

DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
ALABAMA STATE PORT AUTHORITY
FOR
DESIGN
FOR THE
MOBILE HARBOR, ALABAMA PROJECT

THIS AGREEMENT is entered into this 2nd day of OCT, 2017 by and between the Department of the Army (hereinafter the "Government"), represented by the District Commander for the Mobile District (hereinafter the "District Commander") and the Alabama State Port Authority (hereinafter the "Non-Federal Sponsor"), represented by its Director and Chief Executive Officer.

WITNESSETH, THAT:

WHEREAS, Federal funds were provided in the FY 2019 Work Plan to initiate design of the channel deepening and widening of Mobile Harbor, Alabama;

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

WHEREAS, Section 101 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2211), specifies the cost-sharing requirements applicable to construction of the Project, and Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215), provides that the costs of design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project's primary project purpose of commercial navigation, the parties agree that the Non-Federal Sponsor shall contribute 25 percent of the total design costs under this Agreement;

WHEREAS, pursuant to Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)), the Non-Federal Sponsor may perform or provide in-kind contributions for credit towards the non-Federal share of the total design costs; and

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

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" means deepen the existing Bar, Bay, and River Channels (south of station 226+16) to a depth of 50 feet, with an additional 2 feet for entrance channel wave allowances and an additional 2 feet for advanced maintenance plus 2 feet of allowable overdepth for dredging (with total depths of 56, 54, and 54 feet, respectively); incorporate minor bend easings at the double bends (at stations 1857+00 and 1775+26) in the Bar Channel approach to the Bay Channel; widen the Bay Channel from 400 feet to 500 feet at a depth of 50 feet (with an additional 2 feet for advanced maintenance plus 2 feet of allowable overdepth for dredging (with total depths of 54 feet) from the mouth of Mobile Bay northward for 3 nautical miles to provide a two-way traffic area for passing; and expand the Choctaw Pass Turning Basin 250 feet to the south at a depth of 50 feet with an additional 4 feet for advanced maintenance plus 2 feet of allowable overdepth for dredging (total depth of 56 feet) to better accommodate safe turning of the design vessel and other large vessels, as generally described in the Mobile Harbor, Mobile, Alabama Integrated General Reevaluation Report With Supplemental Environmental Impact Statement, dated May 2019 and approved by the Division Commander for the South Atlantic Division on September 6, 2019.

B. The term "Design" means perform detailed pre-construction engineering and design, including, but limited to, conducting final ship simulation, geotechnical investigation, and sediment testing; preparation of plans and specifications for the initial construction contract; and obtaining water quality certification, concurrence with the coastal zone management consistency determination, Ocean Dredged Material Disposal Site designation, and section 103 evaluation permits for the Project.

C. The term "total design costs" means the sum of all costs that are directly related to the Design and cost shared in accordance with the terms of this Agreement. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government's costs for engineering and design, economic and environmental analyses, and evaluation; for contract dispute settlements or awards; for supervision and administration; for Agency Technical Review and other review processes required by the Government; for response to any required Independent External Peer Review; and the Non-Federal Sponsor's creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; participation in the Design Coordination Team; audits; an Independent External Peer Review panel, if required; or betterments; or the Non-Federal Sponsor's cost of negotiating this Agreement.

D. The term "in-kind contributions" means those materials or services provided by the Non-Federal Sponsor that are identified as being integral to design of the Project by the Division Commander for the South Atlantic Division. To be integral, the material or service must be part of the work that the Government would otherwise have undertaken for design of the Project. In-kind contributions also include any investigations performed by the Non-Federal Sponsor to identify the existence and extent of any hazardous substances that may exist in, on, or under real property interests required for the Project.

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

F. The term “betterment” means a difference in the design of a portion 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 portion.

