

MEMORANDUM OF AGREEMENT  
BETWEEN  
THE PORT OF OAKLAND  
AND  
THE DEPARTMENT OF THE ARMY

Reimb by Port to DA  
Sep 96

ARTICLE I - PURPOSE AND AUTHORITY

This Memorandum of Agreement ("MOA") is entered into by and between the U.S. Department of the Army ("DA"), represented by the Assistant Secretary of the Army (Civil Works) and the City of Oakland, California, a municipal corporation, acting by and through its Board of Port Commissioners ("Port") ("the parties"), for the purpose of establishing a mutual framework governing the respective responsibilities of the parties for the provision of a feasibility study for improvements to the Oakland Harbor, California, including channel deepening and related navigation improvements. This MOA is entered into pursuant to the Intergovernmental Cooperation Act (31 U.S.C. § 6505) and Section 203 of the Water Resources Development Act of 1986, Pub.Law No. 99-662 (WRDA 86). The Intergovernmental Cooperation Act authorizes Federal agencies to provide reimbursable services to state and local governments. Section 203 of WRDA 86 authorizes non-Federal interests to undertake feasibility studies of proposed harbor or inland harbor projects and submit them to the Secretary of the Army.

The objectives of this effort to prepare a feasibility study pursuant to Section 203 of WRDA 86 are to, (1) shorten the overall project development process for improvements to the Oakland Harbor, (2) decrease overall study costs and (3) increase Non-Federal Sponsor (Port) participation.

The Port and the DA understand that entering into this Agreement in no way obligates either party to implement a project and that whether the Government supports a project authorization and budgets for its implementation depends upon, among other things, the outcome of the study and whether the proposed solution is consistent with the Economic and Environmental Principles and Guidelines (P&G) for Water and Related Land

Resources Implementation Studies, March 10, 1983 [Appendix A to Engineering Regulation (ER) 1105-2-50] and with the budget priorities of the Administration. The DA agrees promptly to provide the Port with a complete copy of ER 1105-2-50 and all documents referred to therein, and promptly to provide the Port with all subsequent modifications or additions to ER 1105-2-50 and all documents referred to therein.

## ARTICLE II - SCOPE

Goods and services which the DA may provide under this MOA include appropriate assistance to the Port in the Port's development of a feasibility level study for channel deepening and related improvements at Oakland Harbor, California, for a Federal navigation project servicing the Port and such other related goods or services as may be agreed upon in the future. The scope of the feasibility study will be such as to meet current requirements for Federal water resources investment decision making. In preparing the feasibility study the provisions of ER 1165-2-122, issued pursuant to WRDA 86 shall be followed. In the DA's performance of work for the Port the provisions of ER 1140-1-211, issued pursuant to the Intergovernmental Cooperation Act shall be followed. The DA agrees to promptly provide to the Port complete copies of ER 1165-2-122 and ER 1140-1-211 and all documents referred to therein, and promptly to provide the Port with all subsequent modifications or additions to ER 1165-2-122 and ER 1140-1-211, and all documents referred to therein.

Nothing in this MOA shall be construed to require the Port to use the DA or to require the DA to provide any goods or services to the Port, except as may be set forth in Support Agreements ("SA(s)") and Work Orders ("WO(s)") for specific, discrete tasks as generally defined in an SA. -

## ARTICLE III - INTERGOVERNMENTAL COMMUNICATIONS

To provide for consistent and effective communication between the DA and the Port, each party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may

also be appointed to serve as points of contact on SAs and WOs.

#### ARTICLE IV - SUPPORT AGREEMENTS

In response to requests from the Port for DA assistance under this MOA, the DA and the Port shall seek to conclude mutually agreed upon written SAs, which shall include the following:

- a detailed scope of work statement;
- schedules;
- funding arrangements;
- the amount of funds required and available to accomplish the scope of work as stated above; and

The following must be addressed in each SA:

- identification of individual project managers;
- identification of types of contracts to be used (if known);
- types and frequencies of reports;
- identification of which party is to be responsible for government-furnished equipment, contract administration, records maintenance, rights to data, software and intellectual property, and contract audits;
- procedures for amending or modifying the SA; and
- such other particulars as are necessary to describe clearly the obligations of the parties with respect to the requested goods and services.

An SA may describe multiple goods and services to be provided by the DA pursuant to this agreement. In the event an SA describes multiple goods and services a separate WO may be prepared for each item or groups of items identified in the SA and the SA shall clearly state whether or not the SA is also a WO obligating the DA to provide those goods and services or whether a subsequent WO shall be prepared.

