

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF THE ARMY
AND THE
CITY OF FARGO, NORTH DAKOTA,
THE CITY OF MOORHEAD, MINNESOTA,
AND THE
FLOOD DIVERSION BOARD OF AUTHORITY
FOR WORK PROVIDED OR PERFORMED
PRIOR TO EXECUTION OF
A
PROJECT PARTNERSHIP AGREEMENT
FOR
THE FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK
MANAGEMENT PROJECT

THIS MEMORANDUM OF UNDERSTANDING (hereinafter the "MOU") is entered into this _____ day of _____, _____, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer St. Paul District (hereinafter the "District Engineer") and the City of Fargo, North Dakota, represented by its Mayor, the City of Moorhead, Minnesota, represented by its Mayor and City Manager, and the Flood Diversion Board of Authority, represented by its Chairman (hereinafter the "Non-Federal Interests").

WITNESSETH, THAT:

WHEREAS, Section 221(a) of the Flood Control Act of 1970, as amended by Section 2003 of the Water Resources Development Act of 2007, provides that a cost sharing partnership agreement may provide credit for the value of materials or services provided before the execution of such cost sharing partnership agreement if the Secretary and the non-Federal interests enter into an agreement under which the non-Federal interests shall carry out such work and only work carried out following the execution of such agreement shall be eligible for credit;

WHEREAS, the Non-Federal Interests understand and acknowledge that any credit for eligible in-kind contributions will be afforded only toward the required non-Federal contribution of funds (i.e. cash contribution) under the Project Partnership Agreement for the project or separable element of the project except such credit will not be afforded toward the non-Federal requirement to provide in cash 5 percent of the costs allocated to structural flood damage reduction; and

WHEREAS, by letter dated November 8, 2013, the Non-Federal Interests stated their intent to perform certain work (hereinafter the "Proposed Work", as defined in Paragraph 1 of this MOU) prior to the execution of the Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area.

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

1. The Non-Federal Interests shall provide or perform the Proposed Work in accordance with the terms and conditions of this MOU. The Proposed Work shall consist of permanent levees along the banks of the Red River of the North within the City of Fargo and the City of Moorhead, and a community ring levee around Oxbow, Hickson, and Bakke, North Dakota, as generally described in the letter from the Non-Federal Interests.
2. The Non-Federal interests shall develop any additional necessary engineering plans and specifications for the Proposed Work.
3. The Non-Federal Interests shall complete all necessary environmental coordination and obtain all applicable Federal, State, and local permits required for the performance of the Proposed Work.
4. The Non-Federal Interests shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for construction and subsequent operation and maintenance of the Proposed Work, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.
5. Nothing in this MOU creates any duty, obligation, or responsibility for the Government. Any activity undertaken by the Non-Federal Interests for the implementation of the Proposed Work is solely at the Non-Federal Interests' own risk and responsibility.
6. The Non-Federal Interests shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this MOU to the extent and in such detail as will properly reflect total costs for the Proposed Work and the Non-Federal Interests shall make such evidence available for inspection and audit by authorized representatives of the Government.
7. The Non-Federal Interests understand that any costs incurred for the clean-up of hazardous material regulated by 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, or rights-of-way required for the Proposed Work are a Non-Federal Interest responsibility and that no credit shall be afforded for such clean-up costs. In addition, the Non-Federal Interests understand that as between the Government and the Non-Federal Interests, the Non-Federal Interests shall be considered the operators of the Proposed Work for the purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Interests shall operate, maintain, repair, replace, and rehabilitate the Proposed Work in a manner that will not cause liability to arise under CERCLA.

8. The parties to this MOU shall each act in an independent capacity in the performance of their respective functions under this MOU, and neither party is to be considered the officer, agent, or employee of the other.

