

PROJECT COOPERATION AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE CITY OF ALBUQUERQUE, NEW MEXICO  
FOR CONSTRUCTION OF THE  
DOUBLE EAGLE II WATER AND WASTEWATER INFRASTRUCTURE PROJECT  
ALBUQUERQUE, NEW MEXICO

THIS AGREEMENT is entered into this 16 day of SEP 2002 2002 by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Albuquerque District, and the City of Albuquerque, New Mexico (hereinafter the "City"), represented by its Chief Administrative Officer.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized to provide design and construction assistance for water-related environmental infrastructure and resource protection and development projects in central New Mexico (hereinafter the "Section 593 Program") pursuant to Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53);

WHEREAS, Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53), provides that the Secretary of the Army shall not provide assistance for any water-related environmental infrastructure and resource protection and development project, or separable element thereof, unless the project is publicly owned;

WHEREAS, the Double Eagle II Water and Wastewater Infrastructure Project in Albuquerque, New Mexico (hereinafter the "Project", as defined in Article I.A. of this Agreement) has been identified as a project of the type authorized by Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53);

WHEREAS, the Government and the City desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for design and construction of the Project;

WHEREAS, Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53), specifies the cost-sharing requirements applicable to the Project and provides that total project costs shall be shared 75 percent Federal and 25 percent Non-Federal;

WHEREAS, Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53), provides that the Secretary of the Army shall not provide assistance in the form of design and construction for any water-related environmental infrastructure and resource protection and development projects, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, pursuant to Section 593 of the Water Resources Development Act of 1999 (Public Law 106-53), the Secretary of the Army is authorized to provide assistance, which may be in the form of grants or reimbursements of the Federal share of project costs, to the City and to afford credit, not to exceed 6 percent of the total construction costs of the Project, for the reasonable costs of design work completed by the non-Federal interest before entering into a written agreement with the Secretary; and

WHEREAS, the Government and City have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the design and construction of the Project in accordance with the terms of this Agreement;

NOW, THEREFORE, the Government and the City agree as follows:

#### ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean the design and construction of major improvements to the existing water and wastewater infrastructure at the City's Double Eagle II Airport (DEII). The water supply and distribution system consists of a ground storage reservoir with a 1.64 MG capacity; modification of existing pump stations at the airport and Soils Amendment Facility (SAF) to pump the water to the ground storage reservoir; construction of 16,000 linear feet of 24-inch transmission/distribution lines between the DEII and ground storage reservoir; construction of distribution lines to existing and proposed development at the DEII; connection of an existing well at SAF to the 24-inch transmission line; construction of 32,000 linear feet of 8-inch transmission line from Volcano Cliffs Reservoir to DEII; and installation of a booster pump system for the Volcano Cliffs transmission line. The wastewater component consists of a collection system to serve existing and proposed DEII development; connection of the existing Soils Amendment Facility to the collection system; construction of two wastewater lift stations to pump wastewater into the force main, abandoning the lift station serving existing septic tanks and leach field at DEII; and construction of 45,000 linear feet of 8-inch wastewater force main and 1,800 linear feet of 12-inch gravity sewer line to connect to the existing City of Albuquerque wastewater collection system. All features as generally described in the Scope of Work dated April 30, 2002.

B. The term "total project costs" shall mean all costs incurred by the City and the Government in accordance with the terms of this Agreement directly related to project design and construction of the Project. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the costs of project design and construction work; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, suitable borrow and dredged or excavated material disposal areas, and permit costs, not to exceed 25 percent of total project costs, as determined in accordance with Article IV of this Agreement; and costs of audit in accordance with Article X of this Agreement. The term does not include any costs of activities performed under any other agreement for the Project; any

costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; any costs of dispute resolution under Article VII of this Agreement; or the City's costs of negotiating this Agreement.

C. The term "project design work" shall mean the work performed by, or on behalf of, the City for design directly related to the Project, including but not necessarily limited to, the reasonable costs of design work incurred prior to the effective date of this Agreement not to exceed 6 percent of the total construction costs of the Project and which have not been included in costs under any other agreement for the Project. The term includes, but is not necessarily limited to, concept design; report writing; detailed design; preparation of plans and specifications; design analysis; quantity/cost estimates; obtaining required local, state and Federal permits; performance and documentation of environmental investigations; performance and documentation of hazardous substances investigations in accordance with Article XV.A. of this Agreement; performance of historical preservation investigations in accordance with Article XVIII of this Agreement; engineering and design during construction; and other design services and in-kind design work.

