

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE ORANGE COUNTY DRAINAGE DISTRICT AND
THE COUNTY OF ORANGE, TEXAS
FOR DESIGN OF
THE ORANGE COUNTY SEPARABLE ELEMENT,
SABINE PASS TO GALVESTON BAY, TEXAS
COASTAL STORM RISK MANAGEMENT PROJECT

THIS AGREEMENT is entered into this 18 day of September, 2010, by and between the Department of the Army (hereinafter the "Government"), represented by the District Commander for Galveston District (hereinafter the "District Commander"), and the Orange County Drainage District (the "District"), represented by its General Manager and the County of Orange, Texas (the "County"), represented by the County Judge. The District and County are hereinafter referred to as the "Non-Federal Sponsors".

WITNESSETH, THAT:

WHEREAS, construction of the Sabine Pass to Galveston Bay, Texas coastal storm risk management project (hereinafter the "Authorized Project") was authorized by Section 1401(3)(3) of the Water Resources Development Act of 2018, Public Law 115-270;

WHEREAS, the Orange County coastal storm risk management project (hereinafter the "Project", as defined in Article I.A.) is a separable element of the Authorized Project;

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213), specifies the cost-sharing requirements applicable to the Project, and Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215), provides that the costs of Design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project's purpose of coastal storm risk management, the Non-Federal Sponsors' share of total design costs under this Agreement is 35 percent;

WHEREAS, using appropriations provided under the Construction heading, Title IV, Division B of the Bipartisan Budget Act of 2018, Public Law 115-123, enacted February 9, 2018 (hereinafter "BBA 2018") and funds as provided by the Non-Federal Sponsors, the Government is undertaking design of the Project; and

WHEREAS, the Government and Non-Federal Sponsors have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" means the coastal storm risk management project for Orange County, Texas consisting of the following authorized components: approximately 15.6-mi of new levees ranging from 12.0 to 17.5 feet NAVD88 in elevation; 10.7-mi of new floodwalls and gates ranging from 13.5 to 16 feet NAVD 88; and appropriate drainage structures, road/railroad closure gates to mitigate interior flooding during surge events; pump stations, sector gated structures (Cow Bayou and Adams Bayou) with adjacent vertical lift floodgates for normal channel flows, and mitigation features, with up to 5-years after construction is complete for monitoring and adaptive management to ensure mitigation measures have been demonstrated to be successful, as generally described in the Sabine Pass to Galveston Bay, Texas Coastal Storm Risk Management and Ecosystem Restoration Final Feasibility Study and Environmental Impact Statement, dated May, 2017 and approved by the Chief of Engineers on December 7, 2017.

B. The term "Design" means conducting required data collection, site investigations, modeling, design analyses, value engineering studies, and reviews required for development of final plans, specifications and associated documents during the period of design as required for construction contracts to construct the Project.

C. The term "total design costs" means the sum of all costs incurred that are directly related to the Design in accordance with the terms of this Agreement. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government's pre-Agreement design costs; the Government's costs for engineering and design, economic and environmental analyses, and evaluation; for contract dispute settlements or awards; for supervision and administration; for Agency Technical Review and other review processes required by the Government; for response to any required Independent External Peer Review; and the Non-Federal Sponsors' creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsors in the Design Coordination Team to discuss significant issues or actions; audits; an Independent External Peer Review panel, if required; or the Non-Federal Sponsors' cost of negotiating this Agreement.

D. The term "pre-Agreement design costs" means all costs incurred by the Government for design activities performed prior to the effective date of this Agreement.

E. The term "fiscal year" means one year beginning on October 1st and ending on September 30th of the following year.

F. The term "period of design" means the time from the effective date of this Agreement to the date the Government notifies the Non-Federal Sponsors in writing of the Government's determination of completion or termination of Design.

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

A. In accordance with Federal laws, regulations, and policies, the Government is undertaking Design of the Project.

B. The Non-Federal Sponsors shall be responsible for 35 percent of total design costs in accordance with the terms of this Agreement.

1. The Non-Federal Sponsors may contribute their share of total design costs during the period of design. The Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor to meet their cost share for the initial fiscal year of the Design. No later than 60 calendar days after such notification, the Non-Federal Sponsors may provide the full amount of such funds to the Government by delivering a check payable to "FAO, USAED, Galveston District (M3)" to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsors have deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsors, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsors with a written estimate of the amount of funds required from the Non-Federal Sponsors during that fiscal year to meet their cost share. No later than September 30th prior to that fiscal year, the Non-Federal Sponsors may provide the full amount of such required funds to the Government. The Government shall draw from the funds provided by the Non-Federal Sponsors to cover the non-Federal share of the total design costs as those costs are incurred.

