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Date January 26, 2009

APPROVING AMENDMENT NUMBER 1 TO THE DESIGN AGREEMENT BETWEEN
THE DEPARTMENT OF THE ARMY AND THE CITY OF DES MOINES, IOWA FOR
DESIGN OF THE DES MOINES AND RACCOON RIVERS PROJECT

WHEREAS, the City of Des Moines, most of the State of Iowa and much of the Midwest experienced considerable damage as a result of weather related events in 2008; and

WHEREAS, on March 20, 2006, by Roll Call 06-497, the City of Des Moines entered into a Design Agreement with the U.S. Corps of Engineers for the design of the Des Moines and Raccoon Rivers Project; and

WHEREAS, Federal funding has been allocated for the Des Moines and Raccoon Rivers Project, but has not been adequate to complete design; and

WHEREAS, the Corps of Engineers has estimated the cost to complete design of the Des Moines and Raccoon Rivers Project at \$600,000; and

WHEREAS, on August 11, 2008, by Roll Call 08-1468, the City Council authorized a request and approved entering into an agreement with the Corps of Engineers to advance funds up to \$750,000 to complete the design of the Birdland and Central Place levees; and

WHEREAS, the Corps of Engineers has since requested that an amendment to the Design Agreement be executed that allows the Corps of Engineers to accept City of Des Moines funding;

WHEREAS, in accordance with the amendment, the City is responsible for costs as established by the Corps of Engineers and the City is obligated pursuant to the agreement to provide all design costs that are in excess of the Government's financial participation; and

WHEREAS, the City of Des Moines would like to provide funding, up to an additional \$750,000, to the Corps of Engineers to complete the design of the Des Moines and Raccoon Rivers Project, including the Birdland and Central Place Levees; and

WHEREAS, funding from the City of Des Moines would allow design to be completed as we work with our Congressional delegation to obtain the Federal funding required for construction of the Birdland and Central Place levees; and

WHEREAS, once Federal Appropriations are made available for construction of the Des Moines and Raccoon Rivers Project, the amount provided for design by the City of Des Moines will be credited to the required City contribution.

★ **Roll Call Number**

Agenda Item Number

Date January 26, 2009

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DES MOINES, IOWA: That the Amendment Number 1 to the Design Agreement between the Department of the Army and the City of Des Moines, Iowa for Design of the Des Moines and Raccoon Rivers Project, has been drafted by the Corps of Engineers, the final form of the agreement will be subject to review and approval by City Legal and Engineering staff, a copy of the draft amendment is on file in the office of the City Clerk.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DES MOINES, IOWA: That the Mayor is hereby authorized and directed to sign Amendment Number 1 to the Design Agreement between the Department of the Army and the City of Des Moines, Iowa for Design of the Des Moines and Raccoon Rivers Project, which includes providing the estimated amount of \$600,000 for design of the Birdland and Central Place levees.

BE IT FURTHER RESOLVED: That the City Manager is authorized to approve additional funding not to exceed \$150,000 if necessary to complete the design of the Birdland and Central Place levees.

(Council Letter Number **09-048** attached)

Activity ID 14-2000-031

Moved by _____ to adopt.

FORM APPROVED: *Kathleen Vanderpool*
 Kathleen Vanderpool
 Deputy City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
HENSLEY				
KIERNAN				
MAHAFFEY				
MEYER				
VLASSIS				
TOTAL				

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED APPROVED

 Mayor

 City Clerk

AMENDMENT NUMBER 1
TO THE
DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF DES MOINES, IOWA
FOR DESIGN OF THE
DES MOINES AND RACCOON RIVERS PROJECT
DES MOINES, IOWA

THIS AMENDMENT is entered into this _____ day of _____, 2009, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), represented by U.S. Army Engineer, Rock Island District, and City of Des Moines, Iowa (hereinafter the "Non-Federal Sponsor") represented by the Mayor.

WITNESSETH, THAT:

WHEREAS, the Government and the Non-Federal Sponsor entered into a Design Agreement on March 30, 2006 (hereinafter referred to as the "Agreement") for design of the Des Moines and Raccoon Rivers, Des Moines, Iowa Project;

WHEREAS, the Des Moines and Raccoon Rivers, Des Moines, Iowa Project (hereinafter referred to as the "Project") was authorized by section 1001(21) of the Water Resources Development Act of 2007 (Public Law 110-114, 121 Stat 1053);

WHEREAS, the Non-Federal Sponsor has expressed its intent to eventually serve as the non-Federal sponsor that will share in the construction costs of the Project;

WHEREAS, the Non-Federal Sponsor wants to provide, during the period of design, more than 25 percent of the financial obligations for design of the Project; and

WHEREAS, the parties agree that funds provided by the Non-Federal Sponsor shall not represent or give rise to an obligation of the United States, including any obligation to provide reimbursement of the funds the Non-Federal Sponsor elects to provide or any obligation to request future funds for the Project, and that such funds provided will be credited against the Non-Federal Sponsor's future cost share if and only if a Project Partnership Agreement is executed to construct the Project.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree that the Agreement is hereby amended in the following particulars but in no others:

1. ARTICLE I – DEFINITIONS AND GENERAL PROVISIONS

A. Articles I.B., I.C., and I.D. Replace "project cooperation agreement" with "project partnership agreement".

B. Article I.I. Replace "Article II.B." with "Article II.B.3."

2. ARTICLE II – OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. Article II.A.3. Replace "\$1,430,000" with "\$1,777,000".

B. Article II.A.4. Replace "Article II.B." with "Article II.B.3."

C. Article II.B. is deleted in its entirety and replaced with the following:

"B. The Government's and the Non-Federal Sponsor's amount of financial participation in total design costs shall be determined in accordance with the provisions of this paragraph.