D. The term "project design and construction work" shall mean the work performed by the City and the Government for design and construction directly related to the Project incurred subsequent to the effective date of this Agreement. The term includes, but is not necessarily limited to, project design work as defined in paragraph C. of this Article; actual construction, including settlement of or paying awards for contract disputes; supervision and administration; and other construction services and in-kind construction work.

E. The term "total construction costs of the Project", when used to determine the limitation on costs of design incurred prior to the effective date of this Agreement to be included in total project costs under this Agreement, shall mean the actual construction contract costs to construct the Project.

F. The term "financial obligations for design and construction" shall mean a financial obligation of the Government, other than an obligation pertaining to the provision of lands, easements, rights-of-way, relocations, and borrow and dredged or excavated material disposal areas, that results or would result in a cost that is or would be included in total project costs.

G. The term "non-Federal proportionate share" shall mean the ratio of the City's total cash contribution required in accordance with Article II.D.2. of this Agreement to total financial obligations for design and construction, as projected by the Government.

H. The term "period of design and construction" shall mean the time period from execution of this Agreement to the date that the U.S. Army Engineer for the Albuquerque District (hereinafter the "District Engineer") notifies the City in writing of the Government's determination that construction of the Project is complete.

I. The term "highway" shall mean any public highway, roadway, street, or way, including any bridge thereof.

J. The term "relocation" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other public facility, or railroad (including any bridge thereto) 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 removal of the affected facility or part thereof.

K. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

L. The term "functional portion of the Project" shall mean a portion of the Project that is suitable for tender to the City to operate and maintain in advance of completion of the entire Project. For a portion of the Project to be suitable for tender, the District Engineer must notify the City in writing of the Government's determination that the portion of the Project is complete and can function independently and for a useful purpose, although the balance of the Project is not complete.

M. The term "betterment" shall mean a change in the design and construction of an element of the Project resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design and construction of that element.

N. The term "Federal program funds" shall mean funds or grants provided directly to the City by a Federal agency, other than the Department of the Army, and any non-Federal matching share required therefor.

## ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE CITY

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter, the "Congress") and using those funds and funds provided by the City, shall expeditiously design and construct the Project, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall afford the City the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. The Government shall not issue the solicitation for the first design or construction contract until the City has confirmed in writing its willingness to proceed with the Project. To the extent possible, the Government shall afford the City the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the City with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the City the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the City, but the contents of solicitations, award of

contracts, execution of contract modifications, issuance of change orders, resolution of contract claims, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Government.

2. Throughout the period of design and construction, the District Engineer shall furnish the City with a copy of the Government's Written Notice of Acceptance of Completed Work for each contract for the Project.

3. Notwithstanding paragraph A.1. of this Article, if, upon the award of any contract for design or construction of the Project, cumulative financial obligations for design and construction would exceed \$5,500,000, the Government shall defer award of that contract and all subsequent contracts for design or construction of the Project until such time as the Government and the City agree to proceed with further contract awards for the Project, but in no event shall the award of contracts be deferred for more than three years. Notwithstanding this general provision for deferral of contract awards, the Government, after consultation with the City, may award a contract or contracts after the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts must proceed in order to comply with law or to protect life or property from imminent and substantial harm.

4. As of the effective date of this Agreement, \$8,000,000 of Federal funds have been appropriated for the Section 593 Program, of which \$4,125,000 appropriated for the Section 593 Program is currently projected to be available for the Project. The Government makes no commitment to seek additional Federal funds for the Section 593 Program. Notwithstanding any other provision of this Agreement, the Government's financial participation in the Project, when added to the costs incurred by the Government for other projects of the Section 593 Program, shall not exceed the total amount of Federal funds that have been appropriated and hereafter may be appropriated for the Section 593 Program. In the event that the Federal share of a forthcoming financial obligation for total project costs would be limited by this paragraph, the parties shall proceed in accordance with Article XIV.B. of this Agreement.

