

Approved Under DNR Delegated Authority  
CFMS# 620404  
Karen G. Lewis  
COST SHARING AGREEMENT

USACE Agreement No.  
DNR Agreement No. 2511-05-12  
Format 15B

BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE STATE OF LOUISIANA  
FOR CONSTRUCTION, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT,  
REHABILITATION AND MONITORING OF THE  
SABINE REFUGE MARSH CREATION CYCLE 2 PROJECT  
CAMERON PARISH, LOUISIANA

THIS AGREEMENT is entered into this 17<sup>th</sup> day of Feb., 2005, by and between the DEPARTMENT OF THE ARMY (hereinafter referred to as the "Government"), acting by and through the District Engineer, U.S. Army Engineer District, New Orleans and the STATE OF LOUISIANA, (hereinafter referred to as the "State"), acting by and through the Secretary of the Louisiana Department of Natural Resources.

WITNESSETH, THAT:

WHEREAS, construction of the Sabine Refuge Marsh Creation Cycle 2 Project in Cameron Parish, Louisiana, (hereinafter referred to as the "Project" and defined in Article I.b. of this Agreement), is authorized by Section 303(a) of Title III, Pub. L. 101-646, the "Coastal Wetlands Planning, Protection and Restoration Act" enacted on November 29, 1990, as amended, (hereinafter referred to as the "CWPPRA"); and

WHEREAS, the Project was authorized by the Louisiana Coastal Wetlands Conservation and Restoration Plan of the State of Louisiana on March 29, 1999 and February 2004; and

WHEREAS, the Government and the State desire to enter into a Cost Sharing Agreement for construction, operation, maintenance, repair, replacement, rehabilitation, and monitoring of the Project; and

WHEREAS, Section 303(f) of the CWPPRA, as amended, specifies the cost-sharing requirements applicable to the Project; and

WHEREAS, in accordance with Section 304 of the CWPPRA, as amended, the Louisiana Coastal Wetlands Conservation Plan was approved by the Secretary of the Army, the Director of the U.S. Fish and Wildlife Service, and the Administrator of the Environmental Protection Agency on November 21, 1997, effective December 1, 1997; and

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WHEREAS, Section 303(f) of the CWPPRA, specifies that, upon approval of the Louisiana Coastal Wetlands Conservation Plan, the Federal share for this Project will increase from 75 percent to 85 percent. In accordance with the unanimous decision of the Louisiana Coastal Wetlands Conservation and Restoration Task Force, which decision was officially rendered on January 16, 1998, the increased Federal share shall apply to all Project funds expended on or after December 1, 1997; and

WHEREAS, Section 303(f)(2) of the CWPPRA, as amended, provides that in the event that the Secretary of the Army, the Director of the United States Fish and Wildlife Service and the Administrator of the Environmental Protection Agency jointly determine that the State is not taking reasonable steps to implement and administer the Louisiana Coastal Wetlands Conservation Plan, amounts made available by the Government in accordance with Section 306 of the CWPPRA, as amended, for any coastal wetlands restoration Project shall revert from 85 percent to 75 percent of the cost of the Project; provided however, that such reversion to the lower cost share level shall not occur until the Governor of the State of Louisiana has been provided notice of, and opportunity for hearing on, any such determination by the Secretary, the Director and the Administrator, and the State has been given ninety days from the later of such notice or hearing to take corrective action. The decreased Federal share shall apply and extend solely to those funds expended on or after such ninety-day period has elapsed without corrective action having been taken by the State; and

WHEREAS, Section 303(e) of the CWPPRA, as amended, states that the Secretary of the Army "shall not fund a coastal wetlands restoration Project unless that Project is subject to such terms and conditions as necessary to ensure that wetlands restored, enhanced, or managed through that Project will be administered for the long-term conservation of such lands and waters and dependent fish and wildlife populations;" and

WHEREAS, the Government and the State have the legal authority and capability to perform as hereinafter set forth and intend to cooperate in the cost-sharing and financing of the construction, operation, maintenance, repair, replacement, rehabilitation and monitoring of the Project in accordance with the terms of this Agreement.

