

## Agenda Item: 10.

# Memorandum

**To:** Programs, Projects and Operations Subcommittee  
**From:** Brian L. Henkel, Groundwater Management Engineer  
**Date:** July 10, 2012  
**Re:** Phase III Professional services Contract with FYRA Engineering for Missouri River Levee Certification

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The District's consultant, Tetra Tech Inc., has substantially completed the second phase of the professional services contract for the Missouri River Levee Certification Project (Project) for the R-613 and R-616 Missouri River Levee System Units (Levees). Phase I services included investigation of the Levees and was concluded in August 2010 at a cost of \$330,878. Tetra Tech has also completed nearly all of Phase II of the Project which included the alternatives development phase. The Phase II contract is for a maximum, not to exceed, amount of \$903,943. Total billing for the Phase II contract is currently at \$636,291.80 leaving \$267,651.20 remaining in the Phase II contract. The majority of the remaining contract amount for Phase II is for geotechnical analysis.

The principle staff from the local Tetra Tech office that have worked on the Project thus far have formed their own engineering firm, FYRA Engineering, Incorporated. In order to maintain continuity for the Project and to benefit from the knowledge and experience gained from the first two phases of the Project, it is recommended the District award the contract for Phase III to FYRA Engineering without utilizing the District process for consultant selection. FYRA Engineering will be a sub-consultant to Tetra Tech for the remaining portion of the Phase II contract. Tetra Tech will become a sub-consultant to FYRA Engineering for the Phase III contract. These sub-consultant arrangements will help ensure continuity of personnel and experience for the overall benefit of the Project.

The Phase III professional services contract with FYRA Engineering takes the Project through final design and construction bidding and is proposed for a not to exceed contract amount of \$1,835,898. Attached are a proposed professional services contract, time and cost estimate and schedule. Sub-consultants include Tetra Tech Inc., Lamp Rynearson and Associates and FHU Engineering. The schedule calls for a one and a half year effort to be completed by December 2014.

**Management recommends that the Programs, Projects and Operations Subcommittee recommend to the Board of Directors that the District's policy regarding consultant selection be set aside and that the General Manager be authorized to execute the proposed Phase III contract for professional services with Fyra Engineering, Incorporated for the Missouri River Levee System Units R-613 and R-616 Certification Project, for a total not to exceed amount of \$1,835,898, subject to changes deemed necessary by the General Manager and approval as to form by District legal counsel.**

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the Controlling Law.

STANDARD FORM OF AGREEMENT  
BETWEEN OWNER AND ENGINEER  
FOR  
PROFESSIONAL SERVICES

**P-MRNRD Missouri River R-613/R-616  
Federal Levee Certification  
Sarpy County, NE**

Prepared by

**ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE**

and

Issued and Published Jointly by



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*a practice division of the*  
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

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This Agreement has been prepared for use with the Standard General Conditions of the Construction Contract (No. C-700, 2002 Edition) of the Engineers Joint Contract Documents Committee. Their provisions are interrelated, and a change in one may necessitate a change in the other. For guidance on the completion and use of this Agreement, see EJCDC User's Guide to the Owner-Engineer Agreement, No. E-001, 2002 Edition.

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STANDARD FORM OF AGREEMENT  
BETWEEN OWNER AND ENGINEER  
FOR  
PROFESSIONAL SERVICES

THIS IS AN AGREEMENT effective as of July 12 , 2012 (“Effective Date”) between  
Papio-Missouri River Natural Resources District (P-MRNRD) (“Owner”) and  
FYRA Engineering, LLC (FYRA) (“Engineer”).

Owner intends to investigate the technical, environmental and economic requirements to provide certification of the federal Missouri River Levee System Units R-613 and R-616 (Levees), located in southern and eastern Sarpy County, Nebraska to obtain Federal Emergency Management Association (FEMA) accreditation and to obtain US Army Corps of Engineers (USACE) approval for modifications deemed necessary for FEMA accreditation, said investigation to be conducted in accordance with applicable FEMA and USACE guidelines, such certification to possibly require design and construction services on the Levees (Project).

Owner and Engineer agree as follows:

**ARTICLE 1 – SERVICES OF ENGINEER**

1.01 *Scope*

- A. Engineer shall provide, or cause to be provided, the services set forth herein and in Exhibit A.

**ARTICLE 2 – OWNER’S RESPONSIBILITIES**

2.01 *General*

- A. Owner shall have the responsibilities set forth herein and in Exhibit B.
- B. Owner shall pay Engineer as set forth in Exhibit C.
- C. Owner shall be responsible for, and Engineer may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Owner to Engineer pursuant to this Agreement. Engineer may use such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this Agreement.

## ARTICLE 3 – SCHEDULE FOR RENDERING SERVICES

### 3.01 *Commencement*

- A. Engineer shall begin rendering services as of the Effective Date of the Agreement.

### 3.02 *Time for Completion*

- A. Engineer shall complete its obligations within a reasonable time. Specific periods of time for rendering services are set forth or specific dates by which services are to be completed are provided in Exhibit A, and are hereby agreed to be reasonable.
- B. If, through no fault of Engineer, such periods of time or dates are changed, or the orderly and continuous progress of Engineer's services is impaired, or Engineer's services are delayed or suspended, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.
- C. If Owner authorizes changes in the scope, extent, or character of the Project, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.
- D. Owner shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Engineer's performance of its services.
- E. If Engineer fails, through its own fault, to complete the performance required in this Agreement within the time set forth, as duly adjusted, then Owner shall be entitled to the recovery of direct damages resulting from such failure.

## ARTICLE 4 – INVOICES AND PAYMENTS

### 4.01 *Invoices*

- A. *Preparation and Submittal of Invoices.* Engineer shall prepare invoices in accordance with its standard invoicing practices and the terms of Exhibit C. Engineer shall submit its invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of receipt.

### 4.02 *Payments*

- A. *Application to Interest and Principal.* Payment will be credited first to any interest owed to Engineer and then to principal.
- B. *Failure to Pay.* If Owner fails to make any payment due Engineer for services and expenses within 30 days after receipt of Engineer's invoice, then:
  - 1. amounts due Engineer will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day; and
  - 2. Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement until Owner has paid in full all amounts due for services,

expenses, and other related charges. Owner waives any and all claims against Engineer for any such suspension.

- C. *Disputed Invoices.* If Owner contests an invoice, Owner may withhold only that portion so contested, and must pay the undisputed portion.
- D. *Legislative Actions.* If after the Effective Date of the Agreement any governmental entity takes a legislative action that imposes taxes, fees, or charges on Engineer's services or compensation under this Agreement, then the Engineer may invoice such new taxes, fees, or charges as a Reimbursable Expense to which a factor of 1.0 shall be applied. Owner shall pay such invoiced new taxes, fees, and charges; such payment shall be in addition to the compensation to which Engineer is entitled under the terms of Exhibit C.

## ARTICLE 5 – OPINIONS OF COST

### 5.01 *Opinions of Probable Construction Cost*

- A. Engineer's opinions of probable Construction Cost are to be made on the basis of Engineer's experience and qualifications and represent Engineer's best judgment as an experienced and qualified professional generally familiar with the construction industry. However, since Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Engineer. If Owner wishes greater assurance as to probable Construction Cost, Owner shall employ an independent cost estimator as provided in Exhibit B.

### ~~5.02 *Designing to Construction Cost Limit*~~

- ~~A. If a Construction Cost limit is established between Owner and Engineer, such Construction Cost limit and a statement of Engineer's rights and responsibilities with respect thereto will be specifically set forth in Exhibit F, "Construction Cost Limit," to this Agreement.~~

### 5.03 *Opinions of Total Project Costs*

- A. The services, if any, of Engineer with respect to Total Project Costs shall be limited to assisting the Owner in collating the various cost categories which comprise Total Project Costs. Engineer assumes no responsibility for the accuracy of any opinions of Total Project Costs.

## ARTICLE 6 – GENERAL CONSIDERATIONS

### 6.01 *Standards of Performance*

- A. The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time

and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.

