

RESOLUTION NO. 10-232

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ACCEPTANCE, AUTHORIZATION AND EXECUTION OF A "UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT" WITH THE STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (FDOT), FOR INSTALLATION OF NORTH ROOSEVELT SEWER FORCE MAINS, IN THE TOTAL AMOUNT OF \$1,931,672.06 (CITY SEWER UTILITY FUNDS SHARE 35%); PROVIDING FOR NECESSARY BUDGET TRANSFERS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, in Resolution No. 10-154, the City Commission approved the addition of improved system conveyance capacity for the wastewater treatment plan (primarily through the Sigsbee force main project) to the scope of work for the FDOT Project Cooperation Agreement for the North Roosevelt Boulevard project; and

WHEREAS, 65% of the total project cost is reimbursable with federal funding through the Army Corps of Engineers as the construction project progresses; and

WHEREAS, increasing the capacity of the Sigsbee Force Main will improve the City's ability to process sewer flow, reducing the likelihood of overflows at sewer pump stations during severe rains or floods, thereby protecting the health of the residents of Key West;

NOW THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the attached "Utility Work By Highway Contractor Agreement" is hereby approved.

Section 2: That the City Manager, with the advice and consent of the City Attorney, is hereby authorized to execute the "Utility Work by Highway Contractor Agreement."


Section 3: That the City Manager is authorized to effectuate budget transfers in accordance with the funding requirements.

Section 4: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 3rd day of August, 2010.


Authenticated by the presiding officer and Clerk of the Commission on August 4, 2010.

Filed with the Clerk August 4, 2010.



CRAIG CATES, MAYOR

ATTEST:



CHERYL SMITH, CITY CLERK



THE CITY OF KEY WEST

Post Office Box 1409 Key West, FL 33041-1409 (305) 809-3700

M
E
M
O
R
A
N
D
U
M

TO: Jim Scholl, City Manager

FROM: Doug Bradshaw, Senior Project Manager

CC: E. David Fernandez, Asst. City Manager – Operations

DATE: July 14, 2010

SUBJECT: **Approval of a Utility Work By Highway Contractor Agreement with FDOT for Installation of Sewer Force Main during North Roosevelt Construction and Approval for Expenditure of Funds**

ACTION STATEMENT:

This resolution will approve the Utility Work By Highway Contractor Agreement (also referred to as a Joint Participation Agreement or JPA) with the Florida Department of Transportation (FDOT) for the installation of 12 and 24 inch sewer force mains by FDOT during the reconstruction of the North Roosevelt Blvd project, authorize the City Manager to enter into the Utility Work by Highway Contractor Agreement, and authorize the expenditure of funds for the project.

BACKGROUND:

The Florida Department of Transportation (FDOT) is planning road improvements to North Roosevelt Boulevard as part their 5 year capital improvement plan. The City of Key West is planning on utilizing this opportunity to potentially increase conveyance capacity to the Richard A. Heyman Environmental Protection Facility (WWTP) by increasing the size of the Sigsbee (North Roosevelt) sewer force main. Once the Sigsbee force main work is complete, the City plans on installing new pumps, a generator, control panel, and a force main from Pump Station F connecting with the new Sigsbee force main.

PURPOSE & JUSTIFICATION:

The City's current wastewater collection system routes sewage flow through an extended chain of pump stations and pipes stretching from the Airport, all the way around the island eventually passing to the WWTP. If flooding or severe rains results in an overflow at a sewer pump station at a lower elevation, it can impact the lift stations and piping in the chain behind it, thereby potentially backing up the sewer system throughout the island and causing a health risk to our residents.

With the increased capacity of the new Sigsbee Force Main and utilization of a previous

abandoned 30” outfall pipe, flow from the force main and its linked pump stations will be able to pass directly to the WWTP. This flow would no longer have to be pumped through Pump Stations D and DA. This will therefore significantly lessen the chances of one flooded pump station bottleneck negatively impacting the entire City. Many more non-flooded areas under this plan would now have the ability to pump directly into the WWTP without having to pass through a flooded location. This will also improve a flooded pump station’s ability to process sewage flow since the volume of material from the other pump stations currently pumping into it will be lessened.

OPTIONS:

The City could elect to leave the current Sigsbee force main in place as is; however, this leaves the City more vulnerable to surcharging of the wastewater system during large storm events.

The City could approve the Utility Work By Highway Contractor Agreement with FDOT for the installation of a new sewer force main. By upsizing the Sigsbee force main, the City has the option to re-route flow more directly to the treatment plant and eliminate the present operation which again is vulnerable to flooding.

FINANCIAL IMPACT:

The cost is not to exceed \$1,931,672.06 and is budgeted in account number 401-3503-535-65/SE0901. The Utility Work By Highway Contractor Agreement with FDOT requires payment of the full amount of \$1,931,672.06 due at least seven (7) calendar days prior to the date on which FDOT advertises the project for bids. FDOT may advertise the project as early as February 2011.

Amendment No. 2 to the Project Cooperation Agreement (PCA) between the City and the Department of the Army added projects which will provide additional system conveyance capacity to the wastewater treatment plant (including the Sigsbee force main project) to the scope of work in the grant making this project eligible for the funding as described in the PCA. As such, 65% of the total project cost is reimbursable with Army Corps funding as the construction progresses. The remaining 35% is the non-Federal share or local match. Amendment No. 2 was approved by the City Commission via Resolution No. 10-154 at the May 4, 2010 meeting.

Here is the funding breakdown for the Sigsbee force main project:

Army Corps grant (65% Federal share).....	\$1,255,586.84
City Sewer Utility Funds (35% non-Federal share).....	\$ 676,085.22

Total	\$1,931,672.06
--------------	-----------------------

RECOMMENDATION:

City Staff recommends approving the Utility Work By Highway Contractor Agreement with the Florida Department of Transportation (FDOT) for the installation of 12 and 24 inch sewer force mains by FDOT during the reconstruction of the North Roosevelt Blvd project, authorization for the City Manager to enter into the Utility Work By Highway Contractor Agreement and authorization for the expenditure of funds for the project.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

Financial Project ID: 250548-3-56-01	Federal Project ID: N/A
County: Monroe	State Road No.: SR-5
District Document No: N/A	
Utility Agency/Owner (UAO): City of Key West	

THIS AGREEMENT, entered into this _____ day of _____, year of _____, by and between the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, hereinafter referred to as the "FDOT", and City of Key West, hereinafter referred to as the "UAO";

WITNESSETH:

WHEREAS, the **FDOT**, is constructing, reconstructing, or otherwise changing a portion of a public road or publicly owned rail corridor, said project being identified as the Reconstruction of SR 5 (N. Roosevelt Blvd) from Eisenhower Dr. to US-1, State Road No.: 5, hereinafter referred to as the "Project"; and

WHEREAS, the **UAO** owns or desires to install certain utility facilities which are located within the limits of the Project hereinafter referred to as the "Facilities" (said term shall be deemed to include utility facilities as the same may be relocated, adjusted, installed, or placed out of service pursuant to this Agreement); and

WHEREAS, the Project requires the location (vertically and/or horizontally), protection, relocation, installation, adjustment or removal of the Facilities, or some combination thereof, hereinafter referred to as "Utility Work"; and

WHEREAS, the **FDOT** and the **UAO** desire to enter into a joint agreement pursuant to Section 337.403(1)(b), Florida Statutes for the Utility Work to be accomplished by the **FDOT's** contractor as part of the construction of the Project; and

WHEREAS, the **UAO**, pursuant to the terms and conditions hereof, will bear certain costs associated with the Utility Work;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the **FDOT** and the **UAO** hereby agree as follows:

1. Design of Utility Work

- a. **UAO** shall prepare, at **UAO's** sole cost and expense, a final engineering design, plans, technical special provisions, a cost estimate, and a contingency Utility Work Schedule (said contingency schedule to be used in the case of a bid rejection) for the Utility Work (hereinafter referred to as the "Plans Package") on or before N/A, year of _____.
- b. The Plans Package shall be in the same format as the **FDOT's** contract documents for the Project and shall be suitable for reproduction.
- c. Unless otherwise specifically directed in writing, the Plans Package shall include any and all activities and work effort required to perform the Utility Work, including but not limited to, all clearing and grubbing, survey work and shall include a traffic control plan.
- d. The Plans Package shall be prepared in compliance with the **FDOT's** Utility Accommodation Manual and the **FDOT's** Plans Preparation Manual in effect at the time the Plans Package is prepared, and the **FDOT's** contract documents for the Project. If the **FDOT's** Plans Preparation Manual has been updated and conflicts with the Utility Accommodation Manual, the Utility Accommodation Manual shall apply where such conflicts exist.
- e. The technical special provisions which are a part of the Plans Package shall be prepared in accordance with the **FDOT's** guidelines on preparation of technical special provisions and shall

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

not duplicate or change the general contracting provisions of the **FDOT's** Standard Specifications for Road and Bridge Construction and any Supplemental Specifications, Special Provisions, or Developmental Specifications of the **FDOT** for the Project.

