

PROJECT PARTNERSHIP AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE CITY OF FARGO, NORTH DAKOTA,  
THE CITY OF MOORHEAD, MINNESOTA, AND  
THE METRO FLOOD DIVERSION AUTHORITY  
FOR  
CONSTRUCTION  
OF THE  
FARGO-MOORHEAD METROPOLITAN AREA  
FLOOD RISK MANAGEMENT PROJECT

THIS AGREEMENT is entered into this 11th day of July, 2016, by and between the Department of the Army (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works); and the City of Fargo, North Dakota, represented by its Mayor; the City of Moorhead, Minnesota, represented by its Mayor and Interim City Manager; and the Metro Flood Diversion Authority, represented by its Chair and two Deputy Executive Directors (hereinafter collectively referred to as the "Non-Federal Sponsors").

WITNESSETH, THAT:

WHEREAS, construction of the locally preferred plan for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (hereinafter the "Project", as defined in Article I.A. of this Agreement) at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area was authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014, Public Law 113-121;

WHEREAS, the locally preferred flood risk management features of the authorized Project provides fewer total annual economic benefits than the National Economic Development flood risk management plan, and the Federally Comparable flood risk management plan (hereinafter the "FC Plan"), as described in the Report of the Chief of Engineers dated December 19, 2011 (hereinafter the "Chief's Report"), was established to determine the cost-sharing for the Project;

WHEREAS, the Government and the Non-Federal Sponsors entered into an agreement, dated September 12, 2011, and amended on December 19, 2013, for engineering and design of the Project (hereinafter the "Design Agreement");

WHEREAS, the Project consists of the Non-Federal Work, as defined in Article I.B., which will be undertaken by the Non-Federal Sponsors, and the Federal Work, as defined in Article I.C., which will be undertaken by the Government;

WHEREAS, the Non-Federal Sponsors are required to pay to the Government 5 percent of the estimated total FC Plan costs in October 2015 dollars, with future annual adjustments for inflation, with that amount currently estimated at \$64,967,550;

WHEREAS, notwithstanding cost sharing requirements otherwise applicable to the Project, the parties agree that total Federal funding for construction of the Project will be \$450,000,000 in October 2015 dollars, with future annual adjustments for inflation (hereinafter the “Federal Participation Amount”, as defined in Article I.J.), with the Non-Federal Sponsors responsible for all costs in excess of the Federal Participation Amount; and

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

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

#### ARTICLE I - DEFINITIONS

A. The term “Project” means the Fargo-Moorhead Metropolitan Area Flood Risk Management Project authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014 consisting of the Non-Federal Work defined in paragraph B. of this Article and the Federal Work defined in paragraph C. of this Article, as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011 (the “FEIS”) and approved in accordance with the Chief’s Report, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 (the “SEA”) and approved by the U.S. Army Engineer, St. Paul (hereinafter the “District Engineer”) on September 19, 2013.

B. The term “Non-Federal Work” means that portion of the Project consisting of an approximately 30 mile 20,000 cubic feet per second (cfs) diversion channel and associated features; the channel outlet; the Rush and Lower Rush River hydraulic structures; the Maple River aqueduct; the Sheyenne River aqueduct; the inflow design flood levee; associated railroad bridges; the in-town levees and the Oxbow-Hickson-Bakke levee; recreation features; environmental mitigation features located within the diversion channel and associated structures for the diversion channel; and applicable pre- and post-monitoring and adaptive management for the Project.

C. The term “Federal Work” means that portion of the Project consisting of the diversion inlet structure; the approximately 6 mile connecting channel; the control structures on the Red River and Wild Rice River; the southern embankment; the overflow embankment; construction of road and railroad raises associated with the staging area; and all mitigation features not included in the Non-Federal Work.