B. The City may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the City in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The City shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

C. When the District Engineer determines that the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the District Engineer shall so notify the City in writing and furnish the City with an Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (hereinafter the "OMRR&R Manual") and with copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously.

Upon such notification, the City shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project in accordance with Article VIII of this Agreement.

D. The City shall contribute 25 percent of total project costs in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the City shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the City must provide for the construction, operation, and maintenance of the Project, and shall perform or ensure performance of all relocations that the Government determines to be necessary for the construction, operation, and maintenance of the Project.

2. If the Government projects that the value of the City's contributions under paragraphs D.1. and G. of this Article and Articles V, X, XV.A., XVIII.A. and XVIII.C. of this Agreement will be less than 25 percent of total project costs, the City shall provide an additional cash contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the City's total contribution equal to 25 percent of total project costs.

3. If the Government determines that the value of the City's contributions provided under paragraphs D.1. and G. of this Article and Articles V, X, XV.A., XVIII.A., and XVIII.C. of this Agreement have exceeded 25 percent of total project costs, the Government shall reimburse the City for any such value in excess of 25 percent of total project costs subject, however, to the availability of funds and to the limitation on credit for lands, easements, rights-of-way, and relocations, which may not exceed 25 percent of total project costs.

E. The City may request the Government to provide lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or perform relocations on behalf of the City. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the City in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The City shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or performance of relocations by the Government, the City shall be responsible, as between the Government and the City, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

F. The Government shall perform a final accounting in accordance with Article VI.D. of this Agreement to determine the contributions provided by the City in accordance with paragraphs B., D., and E. of this Article and Articles V, X, and XV.A. of this Agreement and to determine whether the City has met its obligations under paragraphs B., D., and E. of this Article.

G. Upon request by the City, the Government shall include in total project costs those reasonable costs incurred by, or on behalf of, the City for project design work that was completed by, or on behalf of, the City prior to the effective date of this Agreement, not to exceed 6 percent of the total construction costs of the Project, and which have not been included in costs under any other agreement for the Project. Such costs shall be limited to the reasonable, allowable, allocable actual cost of project design work as determined by the District Engineer. Where the City's cost for completed project design work is expressed as fixed costs plus a percentage of construction costs, the City shall renegotiate such costs with its Architect-Engineer based on actual costs. On the effective date of this Agreement, the amount of costs for project design work completed prior to the effective date of this Agreement to be included in total project costs is estimated to be \$330,000. This amount is an estimate subject to adjustment by the Government in its sole discretion. The City 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 this project design work.

H. The amount of credit for which the City may be eligible pursuant to this Agreement is not subject to interest charges, nor is it subject to adjustment to reflect changes in price levels between the time that the costs were incurred and the time that the credit is afforded.

I. During the period of design and construction, the Government shall develop and coordinate as required, the Environmental Assessment and either an Environmental Impact Statement or a Finding of No Significant Impact necessary to inform the public regarding the environmental impacts of the Project in accordance with the National Environmental Policy Act of 1969 (hereinafter "NEPA"). Compliance with NEPA is a prerequisite to undertaking construction of the Project. 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.

J. The City shall establish such legal and institutional structures as are necessary to ensure the effective long-term operation of the Project.

K. The City and the Government, in consultation with appropriate Federal and State officials, shall develop a facilities or resource protection and development plan, including appropriate engineering plans and specifications.

L. No construction shall be undertaken 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).

M. The City shall not use Federal program funds to meet the City's share of total project costs under this Agreement unless the Federal agency providing the Federal program funds verifies in writing that the expenditure of such funds is expressly authorized by statute.

ARTICLE III - LANDS, RELOCATIONS, DISPOSAL AREAS, AND  
PUBLIC LAW 91-646 COMPLIANCE

A. The Government, after consultation with the City, shall determine the lands, easements, and rights-of-way required for the construction, operation, and maintenance of the Project, including those required for relocations, borrow materials, and dredged or excavated material disposal. The Government in a timely manner shall provide the City with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the City must provide, in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the end of the period of design and construction, the City shall acquire all lands, easements, and rights-of-way set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each construction contract, the City shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines the City must provide for that contract. For so long as the Project remains authorized, the City shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the City are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the City, shall determine the improvements required on lands, easements, and rights-of-way to enable the proper disposal of dredged or excavated material associated with the construction, operation, and maintenance of the Project. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the City with general written descriptions of such improvements in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with construction of such improvements. Prior to the end of the period of design and construction, the City shall provide all improvements set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government construction contract, the City shall prepare or ensure the preparation of plans and specifications for all improvements the Government determines to be required for the proper disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications.

