by the non-Federal sponsor, the Corps remains responsible for ensuring completion of any environmental compliance activities that may be conducted during design of the Project.
3. Authority to approve an agreement that does not deviate from the approved model has been delegated to the MSC 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 MSC Commander. Division Counsel concurrence that a deviation is non-substantive, with the recommendation to approved the deviation, is required prior to approval by the MSC 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 MSC 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 option, including language for the agreement, is addresses in the Attachment.
 - a. Option 1: Multiple Sponsors (page A-1).
5. Reminder: Make all required insertions; 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; 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., Huntington 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 Government is authorized to provide design assistance for publicly owned, non-Federal water-related environmental infrastructure and resource protection and development projects in Southern West Virginia, including projects for wastewater treatment and related facilities, water supply, storage, treatment, and distribution facilities, and surface water resource protection and development pursuant to Section 340 of the Water Resources Development Act of 1992, Public Law 102-580, as amended (hereinafter “Section 340”);

WHEREAS, the District Commander has determined that the non-Federal **[FULL NAME OF THE PROJECT]** in **[SPECIFY LOCATION OF THE PROJECT, INCLUDING CITY, COUNTY & STATE]** (hereinafter the “Project”, as defined in Article I.A. of this Agreement) is eligible for design assistance under Section 340;

WHEREAS, Section 340(c)(3) provides that the Federal share of design costs under each agreement entered into under Section 340 shall be 75 percent, which may be in the form of reimbursements;

WHEREAS, as of the effective date of this Agreement, the total amount of Federal funds available for the Federal share of design costs under this Agreement is \$[_____]; 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 “Project” means **[DESCRIBE FEATURES]**, as generally described in the **[INSERT NAME OF DECISION DOCUMENT: e.g., Decision Document for Design of the Chattaroy Sanitary Sewer Service Extension and Rehabilitation Project, in Mingo County in the Town of Chattaroy, West Virginia]** dated **[MONTH DAY, YEAR]** and approved by the **[INSERT Division Commander, e.g., for Great Lakes and Ohio River Division or District Commander, e.g., for Huntington District, if such approval authority has been delegated to the District Commander]**, on **[MONTH DAY, YEAR]**.

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 the Project and cost shared. The term includes, but is not necessarily limited to: the Non-Federal Sponsor’s eligible pre-Agreement design work costs, if any; the Government’s costs for conducting environmental compliance activities, if any, providing management oversight and technical assistance, as needed, preparing monthly financial reports, reviewing design work, appraisals, and invoices provided by the Non-Federal Sponsor, and any other costs incurred by the Government pursuant to the provisions of this Agreement; and the Non-Federal Sponsor’s eligible costs of engineering, design, permit work, and supervision and administration. The term does not include any costs for dispute resolution; audits; betterments; or the Non-Federal Sponsor’s cost of negotiating this Agreement.

C. The term “pre-Agreement design work” means the design work performed prior to the effective date of this Agreement by the Non-Federal Sponsor that the Government determines was accomplished in a satisfactory manner and is necessary for the Project.

D. The term “betterment” means a difference in the design of an element 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 that element.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. As of the effective date of this Agreement, the total amount of Federal funds available for the Federal share of design costs under this Agreement is limited to **[\$[INSERT SAME AMOUNT IN FOURTH WHEREAS CLAUSE]]**. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall be responsible for all costs in excess of this amount, as determined by the Government, and such excess costs shall not be eligible for credit or reimbursement or included in the design costs for cost-sharing purposes.

B. The Non-Federal Sponsor shall design the Project in accordance with all requirements of applicable Federal laws and implementing regulations and the following:

1. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all design work, including relevant plans and specifications, and related contract solicitations, prior to the Non-Federal Sponsor's issuance of such solicitations.

2. The Non-Federal Sponsor shall obtain all permits and licenses necessary for design of the Project.

3. The Non-Federal Sponsor shall establish and maintain such legal and institutional structures as necessary to ensure the effective long-term operation of the Project at no cost to the Government.

4. The Non-Federal Sponsor shall be responsible for undertaking any investigations 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 required for the Project.

5. Upon completion of design, the Non-Federal Sponsor shall furnish the Government with copies of the completed design.

6. No more frequently than every 30 calendar days, the Non-Federal Sponsor shall provide the Government an invoice with the documentation required by Article III for the Government to determine whether costs incurred by the Non-Federal Sponsor are eligible for inclusion in design costs. If the Non-Federal Sponsor incurred costs for pre-Agreement design work, documentation of such costs shall be included in the Non-Federal Sponsor's initial invoice. No later than 60 calendar days after completing design of the Project, the Non-Federal Sponsor shall provide its final invoice to the Government, unless an extension is requested by Non-Federal Sponsor in writing and approved by the Government.

C. Using information developed and provided by the Non-Federal Sponsor, the Government is responsible for ensuring completion of any environmental compliance activities that may be conducted during design of the Project. The Government will notify the Non-Federal Sponsor in writing of any such compliance completed under this Agreement.

D. The Government may provide technical assistance to the Non-Federal Sponsor on an as-needed basis during design of the Project.