D. The term “construction costs” means all costs incurred by the Non-Federal Sponsors and the Government for the Project in accordance with the terms and conditions of this Agreement directly related to design and construction of the Project. The term includes, but is not necessarily limited to: the Government’s Preconstruction Engineering and Design costs pursuant to the terms of the Design Agreement; the value of the contributions provided by the Non-Federal Sponsors pursuant to the terms of the Design Agreement; the engineering and design costs during construction; the costs of investigations to identify the existence and extent of hazardous substances; the costs of historic preservation activities; the Non-Federal Sponsors’ eligible costs and the Government’s costs for actual construction work; supervision and administration costs; the Non-Federal Sponsors’ eligible costs for providing real property interests, relocations, and disposal area improvements; the Government’s costs for supporting the Non-Federal Sponsors on the Non-Federal Work; the Non-Federal Sponsors’ costs of monitoring and adaptive management for the environmental mitigation features for the Project; and the Government’s costs of contract dispute settlements or awards. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the Project; any costs of dispute resolution; or the Non-Federal Sponsors’ costs of negotiating this Agreement.

E. The term “real property interests” means lands, easements, and rights-of-way, including those required for relocations and borrow and dredged material disposal areas. Acquisition of real property interests may require the performance of relocations.

F. The term “relocation” means the provision of a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad (excluding railroad bridges and approaches thereto required for construction of the Project), or public facility when such action is required in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may include the alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

G. The term “disposal area improvements” means the improvements required on real property interests to enable the ancillary disposal of material that has been dredged or excavated during construction, operation, or maintenance of the Project, including, but not limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes.

H. The term “monitoring” means those activities, including the collection and analysis of data, to determine if predicted outputs of the environmental mitigation features associated with the Project are being achieved and to determine if adaptive management is necessary, as generally described in the Chief’s Report and National Environmental Policy Act (NEPA) Compliance Documentation.

I. The term “adaptive management” means measures, if necessary; to adjust the environmental mitigation features associated with the Project in response to the monitoring results to ensure the functionality and benefits of such mitigation features are garnered.

J. The term “Federal Participation Amount” means the total amount of Federal funding for construction of the Project. The Federal Participation Amount will initially be fixed at \$450,000,000 in October 2015 dollars, with annual adjustments for inflation of the remaining balance, and includes any Federal appropriation costs associated with loans, if any, obtained through the Transportation Infrastructure Finance and Innovation Act (TIFIA) Federal loan program to finance construction of the Project, with such appropriation costs currently estimated to be 10 percent of the total TIFIA loan value. The term does not include an estimated \$29,008,000 in Federal funds obligated pursuant to the Design Agreement.

K. The term “fiscal year” means one year beginning on October 1 and ending on September 30.

## ARTICLE II – RESPONSIBILITIES OF THE GOVERNMENT AND THE NON-FEDERAL SPONSORS

A. The Non-Federal Sponsors shall provide all real property interests, relocations, and disposal area improvements required for construction, operation, and maintenance of the Project in accordance with the following provisions:

1. As soon as practicable, the Non-Federal Sponsors shall provide the Government with written descriptions and maps of the real property interests, relocations, and disposal area improvements required for construction, operation, and maintenance of the Non-Federal Work and the Government shall provide the Non-Federal Sponsors with written descriptions and maps of the real property interests, relocations, and disposal area improvements required for construction, operation, and maintenance for the Federal Work. The Non-Federal Sponsors shall acquire the real property interests, perform the relocations and disposal area improvements, and provide the Government with authorization for entry thereto. The Non-Federal Sponsors shall also provide the Government with copies of all estates acquired for the Project. The Government shall review the written descriptions, maps, and estates provided by the Non-Federal Sponsors to ensure the real estate interests, relocations, and disposal area improvements are sufficient. If the Government determines that the real estate interests, relocations, or disposal area improvements are insufficient, the Non-Federal Sponsors shall acquire the real estate interests or perform the relocations and disposal area improvements that the Government determines are necessary for construction, operation, and maintenance of the Project. The Non-Federal Sponsors shall ensure that real property interests provided for the Project are retained in public ownership for uses compatible with the authorized purpose of the Project.

2. As required by Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4630 and 4655), and Section 24.4 of the Uniform Regulations contained in 49 C.F.R. Part 24, the Non-Federal Sponsors assure that (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced

persons, as are required to be provided by a Federal agency under Sections 4622, 4623 and 4624 of title 42 of the U.S. Code; (2) relocation assistance programs offering the services described in Section 4625 of title 42 of the U.S. Code shall be provided to such displaced persons; (3) within a reasonable period of time prior to displacement, comparable replacement dwellings will be available to displaced persons in accordance with Section 4625(c)(3) of title 42 of the U.S. Code; (4) in acquiring real property, the Non-Federal Sponsors will be guided, to the greatest extent practicable under State law, by the land acquisition policies in Section 4651 and the provision of Section 4652 of title 42 of the U.S. Code; and (5) property owners will be paid or reimbursed for necessary expenses as specified in Sections 4653 and 4654 of title 42 of the U.S. Code.