- f. **UAO** shall provide a copy of the proposed Plans Package to the **FDOT**, and to such other right of way users as designated by the **FDOT**, for review at the following stages: N/A. Prior to submission of the proposed Plans Package for review at these stages, the **UAO** shall send the **FDOT** a work progress schedule explaining how the **UAO** will meet the **FDOT's** production schedule. The work progress schedule shall include the review stages, as well as other milestones necessary to complete the Plans Package within the time specified in Subparagraph a. above.
- g. In the event that the **FDOT** finds any deficiencies in the Plans Package during the reviews performed pursuant to Subparagraph f. above, the **FDOT** will notify the **UAO** in writing of the deficiencies and the **UAO** will correct the deficiencies and return corrected documents within the time stated in the notice. The **FDOT's** review and approval of the documents shall not relieve the **UAO** from responsibility for subsequently discovered errors or omissions.
- h. The **FDOT** shall furnish the **UAO** such information from the **FDOT's** files as requested by the **UAO**; however, the **UAO** shall at all times be and remain solely responsible for proper preparation of the Plans Package and for verifying all information necessary to properly prepare the Plans Package, including survey information as to the location (both vertical and horizontal) of the Facilities. The providing of information by the **FDOT** shall not relieve the **UAO** of this obligation nor transfer any of that responsibility to the **FDOT**.
- i. The Facilities and the Utility Work will include all utility facilities of the **UAO** which are located within the limits of the Project, except as generally summarized as follows: N/A. These exceptions shall be handled by separate arrangement.
- j. If any facilities of the **UAO** located within the project limits are discovered after work on the project commences to be qualified for relocation at the **FDOT's** expense, but not previously identified as such, the **UAO** shall file a claim with the **FDOT** for recovery of the cost of relocation thereof. The filing of the claim shall not necessarily entitle the **UAO** to payment, and resolution of the claim shall be based on a determination of fault for the error. The discovery of facilities not previously identified as being qualified for relocation at the **FDOT's** expense shall not invalidate this Agreement.
- k. The **UAO** shall fully cooperate with all other right of way users in the preparation of the Plans Package. Any conflicts that cannot be resolved through cooperation shall be resolved in the manner determined by the **FDOT**.
- l. Upon completion of the Utility Work, the Facilities shall be deemed to be located on the public road or publicly owned rail corridor under and pursuant to the Utility Permit: N/A
(Note: It is the intent of this line to allow either attachment of or separate reference to the permit).

2. Performance of Utility Work

- a. The **FDOT** shall incorporate the Plans Package into its contract for construction of the Project.
- b. The **FDOT** shall procure a contract for construction of the Project in accordance with the **FDOT's** requirements.
- c. If the portion of the bid of the contractor selected by the **FDOT** which is for performance of the Utility Work exceeds the **FDOT's** official estimate for the Utility Work by more than ten percent

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

- (10%) and the **FDOT** does not elect to participate in the cost of the Utility Work pursuant to Section 337.403(1)(b), Florida Statutes, the **UAO** may elect to have the Utility Work removed from the **FDOT's** contract by notifying the **FDOT** in writing within Ten (10) days from the date that the **UAO** is notified of the bid amount. Unless this election is made, the Utility Work shall be performed as part of the Project by the **FDOT's** contractor.
- d. If the **UAO** elects to remove the Utility Work from the **FDOT's** contract in accordance with Subparagraph 2. c., the **UAO** shall perform the Utility Work separately pursuant to the terms and conditions of the **FDOT's** standard relocation agreement, the terms and conditions of which are incorporated herein for that purpose by this reference, and in accordance with the contingency relocation schedule which is a part of the Plans Package. The **UAO** shall proceed immediately with the Utility Work so as to cause no delay to the **FDOT** or the **FDOT's** contractor in constructing the Project.
 - e. The **UAO** shall perform all engineering inspection, testing, and monitoring of the Utility Work to insure that it is properly performed in accordance with the Plans Package, except for the following activities:
N/A and will furnish the **FDOT** with daily diary records showing approved quantities and amounts for weekly, monthly, and final estimates in accordance with the format required by **FDOT** procedures.
 - f. Except for the inspection, testing, monitoring, and reporting to be performed by the **UAO** in accordance with Subparagraph 2. e., the **FDOT** will perform all contract administration for its construction contract.
 - g. The **UAO** shall fully cooperate with the **FDOT** and the **FDOT's** contractor in all matters relating to the performance of the Utility Work.
 - h. The **FDOT's** engineer has full authority over the Project and the **UAO** shall be responsible for coordinating and cooperating with the **FDOT's** engineer. In so doing, the **UAO** shall make such adjustments and changes in the Plans Package as the **FDOT's** engineer shall determine are necessary for the prosecution of the Project.
 - i. The **UAO** shall not make any changes to the Plans Package after the date on which the **FDOT's** contract documents are mailed to Tallahassee for advertisement of the Project unless those changes fall within the categories of changes which are allowed by supplemental agreement to the **FDOT's** contract pursuant to Section 337.11, Florida Statutes. All changes, regardless of the nature of the change or the timing of the change, shall be subject to the prior approval of the **FDOT**.

3. Cost of Utility Work

- a. The **UAO** shall be responsible for all costs of the Utility Work and all costs associated with any adjustments or changes to the Utility Work determined by the **FDOT's** engineer to be necessary, including, but not limited to the cost of changing the Plans Package and the increase in the cost of performing the Utility Work, unless the adjustments or changes are necessitated by an error or omission of the **FDOT**. The **UAO** shall not be responsible for the cost of delays caused by such adjustments or changes unless they are attributable to the **UAO** pursuant to Subparagraph 4.a.
- b. The initial estimate of the cost of the Utility Work is \$1,931,672.06. At such time as the **FDOT** prepares its official estimate, the **FDOT** shall notify the **UAO** of the amount of the official estimate for the Utility Work. Upon being notified of the official estimate, the **UAO** shall have five (5) working days within which to accept the official estimate for purposes of making deposits and for determining any possible contribution on the part of the **FDOT** to the cost of the Utility Work, or to elect to have the Utility Work removed from the **FDOT's** contract and performed separately pursuant to the terms and conditions set forth in Subparagraph 2. d. hereof.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

- c. At least Seven (7) calendar days prior to the date on which the **FDOT** advertises the Project for bids, the **UAO** will pay to the **FDOT** an amount equal to the **FDOT's** official estimate; plus 2% for administrative costs of field work, tabulation of quantities, Final Estimate processing and Project accounting (said amounts are to be hereinafter collectively referred to as the Allowances); plus 10% of the official estimate for a contingency fund to be used as hereinafter provided for changes to the Utility Work during the construction of the Project (the Contingency Fund).
- d. Payment of the funds pursuant to this paragraph will be made (choose one):
- directly to the **FDOT** for deposit into the State Transportation Trust Fund.
- as provided in the attached Memorandum of Agreement between **UAO**, **FDOT** and the State of Florida, Department of Financial Services, Division of Treasury. Deposits of less than \$100,000.00 must be pre-approved by the Department of Financial Services and **FDOT** Comptroller's Office prior to execution of this agreement.
- e. If the portion of the contractor's bid selected by the **FDOT** for performance of the Utility Work exceeds the amount of the deposit made pursuant to Subparagraph c. above, then subject to and in accordance with the limitations and conditions established by Subparagraph 2. c. hereof regarding **FDOT** participation in the cost of the Utility Work and the **UAO's** election to remove the Utility Work from the Project, the **UAO** shall, within fourteen (14) calendar days from notification from the **FDOT** or prior to posting of the accepted bid, whichever is earlier, pay an additional amount to the **FDOT** to bring the total amount paid to the total obligation of the **UAO** for the cost of the Utility Work, plus Allowances and 10% Contingency Fund. The **FDOT** will notify the **UAO** as soon as it becomes apparent the accepted bid amount plus allowances and contingency is in excess of the advance deposit amount; however, failure of the **FDOT** to so notify the **UAO** shall not relieve the **UAO** from its obligation to pay for its full share of project costs on final accounting as provided herein below. In the event that the **UAO** is obligated under this Subparagraph 3.e. to pay an additional amount and the additional amount that the **UAO** is obligated to pay does not exceed the Contingency Fund already on deposit, the **UAO** shall have sixty (60) calendar days from notification from the **FDOT** to pay the additional amount, regardless of when the accepted bid is posted.
- f. If the accepted bid amount plus allowances and contingency is less than the advance deposit amount, the **FDOT** will refund the amount that the advance deposit exceeds the bid amount, plus allowances and contingency if such refund is requested by the **UAO** in writing and approved by the Comptroller of the **FDOT** or his designee.
- g. Should contract modifications occur that increase the **UAO's** share of total project costs, the **UAO** will be notified by the **FDOT** accordingly. The **UAO** agrees to provide, in advance of the additional work being performed, adequate funds to ensure that cash on deposit with the **FDOT** is sufficient to fully fund its share of the project costs. The **FDOT** shall notify the **UAO** as soon as it becomes apparent the actual costs will overrun the award amount; however, failure of the **FDOT** to so notify the **UAO** shall not relieve the **UAO** from its obligation to pay for its full share of project costs on final accounting as provided herein below.
- h. The **FDOT** may use the funds paid by the **UAO** for payment of the cost of the Utility Work. The Contingency Fund may be used for increases in the cost of the Utility Work which occur because of quantity overruns or because of adjustments or changes in the Utility Work made pursuant to Subparagraph 2. h. Prior to using any of the Contingency Fund, the **FDOT** will obtain the written concurrence of the person delegated that responsibility by written notice from the **UAO**. The delegatee shall respond immediately to all requests for written concurrence. If the delegatee refuses to provide written concurrence promptly and the **FDOT** determines that the work is necessary, the **FDOT** may proceed to perform the work and recover the cost thereof pursuant to

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

the provisions of Section 337.403(3), Florida Statutes. In the event that the Contingency Fund is depleted, the **UAO** shall, within fourteen (14) calendar days from notification from the **FDOT**, pay to the **FDOT** an additional 10% of the total obligation of the **UAO** for the cost of the Utility Work established under Subparagraph 3. e. for future use as the Contingency Fund.

- I. Upon final payment to the Contractor, the **FDOT** intends to have its final and complete accounting of all costs incurred in connection with the work performed hereunder within three hundred sixty (360) days. All project cost records and accounts shall be subject to audit by a representative of the **UAO** for a period of three (3) years after final close out of the Project. The **UAO** will be notified of the final cost. Both parties agree that in the event the final accounting of total project costs pursuant to the terms of this agreement is less than the total deposits to date, a refund of the excess will be made by the **FDOT** to the **UAO** in accordance with Section 215.422, Florida Statutes. In the event said final accounting of total project costs is greater than the total deposits to date, the **UAO** will pay the additional amount within forty (40) calendar days from the date of the invoice. The **UAO** agrees to pay interest at a rate as established pursuant to Section 55.03, Florida Statutes, on any invoice not paid within the time specified in the preceding sentence until the invoice is paid.