C. The Government, after consultation with the City, shall determine the relocations necessary for construction, operation, and maintenance of the Project, including those necessary to enable the removal of borrow materials and the proper disposal of dredged or excavated material. The Government in a timely manner shall provide the City with general written descriptions, including maps as appropriate, of such relocations in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with such relocations. Prior to the end of the period of design and construction, the City shall perform or ensure the performance of all relocations as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government construction contract, the

City shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all relocations the Government determines to be necessary for that contract.

D. The City in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided during the period of design and construction pursuant to paragraphs A., B. or C. of this Article. Upon receipt of such documents the Government, in accordance with Article IV of this Agreement and in a timely manner, shall determine the value of such contribution, include such value in total project costs, and afford credit for such value toward the City's share of total project costs.

E. The City 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 by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for the construction, operation, and maintenance of the Project, including those necessary for relocations, borrow materials, and dredged or excavated material disposal, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

#### ARTICLE IV - CREDIT FOR VALUE OF LANDS, RELOCATIONS, AND DISPOSAL AREAS

A. To the extent that the value is included in total project costs pursuant to Article I.B. of this Agreement, the City shall receive credit toward its share of total project costs for the value of the lands, easements, and rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the City must provide for construction, operation, and maintenance of the Project pursuant to Article III of this Agreement, and for the value of the relocations that the City must perform or for which it must ensure performance pursuant to Article III of this Agreement. However, the City shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that have been provided previously as an item of cooperation for another Federal project. The City also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that are provided using Federal program funds unless the Federal agency providing the Federal program funds verifies in writing that such credit is expressly authorized by statute.

B. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations, borrow materials and dredged or excavated material disposal, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the City on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the City provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the City after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph B.3. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with paragraph B.2.a. of this Article, unless thereafter a different amount is determined to represent fair market value in accordance with paragraph B.2.b. of this Article.

a. The City shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the City and the Government. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the City's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the City's appraisal, the City may obtain a second appraisal, and the fair market value shall be the amount set forth in the City's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the City's second appraisal, or the City chooses not to obtain a second appraisal, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the City. In the event the City does not approve the Government's appraisal, the Government, after consultation with the City, shall consider the Government's and the City's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the City for the real property interest exceeds the amount determined pursuant to paragraph B.2.a. of this Article, the Government, at the request of the City, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the City, may approve in writing an amount greater than the amount determined pursuant to paragraph B.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the City, but no less than the amount determined pursuant to paragraph B.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the City shall, prior to instituting such proceedings, submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60-day period, the City shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60-day period, the Government and the City shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the City agree as to an appropriate amount, then the City shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the City cannot agree as to an appropriate amount, then the City may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with sub-paragraph B.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are required for the construction, operation, and maintenance of the Project, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental and Permit Costs. For lands, easements, or rights-of-way acquired by the City within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with Article III.E. of this Agreement. In addition, the City shall receive credit for all reasonable costs incurred by the City, as part of project design and construction work, that are associated with obtaining permits necessary for the construction, operation, and maintenance of the Project on publicly owned or controlled land subject to the 25 percent limitation contained in Article I.B. of this Agreement and subject to an audit in accordance with Article X of this Agreement to determine reasonableness, allowability, and allocability of costs.

5. Waiver of Appraisal. Except as required by paragraph B.3. of this Article, the Government may waive the requirement for an appraisal for the purpose of determining the value of a real property interest for inclusion in total project costs and for crediting if it determines that an appraisal is unnecessary because the valuation problem is uncomplicated and that the estimated fair market value of the real property interest is \$5,000.00 or less based upon a review of available data. In such event, the Government and the City must agree in writing to the value of such real property interest in an amount not in excess of \$5,000.00.

C. After consultation with the City, the Government shall determine the value of relocations in accordance with the provisions of this paragraph.