B. In accordance with Federal laws, regulations, and policies and using funds appropriated by the Congress and funds provided by the Non-Federal Sponsors, the Government shall construct the Federal Work. After agreement by the Non-Federal Sponsors, the Government may undertake construction of elements of the Non-Federal Work if the Government projects that the Federal Participation Amount will not be reached.

C. The Non-Federal Sponsors shall construct the Non-Federal Work in accordance with applicable Federal, State, and local laws, regulations, and policies.

1. The Non-Federal Sponsors shall obtain all applicable licenses and permits necessary for construction of the Non-Federal Work. In carrying out their responsibilities under this Agreement, the Non-Federal Sponsors shall comply with all requirements of applicable Federal laws and implementing regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto; and 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (labor standards originally enacted as the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act).

2. The Non-Federal Sponsors plan to use a Public-Private Partnership (P3) delivery process for a portion of the Non-Federal Work (the "P3 Work"). The Government and Non-Federal Sponsors will execute a separate Memorandum of Understanding (MOU) that addresses the development of performance standards and technical requirements; the process for modification of performance standards and technical requirements as a result of the P3 solicitation (through innovative technical concepts), including approvals and denials; notifications of any changes during the delivery process; assessment of whether additional NEPA Compliance Documentation would be required as a result of changes due to the P3 solicitation; and any other pertinent items related to the P3 delivery process that are identified by the Government and Non-Federal Sponsors. In the event of a conflict between such MOU and this Agreement, this Agreement will control.

3. Not later than 4 years after the effective date of this Agreement, the Non-Federal Sponsors will notify the Government in writing of any TIFIA loans that will be used to finance construction of the Project and provide the Government with a letter from the Federal Highway Administration indicating the amount of the Federal appropriation costs that will be associated with such loans. Such appropriation costs will be included in the Federal Participation Amount.

D. The Non-Federal Sponsors shall pay to the Government 5 percent of the estimated total FC Plan costs, which includes design costs, in October 2015 dollars, with future annual adjustments for inflation of the remaining balances, in accordance with Article IV. This amount is \$64,967,550, with an estimated \$7,007,000 in funds already provided by the Non-Federal Sponsors pursuant to the Design Agreement creditable toward that amount. In addition, the Non-Federal Sponsor shall pay all costs of the Project that exceed the Federal Participation Amount.

1. The Government shall determine the amount of non-Federal funds required for the Government to initiate construction of the Federal Work, currently estimated at \$51,000,000, and provide the Non-Federal Sponsors with a written notification of the amount. No later than 60 calendar days after receipt of such notification, the Non-Federal Sponsors shall provide the Government the full amount of such requested funds by delivering a check payable to “FAO, USAED, St. Paul (B6)” to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsors have deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsors, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. The Government, no later than August 1<sup>st</sup> prior to each subsequent fiscal year, shall provide the Non-Federal Sponsors with a written estimate of the amount of funds the Government will require from the Non-Federal Sponsors for the upcoming fiscal year. Not later than September 1<sup>st</sup> prior to that fiscal year, the Non-Federal Sponsors shall provide the Government the full amount of requested funds using one of the payment mechanisms specified in paragraph D.1. of this Article.

E. The Government, as it determines necessary, to ensure compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (hereinafter “Section 106”), shall undertake actions or direct the Non-Federal Sponsors to undertake actions associated with historic preservation, including, but not limited to, the identification and treatment of historic properties as those properties are defined in Section 106. All costs incurred by the Government or the Non-Federal Sponsors for such work (including the mitigation of adverse effects) shall be included in construction costs. If historic properties are discovered during construction and the effects of construction are determined adverse, strategies shall be developed to avoid, minimize or mitigate these adverse effects. In accordance with 54 U.S.C. 312507, up to 1 percent of the total amount authorized to be appropriated for the Project may be applied toward data recovery of historic properties and such costs shall be borne by the Government. In the

event that costs associated with data recovery of historic properties exceed 1 percent of the total amount authorized to be appropriated for the Project, the Government and Non-Federal Sponsors shall consult with each other and reach an agreement on how to fund such data recovery costs. Upon agreement in accordance with 54 U.S.C. 312508, the Government may seek a waiver from the 1 percent limitation under 54 U.S.C. 312507. Any costs of data recovery of historic properties shall be included in calculating the Federal Participation Amount.

