

AMENDMENT NO. 2  
TO  
DESIGN AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
ALABAMA STATE PORT AUTHORITY  
FOR DESIGN OF THE  
MOBILE HARBOR CHANNEL WIDENING  
LIMITED REEVALUATION REPORT

This Amendment No. 2 is entered into this 9<sup>th</sup> day of NOVEMBER, 2015, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Mobile District (hereinafter the "District Engineer") and the Alabama State Port Authority (hereinafter the "Non-Federal Sponsor"), represented by its Director.

WITNESSETH, THAT:

WHEREAS, on August 14, 2012, the Government and the Non-Federal Sponsor entered into an agreement for preparation of a Limited Reevaluation Report for the Mobile Harbor Channel Widening Project (hereinafter the "Agreement");

WHEREAS, on May 2, 2014, the Government and the Non-Federal Sponsor entered into Amendment No. 1 to the Agreement to include evaluation of an additional segment of the channel to obtain the most benefit from widening; and

WHEREAS, Section 110 of the Consolidated and Further Continuing Appropriations Act, 2015 requires the limited reevaluation report initiated in fiscal year 2012 for the Mobile Harbor, Alabama navigation project to include evaluation of the full depth of the project as authorized under Section 201 of the Water Resources Development Act of 1986, Public Law 99-662, at the same non-Federal cost share as in the design agreement executed on August 14, 2012.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree to further amend the Agreement as follows:

1. The following is added after the fourth WHEREAS clause:

"WHEREAS, Section 110 of the Consolidated and Further Continuing Appropriations Act, 2015 requires the limited reevaluation report initiated in fiscal year 2012 for the Mobile Harbor, Alabama navigation project to include evaluation of the full depth of the project as authorized under Section 201 of the Water Resources Development Act of 1986, Public Law 99-662, at the same non-Federal cost share as in the design agreement executed on August 14, 2012;"

2. Article I.A. is amended by striking the current paragraph and replacing it with the following:

“The term “*Project*” shall mean preparation of a Limited Reevaluation Report (LRR) for widening and deepening of the Mobile Harbor Navigation Channel up to the authorized widths and depths, as generally described in the Report of the Chief of Engineers, dated November, 18, 1981.”

3. Article IV.A.1. is amended by striking the current paragraph and replacing it with the following:

“As of the effective date of this Agreement, *total design costs* are projected to be \$7,800,000; the Non-Federal Sponsor’s contribution of funds required by Article II.B.1. of this Agreement is projected to be \$1,870,000; the *non-Federal proportionate share* is projected to be 25 percent; and the Government’s total financial obligations to be incurred for additional work and the Non-Federal Sponsor’s contribution of funds for such costs required by Article II.E. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.”

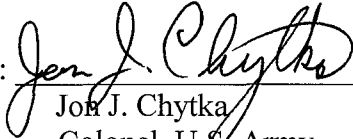
4. All other terms and conditions of the Agreement, as amended, remain unchanged.

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

DEPARTMENT OF THE ARMY

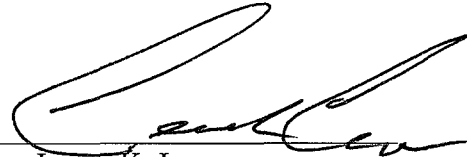
THE ALABAMA STATE PORT AUTHORITY

BY:



Jon J. Chytka  
Colonel, U.S. Army  
District Engineer

BY:



James K. Lyons  
Director

DATE: 9 NOVEMBER, 2015

DATE: OCTOBER 30, 2015

AMENDMENT NO. 1  
TO  
DESIGN AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
ALABAMA STATE PORT AUTHORITY  
FOR  
DESIGN  
OF THE  
MOBILE HARBOR CHANNEL WIDENING  
LIMITED REEVALUATION REPORT

THIS AMENDMENT NO. 1 is entered into this 2<sup>ND</sup> day of MAY, 2014, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Mobile District (hereinafter the "District Engineer"), and the Alabama State Port Authority (hereinafter the "Non-Federal Sponsor"), represented by its Acting Director.