NOW, THEREFORE, the Government and the State agree as follows:

## **ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS**

For the purposes of this Agreement:

- a. The definitions in Section 302 of the CWPPRA, as amended, are incorporated herein by reference.
- b. The term "Project" shall mean the implementation, including the engineering, design, construction, operation, maintenance, repair, replacement, rehabilitation, and monitoring of the Sabine Refuge Marsh Creation Cycle 2 Project, located on the Sabine National Wildlife Refuge,

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west of Highway 27, in large, open water areas north and northwest of Brown's Lake and the dredge pipeline corridor leading to the Cycle 2 disposal area in Cameron Parish, Louisiana. The Project consists of the placement of dredged material (approximately 1,000,000 cubic yards) from routine maintenance of the Calcasieu River Ship Channel via pipeline into a marsh creation site within the Sabine National Wildlife Refuge. The Project will create approximately 230 acres of marsh, as generally described in the CWPPRA Task Force Priority Project List Report, dated November 1999, as amended by later decisions of the Task Force. The Project also includes all monitoring and maintenance required such as degrading dikes and pipeline maintenance.

c. The term "total first costs" shall mean all costs incurred by the State and the Government directly related to pre-construction monitoring, construction, and construction monitoring of the Project. Such costs shall include, but not necessarily be limited to: all engineering and design costs incurred after January 20, 1999; all preconstruction engineering and design costs; engineering and design costs during construction; actual construction costs; construction management costs; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of audit in accordance with Article IX of this Agreement completed prior to the final accounting of total first costs as identified in Article VI.d.; costs of contract dispute settlements or awards; legal costs, awards, damages or settlements associated with any dispute or litigation over reclamation rights; the value of lands, the value of easements, the value of servitudes, the value of severance fees for dredging State waterbottoms, and the value of rights-of-way, including the value of suitable borrow and dredged or excavated material disposal areas acquired by the Government or acquired by the State for which the Government affords credit in accordance with Article IV of this Agreement, all as may be required for the construction, operation and maintenance of the Project; the value of utility and facility relocations, as may be required for the construction, operation, and maintenance of the Project; the cost of investigations to identify the existence of hazardous substances as identified in Article XVI.a.; the cost of clean-up and response of hazardous substances regulated under CERCLA (when the Government and the State mutually agree to initiate or continue construction after discovery of such substances) for all lands other than those owned, controlled and/or claimed by the State or fee-owned by the Government as identified in Art. XVI.c; the cost of developing the Project Monitoring Plan, described in subparagraph o. of this Article; the cost of developing the Project Operations and Schedule Manual, as described in subparagraph p. of this Article; and the cost of cultural resource surveys, documentation and coordination. The term "total first costs" shall not include the costs for operation, maintenance, repair, replacement, rehabilitation; post-construction monitoring; and costs of dispute resolution identified in Article VII; and costs of audit in accordance with Article IX of this Agreement completed subsequent to the final accounting of total first costs as identified in Article VI.d.; and any increase in costs for betterments. The term "total first costs" also includes the amount of work-in-kind credits, verified by Government audits, that will be given to the State for work-in-kind.

d. The term "total project cost" shall mean all cost directly related to implementation of the Project. Such cost shall include total first costs and all costs directly related to operation, maintenance, repair, replacement, and rehabilitation of the Project, including post-construction monitoring and associated supervision and administration costs, but shall not include any costs for disputes as identified in Article VII.

e. The term "District Engineer" shall mean the U.S. Army District Engineer for the New Orleans District, or his designee.

f. The term "period of construction" shall mean the time from the advertisement of the first construction contract to the time the District Engineer certifies in writing to the State that construction of the Project is complete. The District Engineer shall furnish to the State copies of the Government's Written Notice of Acceptance of Completed Work furnished to contractor(s) for all contracts for the Project.

g. The term "highway" shall mean any highway, thoroughfare, roadway, street, or other public road or way.

h. The term "relocations" shall mean the preparation of plans and specifications for, and the accomplishment of all, alterations, modifications, lowering or raising in place, and/or new construction related to, but not limited to, existing: railroads, highways, and other bridges, buildings, pipelines, public utilities (such as municipal water and sanitary sewer lines, telephone lines, and storm drains), aerial utilities, cemeteries, and other facilities, structures, and improvements determined by the Government to be necessary for the construction, operation and maintenance of the Project.

i. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

j. The term "functional portion of the Project" shall mean the completion of the construction of a portion of the Project as determined by the District Engineer in writing to be suitable for tender to the State to operate and maintain in advance of completion of the construction of the entire Project. To be suitable for tender, the District Engineer must determine that the portion of the Project for which construction has been completed can function independently and for a useful purpose, although the balance of the Project is not complete.

k. The term "betterment" shall mean the design and construction of a Project feature accomplished on behalf of, or at the request of the State in accordance with standards which exceed the standards which the Government would otherwise apply for accomplishing the design and construction of the Project.

l. The term "construction management costs" shall mean costs incurred by the State and the Government directly related to supervising and administering of construction contracts, to include related overhead costs, as specified in applicable Government contracting regulations.

m. The term "operation, maintenance, repair, replacement and rehabilitation" shall mean any physical activity associated with the actual operation, maintenance, repair, replacement or rehabilitation of the completed Project, or functional portion of the Project, which has been tendered to the State, as described in the Project Operations and Schedule Manual as described in subparagraph p. of this Article and Article VIII of this Agreement.