F. Upon completion of construction of functional portions of the Federal work, the Government shall promptly provide written notification to the Non-Federal Sponsors, and the Non-Federal Sponsors shall begin operation and maintenance of that work. The Government shall furnish the Non-Federal Sponsors with an Operation, Maintenance, Repair, Rehabilitation, and Replacement (OMRR&R) Manual for the Federal Work and a copy of as-built drawings for completed work.

G. Upon completion of construction of functional portions of the Non-Federal Work, the Non-Federal Sponsors shall promptly provide written notification to the Government, and the Non-Federal Sponsors shall begin operation and maintenance of that work. The Non-Federal Sponsors shall furnish the Government with the OMRR&R Manual, developed in consultation with the Government, for the Non-Federal Work and a copy of as-built drawings for completed work.

H. The Non-Federal Sponsors may request that the Government perform or obtain, on behalf of the Non-Federal Sponsors, real property interests, relocations, or disposal area improvements. Such requests shall be in writing and shall describe the items requested to be performed or obtained. If in its sole discretion the Government elects to perform or obtain the requested items or any portion thereof, it shall so notify the Non-Federal Sponsors in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsors shall be solely responsible for all costs of the items performed or obtained by the Government under this paragraph and shall pay all such costs in advance and using a method described in paragraph D.1. of this Article. If additional funds are required to complete the requested work, the Non-Federal Sponsors shall provide the additional funds within 60 days of a written request by the Government. Notwithstanding the Government performing or obtaining items as specified in this paragraph, the Non-Federal Sponsors shall be responsible, as between the Government and the Non-Federal Sponsors, for any costs of cleanup and response in accordance with Article III of this Agreement.

I. The Non-Federal Sponsors, at no cost to the Government, shall operate, maintain, repair, rehabilitate, and replace the Project in a manner compatible with the authorized purposes of the Project in accordance with applicable Federal laws and the OMRR&R Manuals, and any subsequent modifications thereto.

1. The Non-Federal Sponsors hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-

Federal Sponsors now or hereafter owns or controls to inspect the Project, and, if necessary, to undertake any work necessary to the functioning of the Project for its authorized purposes.

2. If the Government determines that the Non-Federal Sponsors are failing to perform their responsibilities under this Agreement and the Non-Federal Sponsors do not correct such failures within a reasonable time after notification by the Government, the Government may undertake any operation, maintenance, repair, rehabilitation, or replacement of the Project necessary to the functioning of the project for its authorized purposes. In determining whether the Non-Federal Sponsors are correcting such failures within a reasonable time, the Government shall consider, with respect to the P3 Work, the Non-Federal Sponsors' rights to remedy such failures under their P3 contracts. No operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the Non-Federal Sponsors of their responsibilities under this Agreement, or preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

J. Not less than once each year the Non-Federal Sponsors shall inform affected interests of the extent of protection afforded by the Project.

K. The Non-Federal Sponsors shall participate in and comply with applicable Federal floodplain management and flood insurance programs.

L. In accordance with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), the Non-Federal Sponsors shall prepare a floodplain management plan for the Project within one year after the effective date of this Agreement, and shall implement such plan not later than one year after completion of construction of the Project. The plan shall be designed to reduce the impacts of future flood events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood risk reduction provided by such work. The Non-Federal Sponsors shall provide an information copy of the plan to the Government.

M. The Non-Federal Sponsors shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in adopting regulations, or taking other actions, to prevent unwise future development and to ensure compatibility with the Project.

N. The Non-Federal Sponsors shall prevent obstructions or encroachments on the Project (including prescribing and enforcing regulations to prevent such obstructions or encroachments) that might reduce the level of protection the Project affords, hinder operation and maintenance of the Project, or interfere with the Project's proper function.