- B. Owner shall not be responsible for discovering deficiencies in the technical accuracy of Engineer's services. Engineer shall correct any such deficiencies in technical accuracy without additional compensation except to the extent such corrective action is directly attributable to deficiencies in Owner-furnished information.
- C. Engineer may employ such Consultants as Engineer deems necessary to assist in the performance or furnishing of the services, subject to reasonable, timely, and substantive objections by Owner.
- D. Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.
- E. Engineer and Owner shall comply with applicable Laws and Regulations and Owner-mandated standards that Owner has provided to Engineer in writing. This Agreement is based on these requirements as of its Effective Date. Changes to these requirements after the Effective Date of this Agreement may be the basis for modifications to Owner's responsibilities or to Engineer's scope of services, times of performance, and compensation.
- F. Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain. Owner agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer signing any such documents.
- G. The General Conditions for any construction contract documents prepared hereunder are to be the "Standard General Conditions of the Construction Contract" as prepared by the Engineers Joint Contract Documents Committee (No. C-700, 2002 Edition) unless both parties mutually agree to use other General Conditions by specific reference in Exhibit J.
- H. Engineer shall not at any time supervise, direct, or have control over Contractor's work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by Contractor, for security or safety at the Site, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.
- I. Engineer neither guarantees the performance of any contractor nor assumes responsibility for any contractor's failure to furnish and perform the Work in accordance with the Contract Documents.
- J. Engineer shall not be responsible for the acts or omissions of any contractor, subcontractor, or supplier, or of any of their agents or employees or of any other persons (except Engineer's own employees and its Consultants) at the Site or otherwise furnishing or

performing any Work; or for any decision made on interpretations or clarifications of the Contract Documents given by Owner without consultation and advice of Engineer.

#### 6.02 *Design Without Construction Phase Services*

- A. If Engineer's Basic Services under this Agreement do not include Project observation, or review of the Contractor's performance, or any other Construction Phase services, then (1) Engineer's services under this Agreement shall be deemed complete no later than the end of the Bidding or Negotiating Phase; (2) Engineer shall have no design or shop drawing review obligations during construction; (3) Owner assumes all responsibility for the application and interpretation of the Contract Documents, contract administration, construction observation and review, and all other necessary Construction Phase engineering and professional services; and (4) Owner waives any claims against the Engineer that may be connected in any way thereto.

#### 6.03 *Use of Documents*

- A. All Documents are instruments of service in respect to this Project, and Engineer shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the Engineer) whether or not the Project is completed. Owner shall not rely in any way on any Document unless it is in printed form, signed or sealed by the Engineer or one of its Consultants.
- B. A party may rely that data or information set forth on paper (also known as hard copies) that the party receives from the other party by mail, hand delivery, or facsimile, are the items that the other party intended to send. Files in electronic media format of text, data, graphics, or other types that are furnished by one party to the other are furnished only for convenience, not reliance by the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.
- C. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.
- D. When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents' creator.
- E. Owner may make and retain copies of Documents for information and reference in connection with use on the Project by Owner. Engineer grants Owner a license to use the Documents on the Project, extensions of the Project, and other projects of Owner, subject to the following limitations: (1) Owner acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use

or reuse by Owner or others on extensions of the Project or on any other project without written verification or adaptation by Engineer; (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Engineer or to Engineer's Consultants; (3) Owner shall indemnify and hold harmless Engineer and Engineer's Consultants from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from any use, reuse, or modification without written verification, completion, or adaptation by Engineer; (4) such limited license to Owner shall not create any rights in third parties.

- F. If Engineer at Owner's request verifies or adapts the Documents for extensions of the Project or for any other project, then Owner shall compensate Engineer at rates or in an amount to be agreed upon by Owner and Engineer.

#### 6.04 *Insurance*

- A. Engineer shall procure and maintain insurance as set forth in Exhibit G, "Insurance." Engineer shall cause Owner to be listed as an additional insured on any applicable general liability insurance policy carried by Engineer.
- B. Owner shall procure and maintain insurance as set forth in Exhibit G, "Insurance." Owner shall cause Engineer and Engineer's Consultants to be listed as additional insureds on any general liability or property insurance policies carried by Owner which are applicable to the Project.
- C. Owner shall require Contractor to purchase and maintain general liability and other insurance in accordance with the requirements of Paragraph 5.04 of the "Standard General Conditions of the Construction Contract," (No. C-700, 2002 Edition) as prepared by the Engineers Joint Contract Documents Committee and to cause Engineer and Engineer's Consultants to be listed as additional insureds with respect to such liability and other insurance purchased and maintained by Contractor for the Project.
- D. Owner and Engineer shall each deliver to the other certificates of insurance evidencing the coverages indicated in Exhibit G. Such certificates shall be furnished prior to commencement of Engineer's services and at renewals thereafter during the life of the Agreement.
- E. All policies of property insurance relating to the Project shall contain provisions to the effect that Engineer's and Engineer's Consultants' interests are covered and that in the event of payment of any loss or damage the insurers will have no rights of recovery against Engineer or its Consultants, or any insureds or additional insureds thereunder.
- F. At any time, Owner may request that Engineer or its Consultants, at Owner's sole expense, provide additional insurance coverage, increased limits, or revised deductibles that are more protective than those specified in Exhibit G. If so requested by Owner, and if commercially available, Engineer shall obtain and shall require its Consultants to obtain such additional insurance coverage, different limits, or revised deductibles for such periods of time as requested by Owner, and Exhibit G will be supplemented to incorporate these requirements.

6.05 *Suspension and Termination*

A. Suspension.

By Owner: Owner may suspend the Project upon seven days written notice to Engineer.

By Engineer: If Engineer's services are substantially delayed through no fault of Engineer, Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement.

B. Termination. The obligation to provide further services under this Agreement may be terminated:

1. For cause,

a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party.

b. By Engineer:

1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional; or

2) upon seven days written notice if the Engineer's services for the Project are delayed or suspended for more than 90 days for reasons beyond Engineer's control.

3) Engineer shall have no liability to Owner on account of such termination.

c. Notwithstanding the foregoing, this Agreement will not terminate under Paragraph 6.05.B.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.

2. For convenience,

a. By Owner effective upon Engineer's receipt of notice from Owner.

C. *Effective Date of Termination.* The terminating party under Paragraph 6.05.B may set the effective date of termination at a time up to 30 days later than otherwise provided to allow

Engineer to demobilize personnel and equipment from the Site, to complete tasks whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Project materials in orderly files.

D. Payments Upon Termination.

1. In the event of any termination under Paragraph 6.05, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished and all Reimbursable Expenses incurred through the effective date of termination. Upon making such payment, Owner shall have the limited right to the use of Documents, at Owner's sole risk, subject to the provisions of Paragraph 6.03.E.
2. In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.05.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer's Consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.

6.06 *Controlling Law*

- A. This Agreement is to be governed by the law of the state in which the Project is located.

6.07 *Successors, Assigns, and Beneficiaries*

- A. Owner and Engineer are hereby bound and the partners, successors, executors, administrators and legal representatives of Owner and Engineer (and to the extent permitted by Paragraph 6.07.B the assigns of Owner and Engineer) are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.
- B. Neither Owner nor Engineer may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise in this Agreement:
1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Engineer to any Contractor, Contractor's subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them.
  2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Engineer and not for the benefit of any other party.

3. Owner agrees that the substance of the provisions of this Paragraph 6.07.C shall appear in the Contract Documents.

#### 6.08 *Dispute Resolution*

- A. Owner and Engineer agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to invoking the procedures of Exhibit H or other provisions of this Agreement, or exercising their rights under law.
- B. If the parties fail to resolve a dispute through negotiation under Paragraph 6.08.A, then either or both may invoke the procedures of Exhibit H. If Exhibit H is not included, or if no dispute resolution method is specified in Exhibit H, then the parties may exercise their rights under law.

#### 6.09 *Environmental Condition of Site*

- A. Owner has disclosed to Engineer in writing the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern located at or near the Site, including type, quantity, and location.
- B. Owner represents to Engineer that to the best of its knowledge no Constituents of Concern, other than those disclosed in writing to Engineer, exist at the Site.
- C. If Engineer encounters an undisclosed Constituent of Concern, then Engineer shall notify (1) Owner and (2) appropriate governmental officials if Engineer reasonably concludes that doing so is required by applicable Laws or Regulations.
- D. It is acknowledged by both parties that Engineer's scope of services does not include any services related to Constituents of Concern. If Engineer or any other party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then Engineer may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until Owner: (1) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Constituents of Concern; and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.
- E. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Engineer's services under this Agreement, then the Engineer shall have the option of (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating this Agreement for cause on 30 days notice.
- F. Owner acknowledges that Engineer is performing professional services for Owner and that Engineer is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with Engineer's activities under this Agreement.

6.10 *Indemnification and Mutual Waiver*

- A. *Indemnification by Engineer.* To the fullest extent permitted by law, Engineer shall indemnify and hold harmless Owner, and Owner's officers, directors, partners, agents, consultants, and employees from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Engineer or Engineer's officers, directors, partners, employees, or Consultants. The indemnification provision of the preceding sentence is subject to and limited by the provisions agreed to by Owner and Engineer in Exhibit I, "Allocation of Risks," if any.
- B. *Indemnification by Owner.* To the fullest extent permitted by law, Owner shall indemnify and hold harmless Engineer, Engineer's officers, directors, partners, agents, employees, and Consultants from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Owner or Owner's officers, directors, partners, agents, consultants, or employees, or others retained by or under contract to the Owner with respect to this Agreement or to the Project.
- C. *Environmental Indemnification.* In addition to the indemnity provided under Paragraph 6.10.B of this Agreement, and to the fullest extent permitted by law, Owner shall indemnify and hold harmless Engineer and its officers, directors, partners, agents, employees, and Consultants from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals, and all court, arbitration, or other dispute resolution costs) caused by, arising out of, relating to, or resulting from a Constituent of Concern at, on, or under the Site, provided that (i) any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (ii) nothing in this paragraph shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.
- D. *Percentage Share of Negligence.* To the fullest extent permitted by law, a party's total liability to the other party and anyone claiming by, through, or under the other party for any cost, loss, or damages caused in part by the negligence of the party and in part by the negligence of the other party or any other negligent entity or individual, shall not exceed the percentage share that the party's negligence bears to the total negligence of Owner, Engineer, and all other negligent entities and individuals.

