

CECW-PA Regulation No. 1165-2-124	Department of the Army U.S. Army Corps of Engineers Washington, DC 20314-1000	ER 1165-2-124 1 Oct 90
	Water Resources Policies and Authorities CONSTRUCTION OF HARBOR AND INLAND HARBOR PROJECTS BY NON-FEDERAL INTERESTS	
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DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
Washington, DC 20314-1000

CECW-PA

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Water Resource Policies and Authorities
CONSTRUCTION OF HARBOR AND INLAND HARBOR PROJECTS
BY NON-FEDERAL INTERESTS

1. Purpose. This regulation provides instructions on the use of Sections 204(a), 204(b), 204(c), 204(d), 204(e) (Operations and Maintenance), and 204(f) of the Water Resources Development Act (WRDA) of 1986.

2. Applicability. This regulation applies to HQUSACE/OCE elements, major subordinate commands, districts, laboratories, and field operating activities (FOA) having Civil Works responsibilities.

3. References.

a. Water Resources Development Act of 1986, Public Law (PL) 99-662.

b. ER 1105-2-100. (Draft)

c. ER 1140-1-211.

d. ER 1165-2-120.

4. Definitions.

a. Harbor and Inland Harbor - Section 204 applies to the places identified by the terms "harbor", "inland harbor", "deep-draft harbor", and "general cargo harbor" which are defined in Section 214 of PL 99-662. Harbors and Inland Harbors include any project of improvement for commercial navigation purposes in the navigable waters of the U.S. excluding

(1) inland waterways subject to waterway user fuel taxes under PL 95-502, as amended, or as otherwise defined,

(2) the Saint Lawrence Seaway,

(3) navigation improvements constructed or maintained by non-public interests,

ER 1165-2-124
1 Oct 90

(4) interior access channels, berthing and mooring areas, and other improvements that are not included in "general navigation features" as that term applies in Authorized Federal Projects;

(5) navigation improvements for the benefit of only one owner/user; and

(6) any portion of the Columbia River other than the channels on the downstream side of Bonneville lock and dam.

b. Authorized Federal Project - Any navigation improvement project specifically authorized by Federal statute.

c. Non-Federal Interest - is defined as a State, political subdivisions thereof, or other responsible agency described as a legally constituted and financially capable public body with full legal authority and financial capability to obligate itself to execute and perform fully all the requirements and terms of its local cooperation agreement. Included is a public agency or port authority established under State laws or a compact entered into between two or more States with the consent of Congress under Section 10 of Article I of the constitution.

d. Separable Element - Section 103(f) of PL 99-662 defines Separable Element as a portion of a project (1) which is physically separable from other portions of the project; and (2) which (A) achieves hydrologic effects, or (B) produces physical or economic benefits, which are separably identifiable from those produced from other portions of the project.

e. Eligible Operation and Maintenance - Section 214 of PL 99-662 defines eligible operation and maintenance to mean all operations, maintenance, repair, and rehabilitation, including maintenance dredging reasonably necessary to maintain the width and nominal depth of any harbor or inland harbor. It does not include providing any lands, easements, rights-of-way, or dredged material disposal areas including retaining dikes necessary for use of the area, or performing relocations required for project operation and maintenance.

5. Background.

a. Section 204(a) authorizes a non-Federal interest to undertake navigational improvements in harbors or inland harbors. Projects constructed under this subsection are not considered to be Federal projects unless the Federal Government later assumes responsibility for operation and maintenance after project construction is completed pursuant to Section 204(e) (Operation and Maintenance). For any project constructed in

accordance with Section 204(a), the non-Federal interest is fully responsible for all construction costs incurred and for obtaining all necessary permits. See paragraph 6 for further discussion of Section 204(a).

b. Section 204(b) allows the non-Federal interest to contract with the Corps of Engineers to have the Corps undertake studies and engineering for projects which the non-Federal interest will construct under 204(a). The studies, conducted at the expense of the non-Federal interest, can be used (under Section 204(d)) in addressing the requirements for obtaining the appropriate permits required under the Secretary's authority as well as support for a request for Federal operation and maintenance under Section 204(e) (Operation and Maintenance). See paragraph 7 for further discussion.

c. Section 204(c) permits the Corps to turn over to non-Federal interests Corps studies initiated before 17 November 1986 (either finished or unfinished), so that the study information may be used in the permitting process. If the transferred Corps study is complete, it can be used (under Section 204(d)) in addressing the requirements for obtaining the appropriate permits required under the Secretary's authority as well as support for a request for Federal operation and maintenance under Section 204(e) (Operation and Maintenance). See paragraph 7 for further discussion.