4. Claims Against UAO

- a. The **UAO** shall be responsible for all costs incurred as a result of any delay to the **FDOT** or its contractors caused by errors or omissions in the Plans Package (including inaccurate location of the Facilities) or by failure of the **UAO** to properly perform its obligations under this Agreement in a timely manner.
- b. In the event the **FDOT's** contractor provides a notice of intent to make a claim against the **FDOT** relating to the Utility Work, the **FDOT** will notify the **UAO** of the notice of intent and the **UAO** will thereafter keep and maintain daily field reports and all other records relating to the intended claim.
- c. In the event the **FDOT's** contractor makes any claim against the **FDOT** relating to the Utility Work, the **FDOT** will notify the **UAO** of the claim and the **UAO** will cooperate with the **FDOT** in analyzing and resolving the claim within a reasonable time. Any resolution of any portion of the claim directly between the **UAO** and the **FDOT's** contractor shall be in writing, shall be subject to written **FDOT** concurrence and shall specify the extent to which it resolves the claim against the **FDOT**.
- d. The **FDOT** may withhold payment of surplus funds to the **UAO** until final resolution (including any actual payment required) of all claims relating to the Utility Work. The right to withhold shall be limited to actual claim payments made by the **FDOT** to the **FDOT's** contractor.

5. Out of Service Facilities

No Facilities shall be placed out of service unless specifically identified as such in the Plans. The following terms and conditions shall apply to Facilities placed Out-of-Service:

- a. The **UAO** acknowledges its present and continuing ownership of and responsibility for out of service Facilities.
- b. The **FDOT** agrees to allow the **UAO** to leave the Facilities within the right of way subject to the continuing satisfactory performance of the conditions of this Agreement by the **UAO**. In the event of a breach of this Agreement by the **UAO**, the Facilities shall be removed upon demand from the **FDOT** in accordance with the provisions of Subparagraph e. below.
- c. The **UAO** shall take such steps to secure the Facilities and otherwise make the Facilities safe in accordance with any and all applicable local, state or federal laws and regulations and in

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

accordance with the legal duty of the **UAO** to use due care in its dealings with others. The **UAO** shall be solely responsible for gathering all information necessary to meet these obligations.

- d. The **UAO** shall keep and preserve all records relating to the Facilities, including, but not limited to, records of the location, nature of, and steps taken to safely secure the Facilities and shall promptly respond to information requests of the **FDOT** or other permittees using or seeking use of the right of way.
- e. The **UAO** shall remove the Facilities at the request of the **FDOT** in the event that the **FDOT** determines that removal is necessary for **FDOT** use of the right of way or in the event that the **FDOT** determines that use of the right of way is needed for other active utilities that cannot be otherwise accommodated in the right of way. Removal shall be at the sole cost and expense of the **UAO** and without any right of the **UAO** to object or make any claim of any nature whatsoever with regard thereto. Removal shall be completed within the time specified in the **FDOT's** notice to remove. In the event that the **UAO** fails to perform the removal properly within the specified time, the **FDOT** may proceed to perform the removal at the **UAO's** expense pursuant to the provisions of Sections 337.403 and 337.404, Florida Statutes.
- f. Except as otherwise provided in Subparagraph e. above, the **UAO** agrees that the Facilities shall forever remain the legal and financial responsibility of the **UAO**. The **UAO** shall reimburse the **FDOT** for any and all costs of any nature whatsoever resulting from the presence of the Facilities within the right of way. Said costs shall include, but shall not be limited to, charges or expenses which may result from the future need to remove the Facilities or from the presence of any hazardous substance or material in or discharging from the Facilities. Nothing in this paragraph shall be interpreted to require the **UAO** to indemnify the **FDOT** for the **FDOT's** own negligence; however, it is the intent that all other costs and expenses of any nature be the responsibility of the **UAO**.

6. Default

- a. In the event that the **UAO** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in this Agreement, the **FDOT** may exercise one or more of the following options, provided that at no time shall the **FDOT** be entitled to receive double recovery of damages:
 - (1) Terminate this Agreement if the breach is material and has not been cured within sixty (60) days from written notice thereof from **FDOT**.
 - (2) Pursue a claim for damages suffered by the **FDOT**.
 - (3) If the Utility Work is reimbursable under this Agreement, withhold reimbursement payments until the breach is cured. The right to withhold shall be limited to actual claim payments made by **FDOT** to third parties.
 - (4) If the Utility Work is reimbursable under this Agreement, offset any damages suffered by the **FDOT** or the public against payments due under this Agreement for the same Project. The right to offset shall be limited to actual claim payments made by **FDOT** to third parties.
 - (5) Suspend the issuance of further permits to the **UAO** for the placement of Facilities on **FDOT** property if the breach is material and has not been cured within sixty (60) days from written notice thereof from **FDOT**.
 - (6) Pursue any other remedies legally available.
 - (7) Perform any work with its own forces or through contractors and seek repayment for the

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

cost thereof under Section 337.403(3), Florida Statutes.

- b. In the event that the **FDOT** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in the Agreement, the **UAO** may exercise one or more of the following options:
- (1) Terminate this Agreement if the breach is material and has not been cured within sixty (60) days from written notice thereof from the **UAO**.
 - (2) If the breach is a failure to pay an invoice for Utility Work which is reimbursable under this Agreement, pursue any statutory remedies that the **UAO** may have for failure to pay invoices.
 - (3) Pursue any other remedies legally available.
- c. Termination of this Agreement shall not relieve either party from any obligations it has pursuant to other agreements between the parties nor from any statutory obligations that either party may have with regard to the subject matter hereof.

7. Force Majeure

Neither the **UAO** nor the **FDOT** shall be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, or other event beyond the control of the non-performing party and which could not have been avoided or overcome by the exercise of due diligence; provided that the party claiming the excuse from performance has (a) promptly notified the other party of the occurrence and its estimate duration, (b) promptly remedied or mitigated the effect of the occurrence to the extent possible, and (c) resumed performance as soon as possible.

8. Indemnification

FOR GOVERNMENT-OWNED UTILITIES,

To the extent provided by law, the **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

When the **FDOT** receives a notice of claim for damages that may have been caused by the **UAO** in the performance of services required under this Agreement, the **FDOT** will immediately forward the claim to the **UAO**. The **UAO** and the **FDOT** will evaluate the claim and report their findings to each other within fourteen (14) working days and will jointly discuss options in defending the claim. After reviewing the claim, the **FDOT** will determine whether to require the participation of the **UAO** in the defense of the claim or to require the **UAO** to defend the **FDOT** in such claim as described in this section. The **FDOT's** failure to notify the **UAO** of a claim shall not release the **UAO** from any of the requirements of this section. The **FDOT** and the **UAO** will pay their own costs for the evaluation, settlement negotiations, and trial, if any. However, if only one party participates in the defense of the claim at trial, that party is responsible for all costs.

FOR NON-GOVERNMENT-OWNED UTILITIES,

The **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

The **UAO's** obligation to indemnify, defend, and pay for the defense or at the **FDOT's** option, to participate and associate with the **FDOT** in the defense and trial of any damage claim or suit and any related settlement negotiations, shall arise within fourteen (14) days of receipt by the **UAO** of the **FDOT's** notice of claim for indemnification to the **UAO**. The notice of claim for indemnification shall be served by certified mail. The **UAO's** obligation to defend and indemnify within fourteen (14) days of such notice shall not be excused because of the **UAO's** inability to evaluate liability or because the **UAO** evaluates liability and determines the **UAO** is not liable or determines the **FDOT** is solely negligent. Only a final adjudication of judgment finding the **FDOT** solely negligent shall excuse performance of this provision by the **UAO**. The **UAO** shall pay all costs and fees related to this obligation and its enforcement by the **FDOT**. The **FDOT's** delay in notifying the **UAO** of a claim shall not release **UAO** of the above duty to defend.

9. Miscellaneous

- a. Time is of essence in the performance of all obligations under this Agreement.
- b. The Facilities shall at all times remain the property of and be properly protected and maintained by the **UAO** in accordance with the current Utility Accommodation Manual in effect at the time the Plans Package is prepared and the current utility permit for the Facilities; provided, however, that the **UAO** shall not be obligated to protect or maintain any of the Facilities to the extent the **FDOT's** contractor has that obligation as part of the Utility Work pursuant to the **FDOT's** specifications.
- c. The **FDOT** may unilaterally cancel this Agreement for refusal by the **UAO** to allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the **UAO** in conjunction with this Agreement.
- d. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto, except that the parties understand and agree that the **FDOT** has manuals and written policies and procedures which may be applicable at the time of the Project and the relocation of the Facilities.
- e. This Agreement shall be governed by the laws of the State of Florida. Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.
- f. All notices required pursuant to the terms hereof may be sent by first class United States Mail, facsimile transmission, hand delivery, or express mail and shall be deemed to have been received by the end of five business days from the proper sending thereof unless proof of prior actual receipt is provided. The **UAO** shall have a continuing obligation to notify each District of the **FDOT** of the appropriate persons for notices to be sent pursuant to this Agreement. Unless otherwise notified in writing, notices shall be sent to the following addresses:

If to the **UAO**:

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

Mr. Doug Bradshaw,
City of Key West
604 Simonton Street, Key West, FL 33040

If to the **FDOT**:
Harold Desdunes, P.E. District Six Design Engineer

1000 NW 111 Ave.
Miami, FL 33172

10. Certification

This document is a printout of an **FDOT** form maintained in an electronic format and all revisions thereto by the **UAO** in the form of additions, deletions, or substitutions are reflected only in an Appendix entitled Changes To Form Document and no change is made in the text of the document itself. Hand notations on affected portions of this document may refer to changes reflected in the above-named Appendix but are for reference purposes only and do not change the terms of the document. By signing this document, the **UAO** hereby represents that no change has been made to the text of this document except through the terms of the appendix entitled Changes to Form Document.

You **MUST** signify by selecting or checking which of the following applies:

- No changes have been made to this Form Document and no Appendix entitled "Changes to Form Document" is attached.
- No changes have been made to this Form Document, but changes are included on the attached Appendix entitled "Changes to Form Document."