WITNESSETH, THAT:

WHEREAS, on August 14, 2012, the Government and the Non-Federal Sponsor entered into an agreement for the preparation of a Limited Reevaluation Report for the Mobile Harbor Channel Widening Project (hereinafter the "Agreement");

WHEREAS, the Government and the Non-Federal Sponsor concluded that the Limited Reevaluation Report should include evaluation of an additional segment of the channel to obtain the most benefit from widening;

WHEREAS, this additional segment of the channel is within the authorization in Section 201 of the Water Resources Development Act of 1986, Public Law 99-662, for the Mobile Harbor Navigation Project at Mobile, Alabama; and

WHEREAS, the Government and Non-Federal Sponsor desire to amend the Agreement to include evaluation of the addition channel segment in the Limited Reevaluation Report and update the costs accordingly.

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

1. The fifth WHEREAS clause is amended by replacing "Project Cooperation Agreement" with "Project Partnership Agreement" in both locations.
2. Article I.A. is amended by striking the current paragraph and replacing it with the following:

“The term “*Project*” shall mean preparation of a Limited Reevaluation Report (LRR) for widening of the Mobile Harbor Navigation Channel up to the authorized widths, as generally described in the Report of the Chief of Engineers, dated November 18, 1981.

3. Article I.B. is amended by striking the current paragraph and replacing it with the following:

“The term “*total design costs*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to design of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s costs of engineering and design, economic and environmental analyses, and evaluation performed after a feasibility report whether performed prior to or after the effective date of this Agreement that were not previously shared with a non-Federal interest pursuant to any other agreement; the Government’s costs of review processes required by the Government; the Government’s costs of Independent External Peer Review, if required, except for the costs of any contract for an Independent External Peer Review Panel; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Design Coordination Team in accordance with Article III of this Agreement; the Government’s costs of contract dispute settlements or awards; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article VII.B. and Article VII.C. of this Agreement. The term does not include any costs of additional work under Article II.E. of this Agreement; any costs of dispute resolution under Article V of this Agreement; any costs incurred as part of reconnaissance studies for the *Project*; any costs incurred as part of feasibility studies under any other agreement for the *Project*; the Non-Federal Sponsor’s costs of negotiating this Agreement; or any costs of negotiating a project partnership agreement for the *Project* or separable element thereof.”

4. Article I.C. is amended by replacing “Project Cooperation Agreement” with “Project Partnership Agreement”.

5. Article II.A. is amended by deleting paragraph 7. in its entirety.

6. Article II.F., Article II.F.1., Article II.F.2., Article II.F.3., and Article II.G. are amended by replacing “Project Cooperation Agreement” with “Project Partnership Agreement”.

7. Article IV.A.1. is amended by striking the current paragraph and replacing it with the following:

“As of the effective date of this Agreement, *total design costs* are projected to be \$1,806,667; the Non-Federal Sponsor’s contribution of funds required by Article II.B.1. of this Agreement is projected to be \$451,667; the *non-Federal proportionate share* is projected to be 25 percent; and the Government’s total financial obligations to be incurred for additional work and the Non-Federal Sponsor’s contribution of funds for such costs required by Article II.E. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.”

8. Article IV.C.2. is amended by replacing "Project Cooperation Agreement" with "Project Partnership Agreement".

9. Article IV.D.3.b. is amended by replacing "Project Cooperation Agreement" with "Project Partnership Agreement".

10. All other terms and conditions of the Agreement remain unchanged.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 1 to the Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

ALABAMA STATE PORT AUTHORITY

BY: 

Jon J. Chytko  
Colonel, U.S. Army  
District Commander

BY: 

James K. Lyons  
Director

DATE: 5/2/14

DATE: 4/14/14

DESIGN AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
ALABAMA STATE PORT AUTHORITY  
FOR  
DESIGN  
OF THE  
MOBILE HARBOR CHANNEL WIDENING  
LIMITED REEVALUATION REPORT

THIS AGREEMENT is entered into this 14<sup>TH</sup> day of AUG, 2012, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Mobile District and the Alabama State Port Authority (hereinafter the "Non-Federal Sponsor"), represented by it's Acting Director.

