

APPENDIX A

MODEL AGREEMENT
UNDER SECTION 204(e) (Operation and Maintenance)
OF PUBLIC LAW 99-662
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[THE NON-FEDERAL INTEREST]
FOR FEDERAL ASSUMPTION OF THE
OPERATION AND MAINTENANCE OF
[NAME OF PROJECT]

THIS AGREEMENT entered into this _____ day of 19__, by and between the United States of America (hereinafter referred to as the "GOVERNMENT") represented by the Assistant Secretary of the Army (Civil Works), and name of non-Federal Interest (hereinafter referred to as the "[local sponsor]"); (Throughout this document the term "local sponsor" is included in square brackets. This is to indicate that this phrase can be replaced by either an abbreviated name for the non-Federal interest such as the "City" or the "Port" or by the term "local sponsor.")

WHEREAS, Section 204(e) of the Water Resources Development Act of 1986 (WRDA 1986) (33 U.S.C. Section 2232(e)) authorizes the Secretary of the Army, subject to certain limitations contained therein, to assume responsibility for the operation and maintenance of a navigation project that is constructed by non-Federal interests pursuant to Section 204 of WRDA 1986; and

WHEREAS, the [local sponsor] has proposed to construct [name and location of project]; and

WHEREAS, the Assistant Secretary of the Army (Civil Works) has determined that the improvements are economically justified, environmentally acceptable, and consistent with the purposes of Title II of WRDA 1986.

NOW THEREFORE, it is agreed between the Government and the [local sponsor] that:

Article 1 - Definitions.

For purposes of this Agreement:

¹- Throughout this document the term "local sponsor" is included in square brackets. This is to indicate that this phrase can be replaced by either an abbreviated name for the non-Federal interest such as the "City" or the "Port" or by the term "local sponsor."

ER 1165-2-124
1 Oct 90

The term "general navigation features of the project" shall mean the following project features assigned to commercial navigation: [here describe the work to be performed which will be subject to Operation and Maintenance by the government, e.g., "dredging to a depth of 40 feet below the mean low water a channel from x to x ..."]

Article 2 - Project--Construction.

(Describe the construction (all features) to be performed by the local sponsor).

Article 3 - Review of Designs, Detailed Plans and Specifications, and Arrangements for Prosecution of the Work.

No construction shall commence under this Agreement until the designs, detailed plans and specifications, and arrangements for the prosecution of the work have been approved by the Secretary of the Army. The Commander, U.S. Army District _____ shall ensure that all required Federal, State, regional, and local permits have been obtained. Proposed changes in approved designs, plans and specifications also must be reviewed and approved by the District Commander in advance of construction.

Article 4 - Inspection of Work.

The Government may inspect any work that is performed under this Agreement and the [local sponsor] hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which the [local sponsor] owns or controls for access to the project for purposes of inspection.

Article 5 - Obligations of the [local sponsor].

The [local sponsor] agrees to:

- a. Construct the Project, including the general navigation features of the Project, at no cost to the Federal government.
- b. Provide and maintain at its own expense, all facilities other than the general navigation features of the project.
- c. Ensure that the project and ancillary facilities shall be open to all on an equal basis.
- d. [Add any additional language to describe fully portions of the project for which the local sponsor will be responsible including 100 percent of all costs associated with project purposes other than commercial navigation, responsibility for securing necessary aids to navigation, etc.]

e. [Add additional paragraphs as needed to reflect special requirements.]

Article 6 - Operation and Maintenance.

After completion of the project, the Government shall operate and maintain the general navigation features of the project. This responsibility shall not begin unless and until the Secretary of the Army has certified that the work described in Article 2 has been completed in accordance with applicable permits and approved plans. The [local sponsor] shall provide to the Government all lands, easements, rights-of-way, and dredged material disposal areas, and perform all relocations required for operation and maintenance of the general navigation features of the project. Operation and maintenance of such features will remain a Federal responsibility consistent with the availability of funds, unless the Secretary finds that the project is no longer economically justified or environmentally acceptable.