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

UTILITY: City of Key West

BY: (Signature) _____

Jim K. Scholl

DATE: 8-3-10

(Typed Name: Jim K. Scholl)

(Typed Title: City Manager)

Recommend Approval by the District Utility Office

BY: (Signature) _____

DATE: _____

FDOT Legal review

BY: (Signature) _____

DATE: _____

District Counsel

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
UTILITY WORK BY HIGHWAY CONTRACTOR AGREEMENT
(AT UTILITY EXPENSE)

Form No. 710-010-22
UTILITIES
10/04

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

BY: (Signature) _____

DATE: _____

(Typed Name: Gus Pego, P.E.)

(Typed Title: District Secretary)

FEDERAL HIGHWAY ADMINISTRATION (if applicable)

BY: _____

DATE: _____

(Typed Name: _____)

(Typed Title: _____)



CONSTRUCTION COST ESTIMATE

Proposed 12 and 24 inches Force Mains along SR 5 (N. Roosevelt Blvd.), From Georgia St. to Kennedy Dr.

Financial Project No. 250548-3-56-01

City of Key West

ITEM	DESCRIPTION	UNIT	UNIT PRICE	QUANTITY	TOTAL
1	Install 24" PVC Pipe and Fittings.	LF	\$68.00	9,186.00	\$624,648.00
2	Furnish 24" PVC Pipe and Fittings.	LF	\$42.00	9,186.00	\$385,812.00
3	Install 16" PVC Pipe and Fittings.	LF	\$60.00	82.00	\$4,920.00
4	Furnish 16" PVC Pipe and Fittings.	LF	\$37.00	82.00	\$3,034.00
5	Install 12" PVC Pipe, Fittings and Valves.	LF	\$52.00	710.00	\$36,920.00
6	Furnish 12" PVC Pipe, Fittings and Valves.	LF	\$30.00	710.00	\$21,300.00
7	Install 6" PVC Pipe and Fittings.	LF	\$35.00	84.00	\$2,940.00
8	Furnish 6" PVC Pipe and Fittings.	LF	\$20.00	84.00	\$1,680.00
9	Install 4" PVC Pipe, Fittings and Valves.	LF	\$33.00	176.00	\$5,808.00
10	Furnish 4" PVC Pipe, Fittings and Valves.	LF	\$19.00	176.00	\$3,344.00
11	Install 24" Gate Valves complete, w/rise pipe and valve box.	EA	\$3,200.00	10.00	\$32,000.00
12	Furnish 24" Gate Valves complete, w/rise pipe and valve box.	EA	\$7,450.00	10.00	\$74,500.00
13	Install 16" Gate Valves complete, w/rise pipe and valve box.	EA	\$2,500.00	3.00	\$7,500.00
14	Furnish 16" Gate Valves complete, w/rise pipe and valve box.	EA	\$3,800.00	3.00	\$11,400.00
15	Furnish and Install 24" Steel Pipe on Bridge over Salt Run Canal	LF	\$450.00	221.00	\$99,450.00
16	Make connections to exist. F.M. at Several Locations	EA	\$4,500.00	8.00	\$36,000.00
17	Furnish & Install Air Release Valve assembly complete.	EA	\$2,500.00	15.00	\$37,500.00
18	Install M.J. Tapping Sleeves and Tapping Valves (Several Diameters)	EA	\$6,500.00	4.00	\$26,000.00
19	Furnish M.J. Tapping Sleeves and Tapping Valves (Several Diameters)	EA	\$4,500.00	4.00	\$18,000.00
20	Remove Valve Boxes and riser pipe on mains to be placed out of service to 2' below finish grade.	EA	\$300.00	15.00	\$4,500.00
Total					\$1,437,256.00
21	Maintenance of Traffic [M.O.T.] (10%)	LS	\$143,725.60	1	\$143,725.60
22	Mobilization (10%)	LS	\$143,725.60	1	\$143,725.60
Total Estimated Construction Cost					\$1,724,707.20
23	Contingency Fund (10%)	LS	\$172,470.72	1	\$172,470.72
24	Const. Engineering Administration [C.E.A.] (2%)				\$34,494.14
UTILITY WORK GRAND TOTAL					\$1,931,672.06

RESOLUTION NO. 08-033

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED AGREEMENT BETWEEN THE CITY OF KEY WEST AND THE DEPARTMENT OF ARMY FOR PLANNING DESIGN AND CONSTRUCTION OF FLORIDA KEYS WATER QUALITY IMPROVEMENT PROGRAM STORMWATER IMPROVEMENT PROJECT; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the Secretary of the Army, represented by the assistant Secretary of the Army (Civil Works) appeared in the City of Key West for a document signing ceremony with the City and various municipalities on January 11, 2008; and

WHEREAS, the Mayor executed a previously reviewed document on behalf of the City of Key West in order to timely receive Federal funding for stormwater improvements in the City;

NOW THEREFORE BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the attached agreement between the Department of Army and the City of Key West is hereby approved.

Section 2: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

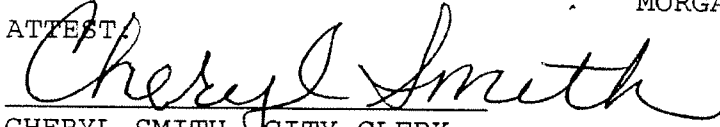
Passed and adopted by the City Commission at a meeting held this 5th day of February, 2008.

Authenticated by the presiding officer and Clerk of the Commission on February 6, 2008.

Filed with the Clerk February 6, 2008.


MORGAN MCPHERSON, MAYOR

ATTEST


CHERYL SMITH, CITY CLERK

EXECUTIVE SUMMARY



TO: Jim Scholl, City Manager
FROM: E. David Fernandez, General Services Director *EDF*
DATE: January 30, 2008
SUBJECT: Execution of a Project Cooperation Agreement with the US Army Corps of Engineers for Stormwater Improvements

ACTION STATEMENT: A resolution authorizing the execution of a Project Cooperation Agreement (PCA) with the US Army Corps of Engineers (ACOE) for up to \$10.3 million to be used for stormwater improvements.

BACKGROUND:

The City and other local Governments have been working together for more than 7 years to secure federal funding for water quality in the Keys. Congress authorized up to \$100 million in funding to be passed through the Army Corp of Engineers (ACOE). The Corps brought the group of stakeholders together forming the Project Development Team (PDT) for the purpose of allocating the \$100 million.

The PDT allocated the funds as follows:

Total Allocation for FKWCIP (per IGTF)	Municipality	2004 Funding	2005 Funding	2006 Funding	Total Allocated to Date	% Allocated
\$ 200,000.00	Key Colony Beach	\$ 200,000.00	\$ -	\$ -	\$ 200,000.00	100%
\$ 800,000.00	Layton	\$ -	\$ 800,000.00	\$ -	\$ 800,000.00	100%
\$ 10,300,000.00	Key West	\$ 100,000.00	\$ 400,000.00	\$ 1,980,000.00	\$ 2,480,000.00	24.80%
\$ 29,560,000.00	Islamorada	\$ 267,000.00	\$ 233,000.00	\$ -	\$ 500,000.00	1.69%
\$ 29,560,000.00	Marathon	\$ 267,000.00	\$ 233,000.00	\$ -	\$ 500,000.00	1.69%
\$ 29,560,000.00	Key Largo	\$ 267,000.00	\$ 233,000.00	\$ -	\$ 500,000.00	1.69%

There are additional funds totaling \$1,984,728 that were recently approved (December 17, 2007) that have yet to be allocated. ACOE prepared Environmental Assessment documents for each project to comply with the National Environmental Protection Act (NEPA). The cost for these studies and other ACOE administrative costs serve to reduce the above allocations. NEPA documents must be completed and approved before any cost can be incurred by the Grantee.

Once NEPA documents were complete, the ACOE began preparing Project Cooperation Agreements (PCAs). These grant documents authorize the grantee to incur (subject to Appropriations).

On January 11, 2008 at the Nancy Foster Eco-Discovery Center, Mayor McPherson signed this agreement in a ceremony attended by US Representative Ileana Ros-Lehtinen and the Assistant Secretary of the Army for Civil Works John Paul Woodley Jr.

PURPOSE & JUSTIFICATION:

The City has determined that stormwater collection and outfall reduction is a priority. All grant funding opportunities are sought as a means to leverage user fees and maximizes services to our customers. Federal allocations would fund improvements to the City's drainage system to reduce flooding and treat stormwater run-off.

The project consists of the installation of gravity injection wells, with triple chamber baffle boxes, catch basins, and drainage pipes. Grant funds will allow the construction of 19 gravity wells which could facilitate stormwater services for approximately 500 homes in Key West.

OPTIONS:

1. Ratify the PCA and proceed with our stormwater capital projects. The Stormwater Fund is heavily dependent on grants to accomplish the Stormwater Capital Improvement Plan. Without grant funding, many of these proposed wells cannot be built with available resources unless other projects are set aside.
2. Reject the PCA. As noted above, choosing this option will indefinitely delay construction of gravity wells that can help minimize localized flooding and reduce stormwater pollution in our nearshore waters. This option would also forego \$2.48 million that has already been appropriated for our use.

FINANCIAL IMPACT:

Approval of the ACOE PCA will increase resources available to the Stormwater Capital Improvement Plan by as much as \$10,300,000. We have currently been appropriated \$2.48 million to spend from the federal government.