1. For a relocation other than a highway, the value shall be only that portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a relocation of a highway, the value shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of New Mexico would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. Relocation costs shall include, but not necessarily be limited to, actual costs of performing the relocation; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the relocation, but shall not include any costs due to betterments, as determined by the Government, nor any additional cost of using new material when suitable used material is available. Relocation costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

4. Crediting for relocations performed within the Project boundaries is subject to satisfactory compliance with applicable federal labor laws covering non-Federal construction, including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq), and the Copeland Anti-Kickback Act (40 USC 276c). Crediting 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.

D. The value of the improvements made to lands, easements, and rights-of-way for the proper disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to betterments, as determined by the Government.

## ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the City and the Government, not later than 30 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 City shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the City'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 issues related to design; completion of all necessary NEPA coordination; development of plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act for relocations and for the construction portion of the non-Federal project design and construction work; the Government's cost projections; final inspection of the construction or functional portions of the Project; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a project management plan developed by the Government after consultation with the City.

D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for design and construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

E. The 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 VI - METHOD OF PAYMENT

A. The Government shall maintain current records of contributions provided by the parties and current projections of total project costs and costs due to betterments. By March 1 and at least quarterly thereafter during the period of design and construction, the Government shall provide the City with a report setting forth all contributions provided to date and the current projections of total project costs, of total costs due to betterments, of the components of total project costs, of each party's share of total project costs, of the City's total cash contributions required in accordance with Articles II.B., II.D., and II.E. of this Agreement, of the non-Federal proportionate share, and of the funds the Government projects to be required from the City for the upcoming fiscal year. On the effective date of this Agreement, total project costs are projected to be \$5,500,000, and the City's cash contribution required under Article II.D. of this Agreement is projected to be \$1,045,000. Such amounts are estimates subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the City.

B. The City shall provide the cash contribution required under Article II.D.2. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first design contract or commencement of design using the Government's own forces, the Government shall notify the City in writing of such scheduled date and the funds the Government determines to be required from the City to meet the non-Federal proportionate share of projected financial obligations for design and construction through the first fiscal year of the period of design and construction, including the non-Federal proportionate share of financial obligations for design and construction incurred prior to the commencement of the period of design and construction. Not later than such scheduled date, the City shall either provide the Government with the full amount of the required funds by either delivering a check payable to "FAO, USAED, Albuquerque District" to the District Engineer or by verifying to the satisfaction of the Government that the City has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the City or by presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of the period of design and construction, the Government shall notify the City in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government determines to be required from the City to meet the non-Federal proportionate share of projected financial obligations for design and construction for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the City shall make the full amount of the required funds for that fiscal year available to the Government through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

3. The Government shall draw from the funds provided by the City such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for design and construction incurred prior to the commencement of the period of design and construction; and (b) the non-Federal proportionate share of financial obligations for design and construction as they are incurred during the period of design and construction.

4. If at any time during the period of design and construction the Government determines that additional funds will be needed from the City to cover the non-Federal proportionate share of projected financial obligations for design and construction for the current fiscal year, the Government shall notify the City in writing of the additional funds required, and provide an explanation of why additional funds are required, and the City, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

C. In advance of the Government incurring any financial obligation associated with additional work under Article II.B. or II.E. of this Agreement, the City shall provide the Government with the full amount of the funds required to pay for such additional work through

any of the payment mechanisms specified in Article VI.B.1. of this Agreement. The Government shall draw from the funds provided by the City such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the City must provide additional funds to meet its cash contribution, the Government shall notify the City in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days thereafter, the City shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

D. Upon completion of the Project or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the City with the results of the final accounting. The final accounting shall determine total project costs, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments and the City's cash contribution provided pursuant to Article II.B. of this Agreement.

1. In the event the final accounting shows that the total contribution provided by the City is less than its required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the City shall, no later than 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet the City's required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement by delivering a check payable to "FAO, USAED, Albuquerque District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. In the event the final accounting shows that the total contribution provided by the City exceeds its required share of total project costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the City no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the City, the Government shall seek such appropriations as are necessary to make the refund.