- n. The term "monitoring" shall mean the pre-construction, construction, and post-construction activities undertaken pursuant to the Project Monitoring Plan.
- o. The term "Project Monitoring Plan" shall mean a specific plan prepared by the State, and mutually agreed to by the State and the Government, to provide direction and guidance concerning all monitoring requirements, parameters and procedures for the Project, which shall include the procurement of aerial photographs of the Project area taken within one year prior to the commencement of construction of the Project.
- p. The term "Project Operations and Schedule Manual" shall mean a specific plan and schedule prepared by the Government, and mutually agreed to by the State and the Government, to provide direction and guidance concerning all operation, maintenance, repair, replacement and rehabilitation activities for the Project or functional portion of the Project in accordance with Article VIII of this Agreement.
- q. The term "work-in-kind" shall mean engineering, design, pre-construction and/or construction monitoring, and/or construction of the Project or feature of the Project which has been approved in advance by the Government and is performed by the State.
- r. The term "life of the Project" shall mean 20 years from completion of construction of the Project or functional portion of the Project unless otherwise mutually agreed in writing.
- s. The term "non-Federal proportionate share" shall mean the ratio of the State's total cash contribution required in accordance with Article II.e. of this Agreement to total financial obligations for construction, as projected by the Government.
- t. The term "Project Management Plan" shall mean the written, approved document designed to guide both Project execution and Project control through completion of the fiscal closeout. The plan will clearly identify the Project scope, cost, and schedule baselines. The plan may be summary or detailed.
- u. The term "completion of the Project" shall mean the end of the Project life as defined in Article 1.r. above, i.e. through the post-construction monitoring, operation, maintenance, repair, replacement, and rehabilitation of the Project.

## **ARTICLE II - OBLIGATIONS OF THE PARTIES**

- a. The Government, subject to receiving funds appropriated by the Congress of the United States and using funds provided by the State, shall expeditiously construct the Project applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The State shall be afforded the opportunity to review and comment on all contracts, including relevant plans and specifications, prior to the issuance of invitations for bids. Before initial construction of the Project can proceed, the State must concur in writing with issuance of the invitation for bids for the first construction contract. The State will be afforded the opportunity to review and comment on all modifications and change orders

prior to the issuance to the contractor of a Notice to Proceed. In those cases where providing notice to the State of the required contract modifications or change orders is not possible prior to issuance of Notice to Proceed, such notification will be provided after the fact at the earliest date possible. The District Engineer will, in good faith, consider the comments of the State, but award of contracts, modifications or change orders, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the District Engineer provided such contracts, modifications and change orders are in accordance with the Project purposes.

b. The State may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government, in its sole discretion, elects to accomplish the requested betterments or any portion thereof, it shall so notify the State 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. If the State accepts the terms and conditions, including estimated costs, the Government shall proceed to accomplish the requested betterments. The State shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.c. of this Agreement.

c. After the District Engineer determines that construction of the Project, or functional portion of the Project, is complete, and notifies the State in writing of such determination, the District Engineer shall turn the Project or functional portion of the Project over to the State, which shall accept the Project, or functional portion of the Project, and be responsible for operating, maintaining, repairing, replacing, rehabilitating and monitoring the Project or functional portion of the Project in accordance with the Project Operations and Schedule Manual, the Project Monitoring Plan, and Article VIII hereof, to ensure that wetlands restored, enhanced or managed through the Project will be administered for the long-term conservation of such lands and waters and dependent fish and wildlife populations.

d. The Government shall pay 85 percent of the total first costs of the Project through a combination of cash and the provision of all lands, easements, servitudes, rights-of-way, including suitable borrow and dredged or excavated material disposal areas, and accomplishment or assurance of accomplishment of all relocations determined by the Government to be necessary for construction, monitoring, operation and maintenance of the Project, except for those lands, easements, servitudes, rights-of-way, suitable borrow and dredged or excavated material disposal areas provided pursuant to subparagraph e.2. of this Article and Article III.b. of this Agreement.

e. The State shall contribute, during the period of construction, 15 percent of the total first costs through a combination of cash payments, lands, easements, servitudes, rights-of way, and work-in-kind, as hereby specified and as further specified in Article III.b. and Article VI. of this Agreement.

1. As further specified in Article VI hereof, during the period of construction, the State shall provide a cash contribution equal to 5 percent of the total first costs.