WITNESSETH, THAT:

WHEREAS, Federal Construction, General funds for Fiscal Year 12, included funds for the Government to initiate design of the Mobile Harbor Navigation Project (hereinafter the "Parent Project") at Mobile, Alabama;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the "Agreement") for the provision of design for and preparation of a Limited Reevaluation Report (LRR) for the Mobile Harbor Channel Widening (an element of the Parent Project and hereinafter the "*Project*", as defined in Article I.A. of this Agreement);

WHEREAS, construction or implementation of the *Project* is authorized by Section 201 of the Water Resources Development Act of 1986, Public Law 99-662 ;

WHEREAS, Section 105(c) of the Water Resources Development Act of 1986, Public Law 99-662 (33 U.S.C. 2215), provides that the costs of design of a water resources project shall be shared in the same percentage as the purposes of such project;

WHEREAS, the Government and the Non-Federal Sponsor agree that, during the *period of design*, the Non-Federal Sponsor shall contribute 25 percent of *total design costs* and that, if a Project Cooperation Agreement for construction of the *Project* is executed between the Government and a non-Federal interest, such non-Federal interest shall contribute any remaining

portion of the non-Federal share of the costs of design in accordance with the provisions of such Project Cooperation Agreement;

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

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful design and implementation of the *Project*.

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

#### ARTICLE I - DEFINITIONS

A. The term "*Project*" shall mean preparation of a Limited Reevaluation Report (LRR) for widening of approximately 4.2 miles of the Bay Channel up to the authorized width of 650 feet \_\_\_\_\_ as generally described in the Report of The Chief of Engineers, dated 18 November, 1981.

B. The term "*total design costs*" shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to design of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government's costs of engineering and design, economic and environmental analyses, and evaluation performed after a feasibility report whether performed prior to or after the effective date of this Agreement that were not previously shared with a non-Federal interest pursuant to any other agreement; the Government's supervision and administration costs; the Non-Federal Sponsor's and the Government's costs of participation in the Design Coordination Team in accordance with Article III of this Agreement; the Government's costs of contract dispute settlements or awards; and the Non-Federal Sponsor's and the Government's costs of audit in accordance with Article VII.B. and Article VII.C. of this Agreement. The term does not include any costs of additional work under Article II.E. of this Agreement; any costs of dispute resolution under Article V of this Agreement; any costs incurred as part of reconnaissance studies for the *Project*; any costs incurred as part of feasibility studies under any other agreement for the *Project*; the Non-Federal Sponsor's costs of negotiating this Agreement; or any costs of negotiating a project cooperation agreement for the *Project* or separable element thereof.

C. The term "*period of design*" shall mean the time from the effective date of this Agreement to the date that a Project Cooperation Agreement for construction of the *Project*, or a

separable element thereof, is executed between the Government and a non-Federal interest or the date that this Agreement is terminated in accordance with Article X of this Agreement, whichever is earlier.

D. The term “*financial obligations for design*” shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total design costs*.

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

F. The term “*betterment*” shall mean 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 the design of that element. The term does not include any design for features not included in the *Project* as defined in paragraph A. of this Article.

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

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

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

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) and using those funds and funds provided by the Non-Federal Sponsor, expeditiously shall design the *Project*, applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

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

2. To the extent possible, the Government shall design the *Project* in accordance with the Project Management Plan for the *Project* developed and updated as required by the Government after consultation with the Non-Federal Sponsor.

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



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

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

5. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all design products that are developed by contract or by Government personnel during the *period of design*. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the final approval of all design products shall be exclusively within the control of the Government.

6. Notwithstanding paragraph A.4. of this Article, if the award of any contract for design of the *Project*, or continuation of design of the *Project* using the Government's own forces, would result in *total design costs* exceeding \$1,066,667, the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for design of the *Project*, and continuation of design of the *Project* using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Project* or the continuation of design of the *Project* using the Government's own forces, but in no event shall the award of contracts or the continuation of design of the *Project* using the Government's own forces be deferred for more than three years. Notwithstanding this general provision for deferral, in the event the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of design of the *Project* using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts, or continue with design of the *Project* using the Government's own forces.