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

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Design using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. The Non-Federal Sponsor shall perform or provide any in-kind contributions in accordance with applicable Federal laws, regulations, and policies. If the Government and non-Federal interest enter into a Project Partnership Agreement for construction of the Project, the Government shall include the total design costs in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

B. The Non-Federal Sponsor shall contribute 25 percent of total design costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

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

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

C. The Government shall credit towards the Non-Federal Sponsor’s share of total design costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in providing or performing in-kind contributions integral to the Design, including associated supervision and administration. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar 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 the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; for any items provided or performed prior to the effective date of this Agreement unless covered by an In-Kind Memorandum of Understanding; for any items not identified as integral in the integral determination report; or for costs that exceed the Government's estimate of the cost for such item if it had been performed by the Government.

3. No reimbursement will be provided for any in-kind contributions that exceed the Non-Federal Sponsor's share of the total design costs under this Agreement. As provided in Article II.A., total design costs, including credit for in-kind contributions, shall be included in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

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

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

F. Except as provided in paragraph C. of this Article, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

G. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Title VI of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

H. If Independent External Peer Review (IEPR) is required for the Design, the Government shall conduct such review in accordance with Federal laws, regulations, and policies. The Government's costs for an IEPR panel shall not be included in the total design costs.

I. In addition to the ongoing, regular discussions of the parties in the delivery of the Design, the Government and the Non-Federal Sponsor may establish a Design Coordination Team consisting of Government's Project Manager and the Non-Federal Sponsor's counterpart and one senior representative each from the Government and Non-Federal Sponsor to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be included in the total design costs. The Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be paid solely by the Non-Federal Sponsor without reimbursement or credit.

J. 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 for the South Atlantic Division. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article III.F., must provide funds sufficient to cover the costs of such work in advance of the Government performing the work.

ARTICLE III - METHOD OF PAYMENT

A. As of the effective date of this Agreement, total design costs are projected to be \$3,433,300, with the Government's share of such costs projected to be \$2,575,000, the Non-Federal Sponsor's share of such costs projected to be \$858,300; and the costs for betterments are projected to be \$0. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

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

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, Mobile (K5)" to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an

Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

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

E. Upon conclusion of the Design and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsor, apply the excess amount towards the non-Federal share of the cost of construction of the Project in the event a Project Partnership Agreement is executed for the Project. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of total design costs, including contract claims or any other liability that may become known after the final accounting.

F. Payment of Costs for Betterments Provided on Behalf of the Non-Federal Sponsor. No later than 30 calendar days after receiving written notice from the Government of the amount of funds required to cover any such costs, as applicable, 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, Mobile (K5)" 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 any such costs, as applicable, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government.

ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate Design unless the Assistant Secretary of the Army (Civil Works) determines that continuation of the Design is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government determines at any time that the Federal funds made available for the Design are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing, and upon exhaustion of such funds, the Government shall suspend Design until there are sufficient Federal funds appropriated by the Congress and funds provided by the Non-Federal Sponsor to allow Design to resume.

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

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

ARTICLE V – HOLD AND SAVE

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

ARTICLE VI - DISPUTE RESOLUTION

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

ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall

assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Design. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Design shall not be included in total 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 certified mail, with return receipt, 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 Commander
U.S. Army Corps of Engineers, Mobile District
Post Office Box 2288
Mobile, Alabama 36628-0001

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

ARTICLE X - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XI - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

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

DEPARTMENT OF THE ARMY

ALABAMA STATE PORT
AUTHORITY

BY: 
SEBASTIEN P. JOLY
Colonel, U.S. Army
District Commander

BY: 
JAMES LYONS
Director and Chief Executive Officer

DATE: 10/02/19

DATE: 09/25/19

CERTIFICATE OF AUTHORITY

I, Steve Marshall, do hereby certify that I am the principal legal officer for the Alabama State Port Authority, that the Alabama State Port Authority is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the Alabama State Port Authority in connection with the design for the deepening and widening of the Mobile Harbor, Alabama Project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the person who executed this Agreement on behalf of the Alabama State Port Authority acted within his statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
1st day of October 2019.

A handwritten signature in blue ink that reads "Steve Marshall". The signature is written in a cursive style and is positioned above a horizontal line.

STEVE MARSHALL
Attorney General
State of Alabama

CERTIFICATION REGARDING LOBBYING

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

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

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

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

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



JAMES LYONS
Director and Chief Executive Officer
Alabama State Port Authority