d. Section 204(d) states that if the Corps of Engineers has completed a study and engineering for an improvement to a harbor, including filing of a Final Environmental Impact Statement, and the non-Federal interest has requested and received such study and engineering from the secretary pursuant to subsection (b) or (c) of Section 204, the non-Federal interest is authorized to carry out the improvement. Any improvement implemented in accordance with subsection (d) of Section 204 shall be deemed to satisfy the requirements for obtaining the appropriate permits required under the Secretary's authority, subject to a finding that(1) the applicable regulatory criteria and procedures have been satisfied and that(2) regulatory requirements and environmental conditions have not changed since the studies were completed. Note this provision only applies to satisfying the permits required under the Secretary's authority.

e. Section 204(e). The 1986 Water Resources Development Act contains two sections labeled 204(e). Regulations implementing the first Section 204(e) (Reimbursement) are available in ER 1165-2-120. The second Section 204(e) (Operation and Maintenance) gives the Secretary of the Army responsibility for operation and maintenance of any project constructed by non-Federal interests under Section 204, provided

that before construction, the Secretary determines that the proposed work is economically justified and environmentally acceptable. The Secretary must also certify that the work has been completed in accordance with applicable permits and acceptable design standards. To avoid confusion, all references to the section authorizing Federal assumption of operation and maintenance will be referred to herein as Section 204(e') (Operation and Maintenance). Further guidance regarding Section 204(e') (Operation and Maintenance) is provided in paragraph 8.

f. Section 204f allows the Secretary to approve as many as two proposals whereby a non-Federal interest would undertake all or part of an authorized Federal project as the agent of the Secretary by utilizing its own personnel or by procuring outside services, so long as the cost of doing so will not exceed the cost of the Secretary undertaking the project. See paragraph 9.

6. Non-Federal Construction of a Project. Section 204(a) applies to construction of a navigation improvement by non-Federal interests without Federal participation in the initial costs of project construction. Although Section 204(a) authorized non-Federal interests to undertake navigational improvements in harbor or inland harbors, it does not change requirements to obtain regulatory permits for the proposed improvement. All permits required pursuant to Federal and State laws must be obtained in advance of the actual construction. Furthermore, in the event that fish and wildlife mitigation measures are determined appropriate, such mitigation shall be conducted before or concurrent with construction. See paragraph 8 regarding how a non-Federal project may qualify for Federal assumption of O&M.

7. Studies undertaken by the Corps of Engineers. Reference is made to three categories of Corps of Engineers studies in Subsections 204(b) and 204(c): new studies requested by the non-Federal interest; studies initiated prior to 17 November 1986; that are still unfinished; and completed studies initiated prior to 17 November 1986. All can be used to help expedite the Federal permitting process.

a. Subject to policies established in ER 1140-1-211, a district commander may provide study services to a non-Federal interest to meet the objectives of Section 204(b) with funds advanced by the non-Federal interest, if Corps personnel are available to do the work.

b. Whenever a non-Federal interest requests studies and engineering from the Corps, the District Commander should also be prepared to provide guidance to the requesting party concerning the need for any additional work that must be completed prior to obtaining any permits required pursuant to Federal and State laws.

8. When the conditions of Section 204(d) are met, the appropriate permits required under the Secretary's authority shall be granted subject to the non-Federal interest's acceptance of the terms and conditions of such permits. The Corps will monitor projects that have been constructed using Federal permits obtained through Section 204(d) in the same way that all other non-Federal projects are monitored to ensure that such projects have been constructed in accordance with the terms and conditions of such permits.

9. Operation and Maintenance (O&M). Subject to certain conditions, the Federal Government will become responsible for the future operation and maintenance of a harbor or inland harbor improvement constructed by a non-Federal interest under Section 204(a), Section 204(d), or Section 204(e) (Reimbursement). Federal O&M responsibilities for authorized Federal projects subject to reimbursement, Section 204(e), are addressed in ER 1165-2-120. The procedures described herein apply only to improvements undertaken by the non-Federal interest under the authority of Section 204(a) or Section 204(d).

a. Secretary Approval. No construction shall commence for any project which proposes to have the Secretary maintain the general navigation features under the authority of Section 204(e') (Operation and Maintenance) until the Secretary of the Army determines that the proposed improvements are economically justified, environmentally acceptable and consistent with the purposes of Title II of P.L. 99-662. The Secretary must, before construction, review and approve the economic justification, details of the project plans and design, arrangements for the prosecution of the work, and the environmental aspects. All information necessary for this determination must be provided at non-Federal expense.

b. Environmental Acceptability. Since the non-Federal interest will be required to obtain all necessary Federal, State, and local permits, normally environmental concerns will be addressed adequately through the permitting process. However, consideration will be given to any need for further documentation to meet NEPA requirements.

c. Economic Justification. In order to find the proposed work economically justified, it must be demonstrated that:

(1) Project benefits as defined by the Water Resources Council's Principles and Guidelines exceed project costs, including construction and O&M costs.