7. As of the effective date of this Agreement, \$\_\_\_\_\_ of Federal funds for design and construction have been provided by Congress for the Parent Project of which \$800,000 is currently projected to be available for the *Project*. The Government makes no

commitment to request Congress to provide additional Federal funds for the Parent Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

B. The Non-Federal Sponsor shall contribute 25 percent of *total design costs* in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall provide funds in accordance with Article IV.B. of this Agreement in the amount necessary to meet the Non-Federal Sponsor's share of 25 percent of *total design costs* if the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement will be less than such share.

2. The Government, subject to the availability of funds, shall refund or reimburse to the Non-Federal Sponsor any contributions in excess of 25 percent of *total design costs* if the Government determines at any time that the collective value of the following contributions has exceeded 25 percent of *total design costs*: (a) the value of the Non-Federal Sponsor's contributions under paragraph B.1. of this Article; and (b) the value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement.

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

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

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

1. Inclusion of *betterments* in the design of the general navigation features of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of designing the general navigation features of the *Project* that include *betterments* between *total design costs* and the costs of the additional work.

2. Design of local service facilities in connection with design of the general navigation features of the *Project*.

3. Design of a dredged or excavated material disposal facility necessary for the *Project* to provide additional capacity for dredged or excavated material from outside the general navigation features of the *Project*. In the event the Government elects to include such capacity, the Government shall allocate the costs of designing the dredged or excavated material disposal facility between *total design costs* and the costs of the additional work.

F. If the Government and a non-Federal interest enter into a Project Cooperation Agreement for construction of the *Project*, or a separable element thereof, the Government, in accordance with the provisions of this paragraph, shall include the amount of *total design costs* in total cost of construction of the general navigation features for the *Project*, or separable element thereof. Further, the Government, in accordance with the provisions of this paragraph, shall afford credit toward the non-Federal interest's share of total cost of construction of the general navigation features for the *Project*, or separable element thereof, for the Non-Federal Sponsor's contributions toward *total design costs* under this Agreement.

1. If the Government and a non-Federal interest enter into a Project Cooperation Agreement for construction of the entire *Project*, the Government shall include the amount of *total design costs* in total cost of construction of the general navigation features for the *Project*. Further, the Government shall afford credit toward the non-Federal interest's share of total cost of construction of the general navigation features for the Non-Federal Sponsor's contributions toward *total design costs*, including any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement that was not refunded or reimbursed by the Government.

2. If the Government and a non-Federal interest enter into a Project Cooperation Agreement for construction of a separable element of the *Project*, the Government shall determine the portion of *total design costs* that are allocable to such separable element and include such amount in total cost of construction of the general navigation features for such separable element. Further, the Government shall determine the amount of the Non-Federal Sponsor's contributions toward *total design costs*, including any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement that was not refunded or reimbursed by the Government, that are allocable or attributable to such separable element and shall afford credit for such amount toward the non-Federal interest's share of total cost of construction of the general navigation features of such separable element.

3. If the Government and a non-Federal interest do not enter into a Project Cooperation Agreement for construction of the *Project* or a separable element thereof, the Government shall not be obligated to refund or reimburse the Non-Federal Sponsor, in whole or in part, for the Non-Federal Sponsor's 25 percent contribution of *total design costs*. Further, refund or reimbursement by the Government for any excess amount determined in accordance with Article IV.C.2. or Article IV.D.3.b. of this Agreement is subject to the availability of funds.

4. Notwithstanding any other provision of Article II.F. of this Agreement, any amount credited for the value of the Non-Federal Sponsor's contributions toward *total design costs* provided in accordance with Articles III and VII of this Agreement shall not be applied toward the 5 percent cash share required by Section 103(a)(1) (A) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(a)(1)(A)).

G. This Agreement shall not be construed as obligating either party to seek funds for, or to participate in, construction or implementation of the *Project* or a separable element thereof or as relieving the Non-Federal Sponsor of any future obligation under the terms of any Project Cooperation Agreement.