E. The Government shall be responsible for 75 percent of design costs, with reimbursement for costs incurred by the Non-Federal sponsor determined in accordance with this paragraph. The Government shall review each invoice provided by the Non-Federal Sponsor and, based on the procedures, requirements, and conditions provided in Article III, shall determine the costs, or portion thereof, that are eligible for inclusion in design costs. To the maximum extent practicable, within 30 days of receipt of each invoice, the Government, subject to the availability of Federal funds, shall reimburse the Non-Federal Sponsor for costs for each invoice by taking 75 percent of the Non-Federal Sponsor's eligible costs, less 25 percent of the costs incurred by the Government during that same invoice period. The Government shall

provide a written explanation to the Non-Federal Sponsor for costs it determines are not eligible for inclusion in design costs.

F. 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 design of the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share for such work.

G. The Non-Federal Sponsor and the Government, in consultation with appropriate Federal and State officials, shall develop a facilities or resource protection and development plan, including appropriate engineering plans and specifications.

H. In the event that the Non-Federal Sponsor elects to include betterments in the design of the Project, the Non-Federal Sponsor shall notify the Government in writing and describe the betterments it intends to design. The Non-Federal Sponsor shall be solely responsible for all costs due to betterments, including costs associated with obtaining permits for such work, without reimbursement by the Government.

ARTICLE III - VALUE OF DESIGN AND PERMIT WORK

A. The Government and the Non-Federal Sponsor agree that the amount of costs eligible for inclusion in the design costs shall be determined in accordance with the following procedures, requirements, and conditions and shall be subject to audit in accordance with Article VIII.B. to determine reasonableness, allocability, and allowability of costs.

B. Design Work. The Government shall include in design costs the value of the design work performed by the Non-Federal Sponsor after the effective date of this Agreement, and the value of pre-Agreement design work, if any, pursuant to the provisions of this paragraph.

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 design work. Such costs shall include, but not necessarily be limited to, actual costs for performing engineering and design, and supervision and administration. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Where the Non-Federal Sponsor's cost for completed pre-Agreement design work is expressed as fixed costs plus a percentage of estimated Project costs, the Non-Federal Sponsor shall renegotiate such costs with its contractor based on actual costs.

2. The following costs are not eligible for inclusion in design costs: costs for interest charges, or any adjustment to reflect changes in price levels between the time the design work is completed; for any pre-Agreement design work costs previously reimbursed under another agreement; for all pre-Agreement design work costs in excess of 6 percent of estimated Project costs; for costs that exceed the Government's estimate of the cost for such design work; or for the costs of design work obtained at no cost to the Non-Federal Sponsor.

C. Permit Work. The Government shall include in design costs the value of permit work performed by the Non-Federal Sponsor after the effective date of this Agreement. The value shall be equivalent to the direct costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in obtaining all permits and licenses necessary for design of the Project. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees involved in obtaining such permits.

ARTICLE IV - ACCOUNTING

A. As of the effective date of this Agreement, design costs are projected to be \$_____, with the amount of Federal funds available for such work limited to \$_____ **[INSERT AMOUNT OF FEDERAL FUNDS AVAILABLE FOR THE PROJECT]**. The Non-Federal Sponsor's share of design costs are projected to be \$_____. Costs to be incurred by the Government are projected to be \$_____. Costs to be incurred by the Non-Federal Sponsor are projected to be \$_____, which includes eligible design work projected to be \$_____, consisting of eligible design work after the effective date of this Agreement projected to be \$_____ and eligible pre-Agreement design work projected to be \$_____, and eligible permit work projected to be \$_____. Reimbursements pursuant to Article II.E. for eligible costs incurred by the Non-Federal Sponsor are projected to be \$_____. 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. The Government shall provide the Non-Federal Sponsor with monthly financial 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 to date; costs incurred by the Non-Federal Sponsor to date; the total amount of reimbursements made to the Non-Federal Sponsor to date; and the balance of the Federal funds available for design of the Project.

C. After the Non-Federal Sponsor has provided its final invoice to the Government, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. As a part of the final accounting, the Government will determine the total reimbursable amount by taking 75 percent of the eligible costs incurred by the Non-Federal Sponsor, less 25 percent of the costs incurred by the Government for design of the Project. Should the final accounting determine that funds in excess of the total reimbursable amount have been reimbursed to 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 excess reimbursement by delivering a check payable to "FAO, USAED, **[INSERT DISTRICT AND EROC CODE, e.g., Huntington (H1)]**" 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 reimbursements provided to the Non-Federal Sponsor are less than the total reimbursable amount, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for the amount equal to such difference.

ARTICLE V - TERMINATION OR SUSPENSION

If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate this Agreement. If the Government determines that the Federal funds available for design of the Project will be exhausted prior to completion of such design, the Government shall notify the Non-Federal Sponsor and the Non-Federal Sponsor may continue with design of the Project, at no cost to the Government and with no further participation in the Project by the Government.

ARTICLE VI - HOLD AND SAVE

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

ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to 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 VIII - 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 IX - 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 X - 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
[NAME OF USACE 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 XI - 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 XII - 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: Multiple Non-Federal Sponsors.

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

Delete the “and” at the end of the fourth WHEREAS clause and insert the following WHEREAS clauses after the fourth 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 **[Name of State]** 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 increment of work; and”