2. As further specified in Article III hereof, the State shall, prior to the scheduled date for issuance of the solicitation for any construction contract, provide all lands, easements, servitudes, rights-of-way, including suitable borrow and dredged or excavated material disposal areas to the Government in, over, under and upon any lands, waterbodies, and/or waterbottoms deemed by the Government, in formal consultation with the State, to be necessary for the construction, of the Project, which are owned, controlled and/or claimed by the State, provided however, that the final designation of the necessary lands, easements, servitudes, rights-of-way, including suitable borrow and dredged or excavated material disposal areas in, over, under and upon any lands, waterbodies, and waterbottoms, shall be exclusively within control of the District Engineer.

3. If the value of the contributions provided under subparagraphs e.1. and e.2. of this Article is less than 15 percent of total first costs, the State shall provide, during the period of construction, additional cash contributions in the amount necessary to make the State's total contribution equal to 15 percent of total first costs.

4. The State shall implement and perform Project pre-construction and construction monitoring in accordance with the Project Monitoring Plan and may perform other work-in-kind upon approval of the Government. The State shall receive a credit for the value of work-in-kind as approved by the Government, subject to Government audit, toward the cash contribution required under subparagraph e.3. of this Article.

5. Crediting and/or reimbursement is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to the 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Crediting and/or reimbursement may be withheld, in whole or in part, as a result of the State's failure to comply with its obligations under these laws.

f. The State may request the Government to provide lands, easements, servitudes, rights-of-way, and suitable borrow and dredged or excavated material disposal areas, which are owned, controlled and/or claimed by the State on behalf of the State. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the State 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. If the State accepts the terms and conditions, including estimated costs, the Government shall proceed to accomplish the requested services. The State shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.c. of this Agreement. Notwithstanding the provision of lands, easements, servitudes, rights-of-way, and suitable borrow and dredged or excavated material disposal areas, which are owned, controlled and/or claimed by the State, the State shall be responsible, as between the Government and the State, for the costs of cleanup and response upon said lands in accordance with Article XVI.c. of this Agreement.

g. It is anticipated that the State will perform all operation, maintenance, repair, replacement, rehabilitation and post-construction monitoring associated with this Project. During the life of the Project, upon receipt of requests from the State, the Government shall, subject to the availability of Government funding and subject to Government audit, reimburse the State 85 percent of the State's actual operation, maintenance, repair, replacement, rehabilitation and monitoring costs, as approved by the Government, less a credit for any Government costs related to such activities. In the event the Government performs any operation, maintenance, repair, replacement, rehabilitation, and post-construction monitoring work on the Project, the Government shall receive a credit for such work in the amount equal to the actual reasonable costs incurred which shall be applied against the Government's requirement to pay 85 percent of the operation, maintenance, repair, replacement, rehabilitation, and post-construction monitoring costs.

h. No Federal funds may be used to meet the State's share of total project costs under this Agreement unless the expenditure of such funds is expressly authorized by statute as verified in writing by the granting Federal agency.

i. Notwithstanding any other provision of this Agreement to the contrary, in the event that, on or after December 1, 1997, the Secretary of the Army, the Director of the United States Fish and Wildlife Service and the Administrator of the Environmental Protection Agency, jointly determine, pursuant to the provisions of Section 303(f)(2) of the CWPPRA, as amended, that the State of Louisiana is not taking reasonable steps to implement and administer the Louisiana Coastal Wetlands Conservation Plan, amounts made available by the Government in accordance with Section 306 of the CWPPRA, as amended, shall revert from 85 percent to 75 percent of the cost of the Project, including both the monitoring and operations and maintenance phases, and the State's share of the costs of the Project shall revert from 15 percent to 25 percent of the costs of the Project, including both the monitoring and operations and maintenance phases; provided however, that such reversion to the Government's lower cost share level shall not occur until the Governor of the State of Louisiana has been provided notice of, and opportunity for hearing on, any such determination by the Secretary, the Director and the Administrator, and the State has been given ninety days from such notice or hearing to take corrective action. The decreased Federal share of the costs of the Project shall apply and extend solely to those funds expended on or after such ninety-day period has elapsed without corrective action having been taken by the State.

### ARTICLE III - LANDS, RELOCATIONS AND Pub. L. 91-646

a. The Government shall acquire all lands, easements, servitudes, and rights-of-way, including suitable dredged or excavated material disposal areas, determined by the Government to be necessary for construction, operation and maintenance of the Project, except as provided in subparagraph b. of this Article.

b. Prior to the scheduled date for issuance of the solicitation for any construction contract, the State shall provide all lands, easements, servitudes, rights-of-way, dredged material



disposal areas and any other interests in, over, under and upon any lands, waterbodies, and/or waterbottoms deemed by the Government, after formal consultation with the State, to be necessary for the construction, operation and maintenance of the Project, which are owned, controlled and/or claimed by the State, provided however, that the final designation of the necessary lands, easements, servitudes, rights-of-way, including suitable borrow and dredged or excavated material disposal areas in, over, under and upon any lands, waterbodies, and waterbottoms, shall be exclusively within control of the District Engineer. The State shall provide the Government with evidence supporting the State's legal authority to grant the Government an interest in such lands.