## ARTICLE VII - 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. The parties shall each pay 50 percent 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 VIII – OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

Upon notification in accordance with Article II.C. of this Agreement and for so long as the Project remains authorized, the City shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto. As between the Government and the City, the Government shall have no responsibility to operate, maintain, repair, rehabilitate, or replace the Project or functional portion of the Project.

## ARTICLE IX - INDEMNIFICATION

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

## ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the City shall develop procedures for keeping books, records, documents, and 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 City shall maintain such books, records, documents, and other evidence pertaining to design and construction in accordance with these procedures and for a minimum of three years after the period of design and construction and resolution of all relevant claims arising therefrom. To the extent permitted under applicable Federal laws and regulations, the Government and the City shall each allow the other to inspect such books, documents, records, and other evidence.

B. Pursuant to 32 C.F.R. Section 33.26, the City is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 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 City and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the City and independent auditors any information necessary to enable an audit of the City'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. Section 7503, the Government may conduct audits in addition to any audit that the City is required to conduct under the Single Audit Act. 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 XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the City and the Government agree to 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, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army". The Non-Federal Sponsor is also required to comply with all applicable federal labor standards requirements including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c).

#### ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the City 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 such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

#### ARTICLE XIII - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

#### ARTICLE XIV - TERMINATION OR SUSPENSION

A. If at any time the City fails to fulfill its obligations under Article II.B., II.D., II.E., VI, or XVIII.C. of this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate

this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the Project 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 fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the City in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the City elects to terminate this Agreement.

C. If after completion of the design phase of the Project both parties mutually agree in writing not to proceed with the construction phase of the Project, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.D. of this Agreement.

D. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.D. of this Agreement.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the City 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 XV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the City shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the City 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. Sections 9601-9675, that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project. However, for lands that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the City with prior specific written direction, in which case the City shall perform such investigations in accordance with such written direction. All actual costs incurred by the City for such investigations for hazardous substances 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 X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

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 the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project, the City and the Government shall provide prompt written notice to each other, and the City shall not proceed with the acquisition of the real property interests until both parties agree that the City should proceed.

C. The Government and the City shall determine whether to initiate construction of the Project, or, if already in construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, 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 the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project. Should the Government and the City determine to initiate construction or continue with construction after considering any liability that may arise under CERCLA, the City shall be responsible, as between the Government and the City, for the costs of clean-up and response, to include 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 City fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the City's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The City and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary clean up 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 City, the City shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the City shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA.

#### ARTICLE XVI - 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 either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as

follows:

If to the City;  
Chief Administrative Officer  
City of Albuquerque  
P.O. Box 1293  
Albuquerque, New Mexico 87103

If to the Government:  
District Engineer  
US Army Corps of Engineers  
4101 Jefferson Plaza Northeast  
Albuquerque, New Mexico 87109-3435

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 XVII - 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 XVIII - HISTORIC PRESERVATION

A. The costs of identification, survey and evaluation of historic properties shall be included in total project costs and shared in accordance with the provisions of this Agreement.


B. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of total project costs for the Project.

C. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the District Engineer waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall be included in total project costs and shared in accordance with the provisions of 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 Engineer.

DEPARTMENT OF THE ARMY

CITY OF ALBUQUERQUE  
NEW MEXICO

BY: 

DANA HURST  
Lieutenant Colonel, EN  
U.S. Army Corps of Engineers  
District Engineer

BY: 

JAY K. CZAR  
Chief Administrative Officer  
City of Albuquerque


DATE: 16 SEP 2002

DATE: 9/16/02

CERTIFICATE OF AUTHORITY

I, James P. Fitzgerald, do hereby certify that I am the principal legal officer of the City of Albuquerque, New Mexico, that the City of Albuquerque, New Mexico 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 Albuquerque, New Mexico in connection with the Double Eagle II Water and Wastewater Infrastructure Project and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the City of Albuquerque, New Mexico have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
10<sup>th</sup> day of September 2002.

  
\_\_\_\_\_  
JAMES P. FITZGERALD  
Assistant City Attorney

## 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 Section 1352, Title 31, U.S. Code. 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.

  
\_\_\_\_\_  
JAY M. OZAR  
Chief Administrative Officer  
City of Albuquerque

9-10-02

DATE: 9/10/02