The grant funds are budgeted in Revenue Account # 402-334.90. The project cost associated with this grant is budgeted in expense account # 402-3802-538-65

RECOMMENDATION:

Staff recommends option 1, the approval of the PCA with ACOE

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF KEY WEST, FLORIDA
FOR
PLANNING, DESIGN AND CONSTRUCTION
OF
FLORIDA KEYS WATER QUALITY IMPROVEMENT PROGRAM
STORMWATER IMPROVEMENT PROJECT
CITY OF KEY WEST
IN MONROE COUNTY, FLORIDA

THIS AGREEMENT is entered into this 11 day of January, 2008, 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 Key West, Florida (hereinafter the "Non-Federal Sponsor"), represented by its ~~City Manager~~ Mayor.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized to provide technical and financial assistance to carry out projects for the planning, design, and construction of treatment works to improve water quality in the Florida Keys National Marine Sanctuary (hereinafter the "Section 109 Program") pursuant to Section 109 of the Consolidated Appropriations Act, 2001, Division B of Appendix D of Public Law 106-554 (hereinafter "Section 109");

WHEREAS, Section 109 provides that \$100,000,000 in Federal funds are authorized to be appropriated for assistance for the Section 109 Program;

WHEREAS, the U.S. Army Engineer, Jacksonville District (hereinafter the "District Engineer") has determined that Florida Water Quality Improvement Program Stormwater Improvement Project City of Key West, Florida in Monroe County, Florida (hereinafter the "Project", as defined in Article I.A. of this Agreement) is eligible for implementation under Section 109;

WHEREAS, Section 109 provides that before entering into an agreement to provide assistance for a project under this section, the Secretary of the Army shall ensure the non-Federal sponsor has completed adequate planning and design activities, as applicable; the non-Federal sponsor has completed a financial plan identifying sources of non-Federal funding for the project; the project complies with applicable growth management ordinances of Monroe County, applicable agreements between Monroe County and the State of Florida to manage growth in Monroe County, and applicable water quality standards; and the project is consistent with the master wastewater and storm water plans for Monroe County, Florida;

WHEREAS, Section 109 specifies the cost-sharing requirements applicable to the *Project*

including that the Secretary of the Army shall afford credit for the costs of planning and design completed by the non-Federal interest before entering into a written agreement with the Secretary;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, provides that credits and reimbursements afforded for all applicable general authorities and under specific project authority shall not exceed \$100,000,000 for all applicable programs and projects in each fiscal year;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the "Agreement") for the provision of technical and financial assistance for the *Project*;

WHEREAS, the Government and Non-Federal Sponsor 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; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

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

ARTICLE I – DEFINITIONS

A. The term "Project" shall mean the City of Key West, Monroe County, Florida Stormwater Improvement Project consisting of the following features: the construction of 108 gravity injection wells and two pump-assisted wells within the City boundaries. The specific location of the well sites will be determined as funds become available, but will be located at one of the 349 road intersections where wells can be installed. All gravity injection wells would include pre-treatment best management practices (BMPs) to reduce stormwater pollutants prior to injection. The proposed gravity wells use a triple-chamber baffle box to skim off debris, oils, and other pollutants prior to disposal into the ground. The wells consist of a drilled open shaft that is partially lined with casing. The 24-inch casing extends downward past a confining soil layer located 35-40 feet below the surface. As required by Florida Department of Environmental Protection, the gravity wells would be encased to a minimum depth of 60 feet. The two pump-assisted wells would be constructed using the same specifications as the gravity wells with the addition of two 60-horsepower, 8350-gallon per minute pumps to assist in moving stormwater into the Biscayne Aquifer. Those areas which offer the greatest opportunity for water quality improvement are being implemented first. Gravity wells will be located in the right-of-way at intersections of City-owned streets. Siting of each well will be done on an intersection-by-

intersection basis. A secondary action under this project is to abandon existing stormwater outfalls. As stormwater wells come online, outfalls will be abandoned. This project is generally described in the Decision Document Florida Keys Water Quality Improvement Program (FKWQIP) Stormwater Improvement Project City of Key West, Florida, dated October 4, 2005 and approved by the District Engineer, U.S. Army Corps of Engineers, Jacksonville District on September 26, 2007.

B. The term “*total project costs*” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement that the District Engineer determines are directly related to planning, design, and construction of the *Project*. Subject to the provisions of this Agreement including audits conducted in accordance with Article VIII.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs, the term shall include, but is not necessarily limited to: the costs of the Non-Federal Sponsor’s *pre-Agreement planning and design work* determined in accordance with Article II.K. of this Agreement; the Non-Federal Sponsor’s design costs incurred after the effective date of this Agreement; the Government’s costs of review in accordance with Article II.A.1. of this Agreement; the Government’s costs of preparation of environmental compliance documentation in accordance with Article II.A.2. of this Agreement; the Government’s costs of inspection in accordance with Article II.A.6. of this Agreement; the Government’s costs of technical assistance in accordance with Article II.A.1. and Article II.A.6. of this Agreement; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XII.A.1. and Article XII.A.2. of this Agreement; the Non-Federal Sponsor’s and the Government’s costs of historic preservation activities in accordance with Article XV.A. and Article XV.B. of this Agreement; the Non-Federal Sponsor’s construction costs; the Non-Federal Sponsor’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article III of this Agreement; the Non-Federal Sponsor’s costs of contract dispute settlements or awards; the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article VIII.B. and Article VIII.C. of this Agreement; and any other costs incurred by the Government pursuant to the provisions of this Agreement. The term does not include any costs of activities performed under any other agreement for the *Project*; any costs of lands, easements, rights-of-way, *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that are required for construction, operation, or maintenance of the *Project*; any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of *betterments*; any costs incurred in advertising and awarding any construction contracts prior to the effective date of this Agreement; any construction costs incurred prior to the effective date of this Agreement; any costs of dispute resolution under Article V of this Agreement; the Government’s costs for data recovery activities in accordance with Article XV.D. and Article XV.E. of this Agreement; or the Non-Federal Sponsor’s costs of negotiating this Agreement.

C. The term “*period of design and construction*” shall mean the time from the effective date of this Agreement to the date that construction of the *Project* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article II.E. or

Article XI or Article XII.C. of this Agreement, whichever is earlier.

D. The term “*highway*” shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

E. The term “*relocation*” shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, *highway*, railroad, or public facility when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

F. The term “*betterment*” shall mean a difference in the design or construction of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design or construction of that element. The term does not include any design or construction for features not included in the *Project* as defined in paragraph A. of this Article.

G. The term “*fiscal year*” shall mean one year beginning on October 1 and ending on September 30.

H. The term “*Federal program funds*” shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefore.

I. The term “*sufficient invoice*” shall mean submission of all of the following three items: (1) a written certification by the Non-Federal Sponsor to the Government that it has made specified payments to contractors, suppliers, or employees for performance of work in accordance with this Agreement, or a written certification by the Non-Federal Sponsor to the Government that it has received bills from contractors, suppliers, or employees for performance of work in accordance with this Agreement; (2) copies of all relevant invoices and evidence of such payments or bills received; and (3) a written request for reimbursement for the amount of such specified payments or bills received that identifies those costs that have been paid or will be paid with *Federal program funds*.

J. The term “*Section 109 Program Limit*” shall mean the amount of Federal funds authorized to be appropriated for the Section 109 Program. As of the effective date of this Agreement, such amount is \$100,000,000.

K. The term “*Section 102 Limit*” shall mean the annual limit on credits and reimbursements imposed by Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103.

L. The term “*pre-Agreement planning and design work*” shall mean the work performed prior to the effective date of this Agreement by the Non-Federal Sponsor that is directly related to planning and design of the *Project* and that was not performed pursuant to any other

agreement for the *Project*.

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

A. Using its funds, the Non-Federal Sponsor expeditiously shall design and construct the *Project* in accordance with Federal laws, regulations, and policies.

1. The Non-Federal Sponsor shall require all contractors to whom it awards design contracts to provide 30 percent and 100 percent design information to enable in-progress review of the design. The Government may participate in the review of the design at each stage of completion and may provide technical assistance to the Non-Federal Sponsor on an as-needed basis until the end of the *period of design and construction*. The Government shall perform a final review to verify that the design is complete and is necessary for the *Project*. Upon completion of design, the Non-Federal Sponsor shall furnish the District Engineer with copies of the completed design.

2. Using information developed by the Non-Federal Sponsor, the Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary, to inform the public regarding the environmental impacts of the *Project* in accordance with the National Environmental Policy Act of 1969 (hereinafter "NEPA") (42 U.S.C. 4321-4347). The Non-Federal Sponsor shall not issue the solicitation for the first construction contract for the *Project* or commence construction of the *Project* using the Non-Federal Sponsor's own forces until all applicable environmental laws and regulations have been complied with, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

3. The Non-Federal Sponsor shall obtain all permits and licenses necessary for the design and construction of the *Project* and, in the exercise of its rights and obligations under this Agreement, shall comply with all applicable Federal, state, and local laws, regulations, ordinances, and policies including the laws and regulations specified in Article IX of this Agreement. As necessary to ensure compliance with such laws, regulations, ordinances, and policies, the Non-Federal Sponsor shall include appropriate provisions in its contracts for the design and construction of the *Project*.

4. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *Project*, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Government with notification of a contract modification is not possible prior to execution of the contract modification, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal

Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The Non-Federal Sponsor shall consider in good faith the comments of the Government, but the contents of solicitations, award of contracts or commencement of design or construction using the Non-Federal Sponsor's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Non-Federal Sponsor.

5. At the time the Non-Federal Sponsor furnishes a contractor with a notice of acceptance of completed work for each contract for the *Project*, the Non-Federal Sponsor shall furnish a copy thereof to the Government.

6. The Government may perform periodic inspections to verify the progress of construction and that the work is being performed in a satisfactory manner. In addition, the Government may provide technical assistance to the Non-Federal Sponsor on an as-needed basis until the end of the *period of design and construction*. Further, the Government shall perform a final inspection to verify the completion of construction of the entire *Project* or completed portion thereof as the case may be. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of performing such inspections.

B. The Non-Federal Sponsor shall provide, at no cost to the Government, all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that are required for construction, operation, and maintenance of the *Project*. Further, the Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

C. The Government shall determine and include in *total project costs* any costs incurred by the Non-Federal Sponsor that the District Engineer determines are directly related to design and construction of the *Project*, subject to the conditions and limitations of this paragraph.

1. Pursuant to paragraph A.6. of this Article, all work performed by the Non-Federal Sponsor for the *Project* is subject to on-site inspection and determination by the Government that the work was accomplished in a satisfactory manner and is suitable for inclusion in the *Project*.