c. It is specifically understood that no fee title to the property or minerals affected herein are transferred with any easements, servitudes, rights-of-way, and suitable borrow and dredged or excavated material disposal areas provided by the State pursuant to this Agreement. No public rights of ownership shall be transferred and vest in private parties as a result of the Project except as provided for explicitly in the State constitution or other State laws which govern local sponsor's acquisition and negotiation of said rights; provided, however, that any such transfer or vesting or rights of ownership, including mineral rights, in private parties pursuant to the State constitution or other State laws shall be made subject to such terms and conditions which establish, preserve, and protect the right of the Government and of the State to construct, operate, maintain, replace, repair and rehabilitate the Project to the extent deemed necessary by the Government. It is further understood and agreed that any easements, servitudes, rights-of-way, and suitable borrow and dredged or excavated material disposal areas shall provide for access for mineral exploration and development which will not unreasonably interfere with the purposes of the Project.

d. The Government shall accomplish or assure accomplishment of all relocations that are deemed necessary by the Government for the construction, operation and maintenance of the Project.

e. After execution of this Agreement, the Government or the State, as the case may be, shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17), and the Uniform Regulations contained in 49 CFR Part 24, in acquiring lands, easements, servitudes, and rights-of-way for construction and subsequent operation and maintenance of the Project, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

f. Eminent Domain. The Government will coordinate its acquisition efforts with the State. Condemnation will only be initiated by the Government when necessary, as in cases where the State is not empowered to acquire a real property interest under State law or where agreement cannot be reached on the purchase price. The Government will make every reasonable effort to resolve disagreements on price without condemnation. The Government will inform the State of acquisitions requiring condemnation for price or title prior to initiating condemnation proceedings.

g. If after construction of the Project, it is determined that additional property should have been acquired or additional facilities or utilities relocated for the construction, operation and maintenance of the Project, beyond that initially determined by the Government to be necessary for construction, operation and maintenance of the Project, all cost to acquire the additional property or to accomplish the additional relocations, through direct purchase, eminent domain or involuntary acquisition, will be included as part of the total first costs of the Project.

#### ARTICLE IV - VALUE OF LANDS AND FACILITIES

a. The State shall not receive any credit for lands, easements, servitudes, and rights-of-way, including borrow or dredged or excavated material disposal areas, previously provided as an item of cooperation for another Federal project nor shall the value thereof be included in total project costs. The value of the lands, easements, servitudes, and rights-of-way, including suitable borrow or dredged or excavated material disposal areas, to be included in total first costs and credited towards the Government and State's share of total first costs shall be determined in accordance with the following procedures:

1. If the lands, easements, servitudes, or rights-of-way, including suitable borrow and dredged or excavated material disposal areas and any other interests in, over, under and upon any lands, waterbodies, and/or waterbottoms which are owned by the State as of the date the first construction contract for the Project is awarded, the State shall be given a credit equal to the fair market value of the interest at the time of such award or in exceptional circumstances, upon request of the State and in the sole discretion of the Government, the actual purchase price paid by the State. The fair market value shall be determined by an appraisal, to be obtained by the State, which has been prepared by a qualified appraiser who is acceptable to both the State and the Government. The appraisal shall be reviewed and approved by the State and the Government.

2. The value of lands, easements, servitudes, or rights-of-way, including suitable borrow and dredged or excavated material disposal areas, acquired by the Government shall be the actual costs of the land, including, but not limited to the actual incidental costs of acquiring the land, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, court costs, plat maps and mapping costs, as well as the actual amounts expended for any Pub. L. 91-646 relocation assistance benefits made in accordance with Article III., and all Government administrative costs in the land acquisition for the Project.

3. If the State acquires a greater real estate interest in the lands, easements, servitudes, or rights-of-way than are necessary for Project purposes, as determined by the Government, then only the value of such portions of those acquisitions as are necessary for Project purposes shall be included in total first costs and credited towards the State's share.

4. Credit for lands, easements, servitudes and rights-of-way acquired through eminent domain proceedings occurring after the date of this Agreement will be based on court awards for the real property interests taken, or on stipulated settlements or portions of stipulated settlements that have received written Government approval. The fair market value for the

purposes of filing an eminent domain proceeding in court shall be based on an appraisal prepared by a qualified appraiser who is acceptable to both the State and the Government and approved by the Government and the State. Appraisals shall be done in accordance with the Federal Rules of Compensation.