9. The Non-Federal Interests understand that to be eligible for credit for the costs of the Proposed Work:

a. The Government must make a determination that the Proposed Work is integral to the project;

b. The Proposed Work shall be subject to a review or on-site inspection, as applicable, and certification by the Government that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies;

c. The costs for the Proposed Work that may be eligible for credit shall be subject to an audit by the Government to determine the reasonableness, allocability, and allowability of such costs;

d. The costs incurred for the Proposed Work are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the Proposed Work is completed and the time that credit may be afforded;

e. The Non-Federal Interests shall not use Federal program funds (either funds or grants provided by a Federal agency as well as any non-Federal matching share or contribution that was required by such Federal agency for such program or grant) for the Proposed Work unless the Federal agency providing the Federal portion of such funds verifies in writing that such funds are authorized to be used to carry out the Proposed Work;

f. Only the costs of the Proposed Work that do not exceed the Government's estimate of the cost of such work if the work been accomplished by the Government may be eligible for credit;

g. Any contract awarded for the Proposed Work shall include provisions consistent with all applicable Federal laws and regulations and the Non-Federal Interests shall comply with all applicable Federal and State laws and regulations, including, but not limited to Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, 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";

h. The Non-Federal Interests must comply with applicable Federal labor laws covering non-Federal construction, including but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work

Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*), and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c); and

i. Crediting for the costs of the Proposed Work may be withheld, in whole or in part, as a result of the Non-Federal Interests' failure to comply with the terms of this MOU.

10. If the parties agree to enter into a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area, then the Project Partnership Agreement will contain provisions regarding affording credit for costs of the Proposed Work, if the Secretary determines that the Proposed Work is integral to the project.

11. Execution of this MOU shall not be interpreted as a Federal assurance regarding later approval of any project; shall not commit the United States to any type of reimbursement or credit for the Proposed Work; does not alter any process to be followed by the Government in making a determination to execute a future Project Partnership Agreement; nor does it provide any assurance that any future agreement will ever be executed for the project, the Proposed Work, or any portion of the project. Further, this MOU shall not be interpreted to signify any Federal participation in or commitment to the project or the Proposed Work. Finally, this MOU shall not be construed as committing the Government to assume any responsibility placed upon the Non-Federal Interests or any other non-Federal entity or as preventing the Government from modifying the project that could result in the Proposed Work performed by the Non-Federal Interests no longer being an integral part of the design of the project.

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

DEPARTMENT OF THE ARMY

CITY OF FARGO, NORTH DAKOTA

BY: _____
Daniel C. Koprowski
Colonel, Corps of Engineers
District Engineer
St. Paul District

BY: _____
Dennis R. Walaker
Mayor
City of Fargo, North Dakota

DATE: _____

DATE: _____

CITY OF MOORHEAD, MINNESOTA

CITY OF MOORHEAD, MINNESOTA

BY: _____
Del Rae Williams
Mayor
City of Moorhead, Minnesota

BY: _____
Michael J. Redlinger
City Manager
City of Moorhead, Minnesota

DATE: _____

DATE: _____

FLOOD DIVERSION BOARD OF AUTHORITY

BY: _____
Darrell Vanyo
Chairperson
Flood Diversion Board of Authority

DATE: _____

CERTIFICATE OF AUTHORITY

I, Erik Johnson, do hereby certify that I am the principal legal officer of the City of Fargo, North Dakota, that the City of Fargo, North Dakota is a legally constituted public body with full authority and legal capability to perform the terms of the MOU between the Department of the Army and the City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Flood Diversion Board of Authority in connection with the Proposed Work to be provided or performed prior to execution of a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area and that the persons who have executed this MOU on behalf of the City of Fargo, North Dakota have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____, _____.

Erik Johnson
Fargo City Attorney

CERTIFICATE OF AUTHORITY

I, John Shockley, do hereby certify that I am the principal legal officer of the City of Moorhead, Minnesota, that the City of Moorhead, Minnesota is a legally constituted public body with full authority and legal capability to perform the terms of the MOU between the Department of the Army and the City of Fargo, North Dakota, the City of Moorhead, Minnesota, and the Flood Diversion Board of Authority in connection with the Proposed Work to be provided or performed prior to execution of a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area and that the persons who have executed this MOU on behalf of the City of Moorhead, Minnesota have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____, _____.

John Shockley
Moorhead City Attorney

CERTIFICATE OF AUTHORITY

I, Erik Johnson, do hereby certify that I am the principal legal officer of the Flood Diversion Board of Authority, that the Flood Diversion Board of Authority is a legally constituted public body with full authority and legal capability to perform the terms of the MOU between the Department of the Army and the City of Fargo, North Dakota, the City of Moorhead, Minnesota, and Flood Diversion Board of Authority in connection with the Proposed Work to be provided or performed prior to execution of a Project Partnership Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area and that the persons who have executed this MOU on behalf of the Flood Diversion Board of Authority have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____, _____.

Erik Johnson
Lead Counsel, Flood Diversion Board of Authority