- E. *Mutual Waiver.* To the fullest extent permitted by law, Owner and Engineer waive against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project.

#### 6.11 *Miscellaneous Provisions*

- A. *Notices.* Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, by facsimile, by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.
- B. *Survival.* All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.
- C. *Severability.* Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
- D. *Waiver.* A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.
- E. *Accrual of Claims.* To the fullest extent permitted by law, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date of Substantial Completion.

### ARTICLE 7 – DEFINITIONS

#### 7.01 *Defined Terms*

- A. Wherever used in this Agreement (including the Exhibits hereto) terms (including the singular and plural forms) printed with initial capital letters have the meanings indicated in the text above or in the exhibits; in the following provisions; or in the "Standard General Conditions of the Construction Contract," prepared by the Engineers Joint Contract Documents Committee (No. C-700, 2002 Edition):
  1. *Additional Services* – The services to be performed for or furnished to Owner by Engineer in accordance with Exhibit A, Part 2, of this Agreement.
  2. *Basic Services* – The services to be performed for or furnished to Owner by Engineer in accordance with Exhibit A, Part 1, of this Agreement.
  3. *Construction Cost* – The cost to Owner of those portions of the entire Project designed or specified by Engineer. Construction Cost does not include costs of services of Engineer or other design professionals and consultants, cost of land or

rights-of-way, or compensation for damages to properties, or Owner's costs for legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project, or the cost of other services to be provided by others to Owner pursuant to Exhibit B of this Agreement. Construction Cost is one of the items comprising Total Project Costs.

4. *Constituent of Concern* – Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to [a] the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. (“CERCLA”); [b] the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; [c] the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); [d] the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; [e] the Clean Water Act, 33 U.S.C. §§1251 et seq.; [f] the Clean Air Act, 42 U.S.C. §§7401 et seq.; and [g] any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
5. *Consultants* – Individuals or entities having a contract with Engineer to furnish services with respect to this Project as Engineer's independent professional associates, consultants, subcontractors, or vendors.
6. *Documents* – Data, reports, Drawings, Specifications, Record Drawings, and other deliverables, whether in printed or electronic media format, provided or furnished in appropriate phases by Engineer to Owner pursuant to this Agreement.
7. *Drawings* – That part of the Contract Documents prepared or approved by Engineer which graphically shows the scope, extent, and character of the Work to be performed by Contractor. Shop Drawings are not Drawings as so defined.
8. *Laws and Regulations; Laws or Regulations* – Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
9. *Reimbursable Expenses* – The expenses incurred directly by Engineer in connection with the performing or furnishing of Basic and Additional Services for the Project.
10. *Resident Project Representative* – The authorized representative of Engineer, if any, assigned to assist Engineer at the Site during the Construction Phase. The Resident Project Representative will be Engineer's agent or employee and under Engineer's supervision. As used herein, the term Resident Project Representative includes any assistants of Resident Project Representative agreed to by Owner. The duties and responsibilities of the Resident Project Representative, if any, are as set forth in Exhibit D.

11. *Specifications* – That part of the Contract Documents consisting of written technical descriptions of materials, equipment, systems, standards, and workmanship as applied to the Work and certain administrative details applicable thereto.
12. *Total Project Costs* – The sum of the Construction Cost, allowances for contingencies, and the total costs of services of Engineer or other design professionals and consultants, together with such other Project-related costs that Owner furnishes for inclusion, including but not limited to cost of land, rights-of-way, compensation for damages to properties, Owner’s costs for legal, accounting, insurance counseling and auditing services, interest and financing charges incurred in connection with the Project, and the cost of other services to be provided by others to Owner pursuant to Exhibit B of this Agreement.

## ARTICLE 8 – EXHIBITS AND SPECIAL PROVISIONS

### 8.01 *Exhibits Included*

- A. Exhibit A, “Engineer’s Services,” consisting of 7 pages.
- B. Exhibit B, “Owner’s Responsibilities,” consisting of 3 pages.
- C. Exhibit C, “Payments to Engineer for Services and Reimbursable Expenses,” consisting of 3 pages.
- ~~D. Exhibit D, “Duties, Responsibilities and Limitations of Authority of Resident Project Representative,” consisting of 5 pages.~~
- E. Exhibit E, “Notice of Acceptability of Work,” consisting of 3 pages.
- ~~F. Exhibit F, “Construction Cost Limit,” consisting of 2 pages.~~
- G. Exhibit G, “Insurance,” consisting of 2 pages.
- H. Exhibit H, “Dispute Resolution,” consisting of 2 pages.
- I. Exhibit I, “Allocation of Risks,” consisting of 3 pages.
- J. Exhibit J, “Special Provisions,” consisting of 1 page.
- K. Exhibit K, “Amendment to Owner-Engineer Agreement,” consisting of 2 pages.

### 8.02 *Total Agreement*

- A. This Agreement (consisting of pages 1 to 15 inclusive, together with the exhibits identified above) constitutes the entire agreement between Owner and Engineer and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument based on the format of Exhibit K to this Agreement.

8.03 *Designated Representatives*

- A. With the execution of this Agreement, Engineer and Owner shall designate specific individuals to act as Engineer's and Owner's representatives with respect to the services to be performed or furnished by Engineer and responsibilities of Owner under this Agreement. Such individuals shall have authority to transmit instructions, receive information, and render decisions relative to the Project on behalf of each respective party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

Owner:

Papio-Missouri River Natural Resources  
District

Engineer:

FYRA Engineering, Inc.

By: \_\_\_\_\_

By: Michael K. Sotak, P.E.

Title: \_\_\_\_\_

Title: Owner/Principal Engineer

Date  
Signed: \_\_\_\_\_

Date  
Signed: \_\_\_\_\_

Engineer License or Certificate No. E-8759  
State of: Nebraska

Address for giving notices:

8901 S. 154<sup>th</sup> Street

Address for giving notices:

3925 S. 147<sup>th</sup> Street

Omaha, NE 68138-3621

Suite 117

Omaha, NE 68144

Designated Representative (see Paragraph  
8.03.A):

John Winkler

Designated Representative (see Paragraph 8.03.A):

Michael K. Sotak, P.E.

Title: General Manager

Title: Owner/Principal Engineer

Phone Number: 402.444.6222

Phone Number: 402.502.7131

Facsimile Number: 402.895.6543

Facsimile Number: 402.932.6940

E-Mail Address: jwinkler@papionrd.org

E-Mail Address: msotak@fyraengineering.com

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT A**, consisting of 7 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 July, 2012.

**Engineer's Services**

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Article 1 of the Agreement is amended and supplemented to include the following agreement of the parties. Engineer shall provide Basic and Additional Services as set forth below.

**PART 1 – BASIC SERVICES**

The Engineer was selected to assist the Owner in obtaining Federal Emergency Management Administration (FEMA) accreditation of the Levees. Said accreditation assistance previously involved a technical investigation/categorization of the Levees, followed by an alternatives analysis. The work performed to date has led to the currently proposed permitting, design and construction of modifications to the Levees which shall meet the USACE approval process for levee modifications and any modification will be followed by certification of the existing and modified Levee system components to meet FEMA accreditation standards. Future agreements between the Owner and Engineer and its subconsultants for construction observation and final certification documentation of the Project, will be negotiated at a later date.

*A.1.01 Final Design and Permitting Phase*

The scope of services contained herein is related to the final design and permitting phase of the project where the modifications proposed to the levees to meet FEMA accreditation requirements shall be engineered and permitted in accordance with USACE design guidelines and approval processes.

The following scope of services is broken down into 4 phases, as intended to describe the intended process. (A schedule for the services detailed above is provided for in Attachment 1 to Exhibit A):

**Project Management**

Project Management – Monthly Client Meetings – Monthly meetings between consultant team project manager and client representative(s) to review progress and work ahead for the coming weeks.

Project Management – Monthly Invoice/Schedule Update – Monthly preparation of consultant invoice including incorporation of internal and subconsultant invoices, description of services rendered and update of Project schedule.