5. Credit for lands, easements, servitudes, or rights-of-way acquired by the State preceding the date of this Agreement, or at any time after this Agreement is signed, will also include the reasonable documented incidental costs of acquiring the interest, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Pub. L. 91-646 relocation assistance benefits provided in accordance with the obligations under this Agreement.

6. Credit will be allowed for the value of severance fees applied to dredging State waterbottoms.

b. The costs of relocations which will be included in total first costs shall be that portion of the actual costs as set forth below, and approved by the Government:

1. Highways and Highway Bridges: Only that portion of the cost as would be necessary to construct substitute bridges and highways to the design standard that the State of Louisiana would use in constructing a new bridge or highway under similar conditions of geography and traffic loads.

2. Utilities and Facilities: Actual relocation costs, less depreciation, less salvage value, plus the cost of removal, less the cost of betterments. With respect to betterments, new materials shall not be used in any alteration or relocation if materials of value and usability equal to those in the existing facility are available or can be obtained as salvage from the existing facility or otherwise, unless the provision of new material is more economical. If, despite the availability of used material, new material is used, where the use of such new material represents an additional cost, such cost will not be included in total first costs.

3. Crediting and/or reimbursement is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal relocations, including, but not limited to the 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Crediting and/or reimbursement may be withheld, in whole or in part, as a result of the State's failure to comply with its obligations under these laws.

## ARTICLE V -PROJECT COORDINATION TEAM

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

b. The Government's Project Manager and the State's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

c. Until the end of the period of construction, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for non-Federal relocations and for the construction portion of the non-Federal work-in-kind; the Government's cost projections; final inspection of the entire Project or functional portions of the Project; preparation of the proposed Project Operations and Schedule Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a Project Management Plan developed by the Government after consultation with the State.

d. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

e. The costs of participation in the Project Coordination Team shall be included in total first costs and cost shared in accordance with the provisions of this Agreement.

## ARTICLE VI - METHOD OF PAYMENT

a. The Government shall maintain current records of contributions provided by the parties and current projections of total first costs, total project costs, and costs due to betterments. By January 1st of each year and at least quarterly thereafter, the Government shall provide the State with a report setting forth all contributions provided to date and the current projections of total first costs; of total project costs; of total costs due to betterments; of the maximum amount

of total project costs determined in accordance with Article XX of this Agreement; of the components of total first costs and total project costs; of each party's share of total first costs and total project costs; of the State's total cash contributions required in accordance with Articles II.b., II.e., and II.f. of this Agreement; of the non-Federal proportionate share, and of the funds the Government projects to be required from the State for the upcoming fiscal year. On the effective date of this Agreement, total project costs are estimated to be \$9,266,842.00, and the State's share of the total project costs is estimated to be \$1,390,026.00 (provided however, that should the State's share of the costs of the Project revert from 15 percent to 25 percent in accordance with Article II.i. of this Agreement, the Government's share of the costs of the Project shall be revised accordingly). The total first costs are estimated to be \$9,226,188.00, and the State's cash contribution required under Articles II.b., e. and f. of this Agreement is estimated to be \$461,309.00. Such amounts are estimates subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the State. From time to time, increases and decreases to the costs of the Project will be identified and incorporated into this Agreement when both parties execute a Schedule And Cost Change Request (SACCR) for the Project. All SACCRs related to this Agreement must be reviewed and approved by the Louisiana Division of Administration, or an authorized representative, prior to its execution by the State. To meet its share of the total first cost, the State shall provide during the period of construction, as specified in Article II.e. of this Agreement, a cash contribution of not less than 5 percent of the total first costs.

b. The State shall provide the cash contribution required under Articles II.e.1. and II.e.3. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 60 calendar days prior to the scheduled date for issuance of the solicitation for the first construction contract, the Government shall notify the State in writing of such scheduled date and the funds the Government determines to be required from the State to meet the non-Federal proportionate share of projected financial obligations for total first costs through the first fiscal year of construction, including the non-Federal proportionate share of financial obligations for total first costs incurred prior to the commencement of the period of construction. Not later than such scheduled date, the State shall verify to the satisfaction of the Government that the State has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the State or provide an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of construction, the Government shall notify the State in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government determines to be required from the State to meet the non-Federal proportionate share of projected financial obligations for total first costs for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the State shall make the full amount of the required funds for that fiscal year available to the Government through any of the funding mechanisms specified in Article VI.b.1. of this Agreement.

3. The Government shall draw from the funds provided by the State such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for total first costs incurred prior to the commencement of the period of construction;

and (b) the non-Federal proportionate share of financial obligations for total first costs as they are incurred during the period of construction.