(2) Project O&M costs are no greater than the O&M costs of the project which maximizes net benefits (the so-called "NED plan"). Note that the proposed work does not have to be the NED plan, but only that project benefits exceed project costs.

ER 1165-2-124
1 Oct 90

d. Consistent with Federal Policy. Maintenance of the project must be consistent with other Federal policies, including the policy that the benefits from the project do not accrue to a single privately owned facility (benefit of only one owner/user).

e. Submittal of Data. The study which determines the relationship between project benefits and project costs will be the responsibility of the non-Federal interest. A report of study results will be provided to the District Commander for review and comment. Once the District Commander is satisfied that the study adequately addresses the economic issues and environmental concerns, the study will be forwarded to the Secretary of the Army along with details of proposed design, plans and specifications, and arrangements for prosecution of the work.

f. Construction and Certification. The project must be constructed in accordance with applicable permits, appropriate engineering and design standards, and plans approved by the Secretary of the Army. This means that:

(1) The Corps of Engineers will have the right to inspect the work and to enter, at reasonable times and in a reasonable manner, upon land which the non-Federal interest owns or controls for access to the project for purposes of inspection.

(2) The District Commander must certify that the project was completed in accordance with applicable permits and approved plans. The District Commander will then forward such certification through the Division Commander and Chief of Engineers to the Secretary of the Army.

g. Funding of Document Review and Construction Inspection. Funding for the Corps activities involved in document review as well as inspection and certification of construction should be requested through the normal budgetary process in response to the annual program and budget EC.

h. Cost Sharing for O&M.

(1) Commercial Navigation. Cost sharing will be in accordance with the terms of Section 101b of WRDA of 1986, PL 99-662:

(a) For projects whose depths do not exceed 45 feet, the Federal Government will assume 100 percent of eligible O&M costs (see paragraph 4f). All other costs including lands, easements, rights-of-way and dredged material disposal sites are the responsibility of the non-Federal interest.

(b) When the project depth exceeds 45 feet, the non-Federal interest will be responsible for 50 percent of the incremental eligible O&M costs beyond that necessary to maintain a 45 foot project.

(2) Recreation Navigation. O&M costs for recreational features of a project shall be assigned 100 percent to non-Federal interests (Reference Section 103(c) (4) and Section 103(j) of WRDA of 1986, PL 99-662.)

i. Discontinuance of Maintenance. If, at any time subsequent to construction, the Secretary of the Army determines that the O&M of the project is no longer economically justified or environmentally acceptable, the Federal Government will no longer be responsible for O&M. The Federal Government may choose to maintain a lesser depth or completely discontinue maintenance activities.

j. Model Agreement. A sample model agreement is attached as Appendix A.

10. Section 204(f). A proposal by a non-Federal interest to act as an agent of the Secretary for a Corps project under the terms of Section 204(f) must be approved in advance by the Assistant Secretary of the Army (Civil Works). The proposal would be submitted to the district commander who would forward it, with recommendations to the division and subsequently to HQUSACE (ATTN: CECW-P). Implementation policy is as follows:

a. The proposal must show that the proposed plan can be undertaken at a cost which does not exceed that which could be expected to accrue under normal Corps of Engineers procedures, and offer convincing evidence that the final project will be completed at no additional cost to the Government and within a reasonable schedule.

b. The non-Federal interest must obtain all necessary permits including those Federal permits ordinarily not required when the Corps does the work.

c. Submission proposal by non-Federal interest shall describe procurement methods to be used for procuring outside services, work to be done by its own personnel, and the desired basis for computation of the requested reimbursement amount.

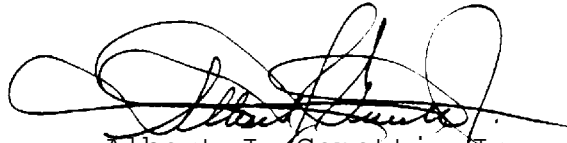
d. Non-Federal interest may start work under Section 204(f) at the Planning, Engineering and Design stage or construction stage as agreed upon with the Secretary.

e. Payment for the Federal share will be after completion of the work that would have been otherwise a Federal

ER 1165-2-124
1 Oct 90

responsibility. The District Commander shall certify accomplishment of such work and forward request for reimbursement.

FOR THE COMMANDER:

A handwritten signature in black ink, appearing to read "Albert J. Genetti, Jr.", written in a cursive style with a large loop at the end.

Albert J. Genetti, Jr.
Colonel, Corps of Engineers
Chief of Staff

APP A - Model Agreement

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.

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