Goods or services shall be provided under this MOA only after an appropriate SA or WO has been signed by a representative of each party authorized to execute that SA or WO. In the case of conflict between this MOA and an SA, this MOA shall control.

In the event of a conflict between this MOA or an SA and a WO, this MOA or the SA shall control.

#### ARTICLE V - RESPONSIBILITIES OF THE PARTIES

##### A. Responsibilities of the Department of the Army

The DA shall provide the Port with goods or services in accordance with the purpose, terms, and conditions of this MOA and with specific requirements set forth in SAs or WOs.

The DA shall identify authorized DA representatives to sign SAs and WOs.

The DA shall ensure that only authorized DA representatives sign SAs and WOs.

The DA shall not contract out any goods or services to be provided pursuant to this MOA, an SA, or a WO except pursuant to a subsequent separate written agreement signed on behalf of the DA and the Port which shall address, among other things, claims by subcontractors and payment of subcontractors' costs of closing out work of subcontracts upon their early termination.

The DA shall provide detailed periodic progress, financial and other reports to the Port as agreed to in the SA or WO. Financial reports shall include information on all funds received, obligated, and expended, and on forecast obligations and expenditures.

Performance of responsibilities, which are undertaken by the DA pursuant to this MOA and any SA or WO under this MOA, shall be accomplished in a cooperative manner consistent with the Port's performance of its responsibilities under section B. of this Article V.

##### B. Responsibilities of the Port

The Port certifies that the services requested of the DA in this MOA and in any SA or WO cannot be procured reasonably and expeditiously by the Port through ordinary business channels.

The Port shall pay all costs associated with the DA's provisions of goods or services under this MOA.

The Port shall ensure that only authorized Port representatives sign SAs or WOs.

The Port in cooperation with the DA shall develop SAs and WOs to include scope of work statements.

The Port shall obtain for the DA all necessary real estate interests and access to all work sites and support facilities, and shall perform all coordination with and obtain any permits from state and local agencies, as necessary during the performance of each SA or WO.

#### ARTICLE VI - FUNDING

The Port shall pay all salaries and all other identifiable direct and indirect costs associated with the DA's provision of goods or services under this MOA or any SA or WO in accordance with the provisions of OMB Circular A-25, "User Charges". The Port shall provide the DA the full amount of funds estimated to cover the above obligations for each WO by either (1) delivering a check payable to "FAO, USAED, San Francisco" to the District Engineer, or (2) verify to the satisfaction of the DA that the Port has deposited the funds in an escrow account acceptable to the DA, with interest accruing to, and withdrawable from time to time, by the Port.

The DA shall request transfer of funds from the Escrow Account to the US Treasury in sufficient time to ensure that necessary funds are available within the US Treasury in advance of obligations necessary to the provision of services. Established Federal Government accounting procedures shall be used.

The DA agrees that it will use its best efforts to remain within the level of funding associated with each WO. In furtherance of this goal, the DA shall review, prior to signing the WO, the scope of work to be accomplished pursuant to the WO and make its best estimate of the cost of the goods or services

to be provided pursuant to that WO. If the estimated cost exceeds the Port's available funding for that WO, the DA agrees to negotiate with the Port to adjust the scope of work to a level commensurate with the Port's available funding.

The DA shall maintain current records of all funds provided by the Port for each SA and WO, and funds expended by the DA for the provision of goods and services under each SA and WO. Subject to an SA or WO to define specific requirements and to provide funding, the DA on a monthly basis shall provide the Port with a report setting forth all funds provided by the Port to date, funds expended by the DA for the provision of goods and services under each SA and WO, and projections of the costs to complete all outstanding SAs and WOs.

If, during performance of a WO, the DA forecasts its actual costs under the WO to exceed the amount of funds available under that WO, it shall promptly notify the Port of the amount of additional funds necessary to complete the work under that WO. The Port shall either provide the additional funds to the DA, or require that the scope of work be limited to that which can be paid for by the then-available funds, or direct termination of the work under that WO. In the event the Port or the DA elects to terminate the work under that WO the DA shall provide to the Port the results of all work performed to date on that WO.