[In the case of a deep draft project exceeding 45 feet, add the following as paragraph b, Article 6 and label the above paragraph as paragraph a]: The [local sponsor] shall pay to the Government one half of the excess of the cost of operation and maintenance of the general navigation features of the project over the cost which the Secretary determines would be incurred for operation and maintenance of such features if the project had a depth of 45 feet. No Federal funds may be used to meet the local sponsor's share of operation and maintenance expenses of the general navigation features of the project unless the expenditure of such funds is expressly authorized by statute as verified in writing by the granting agency.

Article 7 - Disputes.

Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

Article 8 - Release of Claims.

The [local sponsor] shall hold and save the Government free from all damages arising from the construction, operation, and maintenance of the project, except for damages due to the fault or negligence of the Government or its contractors in connection with Federal responsibilities for operation and maintenance of the general navigation features of the project.

ER 1165-2-124
1 Oct 90

Article 9 - Officials Not to Benefit.

No member of or any delegate to the Congress, or Resident Commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

Article 10 - Covenant Against Contingent Fees.

The [local sponsor] warrants that no person or selling agent has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the [local sponsor] for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability, or in its discretion to add to the Agreement or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

Article 11 - Relationship of Parties.

The parties to this Agreement act in an independent capacity in the performance of their respective functions under this agreement, and neither party is to be considered the officer, agent, or employee of the other.

Article 12 - Notices.

a. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage-prepaid), registered, or certified mail, as follows:

If to the [local sponsor]:

(ADDRESS)

If to the Government:

(ADDRESS) (Normally this will be the District Commander)

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

c. Any notice, request, demand, or other communication made pursuant to this article shall be deemed to have been received by the addressee at such time as it is personally delivered or on the third business day after it is mailed, as the case may be.

Article 13 - Expiration of Agreement.

This Agreement shall expire and become null and void if the project to be constructed by the [local sponsor] is not undertaken within _____ (years, months) of the effective date of this Agreement and completed within _____ (years, months) thereafter.

ARTICLE 14 - TERMINATION OR SUSPENSION

If the Government fails to receive annual appropriations in amounts sufficient to meet project operation and maintenance expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Local Sponsor. After 60 calendar days either party may elect without penalty to terminate this Agreement pursuant to the Article or to defer future performance hereunder; however, deferral of future performance under this Agreement shall not affect existing obligation previously incurred. In the event that either party elects to defer future performance under this Agreement pursuant to this Article, such deferral shall remain in effect until such time as the Government receives sufficient appropriations or until either party elects to terminate this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

THE DEPARTMENT OF THE ARMY

THE LOCAL SPONSOR

BY: _____
Assistant Secretary of
the Army (Civil Works)

BY: _____

DATE: _____

DATE: _____

Attachments
Certification Regarding Lobbying
Certification of Authority

Certification Regarding Lobbying.

The undersigned certifies, to the best of its 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 entering into of this 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 cooperative agreement, the undersigned shall complete and submit Standard Form LLL "Disclosure of Lobbying Activities," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all contracts and awards for work described in Article 2 and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance is placed when this transaction is made or entered into. This certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. The prohibition does not apply to the following activities:

(1) providing information specifically requested by the Secretary of the Army and U.S. Army Corps of Engineers or information not specifically requested but necessary for the Secretary to make an informed decision, or

(2) professional or technical services applying a professional or technical discipline rendered directly in the preparation and submission of the application, or

(3) technical discussion regarding the application features and adaption of the proposal to meet eligibility requirements.

Sponsor

CERTIFICATE OF AUTHORITY

I, _____, do hereby certify that I am the principal legal officer of the [local sponsor], that the [local sponsor] 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 [local sponsor] in connection with the Operation and Maintenance of the Project and that the persons who have executed this Agreement on behalf of the [local sponsor] have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19__.

[Signed]
Title