4. If at any time during the period of construction the Government determines that additional funds will be needed from the State to cover the non-Federal proportionate share of projected financial obligations for total first costs for the current fiscal year, the Government shall notify the State in writing of the additional funds required, together with an explanation of why additional funds are required, and the State, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the funding mechanisms specified in Article VI.b.1. of this Agreement.

c. In advance of the Government incurring any financial obligation associated with additional work under Article II.b. or II.f. of this Agreement, the State shall verify to the satisfaction of the Government that the State has deposited the full amount of the funds required to pay for such additional work in an escrow or other account acceptable to the Government, with interest accruing to the State. The Government shall draw from the funds provided by the State such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the State must provide additional funds to meet its cash contribution, the Government shall notify the State in writing of the additional funds required. Within 30 calendar days thereafter, the State shall make the additional required funds available to the Government through any of the funding mechanisms specified in Article VI.b.1. of this Agreement .

d. Upon completion of the period of construction and resolution of all relevant contract claims and appeals, the Government shall compute the total first costs and tender to the State a final accounting of the State's share of total first costs.

1. In the event the total contribution by the State is less than the State's required share of total first costs, the State shall, no later than 90 calendar days after receipt of written notice, make the additional required funds available to the Government through any of the funding mechanisms specified in Article VI.b.1. of this Agreement.

2. If the value of the State's total contribution under Article II.e. of this Agreement exceeds 15 percent of total first costs, the Government shall, subject to the availability of funds, return the excess to the State no later than 90 calendar days after the final accounting of the State's share of total first costs is complete.

e. Not later than October 1 of each fiscal year during the life of the Project, the State, in consultation with the Government, shall prepare a yearly estimate for the anticipated operation, maintenance, repair, replacement, rehabilitation and monitoring costs, by activity or item, for the fiscal year that will begin 12 months thereafter. The District Engineer will review and verify the accuracy of said estimate. For the first year of Project operation, maintenance, repair, replacement, rehabilitation and monitoring after the period of construction, the said estimate shall include operation, maintenance, repair, replacement, rehabilitation and monitoring costs that will have been incurred during the period of construction.

f. On a quarterly basis during the life of the Project, the State shall submit to the Government statements of actual operation, maintenance, repair, replacement, rehabilitation and monitoring costs incurred by the State for the Project or functional portion, including costs incurred by the State for the development and coordination of the Project Monitoring Plan and the Project Operations and Schedule Manual, and not later than 30 days thereafter the Government, subject to availability of funds and subject to audit, shall provide to the State a cash payment equal to 85 percent of said actual costs as approved by the Government less a credit for any Government costs related to such activities. In the event the Government performs any operation, maintenance, repair, replacement, rehabilitation, and post-construction monitoring work on the Project, the Government shall receive a credit for such work in the amount equal to the actual reasonable costs incurred which shall be applied against the Government's requirement to pay 85 percent of the total operation, maintenance, repair, replacement, rehabilitation, and post-construction monitoring costs, including costs incurred by the Government and the State for the development and coordination of the Project Monitoring Plan and the Project Operations and Schedule Manual.

g. During the period of construction and for the life of the Project, the Government shall provide quarterly financial reports on the status of total project costs and status of contributions made by the State and the Government. Upon completion of the Project or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the State with the results of the final accounting. The final accounting shall determine total project costs, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments and the State's cash contribution provided pursuant to Article II.b. of this Agreement.

1. In the event the final accounting shows that the total contribution provided by the State is less than its required share of total project costs, plus costs due to any betterments provided in accordance with Article II.b. of this Agreement, the State shall, no later than 90 calendar days after receipt of written notice, make whatever sum is required to meet the State's required share of total project costs plus costs due to any betterments provided in accordance with Article II.b. of this Agreement available to the Government through any of the funding mechanisms specified in Article VI.b.1. of this Agreement.

2. In the event the final accounting shows that the total contribution provided by the State exceeds its required share of total project costs plus costs due to any betterments provided in accordance with Article II.b. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the State no later than 90 calendar days after the final accounting is complete; however, the State shall not be entitled to any refund of the 5 percent cash contribution required pursuant to Article II.e.1. of this Agreement. In the event existing funds are not available to refund the excess to the State, the Government shall seek such appropriations as are necessary to make the refund.

h. The State shall request prior District Engineer approval of any item of operation, maintenance, repair, replacement, rehabilitation or monitoring costs that exceeds the original estimate by more than \$5,000.00. The District Engineer shall approve or disapprove the request

within 45 days, except that the District Engineer shall approve or disapprove the request within 5 days if the District Engineer determines that an emergency exists.