O. In addition to the ongoing, regular discussions of the parties in the delivery of the Project, the Government and the Non-Federal Sponsors may establish a Project Coordination Team to discuss significant issues or actions. The Government's costs for

participation on the Project Coordination Team shall not be included in the construction costs but shall be included in calculating the Federal Participation Amount. The Non-Federal Sponsors' costs for participation on the Project Coordination Team shall not be included in the construction costs and shall be paid solely by the Non-Federal Sponsors.

P. Except as provided in Article V.B., the Non-Federal Sponsors shall not be entitled to any reimbursement for costs they incur in performing their responsibilities under this Agreement.

### ARTICLE III - HAZARDOUS SUBSTANCES

A. The Non-Federal Sponsors shall be responsible for undertaking any investigations 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. 9601-9675), that may exist in, on, or under real property interests required for construction, operation, and maintenance of the Project. However, for real property interests that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsors with prior specific written direction, in which case the Non-Federal Sponsors shall perform such investigations in accordance with such written direction.

B. In the event it is discovered that hazardous substances regulated under CERCLA exist in, on, or under any of the required real property interests, the Non-Federal Sponsors and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsors shall not proceed with the acquisition of such real property interests until the parties agree that the Non-Federal Sponsors should proceed.

C. If hazardous substances regulated under CERCLA are found to exist in, on, or under any required real property interests, the parties shall consider any liability that might arise under CERCLA and determine whether to initiate construction, or if already initiated whether to continue construction, suspend construction, or terminate construction.

1. Should the parties initiate or continue construction, the Non-Federal Sponsors shall be responsible, as among the Government and the Non-Federal Sponsors, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall be paid solely by the Non-Federal Sponsors without reimbursement by the Government or inclusion of such costs in the construction costs.

2. In the event the parties cannot reach agreement on how to proceed or the Non-Federal Sponsors fail to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsors' responsibilities under this Article upon direction by the Government, the Government may suspend or

terminate construction of the Federal Work but may undertake any actions it determines necessary to avoid a release of such hazardous substances.

D. The Non-Federal Sponsors and the Government shall consult with each other in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As among the Government and the Non-Federal Sponsors, the Non-Federal Sponsors shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsors shall operate, maintain, repair, rehabilitate, and replace the Project in a manner that will not cause liability to arise under CERCLA.

#### ARTICLE IV – CALCULATION OF CONSTRUCTION COSTS

A. As of the effective date of this Agreement, construction costs are projected to be \$1,912,261,000; with the Government's share of construction costs consisting of the Federal Participation Amount of \$450,000,000 and an estimated \$29,008,000 in Federal funds obligated pursuant to the Design Agreement; and the Non-Federal Sponsors' share of construction costs projected to be \$1,433,253,000. These amounts are estimates only that are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Non-Federal Sponsors.

B. The Government shall track construction costs, the Federal Participation Amount, and the funds provided by the Non-Federal Sponsors for construction of the Project. The Government will make future annual adjustments for inflation on the remaining balance of the Federal Participation Amount and the 5 percent contribution of funds consistent with the methodology used by the Government to update construction costs for inflation.

C. The Non-Federal Sponsors shall provide the Government with documentation of construction costs incurred for the Non-Federal Work no less frequently than on a bi-annual basis, to the maximum extent practicable. Such documentation may include invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees; and eligible payments for real property interests, including appraisals, and eligible incidental acquisition costs. The Government may audit any costs in accordance with Article VIII to determine reasonableness, allocability, and allowability.

## ARTICLE V – ACCOUNTING

A. The Government shall provide the Non-Federal Sponsors with bi-annual reports setting forth the estimated construction costs; costs incurred by the Government, identifying both Federal and Non-Federal Sponsors funds, to date; the amount of funds provided to the Government by the Non-Federal Sponsors to date; the estimated amount of any real property interests, relocations, disposal area improvements, and investigations for hazardous substances provided or performed by the Non-Federal Sponsors and costs incurred to date; the estimated cost of any construction by the Non-Federal Sponsors, and costs incurred to date; and the estimated amount of funds required by the Government from the Non-Federal Sponsors during the upcoming fiscal year.