Prepare Nebraska Environmental Trust (NET) Application – Prepare NET application in accordance with Trust fund guidelines for the proposed R-613 setback alignment for the fall 2012 submittal. This task also includes assistance on any other grant application (MAPA and any others to be named later.)

Stakeholder Meetings – Prepare for and attend four (4) meetings with project stakeholders defined by NRD and consultant team to relay the intended project path and identify any input needed from stakeholder

agencies. The NRD may also choose to receive input from stakeholder groups. An early stakeholder meeting will include meeting with Offutt AFB to determine the scope of their culvert repair project, which is currently outside the scope of this project.

USACE Coordination Meetings – Prepare for and attend three (3) meetings with the U.S. Army Corps of Engineers to discuss progress on the levee certification project and how it meshes with the Corps' Major 408 and PL 84-99 programs. Obtain concurrence on type of NEPA document required, limits of Environmental Study Area, and preferred format of the Section 408 submittal materials.

**USACE 408 Permit**

*It is currently anticipated that a single 408 submittal package will suffice for the R-613 and R-616 levee districts.*

ATR/IEPR Documentation & Coordination – Prepare written trail of correspondence with ATR/IEPR members through the preparation of the 408 review process.

Permit Writing – Prepare written text in general sections for 408 submittal as required by USACE format requirements. At this time it is assumed that a single major 408 submittal will suffice for both the R-613 and R-616 levee systems.

Geotech and Geophysics – Prepare brief explanation of geophysics and geotechnical engineering investigations prepared for the site as required by USACE format requirements. Provide correspondence with USACE during any comment/review period. Reference detailed reports within the text.

Structural Analysis - Prepare brief explanation of any structural modifications prepared for the systems as required by USACE format requirements. Provide correspondence with USACE during any comment/review period. Reference detailed reports within the text.

Hydraulics and Hydrology - Prepare brief explanation of hydrologic and hydraulic model modifications prepared for the systems as required by USACE format requirements. Provide correspondence with USACE during any comment/review period. Reference detailed reports/model submittals within the text.

O, M, R & R - Prepare brief explanation of any proposed modifications proposed for the Operation, Maintenance, Repair and Replacement (OMRR) report to be prepared for the systems as required by USACE format requirements. Provide correspondence with USACE during any comment/review period. Also provide any detailed changes that are pertinent to the 408 permitting process. All other changes to the OMRR report will be made upon completion of the construction of the levee modifications.

Real Estate - Prepare brief explanation of any changes in the project real estate prepared for the systems as required by USACE format requirements. Provide correspondence with USACE during any comment/review period. Reference legal documentation of changes to ownership/easement changes to the parcels affected by the project within the text.

Risk & Reliability – Work with the USACE to fulfill the requirement for assessing any changes to the systems' risk and reliability including hydraulic and geotechnical analyses. At the current time, format for

such an assessment has not been documented, however development of such is advertised to be in progress. Prepare written summary of work performed as required by USACE format requirements.

Administrative Record – Prepare all written documentation of changes to the administrative record for the levee systems as required by USACE.

Discussion of Executive Order – Prepare all written documentation to meet USACE requirements pertaining to executive order requirements to process 408 permit.

Environmental Compliance - Environmental protection compliance will follow the Section 408 Submittal Package Guide (Final, dated 11/12/08). Due to the project location, the following compliance considerations are not applicable: Marine Protection, Research and Sanctuaries Act, Wild and Scenic Rivers Act, and Coastal Zone Management Act. All other considerations listed in the Guide will be addressed:

- NEPA Documentation – At this point in time, it is assumed that the project will require a documented Categorical Exclusion to be prepared by the applicant. If an EA and FONSI are required these would be prepared by the Corps using applicant prepared supporting materials. NEPA documentation will include (1) description and analysis of project alternatives, and the determination of effects on significant resources; (2) direct, indirect and cumulative effects analysis; (3) risk analysis of human life, safety and property; and (4) mitigation plans, as needed. It is assumed that the Environmental Study Area will be defined as the area within the Limits of Construction, and areas affected by any potential setback on Levee 613.
- Endangered Species Act Documentation - Coordinate with USFWS and NGPC to obtain written concurrence on project effects on endangered and threatened species. The project may require preparation of a Biological Assessment.
- Fish & Wildlife Coordination Act Documentation - Coordinate with USFWS to obtain either a Final FWCA Report, or a letter stating that a FWCA report is not required. This report evaluates impacts to fish and wildlife from water resource development projects, and may include measures to mitigate impacts. As part of this evaluation, a wetland delineation will be conducted.
- Clean Air Act Compliance – Evaluate project to determine consistency with Nebraska Air Quality Implementation Plan and obtain concurrence from NDEQ, or obtain a conditional permit. Obtain written concurrence from EPA that they have reviewed and commented on the environmental impact evaluations, including the NEPA documents.
- Hazardous Toxic and Radioactive Waste (HTRW) Review – HTRW includes but is not limited to CERCLA, RCRA, and TSCA. A Hazardous Materials Report will be completed for the Environmental Study Area to identify conditions that indicate an existing release, a past release, or a material threat of a release, of any hazardous substances or petroleum products into structures, on the property or into the soils, groundwater, or surface water.

The HMR will include a regulatory file review (local, state and federal agencies). The purpose of this review will be to identify potential sites within the Environmental Study Area. Any sites identified during the file review will be assessed for their potential impact on the project, and discussed in the NEPA document. In addition, the HMR will include review of the Phase I Site Assessment, Phase II Site Assessment, and Environmental Review of the Missouri River Recovery Plan Purchase (conducted respectively by Tetra Tech; OA as part of a Brownfield grant application covering a portion of the study area; and the Corps).

The HMR will cover (1) conducting a review of the Environmental Study Area for local, state and federal environmental database records; (2) conducting a windshield site reconnaissance survey, (3) reviewing readily available aerial photographs, (4) conducting interviews with local agencies and regulators, if necessary, and (5) preparing a written technical memorandum of the findings. The memorandum will be included as an appendix to the NEPA document, with the findings summarized in the main body of the NEPA document.

Coordination with EPA, NDEQ and Tribal agencies with jurisdiction or expertise will be provided to allow those agencies opportunity to comment on the project. Comments will be provided to the Corps for their consideration in the project evaluation.

- National Historic Preservation Act Coordination – Consult with the Nebraska SHPO to obtain written concurrence on project effects on cultural resources. Coordinate with Advisory Council on Historic Preservation and Tribal agencies with jurisdiction or expertise to allow those agencies opportunity to comment on the project. Comments will be provided to the Corps for their consideration in the project evaluation.
- Noise Control Act Documentation – Document significance of construction noise and operational noise. If significant noise levels are anticipated, provide a noise mitigation plan.

Project Economics – Prepare economic assessments as required by USACE for any levee modifications that include a change to the protected area, such as the levee setback or a change in location of a closure section.

Report Preparation and Printing – Assembly, printing and distribution of hard copies of draft 408 permit report.

Address Comments by NRD/USACE – Prepare modifications to 408 report based on comments from NRD (And their IEPR consultant) and USACE that merit being addressed in final report.

Prepare Final 408 Submittal Package for HQUACE Approval – Assembly, printing and distribution of six (6) hard copies and electronic copy of final 408 report and referenced materials.

### **Final Design – R-616 Levee System**

Preparation of Plan/Profile Sheets – Prepare 100-scale plan and profile drawings for modifications to levees to be included in final construction documents package.

Preparation of X-Section Sheets – Prepare typical and special levee cross-sections to properly show planned modifications to levee system.

Utility Coordination – Contact all affected utilities and show utility and associated easement locations on plan and profile sheets. Communication shall include utility review and approval of any planned levee modifications within utility easements.

Levee Embankment / Grading Design – Design all changes to levee embankment including levee raises and berm additions/modifications. Plans will also include any changes to interior channel along Papillion Creek.

Borrow Area Design – Design grading contours and any site-related changes necessary for borrow area determined to provide fill for levee modifications. Off-channel borrow areas shall not include more than two (2) sites.

Levee Penetration Modifications – Design changes to protected side of levee penetrations related to modifications made to levee system at that location. Changes may include channel improvements, culvert extensions or other minor modifications. This item will also include any improvements necessary for penetration outlet support/protection in channel.

Penetration and Gate Actuator Replacement Design – Based on levee penetration condition analysis and replacement/repair recommendations, replace levee penetrations, gate and actuators for six (6) levee penetrations. Additional penetration modifications may be necessary, as per the OMRR schedule to be prepared as part of the final levee certification report.

Temporary Flood Protection Planning – Prepare any temporary flood planning measures required during modifications of levee system that temporarily hinder the levee system's ability to provide the authorized level of flood protection.

Relief Well Design – Design and detail any new or replacement relief wells proposed along the levee system.

Slurry Wall Design – Design and detail of location, depth, thickness, etc. of any slurry walls identified along the levee system for seepage control measures in the final geotechnical report.