2. The Non-Federal Sponsors may defer payment of any portion of their 35 percent of total design costs as follows:

a. If a Project Partnership Agreement for construction of the Project is executed by January 31, 2022, and if the Non-Federal Sponsors for the Project Partnership Agreement agree to assume all responsibility and liability for the non-Federal share of total design costs under this Agreement, any deferred non-Federal share of total design costs under this Agreement shall be paid in accordance with the terms of the Project Partnership Agreement.

b. If a Project Partnership Agreement for construction of the Project is not executed by January 31, 2022, or if the Non-Federal Sponsors for the Project Partnership Agreement do not agree to assume all responsibility and liability for

the non-Federal share of total design costs under this Agreement, the Non-Federal Sponsors shall pay any deferred non-Federal share of total design costs in six approximately equal installments, with payment of the first installment due three months after the Government provides the written notice of the final accounting and the subsequent installments due each six months thereafter by delivering a check payable to "FAO, USAED, Galveston (M3)" to the District Commander or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

C. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsors the opportunity to review and comment on solicitations for contracts prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

D. The Non-Federal Sponsors shall not use Federal program funds to meet any of their obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor

E. The Non-Federal Sponsors shall not be entitled to any credit or reimbursement for costs they incur in performing their responsibilities under this Agreement.

F. If Independent External Peer Review (IEPR) is required for the Design, the Government shall conduct such review in accordance with Federal laws, regulations, and policies. The Government's costs for an IEPR panel shall not be included in the total design costs.

G. In addition to the ongoing, regular discussions of the parties in the delivery of the Design, the Government and the Non-Federal Sponsors may establish a Design Coordination Team to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsors' costs for participation on the Design Coordination Team shall be included in the total design costs. The Non-Federal Sponsors' costs for participation on the Design Coordination Team shall be paid solely by the Non-Federal Sponsors without reimbursement or credit.

ARTICLE III - ACCOUNTING

A. As of the effective date of this Agreement, total design costs are projected to be \$160,000,000, with the Government's share of such costs projected to be \$104,000,000, and the Non-Federal Sponsors' share of such costs projected to be \$56,000,000. These amounts are estimates subject to adjustment by the Government,

after consultation with the Non-Federal Sponsors, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsors.

B. The Government shall provide the Non-Federal Sponsors with monthly reports setting forth the estimated total design costs and the Government's and Non-Federal Sponsors' estimated shares of such costs; costs incurred by the Government using BBA 2018 funds and Non-Federal Sponsors funds, to date, the amount of funds provided by the Non-Federal Sponsors to date; the estimated amount of funds that would be required from the Non-Federal Sponsors during the upcoming fiscal year; and the estimated remaining costs of the Design.

C. Upon completion or termination of Design, and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsors with the written results of such final accounting, including the total design costs, and the non-Federal share of total design costs. Should the final accounting determine that additional funds are required from the Non-Federal Sponsors, the Non-Federal Sponsors shall pay any deferred non-Federal share of total design costs in accordance with Article II.B. Should the final accounting determine that the Non-Federal Sponsors have provided funds in excess of their required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsors, apply the excess amount towards the non-Federal share of the cost of construction of the Project in the event a Project Partnership Agreement is executed for the Project. Such final accounting does not limit the Non-Federal Sponsors' responsibility to pay their share of total design costs, including contract claims or any other liability that may become known after the final accounting.

ARTICLE IV - POSSIBLE TERMINATION IF PROJECT PARTNERSHIP AGREEMENT NOT EXECUTED

A. If a Project Partnership Agreement for construction of the Project is not executed by January 31, 2022, the Government may continue with the Design or, following written notification to the Non-Federal Sponsors, may terminate Design.

B. In the event of termination, the parties shall conclude their activities relating to the Design and conduct an accounting in accordance with Article III.C. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

C. Any termination shall not relieve the parties of liability for any obligation incurred. Any delinquent payment owed by the Non-Federal Sponsors pursuant to this Agreement 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 V - HOLD AND SAVE

The Non-Federal Sponsors shall hold and save the Government free from all damages arising from the Design, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE VI - DISPUTE RESOLUTION

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

ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. The Government may conduct, or arrange for the conduct of, audits of the Design. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Design shall not be included in total design costs.

B. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsors to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the request of the Non-Federal Sponsors, provide to the Non-Federal Sponsors or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsors' activities under this Agreement. The costs of non-Federal audits shall be paid solely by the Non-Federal Sponsors without reimbursement or credit by the Government.

ARTICLE VIII - RELATIONSHIP OF PARTIES

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

ARTICLE IX - NOTICES

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

If to the Non-Federal Sponsors:

Mr. Don Carona
General Manager, Orange County Drainage District
8081 Old Highway 90
Orange, Texas 77630

Judge John Gothia
County Judge, Orange County
123 South 6th Street
Orange, Texas 77630

If to the Government:

Colonel Timothy R Vail
District Commander
Galveston District
U.S. Army Corps of Engineers
2000 Fort Point, Galveston, Texas 77550

B. A party may change the recipient or address for such communications by giving written notice to the other party in the manner provided in this Article.

ARTICLE X - 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 XI - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

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

ARTICLE XII - OBLIGATIONS OF FUTURE APPROPRIATIONS

The Non-Federal Sponsors intend to fulfill fully their obligations under this Agreement. Nothing herein shall constitute, nor be deemed to constitute, an obligation of

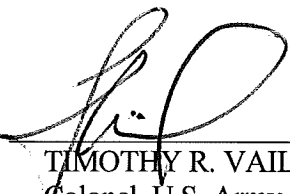
future appropriations by the Orange County Drainage District and the County of Orange, Texas, where creating such an obligation would be inconsistent with Article XI, Section 7 of the Texas Constitution. If the Non-Federal Sponsors are unable to, or do not, fulfill their obligations under this Agreement, the Government may exercise any legal rights it has to protect the Government's interests.

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

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


IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Commander.

DEPARTMENT OF THE ARMY

BY: 
TIMOTHY R. VAIL
Colonel, U.S. Army
District Engineer

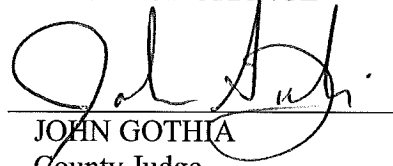
DATE: 09/18/2020

ORANGE COUNTY DRAINAGE
DISTRICT

BY: 
DON CARONA
General Manager

DATE: 9/17/2020

THE COUNTY OF ORANGE

BY: 
JOHN GOTHIA
County Judge

DATE: 9-17-2020

**NON-FEDERAL SPONSOR'S
SELF-CERTIFICATION OF FINANCIAL CAPABILITY
FOR AGREEMENTS**

We, Don Carona and John Gothia, do hereby certify that we are the Manager/Chief Financial Officer of the Orange County Drainage District and County of Orange (the "Non-Federal Sponsor"); that we are aware of the financial obligations of the Non-Federal Sponsor for the Orange CSRM-ER Separable Element of the Sabine Pass to Galveston Bay, Texas CSRM-ER; and that the Non-Federal Sponsor has the financial capability to satisfy the Non-Federal Sponsor's obligations under the Design Agreement, Between the Department of the Army and the County of Orange and the Orange County Drainage District for the Orange CSRM-ER Separable Element of the Sabine Pass to Galveston Bay, Texas CSRM-ER Project.

IN WITNESS WHEREOF, we have made and executed this certification this ____ day of September 2020.

FOR ORANGE COUNTY DRAINAGE DISTRICT:

BY: Don Carona
TITLE: General Manager
DATE: 9/17/2020

FOR THE COUNTY OF ORANGE:

BY: [Signature]
TITLE: 9-17-2020
DATE: Orange County Judge.

CERTIFICATION REGARDING LOBBYING

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


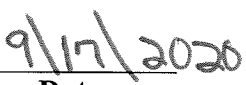
(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection 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.

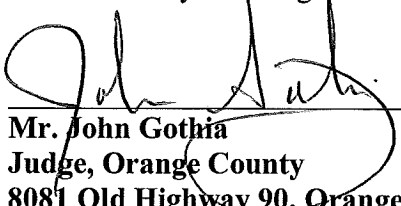
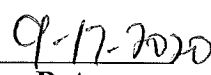
This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification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

For the Orange County Drainage District:

Mr. Don Carona **Date**
General Manager, Orange County Drainage District
8081 Old Highway 90, Orange, Texas 77630

For the County of Orange:

Mr. John Gothia **Date**
Judge, Orange County
8081 Old Highway 90, Orange, Texas 77630