B. Upon conclusion of construction of the Project and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting and furnish the Non-Federal Sponsors with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsors, the Non-Federal Sponsors, within 60 calendar days of receipt of written notice from the Government, shall provide the Government with the full amount of such additional required funds. In the event the final accounting determines that the Federal Participation Amount was not reached, the Government, subject to the availability of funds, shall pay the Non-Federal Sponsors the amount necessary to reach the Federal Participation Amount. Such final accounting does not limit the Non-Federal Sponsors' responsibility to pay all costs in excess of the Federal Participation Amount, including costs of contract claims or any other liability that may become known after the final accounting.

## ARTICLE VI - DISPUTE RESOLUTION

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

## ARTICLE VII – HOLD AND SAVE

The Non-Federal Sponsors shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

## ARTICLE VIII - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsors of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsors shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Project. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Project shall not be included in the construction costs, but shall be included in calculating the Federal Participation Amount.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsors to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the request of the Non-Federal Sponsors, provide to the Non-Federal Sponsors or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsors' activities under this Agreement. The costs of non-Federal audits shall be paid solely by the Non-Federal Sponsors.

## ARTICLE IX - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsors both act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. No party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

## ARTICLE X - TERMINATION OR SUSPENSION

A. If the Non-Federal Sponsors fail to provide the required real property interests, relocations, and disposal area improvements or contribution of funds for construction of the Federal Work as needed and such failure is not resolved in a reasonable period of time, then the Government may suspend or terminate further construction of such work under this Agreement, unless the Assistant Secretary of the Army (Civil Works) determines that continuation of such work is in the interest of the United States or is necessary in order to satisfy agreements with other non-Federal interests.

B. If the Government determines at any time that the Federal funds made available for construction of the Federal Work are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsors in writing, and upon exhaustion of such funds, the Government shall suspend construction until there are

sufficient funds appropriated by the Congress or provided by the Non-Federal Sponsors to allow construction to resume.

C. If hazardous substances regulated under CERCLA are found to exist in, on, or under any required real property interests, the parties shall follow the procedures set forth in Article III.

D. In the event of termination, the Government shall conclude activities relating to construction the Federal Work and may reserve a percentage of available funds as a contingency to pay the costs of termination, including resolution of contract claims and resolution of contract modifications.

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

#### ARTICLE XI - NOTICES

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

If to the Non-Federal Sponsors:

Mayor of Fargo  
200 Third Street North  
Fargo, North Dakota 58102-4809

Mayor of Moorhead  
500 Center Avenue  
PO Box 779  
Moorhead, Minnesota 56561-0779

Chair and Executive Director, Metro Flood Diversion Authority  
Box 2806  
211 Ninth Street South  
Fargo, North Dakota 58108-2806

If to the Government:

District Engineer  
St. Paul District, U.S. Army Corps of Engineers  
180 Fifth Street East, Suite 700  
St. Paul, Minnesota 55101-1678

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

#### ARTICLE XII - CONFIDENTIALITY

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

#### ARTICLE XIII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

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

#### ARTICLE XIV – JOINT AND SEVERAL RESPONSIBILITY OF THE NON-FEDERAL SPONSORS

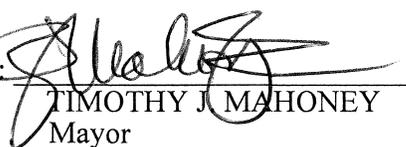
The obligations and responsibilities of the Non-Federal Sponsors shall be joint and several, such that each Non-Federal Sponsor shall be liable for the whole performance of the obligations and responsibilities of the Non-Federal Sponsors under the terms and provisions of this Agreement. The Government may demand the whole performance of said obligations and responsibilities from any of the entities designated herein as one of the Non-Federal Sponsors.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

DEPARTMENT OF THE ARMY

CITY OF FARGO, NORTH DAKOTA

BY:   
for JO-ELLEN DARCY  
Assistant Secretary of the Army  
(Civil Works)

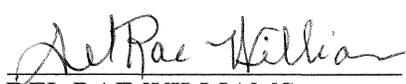
BY:   
TIMOTHY J. MAHONEY  
Mayor  
City of Fargo, North Dakota