Papillion Creek RR Levee Toe Wall Design – Design of reinforced concrete levee wall up to 5' tall to provide adequate freeboard for levee adjacent to railroad crossing of Papillion Creek.

Seeding Plan – Preparation of temporary and final seeding plans of disturbed areas in accordance with OMRR requirements and stormwater management practices.

Bike Trail Details – Preparation of all bike trail details necessary for areas where minor modifications to the existing bike trail are needed. It is currently anticipated that only approximately 200 LF of bike trail will need to be modified where there is a transition from the path from the protected side of the trail to the top of the levee. No trail signage is included in this scope.

Hwy 370 Stop Log Closure Structure Design – Design of structural stop log closure section and related geotechnical engineering. This task also includes all required correspondence and coordination with the railroads.

Prepare Project Specifications and Bid Documents – Prepare technical specifications and all front-end bid information in accordance with EJCDC requirements in EJCDC format.

SWPPP Plan Preparation – Assembly of application and SWPPP to meet NPDES requirements for project.

PCSWMP Design/Permitting Process - Assembly of application, PCSWMP and BMP design/documentation to meet Papillion Creek Stormwater Management requirements for project.

Land Rights Document Preparations – Work with P-MRNRD to prepare temporary/permanent easements or fee title acquisition (or combination thereof) required to complete construction modifications to the levee system and provide long term real estate (access/ownership) to operate and maintain the levees.

### **Final Design – R-613 Levee System**

*The scope of the design for this levee system anticipates including the “minor” levee setback alignment of 399 acres. The coordination of the design of the new system and the subsequent partial/entire removal of the existing system is included in this scope. If the setback alignment is not pursued, the scope will handle the design/modification of the existing R-613 levee alignment.*

Preparation of Plan/Profile Sheets – Prepare 100-scale plan and profile drawings for modifications to levees to be included in final construction documents package.

Preparation of X-Section Sheets – Prepare typical and special levee cross-sections to properly show planned modifications to levee system.

Pump Station Removal Plans – Prepare plan sheets for the decommissioning and salvage/removal of the pump station located in the southeast corner of the R-613 levee district.

Utility Coordination – Contact all affected utilities and show utility and associated easement locations on plan and profile sheets. Communication shall include utility review and approval of any planned levee modifications within utility easements.

Levee Embankment / Grading Design – Design all changes to levee embankment including levee raises and berm additions/modifications. Plans will also include any changes to interior channel along Papillion Creek.

Borrow Area Design – Design grading contours and any site-related changes necessary for borrow area determined to provide fill for levee modifications. Off-channel borrow areas shall not include more than two (2) sites.

Levee Penetration Modifications – Design changes to protected side of levee penetrations related to modifications made to levee system at that location. Changes may include channel improvements, culvert

extensions or other minor modifications. This item will also include any improvements necessary for penetration outlet support/protection in channel.

Penetration and Gate Actuator Replacement Design – Based on levee penetration condition analysis and replacement/repair recommendations, replace levee penetrations, gate and actuators for six (6) levee penetrations. Additional penetration modifications may be necessary, as per the OMRR schedule to be prepared as part of the final levee certification report.

Temporary Flood Protection Planning – Prepare any temporary flood planning measures required during modifications of levee system that temporarily hinder the levee system's ability to provide the authorized level of flood protection.

New Levee Penetration Design – Design of new culvert, gate and actuator for three (3) new levee penetrations in proposed R-613 levee setback alignment.

Setback Alignment Geotechnical Engineering – Geotechnical drilling, testing and design for the proposed R-613 levee setback alignment.

Relief Well Design – Design and detail any new or replacement relief wells proposed along the levee system.

Slurry Wall Design – Design and detail of location, depth, thickness, etc. of any slurry walls identified along the levee system for seepage control measures in the final geotechnical report.

Highway 75 Levee Toe Wall Design – Design of reinforced concrete levee wall up to 5' tall to provide adequate freeboard for levee adjacent to US Hwy 75 north of Platte River along NDOR's proposed Allied Road realignment.

Seeding Plan – Preparation of temporary and final seeding plans of disturbed areas in accordance with OMRR requirements and stormwater management practices.

Hwy 75 Stop Log Closure Structure Design – Design of structural stop log closure section and related geotechnical engineering. This task also includes all required correspondence and coordination with the railroads.

Allied Road Sand Bag Closure Design – Design of sandbag closure within levee freeboard zone across proposed connection of

Prepare Project Specifications and Bid Documents – Prepare technical specifications and all front-end bid information in accordance with EJCDC requirements in EJCDC format.

SWPPP Plan Preparation – Assembly of application and SWPPP to meet NPDES requirements for project.

PCSWMP Design/Permitting Process - Assembly of application, PCSWMP and BMP design/documentation to meet Papillion Creek Stormwater Management requirements for project.

Land Rights Document Preparations – Work with P-MRNRD to prepare temporary/permanent easements or fee title acquisition (or combination thereof) required to complete construction modifications to the levee system and provide long term real estate (access/ownership) to operate and maintain the levees.

## **PART 2 – ADDITIONAL SERVICES**

### *A2.01 Additional Services Requiring Owner's Written Authorization*

- A. If authorized in writing by Owner, Engineer shall furnish or obtain from others Additional Services of the types listed below.
  1. Preparation of applications and supporting documents (in addition to those furnished under Basic Services) for private or governmental grants, loans, or advances in connection with the Project; preparation or review of environmental assessments and impact statements; review and evaluation of the effects on the design requirements for the Project of any such statements and documents prepared by others; and assistance in obtaining approvals of authorities having jurisdiction over the anticipated environmental impact of the Project.
  2. Services to make measured drawings of or to investigate existing conditions or facilities, or to verify the accuracy of drawings or other information furnished by Owner or others.
  3. Services resulting from significant changes in the scope, extent, or character of the portions of the Project designed or specified by Engineer or its design requirements including, but not limited to, changes in size, complexity, Owner's schedule, character of construction, or method of financing; and revising previously accepted studies, reports, Drawings, Specifications, or Contract Documents when such revisions are required by changes in Laws and Regulations enacted subsequent to the Effective Date of this Agreement or are due to any other causes beyond Engineer's control.
  4. Services resulting from Owner's request to evaluate additional Study and Report Phase alternative solutions beyond those identified in Paragraph A1.01.A.4.
  5. Services required as a result of Owner's providing incomplete or incorrect Project information to Engineer.
  6. Providing renderings or models for Owner's use.
  7. Undertaking investigations and studies including, but not limited to, detailed consideration of operations, maintenance, and overhead expenses; the preparation of feasibility studies, cash flow and economic evaluations, rate schedules, and appraisals; assistance in obtaining financing for the Project; evaluating processes available for licensing, and assisting Owner in obtaining process licensing; detailed quantity surveys of materials, equipment, and labor; and audits or inventories required in connection with construction performed by Owner.
  8. Furnishing services of Engineer's Consultants for other than Basic Services.
  9. Services attributable to more prime construction contracts than specified in Paragraph A1.03.C.

10. Services during out-of-town travel required of Engineer other than for visits to the Site or Owner's office.
11. Preparing for, coordinating with, participating in and responding to structured independent review processes, including, but not limited to, construction management, cost estimating, project peer review, value engineering, and constructibility review requested by Owner; and performing or furnishing services required to revise studies, reports, Drawings, Specifications, or other Bidding Documents as a result of such review processes.
12. Preparing additional Bidding Documents or Contract Documents for alternate bids or prices requested by Owner for the Work or a portion thereof.
13. Determining the acceptability of substitute materials and equipment proposed during the Bidding or Negotiating Phase when substitution prior to the award of contracts is allowed by the Bidding Documents.
14. Assistance in connection with Bid protests, rebidding, or renegotiating contracts for construction, materials, equipment, or services, except when such assistance is required by Exhibit F.
15. Providing construction surveys and staking to enable Contractor to perform its work other than as required under Paragraph A1.05.A.6, and any type of property surveys or related engineering services needed for the transfer of interests in real property; and providing other special field surveys.
16. Providing Construction Phase services beyond the original date for final completion of the Work.
17. Providing assistance in responding to the presence of any Constituent of Concern at the Site, in compliance with current Laws and Regulations.
18. Preparing and furnishing to Owner Record Drawings showing appropriate record information based on Project annotated record documents received from Contractor.
19. Preparation of operation and maintenance manuals.
20. Preparing to serve or serving as a consultant or witness for Owner in any litigation, arbitration, or other dispute resolution process related to the Project.
21. Providing more extensive services required to enable Engineer to issue notices or certifications requested by Owner.
22. Other services performed or furnished by Engineer not otherwise provided for in this Agreement.