2. The Non-Federal Sponsor's costs for design and construction that may be eligible for inclusion in *total project costs* shall be subject to an audit in accordance with Article VIII.C. of this Agreement to determine the reasonableness, allocability and allowability of such costs.

3. No costs shall be included in *total project costs* for any construction of the *Project* that was performed prior to compliance with all applicable environmental laws and regulations, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

4. In the performance of all work for the *Project*, the Non-Federal Sponsor must comply with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 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)). Notwithstanding any other provision of this Agreement, inclusion of costs for construction in *total project costs* may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

5. The Non-Federal Sponsor's costs for design and construction that may be eligible for inclusion in *total project costs* pursuant to this Agreement are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the work is completed and the time the costs are included in *total project costs*.

6. The Government shall not include in *total project costs* any costs paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

D. The Government shall reimburse the Non-Federal Sponsor, in accordance with Article IV.B. of this Agreement, the amount necessary so that the Federal contribution towards *total project costs* equals 65 percent; however, any reimbursement by the Government is subject to the availability of funds and is limited by the *Section 109 Program Limit*.

E. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Project* is limited by the following provisions of this paragraph.

1. As of the effective date of this Agreement, \$7,158,000 of Federal funds have been provided by the Congress of the United States (hereinafter the "Congress") for the Section 109 Program of which \$2,480,000 is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Section 109 Program or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

2. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XV.D. and Article XV.E. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, the Government's future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article XI.B. of this Agreement. However, if the Government cannot make available sufficient Federal funds to meet the Federal share of *total project costs* in the then-current *fiscal year* solely due to the *Section 102 Limit*, only the Government's future performance related to reimbursement pursuant to paragraph D. of this Article shall be suspended.

3. If the Government determines that the total amount of Federal funds provided by Congress for the Section 109 Program has reached the *Section 109 Program Limit*, and the Government projects that the Federal funds the Government will make available to the *Project* within the *Section 109 Program Limit* will not be sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XV.D. and Article XV.E. of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project* within the *Section 109 Program Limit*, the parties shall terminate this Agreement and proceed in accordance with Article XI of this Agreement.

F. During the *period of design and construction*, the Non-Federal Sponsor shall prepare and furnish to the Government for review a proposed Operation, Maintenance, Repair, Rehabilitation and Replacement Manual (hereinafter the "OMRR&R Manual"). The failure of the Non-Federal Sponsor to prepare an OMRR&R Manual acceptable to the Government shall not relieve the Non-Federal Sponsor of its responsibilities for operation, maintenance, repair, rehabilitation, and replacement of the entire completed *Project*, or any completed portion thereof as the case may be, in accordance with the provisions of this Agreement.

G. Upon completion of construction and final inspection by the Government in accordance with paragraph A.6. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or a completed portion thereof as the case may be, in accordance with Article VI of this Agreement. Further, after completion of all contracts for the *Project*, copies of all of the Non-Federal Sponsor's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided previously shall be provided to the Government.

H. Upon conclusion of the *period of design and construction*, the Government shall conduct an accounting, in accordance with Article IV.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

I. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

J. In the event that the Non-Federal Sponsor elects to include *betterments* in the design or construction of the *Project* during the *period of design and construction*, the Non-Federal Sponsor shall notify the Government in writing and describe the *betterments* it intends to design and construct. The Non-Federal Sponsor shall be solely responsible for all costs due to *betterments*, including costs associated with obtaining permits therefor, and shall pay all such costs without reimbursement by the Government.

K. The Government shall determine and include in *total project costs* the reasonable costs incurred by the Non-Federal Sponsor for *pre-Agreement planning and design work*, subject to the conditions and limitations of this paragraph, that have not been incurred pursuant to any other agreement for the *Project*. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the amount of costs to be included in *total project costs* for *pre-Agreement planning and design work*.

1. *Pre-Agreement planning and design work* shall be subject to a review by the Government to verify that the work was accomplished in a satisfactory manner and is necessary for the *Project*.

2. The Non-Federal Sponsor's costs for *pre-Agreement planning and design work* that may be eligible for inclusion in *total project costs* shall be subject to an audit in accordance with Article VIII.C. of this Agreement to determine the reasonableness, allocability and allowability of such costs.

3. The Non-Federal Sponsor's costs for *pre-Agreement planning and design work* that may be eligible for inclusion in *total project costs* pursuant to this paragraph are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the *pre-Agreement planning and design work* was completed and the time the costs are included in *total project costs*.

4. The Government shall not include in *total project costs* any costs for *pre-Agreement planning and design work* paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

ARTICLE III - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 calendar 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 design and construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of design and 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 design and construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; plans and specifications; scheduling; real property and *relocation* requirements; 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 the construction portion of the *Project*; the investigations to identify the existence and extent of hazardous substances in accordance with Article XII.A. of this Agreement; historic preservation activities in accordance with Article XV of this Agreement; the Government's cost projections; final inspection of the entire *Project* or completed portions thereof; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government and the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the Non-Federal Sponsor on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for design and construction of the *Project*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VIII.C. of this Agreement to determine

reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE IV - METHOD OF PAYMENT

A. The Non-Federal Sponsor shall provide the Government with such documents as are sufficient to enable the Government to maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, and the costs included in *total project costs* for the *pre-Agreement planning and design work* determined in accordance with Article II.K. of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$15,876,923; the Government's share of *total project costs* is projected to be \$ 10,320,000; the Non-Federal Sponsor's share of *total project costs* is projected to be \$ 5,556,923; *total project costs* to be incurred by the Government are projected to be \$444,077; *total project costs* to be incurred by the Non-Federal Sponsor are projected to be \$15,432,846; total reimbursements in accordance with paragraph B.2. of this Article are projected to be \$9,875,923; the costs included in *total project costs* for the *pre-Agreement planning and design work* determined in accordance with Article II.K. of this Agreement are projected to be \$250,000; the Government's share of financial obligations for data recovery activities pursuant to Article XV.E. of this Agreement is projected to be \$0; and the Non-Federal Sponsor's share of financial obligations for data recovery activities pursuant to Article XV.E. of this Agreement is projected to be \$0. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

~~2. By April 1, 2008 and by each quarterly anniversary thereof until the conclusion of the *period of design and construction* and resolution of all relevant claims and appeals, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; the Government's share of *total project costs*; the Non-Federal Sponsor's share of *total project costs*; *total project costs* incurred by the Government; *total project costs* incurred by the Non-Federal Sponsor; total reimbursements paid to the Non-Federal Sponsor; the costs included in *total project costs* for the *pre-Agreement planning and design work* determined in accordance with Article II.K. of this Agreement; the Government's share of financial obligations for data recovery activities pursuant to Article XV.E. of this Agreement; and the Non-Federal Sponsor's share of financial obligations for data recovery activities pursuant to Article XV.E. of this Agreement.~~

B. The Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor, in accordance with the provisions of this paragraph, the amount required pursuant to Article II.D. of this Agreement.

1. Periodically, but not more frequently than once every 30 calendar days, the Non-Federal Sponsor shall provide the Government with a *sufficient invoice* for costs the Non-Federal Sponsor has incurred for the *Project*.

2. Upon receipt of such *sufficient invoice*, the Government shall review the costs identified therein and shall determine: (a) the amount to be included in *total project costs*, subject to the limitations in Article II.C. and Article II.K. of this Agreement; (b) the total costs incurred by the parties to date; (c) each party's share of *total project costs* and the costs of data recovery activities in accordance with Article XV.E. of this Agreement incurred by the parties to date; (d) the costs incurred by each party to date; (e) the total amount of reimbursements the Government has made to date in accordance with this paragraph; (f) the balance of Federal funds available for the *Project*, as of the date of such review; (g) the amount of reimbursement, if any, due to the Non-Federal Sponsor; and (h) the amount that actually will be paid to the Non-Federal Sponsor (hereinafter the "payment amount") if the amount of reimbursement determined above cannot be fully paid due to an insufficiency of Federal funds or the limitations of the *Section 109 Program Limit* or the *Section 102 Limit*.

3. Within 30 calendar days after receipt of the *sufficient invoice* provided in accordance with paragraph B.1. of this Article (hereinafter the "payment period"), the Government shall: furnish the Non-Federal Sponsor written notice of the determinations made in accordance with paragraph B.2. of this Article; provide an explanation, if necessary, of why the payment amount is less than the amount of reimbursement determined due to the Non-Federal Sponsor; and make a payment to the Non-Federal Sponsor equal to the payment amount.

C. Upon conclusion of the *period of design and construction* and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs* and the costs of any data recovery activities. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Government's total required shares of *total project costs* and the costs of any data recovery activities exceed the Government's total contributions provided thereto, the Government, no later than 90 calendar days after completion of the interim or final accounting, as applicable, shall make a payment to the Non-Federal Sponsor, subject to the availability of funds and as limited by the *Section 109 Program Limit* and the *Section 102 Limit*, in an amount equal to the difference.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Government for *total project costs* and the costs of any data recovery activities exceed the Government's total required shares thereof, the Non-Federal Sponsor shall refund the excess amount to the Government within 90 calendar days of the date of completion of such accounting by delivering a check payable to "FAO, USAED, Jacksonville" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government. In the event the Government is due a refund and funds are not available to refund the excess to the Government, the Non-Federal Sponsor shall seek such appropriations as are necessary to make the refund.

ARTICLE V - 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 both 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 VI – OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

A. Upon completion of construction and final inspection by the Government in accordance with Article II.A.6. of this Agreement, the Non-Federal Sponsor, pursuant to Article II.G. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or a completed portion thereof as the case may be, at no cost to the Government. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Project's* authorized purposes and in accordance with specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection, if the Government determines an inspection to be necessary. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor.

ARTICLE VII – HOLD AND SAVE

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

ARTICLE VIII - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or 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 Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 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 Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor'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 in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. 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 in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE IX - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall 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; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 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)).

ARTICLE X - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE XI - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend the Government's future performance under this Agreement.