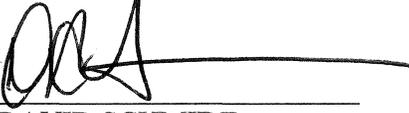
DATE: 7/11/16

DATE: 7/11/16

CITY OF MOORHEAD, MINNESOTA

CITY OF MOORHEAD, MINNESOTA

BY:   
DEL RAE WILLIAMS  
Mayor  
City of Moorhead, Minnesota

BY:   
DAVID SCHMIDT  
Interim City Manager  
City of Moorhead, Minnesota

DATE: 7-11-16

DATE: 07/11/2016

METRO FLOOD DIVERSION AUTHORITY

BY:   
DARRELL VANYO  
Chair  
Metro Flood Diversion Authority

DATE: 7-11-16

BY:   
BRUCE GRUBB  
Deputy Executive Director  
Metro Flood Diversion Authority

BY:   
KEITH BERNDT  
Deputy Executive Director  
Metro Flood Diversion Authority

DATE: 7/11/16

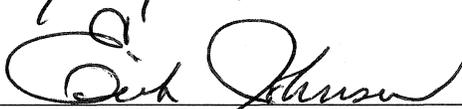
DATE: 7/11/16

CERTIFICATE OF AUTHORITY

I, Erik Johnson, do hereby certify that I am the principal legal officer of the City of Fargo, North Dakota, that the City of Fargo, North Dakota, 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 City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Metro Flood Diversion Authority in connection with the Fargo-Moorhead Metropolitan Area Flood Risk Management Project and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the City of Fargo, North Dakota have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this

11<sup>th</sup> day of July 2016.



ERIK JOHNSON  
Fargo City Attorney

CERTIFICATE OF AUTHORITY

I, John Shockley, do hereby certify that I am the principal legal officer of the City of Moorhead, Minnesota, that the City of Moorhead, Minnesota, 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 City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Metro Flood Diversion Authority in connection with the Fargo-Moorhead Metropolitan Area Flood Risk Management Project and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the City of Moorhead, Minnesota have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
11th day of July 2016.

  
\_\_\_\_\_  
JOHN SHOCKLEY  
Moorhead City Attorney

CERTIFICATE OF AUTHORITY

I, John Shockley, do hereby certify that I am the principal legal officer of the Metro Flood Diversion Authority, that the Metro Flood Diversion Authority, is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Metro Flood Diversion Authority in connection with the Fargo-Moorhead Metropolitan Area Flood Risk Management Project and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the Metro Flood Diversion Authority have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
11th day of July 2016.

  
\_\_\_\_\_  
JOHN SHOCKLEY  
General Counsel, Metro Flood Diversion Authority

## CERTIFICATION REGARDING LOBBYING

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

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

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

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

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

  
\_\_\_\_\_  
TIMOTHY J. MAHONEY  
Mayor, City of Fargo, North Dakota

DATE: July 11, 2016

## CERTIFICATION REGARDING LOBBYING

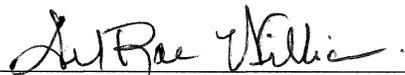
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\_\_\_\_\_  
DEL RAE WILLIAMS  
Mayor, City of Moorhead, Minnesota

DATE: 7/11/16

## CERTIFICATION REGARDING LOBBYING

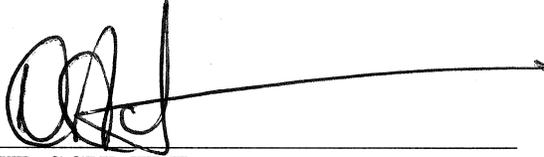
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DAVID SCHMIDT  
Interim City Manager, City of Moorhead, Minnesota

DATE: 07/11/2016

## CERTIFICATION REGARDING LOBBYING

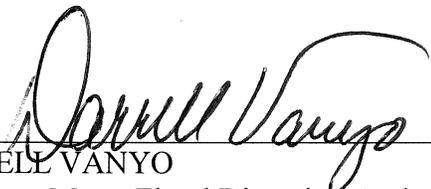
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\_\_\_\_\_  
DARRELL VANYO  
Chairman, Metro Flood Diversion Authority

DATE: 7-11-2016

CERTIFICATION REGARDING LOBBYING

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

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BRUCE GRUBB  
Deputy Executive Director  
Metro Flood Diversion Authority

DATE: 2/11/16

## CERTIFICATION REGARDING LOBBYING

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

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\_\_\_\_\_  
KEITH BERNDT  
Deputy Executive Director  
Metro Flood Diversion Authority

DATE: 7/11/16