*A2.02 Additional Services Not Requiring Owner's Written Authorization*

- A. Engineer shall advise Owner that Engineer is commencing to perform or furnish the Additional Services of the types listed below. For such Additional Services, Engineer need not request or

obtain specific advance written authorization from Owner. Engineer shall cease performing or furnishing such Additional Services upon receipt of written notice from Owner.

1. Services in connection with Work Change Directives and Change Orders to reflect changes requested by Owner.
2. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitute materials or equipment other than "or-equal" items; and services after the award of the Construction Contract in evaluating and determining the acceptability of a substitution which is found to be inappropriate for the Project or an excessive number of substitutions.
3. Services resulting from significant delays, changes, or price increases occurring as a direct or indirect result of materials, equipment, or energy shortages.
4. Additional or extended services during construction made necessary by (1) emergencies or acts of God endangering the Work, (2) the presence at the Site of any Constituent of Concern, (3) Work damaged by fire or other cause during construction, (4) a significant amount of defective, neglected, or delayed work by Contractor, (5) acceleration of the progress schedule involving services beyond normal working hours, or (6) default by Contractor.
5. Services (other than Basic Services during the Post-Construction Phase) in connection with any partial utilization of any part of the Work by Owner prior to Substantial Completion.
6. Evaluating an unreasonable claim or an excessive number of claims submitted by Contractor or others in connection with the Work.
7. Services during the Construction Phase rendered after the date stated in A1.05.B.

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT B**, consisting of 3 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 July, 2012.

**Owner's Responsibilities**

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Article 2 of the Agreement is amended and supplemented to include the following agreement of the parties.

B2.01 *In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense:*

- A. Provide Engineer with all criteria and full information as to Owner's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations; and furnish copies of all design and construction standards which Owner will require to be included in the Drawings and Specifications; and furnish copies of Owner's standard forms, conditions, and related documents for Engineer to include in the Bidding Documents, when applicable.
- B. Furnish to Engineer any other available information pertinent to the Project including reports and data relative to previous designs, or investigation at or adjacent to the Site.
- C. Following Engineer's assessment of initially-available Project information and data and upon Engineer's request, furnish or otherwise make available such additional Project related information and data as is reasonably required to enable Engineer to complete its Basic and Additional Services. Such additional information or data would generally include the following:
  1. Property descriptions.
  2. Zoning, deed, and other land use restrictions.
  3. Property, boundary, easement, right-of-way, and other special surveys or data, including establishing relevant reference points.
  4. Explorations and tests of subsurface conditions at or contiguous to the Site, drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site, or hydrographic surveys, with appropriate professional interpretation thereof.
  5. Environmental assessments, audits, investigations, and impact statements, and other relevant environmental or cultural studies as to the Project, the Site, and adjacent areas.
  6. Data or consultations as required for the Project but not otherwise identified in the Agreement or the Exhibits thereto.

- D. Give prompt written notice to Engineer whenever Owner observes or otherwise becomes aware of the presence at the Site of any Constituent of Concern, or of any other development that affects the scope or time of performance of Engineer's services, or any defect or nonconformance in Engineer's services, the Work, or in the performance of any Contractor.
- E. Authorize Engineer to provide Additional Services as set forth in Part 2 of Exhibit A of the Agreement as required.
- F. Arrange for safe access to and make all provisions for Engineer to enter upon public and private property as required for Engineer to perform services under the Agreement.
- G. Examine all alternate solutions, studies, reports, sketches, Drawings, Specifications, proposals, and other documents presented by Engineer (including obtaining advice of an attorney, insurance counselor, and other advisors or consultants as Owner deems appropriate with respect to such examination) and render in writing timely decisions pertaining thereto.
- H. Provide reviews, approvals, and permits from all governmental authorities having jurisdiction to approve all phases of the Project designed or specified by Engineer and such reviews, approvals, and consents from others as may be necessary for completion of each phase of the Project.
- I. Provide, as required for the Project:
  - 1. Accounting, bond and financial advisory, independent cost estimating, and insurance counseling services.
  - 2. Legal services with regard to issues pertaining to the Project as Owner requires, Contractor raises, or Engineer reasonably requests.
  - 3. Such auditing services as Owner requires to ascertain how or for what purpose Contractor has used the moneys paid.
  - 4. Placement and payment for advertisement for Bids in appropriate publications.
- J. Advise Engineer of the identity and scope of services of any independent consultants employed by Owner to perform or furnish services in regard to the Project, including, but not limited to, cost estimating, project peer review, value engineering, and constructibility review.
- K. Furnish to Engineer data as to Owner's anticipated costs for services to be provided by others (including, but not limited to, accounting, bond and financial, independent cost estimating, insurance counseling, and legal advice) for Owner so that Engineer may assist Owner in collating the various cost categories which comprise Total Project Costs.
- L. If Owner designates a construction manager or an individual or entity other than, or in addition to, Engineer to represent Owner at the Site, define and set forth as an attachment to this Exhibit B the duties, responsibilities, and limitations of authority of such other party and the relation thereof to the duties, responsibilities, and authority of Engineer.

- M. If more than one prime contract is to be awarded for the Work designed or specified by Engineer, designate a person or entity to have authority and responsibility for coordinating the activities among the various prime Contractors, and define and set forth the duties, responsibilities, and limitations of authority of such individual or entity and the relation thereof to the duties, responsibilities, and authority of Engineer as an attachment to this Exhibit B that is to be mutually agreed upon and made a part of this Agreement before such services begin.
- N. Attend the pre-bid conference, bid opening, pre-construction conferences, construction progress and other job related meetings, and Substantial Completion and final payment inspections.
- O. Provide the services of an independent testing laboratory to perform all inspections, tests, and approvals of Samples, materials, and equipment required by the Contract Documents, or to evaluate the performance of materials, equipment, and facilities of Owner, prior to their incorporation into the Work with appropriate professional interpretation thereof.
- P. Provide Engineer with the findings and reports generated by the entities providing services to Owner pursuant to this paragraph.
- ~~Q. Perform or provide the following additional services: \_\_\_\_\_.~~

1.

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT C**, consisting of 3 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 July, 2012.

**Payments to Engineer for Services and Reimbursable Expenses**

---

Article 2 of the Agreement is amended and supplemented to include the following agreement of the parties:

**ARTICLE 2 – OWNER’S RESPONSIBILITIES**

*C2.01 Compensation For Basic Services (other than Resident Project Representative and Post-Construction) – Direct Labor Costs Times a Factor Method of Payment*

- A. Owner shall pay Engineer for Basic Services set forth in Exhibit A, except for services of Engineer’s Resident Project Representative and Post-Construction Phase services, if any, as follows:
1. An amount equal to Engineer’s Direct Labor Costs times a factor of 3.0 for the services of Engineer’s employees engaged on the Project, plus Reimbursable Expenses, provided however, and notwithstanding anything to the contrary contained in this Agreement, the total amount of money due to ENGINEER for such services and for Reimbursable Expenses and Engineer’s Consultant’s charges shall not exceed the amount of \$1,835,898 unless an additional payment for the services, expenses or charges resulting in such excess is authorized in writing by OWNER in advance of such services, expenses or charges being furnished, expended, or incurred, the amount of \$1,835,898 being intended by parties as the maximum amount of money to be due to Engineer under this Agreement.
  2. Engineer’s Reimbursable Expenses Schedule is attached to this Exhibit C as Attachment 2.
  3. The total compensation for services under Paragraph C2.01 is estimated to be \$1,835,898 based on the following assumed distribution of compensation:
    - a. Final Design and Permitting Phase                      \$1,835,898 (See Attachment 1 to Exhibit C)
    - b. Construction Observation Phase                              \$ \_\_\_\_\_ (To be negotiated at a later date)
    - c. Final Certification Phase                                      \$ \_\_\_\_\_ (To be negotiated at a later date)
  4. Engineer may alter the distribution of compensation between individual phases of the work noted herein to be consistent with services actually rendered, but shall not exceed the total compensation amount unless approved in writing by Owner.

5. The total estimated compensation for Engineer's services included in the breakdown by phases as noted in Paragraph C2.01.A.3, incorporates all labor, overhead, profit, Reimbursable Expenses, and Engineer's Consultant's charges.
6. The portion of the amounts billed for Engineer's services which are related to services rendered on a Direct Labor Costs times a Factor basis will be billed based on the applicable Direct Labor Costs for the cumulative hours charged to the Project by Engineer's principals and employees multiplied by the above-designated factor, plus Reimbursable Expenses and Engineer's Consultant's charges incurred during the billing period.
7. Direct Labor Costs means salaries and wages paid to employees but does not include payroll related costs or benefits.
8. The Direct Labor Costs and the factor applied to Direct Labor Costs will be adjusted annually (as of date of execution of contract) to reflect equitable changes to the compensation payable to Engineer.

