

DESIGN AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE CITY OF KENAI, ALASKA  
FOR  
DESIGN  
FOR THE  
KENAI BLUFFS BANK STABILIZATION, ALASKA

THIS AGREEMENT is entered into this 14<sup>th</sup> day of September, 2020,  
by and between the Department of the Army (hereinafter the "Government"), represented by the  
District Commander for Alaska District (hereinafter the "District Commander") and the City of  
Kenai (hereinafter the "Non-Federal Sponsor"), represented by the City Manager.

WITNESSETH, THAT:

WHEREAS, Federal funds provided in General Investigations, Division B of the  
Consolidated Appropriations Act 2012, Public Law 112-74 were reprogrammed to initiate design  
of stabilization of the Kenai River Bluffs;

WHEREAS, construction of the Project is authorized by Section 116 of the Energy and  
Water Development and related Agencies Appropriations Act of 2010 (P.L. 111-85);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, as amended  
(33 U.S.C. 2213), specifies the cost-sharing requirements applicable to construction of 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 primary project purpose of coastal storm risk  
management, the parties agree that the Non-Federal Sponsor shall contribute 35 percent of the  
total design costs under this Agreement; and

WHEREAS, the Government and Non-Federal Sponsor 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 construction of a 5,000 foot long armored protective berm  
at the toe of the 70-foot high bluff along the north bank of the Kenai River protecting 31 bluff  
parcels, existing structures, infrastructure and cultural resources, as generally described in the  
Kenai Bluffs Bank Stabilization Section 116 Feasibility Study approved by the Director of Civil  
Works on April 10, 2019.

B. The term "Design" means perform detailed pre-construction engineering and design including preparation of plans and specifications for the initial construction contract for the Project.

C. The term "total design costs" means the sum of all costs that are directly related to the Design and cost shared 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 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 Sponsor's 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 Sponsor in the Design Coordination Team to discuss significant issues and actions; audits; or an Independent External Peer Review panel, if required; or the Non-Federal Sponsor's cost of negotiating this Agreement.

D. The term "in-kind contributions" means those materials or services provided by the Non-Federal Sponsor that are identified as being integral to design of the Project by the Division Commander for the Pacific Ocean Division (hereinafter the "Division Commander"). To be integral, the material or service must be part of the work that the Government would otherwise have undertaken for design of the Project. In-kind contributions also include any investigations performed by the Non-Federal Sponsor to identify the existence and extent of any hazardous substances that may exist in, on, or under real property interests required for the Project.

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

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

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Design using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all requirements of applicable Federal laws and implementing regulations. If the Government and non-Federal interest enter into a Project Partnership Agreement for construction of the Project, the Government shall include the total design costs in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

B. The Non-Federal Sponsor shall contribute 35 percent of total design costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, 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 its cost share for the initial fiscal year of the Design. No later than 60 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.

2. No later than August 1<sup>st</sup> prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its cost share. No later than September 1<sup>st</sup> prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.

C. The Government shall credit towards the Non-Federal Sponsor's share of total design costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in providing or performing in-kind contributions integral to the Design, including associated supervision and administration. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar day after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation, including invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Failure to provide such documentation in a timely manner may result in denial of credit.

2. No credit shall be afforded for interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; for the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; for any items provided or performed prior to the effective date of this Agreement unless covered by an In-Kind Memorandum of Understanding; for any items not identified as integral in the integral determination report; or for costs that exceed the Government's estimate of the cost for such item if it had been performed by the Government.

3. No reimbursement will be provided for any in-kind contributions that exceed the Non-Federal Sponsor's share of the total design costs under this Agreement. As provided in Article II.A., total design costs, including credit for in-kind contributions, shall be included in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor 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.

E. The Non-Federal Sponsor shall not use Federal program funds to meet any of its 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.

F. Except as provided in paragraph C. of this Article, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

G. 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.

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

### ARTICLE III - PAYMENT OF FUNDS

A. As of the effective date of this Agreement, total design costs are projected to be \$1,000,000, with the Government's share of such costs projected to be \$650,000, and the Non-Federal Sponsor's share of such costs projected to be \$350,000. 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.

B. The Government shall provide the Non-Federal Sponsor with monthly reports setting forth the estimated total design costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Design.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, Alaska District (J4)" to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of the total design costs as those costs are incurred. If the

Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of the total design costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon completion of the Design and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsor, 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 Sponsor's responsibility to pay its share of total design costs, including contract claims or any other liability that may become known after the final accounting.

#### ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate Design unless the Assistant Secretary of the Army (Civil Works) determines that continuation of the Design is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government determines at any time that the Federal funds made available for the Design are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing within 30 calendar day, and upon exhaustion of such funds, the Government shall suspend Design until there are sufficient Federal funds appropriated by the Congress and funds provided by the Non-Federal Sponsor to allow Design to resume.

C. In the event of termination, the parties shall conclude their activities relating to the Design and conduct an accounting in accordance with Article III.E. 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.

D. Any suspension or termination shall not relieve the parties of liability for any obligation incurred. Any delinquent payment owed by the Non-Federal Sponsor 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 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 Sponsor 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 parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the 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.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor 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 Sponsor, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of non-Federal audits shall be paid solely by the Non-Federal Sponsor 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 Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither 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 Sponsor:  
City Manager  
210 Fidalgo, Avenue  
Kenai, Alaska 99611-7794

If to the Government:  
Chief, Civil Works Branch  
ATTN: CEPOA-PM-C  
US Army Engineer District, Alaska  
P.O. Box 6898  
JBER, AK 99506-6898

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.

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

THE CITY OF KENAI, ALASKA

BY:   
DAMON A. DELAROSA  
Colonel, U.S. Army  
District Commander

BY:   
PAUL OSTRANDER  
City Manager

DATE: 14 Sep 2020

DATE: 9/10/20