### ARTICLE III - DESIGN COORDINATION TEAM

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

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

C. Until the end of the *period of design*, the Design Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; scheduling of reports and work products; plans and specifications; real property and relocation requirements for construction of the *Project*; design contract awards and modifications; design contract costs; the Government's cost projections; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

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

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

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

#### ARTICLE IV - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, and the contributions provided by the parties.

1. As of the effective date of this Agreement, *total design costs* are projected to be \$1,066,667; the Non-Federal Sponsor's contribution of funds required by Article II.B.1. of this Agreement is projected to be \$266,667; the *non-Federal proportionate share* is projected to be 25 percent; and the Government's total financial obligations to be incurred for additional work and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.E. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By September 1, 2012 and by each quarterly anniversary thereof until the conclusion of the *period of design* and resolution of all relevant claims and appeals, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total design costs*; the Non-Federal Sponsor's total contribution of funds required by Article II.B.1. of this Agreement; the *non-Federal proportionate share*; and the Government's total financial obligations to be incurred for additional work and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.E. of this Agreement.

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

1. Not less than 45 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for design of the *Project* or commencement of design of the *Project* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet its projected share under Article II.B.1. of this Agreement. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, Mobile District" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for such required funds, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the *non-Federal proportionate share of financial obligations for design* incurred prior to the commencement of the *period of design*; and (b) the *non-Federal proportionate share of financial obligations for design as financial obligations for design* are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 60 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

C. Upon conclusion of the *period of design* and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total design costs*. In addition, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Non-Federal Sponsor's total required share of *total design costs* exceeds the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Mobile District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for *total design costs* exceed the Non-Federal Sponsor's total required share thereof, the Government, subject to the availability of funds, shall refund or reimburse the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund or reimbursement and funds are not available to refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or reimbursement. If such appropriations are not received or, if the Non-Federal Sponsor requests that the Government not refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall apply the excess amount toward the share of total cost of construction of the general navigation features for the *Project* that is required of the non-Federal interest executing a Project Cooperation Agreement or agreements for the *Project* or separable element thereof in accordance with Article II.F. of this Agreement.

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

1. Not less than 60 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

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

a. Should the interim or final accounting, as applicable, show that the total obligations for additional work exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Mobile District" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund. If such appropriations are not received or, if the Non-Federal Sponsor requests that the Government not refund the excess amount to the Non-Federal Sponsor, the Government shall apply the excess amount toward the share of total cost of construction of the general navigation features for the *Project* that is required of the non-Federal interest executing a Project Cooperation Agreement or agreements for the *Project* or separable element thereof in accordance with Article II.F. of this Agreement.

#### ARTICLE V - DISPUTE RESOLUTION

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

#### ARTICLE VI – HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design of the *Project* and design of any additional work pursuant to Article II.E. of this Agreement, except for damages due to the fault or negligence of the Government or its contractors.

#### ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-



Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

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

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

#### ARTICLE VIII - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto and Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

#### ARTICLE IX - RELATIONSHIP OF PARTIES

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

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

## ARTICLE X - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of design of the *Project* 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. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total design costs* that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, future performance under this Agreement shall be suspended. Such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total design costs* the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event the Government determines that modifications to the *Project* are required and that additional authorization by Congress will be required before the Government may construct such modifications, the Government shall notify the Non-Federal Sponsor in writing of such determinations and shall terminate this Agreement.

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

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

## ARTICLE XI - NOTICES

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

If to the Non-Federal Sponsor:

Director  
Alabama State Port Authority  
250 N. Water Street  
Mobile, Alabama 36602

If to the Government:

District Engineer  
US Army Corps of Engineers, Mobile District  
Post Office Box 2288  
Mobile, Alabama 36628-0001

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

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

## ARTICLE XII - 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 XIII - 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 Engineer.

DEPARTMENT OF THE ARMY      THE ALABAMA STATE PORT

AUTHORITY

BY: Steven J. Roemhildt  
STEVEN ROEMHILDT, P.E.  
Colonel, U.S. Army  
District Engineer

BY: H.S. Thorne  
H.S. "SMITTY" THORNE  
Acting Director

DATE: 14 AUG 2012

DATE: 8/14/12