B. In the event all of the Government's future performance under this Agreement or only the Government's future performance to provide reimbursement is suspended pursuant to Article II.E.2. of this Agreement such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XV.D. and Article XV.E. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XII.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree

to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XII.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under Article XII.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XII.C. of this Agreement; or 3) the Government terminates this Agreement in accordance with the provisions of Article XII.C. of this Agreement.

D. If after completion of the design portion of the *Project* the parties mutually agree in writing not to proceed with construction of the *Project*, the parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article IV.C. of this Agreement.

E. In the event that this Agreement is terminated pursuant to this Article or Article II.E. or Article XII.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article IV.C. of this Agreement. The Government may reserve a percentage of total Federal funds made available for the *Project* as a contingency to pay costs of termination. Notwithstanding such termination, the Non-Federal Sponsor may continue with design and construction of the *Project*, at no cost to the Government.

F. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II.E. or Article XII.C. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor 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 XII - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and coordination with the Government, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor 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. 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that are required for construction, operation, and maintenance of the *Project*. However, for lands, easements, and rights-of-way 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 Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances in, on, or under any lands, easements, or rights-of-way that are required for construction, operation, and maintenance of the *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VIII.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that are required for construction, operation, and maintenance of the *Project*, the Non-Federal Sponsor 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 Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the *Project*, or, if already in construction, whether to continue with construction of the *Project*, suspend future performance under this Agreement, or terminate this Agreement, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that are required for construction, operation, and maintenance of the *Project*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, 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 not be considered a part of *total project costs*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement or suspend its future performance under this Agreement, including reimbursement pursuant to Article II.D. of this Agreement.

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

under CERCLA.

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

ARTICLE XIII - 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 sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

City Manager
Key West City Hall
525 Angela Street
Key West, Florida 33040

With copies to:

Director
General Services
City of Key West
627 Palm Ave.
Key West, Fl. 33040

Director
Key Service Center
South Florida Water Management District
10 Highpoint Road, Suite A
Plantation Key, Florida 33070

If to the Government:

District Engineer
Jacksonville District
P.O. Box 4970
Jacksonville, Florida 32232-0019

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

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XIV - 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 XV - HISTORIC PRESERVATION

A. The Government shall ensure compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f; hereinafter "Section 106") prior to initiation of construction by the Non-Federal Sponsor. At the Government's request, the Non-Federal Sponsor shall prepare information, analyses, and recommendations as required by Section 106 and implementing regulations. Any costs incurred by the Non-Federal Sponsor relating to compliance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VIII.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. Any costs incurred by the Government relating to compliance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. The Non-Federal Sponsor shall perform any identification, survey, evaluation, or mitigation (except for data recovery activities) of historic properties the Government determines necessary for the *Project*, in accordance with this paragraph.

1. The Non-Federal Sponsor shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who meet, at minimum, the Secretary of the Interior's Professional Qualifications Standards. The Non-Federal Sponsor shall submit study plans and reports to the Government for review and approval and shall be responsible for resolving any deficiencies.

2. In the event the Government determines that mitigation (except for data recovery activities) should be undertaken due to possible adverse effects to significant archeological or historical properties, the Non-Federal Sponsor shall formulate a plan in consultation with the Government and any other parties involved in the development of a Memorandum of Agreement executed in accordance with Section 106.

3. The Non-Federal Sponsor shall be responsible for implementing mitigation (except for data recovery activities) prior to the initiation of any construction activities affecting historic properties.

4. Any costs of identification, survey, evaluation, and mitigation (except for data recovery activities) of historic properties incurred by the Non-Federal Sponsor pursuant to paragraph B. of this Article shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VIII.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

C. The Non-Federal Sponsor shall include provisions in all of its construction contracts for the protection of cultural resources discovered during construction. These provisions shall include, at a minimum, the requirement to cease all work in the immediate area of a discovered cultural resource until the situation is properly evaluated, and the requirement to immediately provide verbal and written notice to the Non-Federal Sponsor and Government in the event of such discovery. Upon receipt of notice that cultural resources have been discovered, the Government, pursuant to its responsibilities under the National Historic Preservation Act, must authorize further action or study before construction may continue. If the Government concludes that such discovery warrants consultation under the National Historic Preservation Act, the Non-Federal Sponsor shall participate as a consulting party. In such a case, construction shall not continue until the Government sends written notification to the Non-Federal Sponsor. Where the Non-Federal Sponsor elects to perform the construction using its own forces, the same procedures shall be followed.

D. The Government, as it determines necessary for the *Project*, shall perform any data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c(a)), the costs of data recovery activities associated with historic preservation for this *Project* and all other projects implemented pursuant to the Section 109 Program shall be borne entirely by the Government up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the Section 109 Program. None of the costs of data recovery activities shall be included in *total project costs*.

E. The Government shall not incur costs for data recovery activities that exceed the statutory one percent limit specified in paragraph D. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit, and the Secretary of the Interior has concurred in the waiver, in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. Section 469c-2(3)). Any costs of data recovery activities that exceed the one percent limit shall not be included in *total project costs* but shall be shared between the Non-Federal Sponsor and the Government consistent with the cost sharing requirements of the Section 109 Program, as follows: 35 percent will be borne by the Non-Federal Sponsor and 65 percent will be borne by the Government.

ARTICLE XVI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the City Commission of the City of Key West, Florida, where creating such an obligation would be inconsistent with Chapter 2, Article VII, Division 2 of the Code of

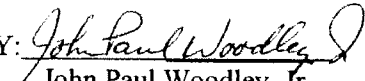
Ordinances of the City of Key West, Florida and the laws of the State of Florida.

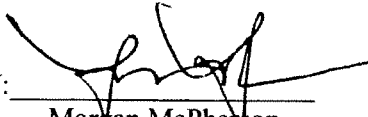
B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

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

DEPARTMENT OF THE ARMY

CITY OF KEY WEST, FLORIDA

BY: 
John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

BY: 
Morgan McPherson
City Manager

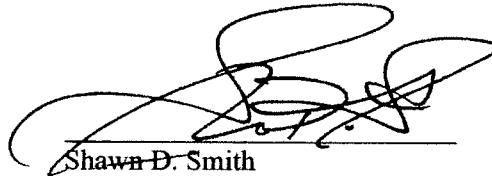
DATE: January 11, 2008

DATE: _____

CERTIFICATE OF AUTHORITY

I, Shawn D. Smith, do hereby certify that I am the principal legal officer of the City of Key West, Florida, that the City of Key West, Florida 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 Key West, Florida in connection with the City of Key West, Monroe County, Florida Stormwater Improvement Project, Florida Keys Water Quality Improvement Project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed this Agreement on behalf of the City of Key West, Florida have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 11th
day of JANUARY 2008



Shawn D. Smith
City Attorney
City of Key West, Florida

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.



Morgan McPherson
City Manager *Mayor*
City of Key West, Florida

DATE: _____

RESOLUTION NO. 10-154

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING AMENDMENT #2 TO THE AGREEMENT BETWEEN THE CITY OF KEY WEST AND THE DEPARTMENT OF ARMY FOR PLANNING DESIGN AND CONSTRUCTION OF FLORIDA KEYS WATER QUALITY IMPROVEMENT PROGRAM; AUTHORIZING THE MAYOR TO SIGN THE FINAL AMENDMENT AGREEMENT DOCUMENT(S) ON BEHALF OF THE CITY UPON THE ADVICE AND CONSENT OF THE CITY MANAGER AND CITY ATTORNEY; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, on February 5, 2008, the City Commission adopted Resolution No. 08-033, approving a Project Cooperation Agreement (PCA) between the City and the Army Corps of Engineers for the planning, design and construction of the Florida Keys Water Quality Improvement Program Stormwater Improvement Project, which allocated about ten million dollars in federal funding for a number of projects within the City; and

WHEREAS, Amendment No. 2 will maximize grant funding opportunities by adding the Sigsbee Force Main project, the WWTP Headworks/Capacity Expansion project and the Pump Station F project to the scope contained in the PCA;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the attached substantial conformity draft of "Amendment No. 2 to Agreement Between the Department of Army and the City of Key West for Planning, Design and Construction of Florida Keys Water Quality Improvement Program Stormwater Improvement Project" is hereby approved.


Section 2: That the Mayor is hereby authorized to sign the document(s) on behalf of the City.

Section 3: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 4th day of May, 2010.

Authenticated by the presiding officer and Clerk of the Commission on May 5, 2010.

Filed with the Clerk May 5, 2010.



CRAIG CATES, MAYOR

ATTEST:



CHERYL SMITH, CITY CLERK



THE CITY OF KEY WEST

Post Office Box 1409 Key West, FL 33041-1409 (305) 894-3700

M
E
M
O
R
A
N
D
U
M

EXECUTIVE SUMMARY

TO: Jim Scholl, City Manager

Cc: David Fernandez, Asst. City Manager - Operations
Gary W. Bowman, General Services Director

FROM: Jay Gewin, Utilities Manager

DATE: April 5, 2010

SUBJECT: **Approving the Substantial Conformity of Amendment # 2 to the Agreement Between the US Army Corps of Engineers and the City of Key West for Project Cooperation Agreement for the Florida Keys Water Quality Improvement Program. Authorizing the Mayor to Execute the Amendment.**

ACTION STATEMENT: We are requesting City Commission approval of a resolution authorizing the Mayor to Sign Amendment No. 2 to the Project Cooperation Agreement (PCA) with the US Army Corps of Engineers (ACOE) to enable additional sewer projects to become eligible for federal grant funding reimbursement. We are requesting the Commission's approval of the substantial conformity of this draft, which would allow Staff and the Army Corps to make very minor changes if needed.

BACKGROUND:

On February 5, 2008 the City Commission passed and adopted Resolution 08-033 approving the PCA between the City and the Army Corps for the planning, design and construction of the Florida Keys Water Quality Improvement Program Stormwater Improvement Project for an amount up to \$10.32 million. \$9,947,000 of this has been appropriated to date.

Funding for the Stormwater Improvement Project originates from the \$100 million in Federal funds designated to improve water quality in the Florida Keys National Marine Sanctuary. Six municipalities were allocated portions of the \$100 million beginning in 2004.