#### C2.02 *Compensation For Reimbursable Expenses*

- A. Owner shall pay Engineer for all Reimbursable Expenses at the rates set forth in Appendix 1 to this Exhibit C.
- B. Reimbursable Expenses include the following categories: transportation and subsistence incidental thereto; obtaining bids or proposals from Contractor(s); providing and maintaining field office facilities including furnishings and utilities; toll telephone calls and mobile phone charges; reproduction of reports, Drawings, Specifications, Bidding Documents, and similar Project-related items in addition to those required under Exhibit A, and, if authorized in advance by Owner, overtime work requiring higher than regular rates. In addition, if authorized in advance by Owner, Reimbursable Expenses will also include expenses incurred for computer time and the use of other highly specialized equipment.
- C. The amounts payable to Engineer for Reimbursable Expenses will be the Project-related internal expenses actually incurred or allocated by Engineer, plus all invoiced external Reimbursable Expenses allocable to the Project, the latter multiplied by a factor of 1.0.
- D. The Reimbursable Expenses Schedule will be adjusted annually (as of date of execution of contract) to reflect equitable changes in the compensation payable to Engineer.

#### C2.03 *Other Provisions Concerning Payment*

- A. Whenever Engineer is entitled to compensation for the charges of Engineer's Consultants, those charges shall be the amounts billed by Engineer's Consultants to Engineer times a factor of 1.0.
- B. Factors. The external Reimbursable Expenses and Engineer's Consultant's factors include Engineer's overhead and profit associated with Engineer's responsibility for the administration of such services and costs.

### C. Estimated Compensation Amounts

1. Engineer's estimate of the amounts that will become payable for specified services are only estimates for planning purposes, are not binding on the parties, and are not the minimum or maximum amounts payable to Engineer under the Agreement.
2. When estimated compensation amounts have been stated herein and it subsequently becomes apparent to Engineer that a compensation amount thus estimated will be exceeded, Engineer shall give Owner written notice thereof. Promptly thereafter Owner and Engineer shall review the matter of services remaining to be performed and compensation for such services. Owner shall either agree to such compensation exceeding said estimated amount or Owner and Engineer shall agree to a reduction in the remaining services to be rendered by Engineer, so that total compensation for such services will not exceed said estimated amount when such services are completed. If Engineer exceeds the estimated amount before Owner and Engineer have agreed to an increase in the compensation due Engineer or a reduction in the remaining services, the Engineer shall be paid for all services rendered hereunder.
3. To the extent necessary to verify Engineer's charges and upon Owner's timely request, Engineer shall make copies of such records available to Owner at cost.

This is **Appendix 1 to EXHIBIT C**, consisting of 1 page, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 Nov, 2009.

### Reimbursable Expenses Schedule

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Current agreements for engineering services stipulate that the Reimbursable Expenses are subject to review and adjustment per Exhibit C. Reimbursable expenses for services performed on the date of the Agreement are:

|                                      |                                   |
|--------------------------------------|-----------------------------------|
| 8"x11" Copies/ B&W                   | <u>\$0.10</u> /page               |
| 8"x11" Copies/ Color                 | <u>\$0.20</u> /page               |
| 11" x 17" Copies / B&W               | \$0.10/page                       |
| 11" x 17" Copies / Color             | \$0.10/page                       |
| Presentation Boards (plot and mount) | \$150/board                       |
| Blue Print Copies                    | <u>\$0.20</u> /sq. ft.            |
| Mileage (auto)                       | <u>\$0.55</u> /mile               |
| GPS Camera                           | \$3/photo Not to Exceed \$100/day |
| Voice Conferencing                   | \$0.10/minute                     |
| Meals and Lodging                    | at cost                           |

\* All other direct costs will be invoiced at actual cost plus G&A of 13.46%

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT E**, consisting of 3 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 Nov, 2009.

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NOTICE OF ACCEPTABILITY OF WORK

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PROJECT:

OWNER:

OWNER'S CONSTRUCTION CONTRACT IDENTIFICATION:

EFFECTIVE DATE OF THE CONSTRUCTION AGREEMENT:

CONSTRUCTION CONTRACT DATE:

ENGINEER:

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To:

OWNER

And To:

CONTRACTOR

From:

ENGINEER

---

The Engineer hereby gives notice to the above Owner and Contractor that the completed Work furnished and performed by Contractor under the above Contract is acceptable, expressly subject to the provisions of the related Contract Documents, the Agreement between Owner and Engineer for Professional Services dated \_\_\_\_\_, \_\_\_\_\_, and the terms and conditions set forth on the reverse side of this Notice.

By: \_\_\_\_\_

\_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Dated  
: \_\_\_\_\_

(Reverse side of Notice)

**CONDITIONS OF NOTICE OF ACCEPTABILITY OF WORK**

The Notice of Acceptability of Work (“Notice”) on the front side of this sheet is expressly made subject to the following terms and conditions to which all persons who receive said Notice and rely thereon agree:

1. This Notice is given with the skill and care ordinarily used by members of the engineering profession practicing under similar conditions at the same time and in the same locality.
2. This Notice reflects and is an expression of the professional judgment of Engineer.
3. This Notice is given as to the best of Engineer’s knowledge, information, and belief as of the date hereof.
4. This Notice is based entirely on and expressly limited by the scope of services Engineer has been employed by Owner to perform or furnish during construction of the Project (including observation of the Contractor’s work) under Engineer’s Agreement with Owner and under the Construction Contract referred to on the front side of this Notice, and applies only to facts that are within Engineer’s knowledge or could reasonably have been ascertained by Engineer as a result of carrying out the responsibilities specifically assigned to Engineer under such Agreement and Construction Contract.
5. This Notice is not a guarantee or warranty of Contractor’s performance under the Construction Contract referred to on the front side of this Notice, nor an assumption of responsibility for any failure of Contractor to furnish and perform the Work thereunder in accordance with the Contract Documents.

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT G**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 Nov, 2009.

**Insurance**

---

Paragraph 6.04 of the Agreement is amended and supplemented to include the following agreement of the parties.

*G6.04 Insurance*

The Engineer shall purchase, and maintain until the expiration of two years after completion of the Engineer's services under the Agreement the following policies of insurance (required by paragraph 6.04 of the Agreement) with minimum requirements as follows:

- Workmens Compensation and Employers Liability
  - Workers' Compensation: statutory minimum
  - Longshore and Harbor Workers' Compensation Act endorsement and Admiralty Law endorsements (required only if the work involves maritime operations).
  - Employer's Liability: \$250,000.00 per accident.
- Professional malpractice
  - \$1,000,000.00 each claim
  - \$2,000,000.00 aggregate
- Commercial General Liability – ISO Occurrence Form
  - \$1,000,000.00 each occurrence
  - \$2,000,000.00 general aggregate
  - \$2,000,000.00 products – completed operations aggregate
  - \$1,000,000.00 personal & advertising injury
  - \$300,000.00 fire damage
  - \$5,000.00 medical expense
- Business Auto Liability - Owned, Non-Owned & Hired vehicles \$1,000,000.00 combined single limit.
- General Provisions:
  - All policies shall be endorsed to have any annual aggregate apply on a per-project basis or, instead of obtaining such endorsements, the Engineer shall purchase and maintain and until the expiration of two years after completion of the Engineer's services, a policy of umbrella insurance with limits of at least \$1,000,000.
  - All policies shall be endorsed to provide 30 days written notice to the NRD prior to termination or change in the coverage provided.

- The NRD reserves the right to approve the Engineer's insurers.
- Workers Compensation and Commercial General Liability policies shall be endorsed to provide Waiver of Subrogation in favor of the NRD.
- The Commercial General Liability policy shall be endorsed to include the NRD as Additional Insured (form CG 20 10)
- Prior to commencement of the Engineer's services and from time to time thereafter at NRD's request, the Engineer shall submit certificates in form acceptable to the NRD evidencing that all such insurance policies are in effect.

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT H**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 Nov, 2009.

**Dispute Resolution**

---

Paragraph 6.08 of the Agreement is amended and supplemented to include the following agreement of the parties:

[NOTE: Select one of the two alternatives provided]

H6.09 *Dispute Resolution*

- A. Mediation. Owner and Engineer agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement or the breach thereof (“Disputes”) to mediation by *[to be determined]*. If such mediation is unsuccessful in resolving a Dispute, then (a) the parties may mutually agree to a dispute resolution of their choice, or (b) either party may seek to have the Dispute resolved by a court of competent jurisdiction.