The DA shall promptly notify the Port of the existence of any claims arising from work done by the DA under this MOA. The DA shall provide the Port full opportunity to participate in the defense of any claims. The DA shall not agree to the settlement of any claims for which the Port bears any liability without the prior written consent of the Port. The Port's liability for such claims shall include any liability that arises out of the Port's consent or failure to give consent to a settlement. Within 90 days of completion of the work under a WO, the DA shall conduct an accounting to determine the actual cost of the work as then known, as well as the DA's estimated cost of unresolved claims, and present it to the Port in the agreed upon format and detail. Within 30 days of completion of this accounting, the DA shall return to the Port any funds advanced in excess of the actual costs as then known.

The Port will keep a separate accounting of all costs incurred in developing the study and make this information available to the DA, in order to implement the provisions of §203(d) of WRDA 86.

#### ARTICLE VII - APPLICABLE LAWS

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, all contract work undertaken by the DA shall be governed by relevant DA policies and procedures.

#### ARTICLE VIII - DISPUTE RESOLUTION

The parties agree that, in the event of a dispute between the parties, the Port and the DA shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the parties. The parties agree that, in the event such measures fail to resolve the dispute, they may seek such lawful remedies as may be available.

#### ARTICLE IX - LIABILITY

If liability is imposed on the United States Government relating to the DA's provision of goods or services under this MOA, the DA will accept accountability for its actions, but the Port shall remain responsible as the program proponent for providing such funds as are necessary to discharge the liability, and all related costs.

#### ARTICLE X - PUBLIC INFORMATION

Justification and explanation of the Port's programs before other agencies, departments, and offices shall be the responsibility of the Port. The DA may provide, upon request, any assistance necessary to support the Port's justification or explanations of the Port's programs conducted under this MOA. In

general, the Port is responsible for all public information. The DA may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The Port or the DA shall make its best public statement regarding work contemplated, undertaken, or completed pursuant to SAs under this MOA.

#### ARTICLE XI - MISCELLANEOUS

##### A. Other Relationships or Obligations

This MOA shall not affect any pre-existing or independent relationships or obligations between the Port and the DA.

##### B. Survival

The provisions of this MOA which require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

##### C. Severability

If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

#### ARTICLE XII - AMENDMENT, MODIFICATION AND TERMINATION

This MOA may be modified or amended only by written, mutual agreement of the parties. Either party may at any time terminate this MOA or any SA or WO without cause by providing written notice to the other party. The termination shall be effective immediately, unless a later date is set forth. In the event of termination, the Port shall continue to be responsible for all costs incurred by the DA under this MOA and for the reasonably necessary and unavoidable costs of closing out the work under any SA or WO. This MOA may also be terminated by mutual written agreement.

#### ARTICLE XIII - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under the MOA shall be deemed to have been duly given in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Port:

Executive Director  
Port of Oakland  
530 Water Street  
Oakland, California 94607

If to the DA:

District Engineer  
U.S. Army Corps of Engineers, San Francisco  
333 Market Street  
San Francisco, California 94105-2197

B. A party may change the address or person to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

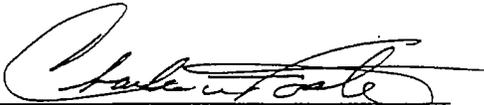
C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

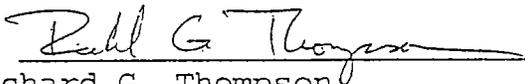
#### ARTICLE XIV - EFFECTIVE DATE

This MOA shall become effective when signed by both the Port and the DA.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners

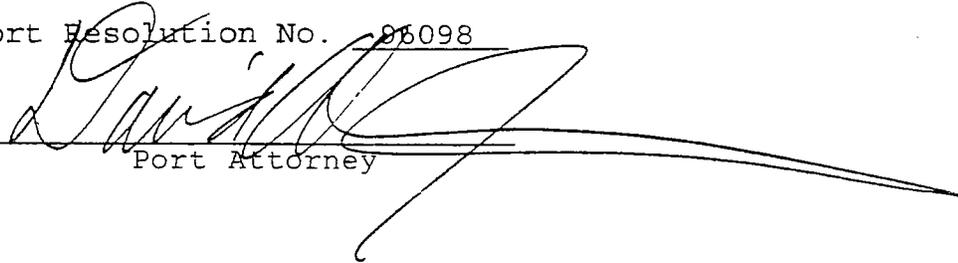
DEPARTMENT OF THE ARMY

By   
Executive Director

By   
Richard G. Thompson  
Lieutenant Colonel  
Corps of Engineers  
District Engineer

Date: September 23, 1996

Approved as to form and legality this 23<sup>rd</sup> day of September, 1996.

Port Resolution No. 96098  
  
Port Attorney