1. The Government's maximum amount of financial participation in total design costs shall not exceed the lesser of the following amounts as determined by the Government: the Federal funds the Government makes available for design of the Project; or 75 percent of total design costs.

2. The Non-Federal Sponsor shall be responsible for all total design costs that are in excess of the Government's financial participation determined in accordance with paragraph B.1. of this Article.

3. If the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement will be less than the Non-Federal Sponsor's share of total design costs determined in accordance with paragraph B.2. of this Article, the Government shall determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share by subtracting from the Non-Federal Sponsor's share of total design costs determined in accordance with paragraph B.2. of this Article the collective value of the Non-Federal Sponsor's contributions under Article III and Article VII of this Agreement. The Non-Federal Sponsor shall provide such funds in accordance with Article IV.B. of this Agreement."

C. Article II.C. Replace the first occurrence of "paragraphs B. and" with "paragraphs B.3. and".

D. Article II.F. is deleted in its entirety and replaced with the following:

"F. In accordance with Article IV.E. of this Agreement, the Government shall afford credit, toward the share of total project costs for the Project that is required of the non-Federal entity or entities executing a Project Partnership Agreement or Agreements for the Project or separable element thereof, for the Non-Federal Sponsor's contributions toward total design costs required under paragraph B.2. of this Article."

E. Article II.G. Replace "Project Cooperation Agreement" with "Project Partnership Agreement".

3. ARTICLE IV – METHOD OF PAYMENT

- A. Article IV.A. In the eighth line replace “Articles II.B. and” with “Articles II.B.2. and”; in the ninth line replace “Articles II.B. and” with “Articles II.B.3. and”; and in the eleventh line replace “Article II.B.” with “Article II.B.3”.
- B. Article IV.B. Replace “Article II.B.” with “Article II.B.3.”.
- C. Article IV.D. is deleted in its entirety and replaced with the following:

“D. Upon conclusion of the period of design 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 design costs. In addition, 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 Non-Federal Sponsor’s total required shares of total design costs, determined in accordance with Article II.B.2. of this Agreement, and the costs of any additional work under Article II.E. of this Agreement exceed the Non-Federal Sponsor’s total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to “FAO, USAED, Rock Island (B5)” to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Non-Federal Sponsor for total design costs and the costs of any additional work under Article II.E. of this Agreement exceed the Non-Federal Sponsor’s total required shares thereof determined in accordance with Articles II.B.2. and II.E. of this Agreement, the Government shall afford credit to the Non-Federal Sponsor during the construction or implementation of the Project (other than the 5 percent cash share for structural flood control), and the Government, subject to the availability of funds, shall refund to the Non-Federal Sponsor any funds contributed by the Non-Federal Sponsor that have not been obligated by the Government for design of the Project or additional work, within 90 calendar days of the date of completion of such accounting.”

- D. Article IV.E. is deleted in its entirety and replaced with the following:

"E. The Government shall afford credit for the Non-Federal Sponsor's share of total design costs determined in accordance with Article II.B.2. of this Agreement, in accordance with this paragraph. The Government shall afford such credit only after any payment to the Government or refund to the Non-Federal Sponsor required by paragraph D. of this Article has been made. To afford such credit, the Government shall apply the amount credited toward the share that non-Federal entities are required to provide toward total project costs for the Project. Nothing in this Agreement shall be construed to obligate the Government to repay the Non-Federal Sponsor, in whole or in part, for its share of total design costs.

1. If the Government and a non-Federal interest enter into a Project Partnership Agreement for construction of the entire Project, the Government shall include the amount of total design costs in total project costs for the Project. Further, the Government shall afford credit toward the non-Federal interest's share of total project costs for the Non-Federal Sponsor's contributions toward total design costs.

2. If the Government and a non-Federal interest enter into a Project Partnership Agreement for construction of a separable element of the Project, the Government shall determine the portion of total design costs that are allocable to such separable element and include such amount in total project costs for such separable element. Further, the Government shall determine the amount of the Non-Federal Sponsor's contributions toward total design costs that are allocable or attributable to such separable element and shall afford credit for such amount toward the non-Federal interest's share of total project costs of such separable element.

3. If the Government and a non-Federal interest do not enter into a Project Partnership Agreement for construction of the Project or a separable element thereof, the Government shall not be obligated to refund or reimburse the Non-Federal Sponsor, in whole or in part, for the Non-Federal Sponsor's contributions for total design costs."

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

IN WITNESS WHEREOF, the parties hereto have executed this amendment to the Agreement, which shall become effective upon the date it is signed by the authorized representative of the Government.

THE DEPARTMENT OF THE ARMY

The City of Des Moines, Iowa

BY: _____

Robert A. Sinkler
Colonel, US Army
District Commander

BY: _____

T.M. Franklin Cownie
Mayor

DATE: _____

DATE: _____

CERTIFICATE OF AUTHORITY

I, Bruce E. Bergman, do hereby certify that I am the principal legal officer of the City of Des Moines, Iowa, that the City of Des Moines, Iowa is a legally constituted public body with full authority and legal capability to perform the terms of the Design Agreement dated March 30, 2006, between the Department of the Army and the City of Des Moines, Iowa for the design of the Des Moines and Raccoon Rivers, Iowa Project, as amended by Amendment Number 1 to the Design Agreement dated _____, 2009, and that the persons who have executed Amendment Number 1 to the Design Agreement on behalf of the City of Des Moines have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ 26th _____ day of _January_____ 2009.

Bruce E. Bergman
City Attorney
City of Des Moines, Iowa

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.

T.M. Franklin Cownie
Mayor
City of Des Moines, Iowa