{or}

~~A. Arbitration. All Disputes between Owner and Engineer shall be settled by arbitration in accordance with the *[here insert the name of a specified arbitration service or organization]* rules effective at the Effective Date of the Agreement, subject to the conditions stated below. This agreement to arbitrate and any other agreement or consent to arbitrate entered into in accordance with this Paragraph H6.08.A will be specifically enforceable under prevailing law of any court having jurisdiction.~~

- ~~1. Notice of the demand for arbitration must be filed in writing with the other party to the Agreement and with the *[specified arbitration service or organization]*. The demand must be made within a reasonable time after the Dispute has arisen. In no event may the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such Dispute would be barred by the applicable statute of limitations.~~
- ~~2. All demands for arbitration and all answering statements thereto which include any monetary claims must contain a statement that the total sum or value in controversy as alleged by the party making such demand or answering statement is not more than \$\_\_\_\_\_ (exclusive of interest and costs). The arbitrators will not have jurisdiction, power, or~~

~~authority to consider, or make findings (except in denial of their own jurisdiction) concerning any Dispute if the amount in controversy in such Dispute is more than \$\_\_\_\_\_ (exclusive of interest and costs), or to render a monetary award in response thereto against any party which totals more than \$\_\_\_\_\_ (exclusive of interest and costs). Disputes that are not subject to arbitration under this paragraph may be resolved in any court of competent jurisdiction.~~

- ~~3. The award rendered by the arbitrators shall be in writing, and shall include: (i) a precise breakdown of the award; and (ii) a written explanation of the award specifically citing the Agreement provisions deemed applicable and relied on in making the award.~~
- ~~4. The award rendered by the arbitrators will be consistent with the Agreement of the parties and final, and judgment may be entered upon it in any court having jurisdiction thereof, and will not be subject to appeal or modification.~~
- ~~5. If a Dispute in question between Owner and Engineer involves the work of a Contractor, subcontractor, or consultants to the Owner or Engineer (each a "Joinable Party"), either Owner or Engineer may join each Joinable Party as a party to the arbitration between Owner and Engineer hereunder, and Engineer or Owner, as appropriate, shall include in each contract with each such Joinable Party a specific provision whereby such Joinable Party consents to being joined in an arbitration between Owner and Engineer involving the work of such Joinable Party. Nothing in this Paragraph H6.08.A.5 nor in the provision of such contract consenting to joinder shall create any claim, right, or cause of action in favor of the Joinable Party and against Owner or Engineer that does not otherwise exist.~~

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT I**, consisting of 3 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 12 Nov, 2009.

**Allocation of Risks**

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Paragraph 6.10 of the Agreement is amended and supplemented to include the following agreement of the parties:

**I6.10.B** *Limitation of Engineer's Liability*

~~[NOTE: Select one of the three alternatives listed below for I6.11 B.1]~~

- ~~1. *Engineer's Liability Limited to Amount of Engineer's Compensation.* To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, and any of them, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, shall not exceed the total compensation received by Engineer under this Agreement.~~

~~{or}~~

- ~~1. *Engineer's Liability Limited to Amount of Insurance Proceeds.* Engineer shall procure and maintain insurance as required by and set forth in Exhibit G to this Agreement. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, and any of them, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied, of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them (hereafter "Owner's Claims"), shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer's insurers in settlement or satisfaction of Owner's Claims under the terms and conditions of Engineer's~~

~~insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal). If no such insurance coverage is provided with respect to Owner's Claims, then the total liability, in the aggregate, of Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, and any of them to Owner and anyone claiming by, through, or under Owner for any and all such uninsured Owner's claims shall not exceed \$\_\_\_\_\_.~~

~~{or}~~

- ~~1. *Engineer's Liability Limited to the Amount of \$\_\_\_\_\_.* Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, and any of them, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, shall not exceed the total amount of \$\_\_\_\_\_.~~

~~*[NOTE: If appropriate and desired, include I6.10.B.2 below]*~~

- ~~2. *Exclusion of Special, Incidental, Indirect, and Consequential Damages.* To the fullest extent permitted by law, and notwithstanding any other provision in the Agreement, consistent with the terms of Paragraph 6.10.E the Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, or any of them, shall not be liable to Owner or anyone claiming by, through, or under Owner for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability, breach of contract, or warranties, express or implied, of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, and including but not limited to:~~

~~*[NOTE: list here particular types of damages that may be of special concern because of the nature of the project or specific circumstances, e.g., cost of replacement power, loss of use of equipment or of the facility, loss of profits or revenue, loss of financing, regulatory fines, etc. If the parties prefer to leave the language general, then end the sentence after the phrase "or any of them."]*~~

~~*[NOTE: the above exclusion of consequential and other damages can be converted to a limitation on the amount of such damages, following the format of Paragraph I6.10.B.1 above, by providing*~~

~~that "Engineer's total liability for such damages shall not exceed \$\_\_\_\_\_."}]~~

~~[NOTE: If appropriate and desired, include I6.10.B.3 below]~~

~~[NOTE: The foregoing provisions may be included as a supplement to Paragraph 6.10.E, which contains a mutual waiver of damages applicable to the benefit of both Owner and Engineer.]~~

~~3. Agreement Not to Claim for Cost of Certain Change Orders. Owner recognizes and expects that certain Change Orders may be required to be issued as the result in whole or part of imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the Drawings, Specifications, and other design documentation furnished by Engineer or in the other professional services performed or furnished by Engineer under this Agreement ("Covered Change Orders"). Accordingly, Owner agrees not to sue and otherwise to make no claim directly or indirectly against Engineer on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceed \_\_\_\_\_% of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of Engineer for the costs of Covered Change Orders in excess of such percentage will be determined on the basis of applicable contractual obligations and professional liability standards. For purposes of this paragraph, the cost of Covered Change Orders will not include any costs that Owner would have incurred if the Covered Change Order work had been included originally without any imprecision, incompleteness, error, omission, ambiguity, or inconsistency in the Contract Documents and without any other error or omission of Engineer related thereto. Nothing in this provision creates a presumption that, or changes the professional liability standard for determining if, Engineer is liable for the cost of Covered Change Orders in excess of the percentage of Construction Cost stated above or for any other Change Order. Wherever used in this paragraph, the term Engineer includes Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants.~~

~~[NOTE: The parties may wish to consider the additional limitation contained in the following sentence.~~

~~Owner further agrees not to sue and otherwise to make no claim directly or indirectly against Engineer with respect to any Covered Change Order not in excess of such percentage stated above, and Owner agrees to hold Engineer harmless from and against any suit or claim made by the Contractor relating to any such Covered Change Order.]~~

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT J**, consisting of 1 pages, referred to in  
and part of the **Agreement between Owner and Engineer  
for Professional Services** dated 12 Nov, 2009.

**Special Provisions**

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Paragraph(s) \_\_\_\_\_ of the Agreement is/are amended to include the following agreement(s) of the parties:

SUGGESTED FORMAT  
(for use with E-500, 2002 Edition)

This is **EXHIBIT K**, consisting of 2 pages, referred to in  
and part of the **Agreement between Owner and Engineer**  
for **Professional Services** dated 12 Nov, 2009.

**AMENDMENT TO OWNER-ENGINEER AGREEMENT**

1. Background Data:

- a. Effective Date of Owner-Engineer Agreement: \_\_\_\_\_
- b. Owner: \_\_\_\_\_
- c. Engineer: \_\_\_\_\_
- d. Project: \_\_\_\_\_

2. Nature of Amendment [Check those that are applicable and delete those that are inapplicable.]

- \_\_\_\_\_ Additional Services to be performed by Engineer
- \_\_\_\_\_ Modifications to Services of Engineer
- \_\_\_\_\_ Modifications to Responsibilities of Owner
- \_\_\_\_\_ Modifications to Payment to Engineer
- \_\_\_\_\_ Modifications to Time(s) for rendering Services
- \_\_\_\_\_ Modifications to other terms and conditions of the Agreement

3. Description of Modifications

Attachment 1, "Modifications"  
[List other Attachments, if any]

Owner and Engineer hereby agree to modify the above-referenced Agreement as set forth in this Amendment. All provisions of the Agreement not modified by this or previous Amendments remain in effect. The Effective Date of this Amendment is \_\_\_\_\_.

OWNER:

ENGINEER:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date Signed: \_\_\_\_\_

Date Signed: \_\_\_\_\_

This is **Attachment 1**, consisting of 1 page, to Amendment No. \_\_\_\_\_, dated \_\_\_\_\_, \_\_\_\_\_.

### **Modifications**

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[Include the following paragraphs that are appropriate and delete those not applicable to this amendment. Refer to paragraph numbers used in the Agreement or a previous amendment for clarity with respect to the modifications to be made. Use paragraph numbers in this document for ease of reference herein and in future correspondence or amendments.]

1. Engineer shall perform the following Additional Services:
  
2. The Scope of Services currently authorized to be performed by Engineer in accordance with the Agreement and previous amendments, if any, is modified as follows:
  
3. The responsibilities of Owner are modified as follows:
  
4. For the Additional Services or the modifications to services set forth above, Owner shall pay Engineer the following additional or modified compensation:
  
5. The schedule for rendering services is modified as follows:
  
6. Other portions of the Agreement (including previous amendments, if any) are modified as follows:



# Attachment 1 to Exhibit A