On April 28, 2009 the Army Corps released a listing of Civil Works projects to be funded by the American Recovery and Reinvestment Act of 2009 (Stimulus), with \$25.408 million going to the Florida Keys. Key West, along

Key to the Caribbean - Average yearly temperature 77° F

with Marathon, Islamorada and Key Largo received \$6.352 million each. The allocation is also included in the \$10.32 million originally allocated to the City and does not increase the \$10.32 million allocation.

Utilizing Army Corps funding places a significant time constraint on the City. By September 1, 2010 the City will have to have invoiced the Army Corps for the entire \$10.32 million. While only \$6.352 million is actual Stimulus funds, the Army Corps has stipulated that the City must first spend the funds allocated in years prior to the Stimulus funds. This means the City will essentially need to spend the entire \$10.32 million by September 1, 2010 since all the non-Stimulus funds were allocated prior to the Stimulus funds.

It is important to keep in mind that the \$10.32 million represents the Army Corps share of 65% of total project costs of \$15,876,923. The non-Federal share is the remaining 35% or \$5,556,923. This means the City will incur over \$15 million in project costs by September 1, 2010. The City will aggressively meet the September 1, 2010 deadline by completing several stormwater injection well projects, a diffused aeration upgrade project at the WWTP, and other wastewater improvements including the replacement of the headworks at the WWTP and improvements designed to increase capacity in the wastewater collection system.

PURPOSE & JUSTIFICATION:

The deadline for invoicing the Army Corps of Engineers for completed work has placed significant time constraints on the City to meet the September 1, 2010 deadline. In an effort to accelerate the spending of federal funds, the City has requested an amendment to the agreement with the Army Corps allowing for the addition of the Sigsbee Force Main project, the WWTP Headworks/Capacity Expansion project, and the Pump Station F project to the scope contained in the PCA. Due to the fact that the City received favorable bids for the Diffused Aeration project at the WWTP, the City now has the opportunity to utilize Army Corps funding for this additional work.

The Army Corps has reviewed all aspects of our request, including compliance with the National Environmental Protection Act (NEPA) and has determined the City's planned capacity expansion and WWTP headworks projects are acceptable. As a result, the Army Corps is granting the City an amendment to the agreement. The City Commission has already approved a task order for the design work for the WWTP Headworks (Resolution 10-056) and Sigsbee Force Main project along North Roosevelt (Resolution 09-102).

Staff is requesting that the Commission approve the substantial conformity of the PCA amendment. This will allow staff or the Army Corps of Engineers to make very minor changes to the document if needed. We are making this request of the Commission so that Staff can maximize grant funding opportunities ahead of grant deadlines.

OPTIONS:

1. Authorize the execution of Amendment No. 2 to the PCA and maximize the City's ability to utilize the full \$9.947 million in Federal funds. This will allow the City to have a portion of the WWTP Headworks/Capacity Expansion project to be funded through Army Corps grants.

2. Reject Amendment No. 2 to the PCA. As noted above, choosing this option will severely impede the City's ability to meet the September 1, 2010 deadline for spending the full allotment of Army Corps reimbursement that is available to the City.

FINANCIAL IMPACT:

Approval of the amendment to the PCA will transfer the grant funding within the City budget from the Diffused Aeration project, awarded at a lower amount than was budgeted, and will allow a portion of the Sigsbee Force Main, WWTP Headworks, and Pump Station F projects to be funded through these federal funds.

The grant funds are in place within wastewater revenue account # 401-331.35, and the project cost associated with this grant will be budgeted in expense account # 401-3503-535-65/SE0903 and SE 0901.

RECOMMENDATION:

Staff recommends option 1, the approval of Amendment # 2 to the PCA with the Army Corps of Engineers.

AMENDMENT NO. 2
TO
AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF KEY WEST, FLORIDA
FOR
PLANNING, DESIGN AND CONSTRUCTION
OF
FLORIDA KEYS WATER QUALITY IMPROVEMENT PROGRAM
STORMWATER IMPROVEMENT PROJECT
CITY OF KEY WEST
IN MONROE COUNTY, FLORIDA

THIS AMENDMENT NO. 2 is entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Jacksonville District (hereinafter the "District Commander"), and the City of Key West, Florida (hereinafter the "Non-Federal Sponsor"), represented by the Mayor.

WITNESSETH, THAT:

WHEREAS, the Government and the Non-Federal Sponsor entered into an agreement on January 11, 2008 (hereinafter the "Agreement") for design and construction of the Florida Keys Water Quality Improvement Program Stormwater Improvement Project City of Key West in Monroe County, Florida;

WHEREAS, the Government and the Non-Federal Sponsor entered into an Amendment to the Agreement on November 27, 2008 to add additional work to the Project;

WHEREAS, the Government and the Non-Federal Sponsor desire to further amend the January 11, 2008 Agreement to add work to the Project so that Federal cost sharing may occur when sufficient Federal appropriations occur;

WHEREAS, the work was evaluated in the Decision Document for the Project consistent with the statutory requirements for the Florida Keys Water Quality Improvement Program and consistent with the requirements of the National Environmental Policy Act and other applicable environmental statutes; and

WHEREAS, it is necessary to amend the January 11, 2008 Agreement to add the additional work;

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree to amend the Agreement as follows to add work and document the requirement of the Non-Federal Sponsor to report the information required by the Recovery Act:

1. Article I – Definitions of the January 11, 2008 Agreement is amended to read at paragraph A. as follows:

A. The term “Project” shall mean the City of Key West, Monroe County, Florida Stormwater and Wastewater Improvement Project consisting of the following features:

1. The construction of 108 gravity injection wells and two pump-assisted wells within the City boundaries. The specific location of the well sites will be determined as funds become available, but will be located at one of the 349 road intersections where wells can be installed. All gravity injection wells would include pre-treatment best management practices (BMPs) to reduce stormwater pollutants prior to injection. The proposed gravity wells use a triple-chamber baffle box to skim off debris, oils, and other pollutants prior to disposal into the ground. The wells consist of a drilled open shaft that is partially lined with casing. The 24-inch casing extends downward past a confining soil layer located 35-40 feet below the surface. As required by Florida Department of Environmental Protection, the gravity wells would be encased to a minimum depth of 60 feet. The two pump-assisted wells would be constructed using the same specifications as the gravity wells with the addition of two 60-horsepower, 8350-gallon per minute pumps to assist in moving stormwater into the Biscayne Aquifer. Those areas which offer the greatest opportunity for water quality improvement are being implemented first. Gravity wells will be located in the right-of-way at intersections of City-owned streets. Siting of each well will be done on an intersection-by-intersection basis. A secondary action under this project is to abandon existing stormwater outfalls. As stormwater wells come online, outfalls will be abandoned. This project is generally described in the Decision Document Florida Keys Water Quality Improvement Program (FKWQIP) Stormwater Improvement Project City of Key West, Florida, dated October 4, 2005 and approved by the District Commander, U.S. Army Corps of Engineers, Jacksonville District on September 26, 2007. The Government’s share of the cost for the stormwater wells is \$5,120,000.

2. Modifications to the Richard A. Heyman Environmental Protection Facility (RHEPF) located in Key West, Monroe County, Florida, to replace the existing mechanical surface aerators with a diffused aeration system, including all associated work necessary to complete such. This base work includes, but is not limited to, mechanical, structural and electrical demolition relative to the removal of the existing surface aerators in the Aeration Basins 1 and 2, including any instrumentation & control (I&C) work related to them. The base project also includes installation of (labor and material) new blowers, mixers, piping, and diffusers in Aeration Basins 1&2 along with associated mechanical, structural, electrical and instrumentation work. The structural work includes, but is not

limited to, installation of new auger cast piles, and blower platform etc. Electrical and I&C work includes, but is not limited to, modifications in the electrical room, and on the SCADA screens at the main operations console as well as local control panels, etc. The Government's share of the cost for the aerators is \$5,200,000. Any monies remaining from the \$5,200,000 after completion of the aerator system may be expended for the stormwater well work described in Paragraph A1 above.

3. Improvements which will provide additional system conveyance capacity to the Richard A. Heyman Environmental Protection Facility (WWTP) in order to decrease the potential for gravity sewer overflows and minimize potential health risks to the public.

2. All other terms and conditions of the Agreement remain unchanged.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 1 which shall become effective upon the date it is signed by the District Commander.

DEPARTMENT OF THE ARMY

CITY OF KEY WEST, FLORIDA

BY: _____
Alfred A. Pantano
Colonel, U.S. Army
District Commander

BY: *Craig Cates*
Craig Cates
Mayor

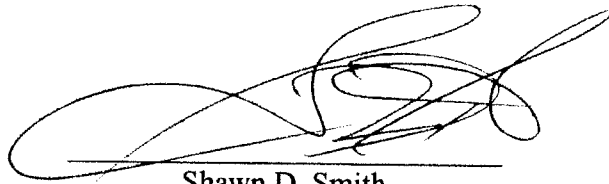
DATE: _____

DATE: *May 4, 2010*

CERTIFICATE OF AUTHORITY

I, Shawn D. Smith, do hereby certify that I am the principal legal officer of the City of Key West, Florida, that the City of Key West, Florida is a legally constituted ~~public~~ ^{at} body with full authority and legal capability to perform the terms of Amendment No. ~~1~~ ², between the Department of the Army and the City of Key West, Florida in connection with the Florida Keys Water Quality Improvement Program, Stormwater Improvement Project, City of Key West, Florida in Monroe County, Florida, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed Amendment No. ~~1~~ ² on behalf of the City of Key West, Florida have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 5th day of May, 2010.



Shawn D. Smith
City Attorney
City of Key West, Florida

CERTIFICATION REGARDING LOBBYING

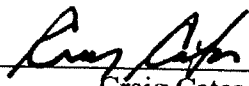
The undersigned certifies, to the best of his or her knowledge and belief that:

(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.



Craig Cates

Mayor

City of Key West, Florida

DATE: May 4, 2010