## **ARTICLE VII - DISPUTES**

Before any party brings 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. The parties shall each pay 50 percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

## **ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, REHABILITATION, AND MONITORING**

a. After the District Engineer has determined that construction of the Project or functional portion of the Project is complete and provided the State with written notice of such determination, the State shall operate, maintain, repair, replace, and rehabilitate the completed Project, or functional portion of the Project, in accordance with applicable Federal and State laws as provided in Article X and specific directions prescribed in accordance with the Project Operations and Schedule Manual and any subsequent amendments thereto.

b. The State hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which the State owns or controls for access to the Project for the purpose of inspection, and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. If an inspection shows that the State for any reason is failing to fulfill the State's obligations under this Agreement without receiving prior written approval from the Government, the Government will send a written notice to the State. If after 30 calendar days from receipt of notice, the State continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon lands the State owns or controls for access to the Project for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. No completion, operation, maintenance, repair, replacement, or rehabilitation by the Government shall operate to relieve the State of responsibility to meet the State obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

c. The State shall implement or assure implementation of post-construction monitoring in accordance with the Project Monitoring Plan.

d. To provide for consistent and effective communication between the State and the Government during the period of Project operation, the State and the Government shall appoint representatives to coordinate on operation, maintenance, repair, replacement and rehabilitation



costs, and other matters relating to operation and maintenance of the Project. The State and the Government will keep each other informed of any changes in cost estimates.

#### **ARTICLE IX - MAINTENANCE OF RECORDS AND AUDIT**

a. Not later than 60 calendar days after the effective date of this Agreement, the Government and the State shall develop procedures for keeping books, records, documents, and 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 State shall maintain such books, records, documents, and other evidence in accordance with these procedures and for a minimum of three years from the date that the Government provides the State with the results of the final accounting referenced in Article VI.g. or three years after the resolution of all relevant claims arising from the results of the Government's final accounting, whichever event occurs last. To the extent permitted under applicable Federal laws and regulations, the Government and the State shall each allow the other to inspect such books, documents, records, and other evidence.

b. Pursuant to 32 C.F.R. Section 33.26, the State is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 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 State and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the State and independent auditors any information necessary to enable an audit of the State'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 as total first costs or total project costs as defined in Article I.c. and cost shared in accordance with the provisions of this Agreement.

c. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the State is required to conduct under the Single Audit Act. 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 as total first costs or total project costs as defined in Article I.c. and cost shared in accordance with the provisions of this Agreement.

#### **ARTICLE X - FEDERAL AND STATE LAWS**

In the exercise of their respective rights and obligations under this Agreement, the State and the Government agree to 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, as well as

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Army Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army". The State is also required to comply with all applicable Federal labor standards requirements including, but not limited to the 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a et seq), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 et seq) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Crediting and/or reimbursement may be withheld, in whole or in part, as a result of the State's failure to comply with its obligations under these laws.

#### **ARTICLE XI - RELATIONSHIP OF PARTIES**

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

#### **ARTICLE XII - OFFICIALS NOT TO BENEFIT**

No member of, or 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 XIII - COVENANT AGAINST CONTINGENT FEES**

The State warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon 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 State 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 XIV - TERMINATION OR SUSPENSION**

a. If at any time the State fails to make the payments required under this Agreement, the Assistant Secretary of the Army (Civil Works) may terminate or suspend work on the Project until the State is no longer in arrears, unless he/she determines that continuation of work on 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. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the State in writing, and 60 calendar days thereafter either party may elect without penalty to

terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the State elects to terminate this Agreement.

c. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XVI of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.g. of this Agreement.

d. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XVI of this Agreement shall not relieve the parties of liability for any obligation previously incurred.

#### **ARTICLE XV - OBLIGATIONS OF FUTURE APPROPRIATIONS**

a. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the Legislature of the State of Louisiana, where creating such an obligation would be inconsistent with Article III, Section 16 of the Constitution of the State of Louisiana.

b. The State intends to fulfill its obligations under this Agreement. The State shall include in its budget request or otherwise propose, for each fiscal period, appropriations sufficient to cover the State's obligations under this Agreement for each year, and will use all reasonable and lawful means to secure the appropriations for that year sufficient to make the payments necessary to fulfill its obligations hereunder. The State reasonably believes that funds in amounts sufficient to discharge these obligations can and will lawfully be appropriated and made available for this purpose. In the event the budget or other means of appropriations does not provide funds in sufficient amounts to discharge these obligations, the State shall use its best efforts to satisfy any requirements or payments under this Agreement from any other source of funds legally available for this purpose. Further, if the State is unable to satisfy its obligations hereunder, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

#### **ARTICLE XVI - HAZARDOUS SUBSTANCES**

a. After execution of this Agreement, the Government, upon formal consultation with the State, shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the State determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project. All actual costs incurred by the State and the Government for such investigations for hazardous substances shall be included in total first costs and cost shared in