

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE CITY OF FARGO, NORTH DAKOTA,
THE CITY OF MOORHEAD, MINNESOTA, AND
THE METRO FLOOD DIVERSION AUTHORITY
FOR
USING A PUBLIC-PRIVATE PARTNERSHIP DELIVERY PROCESS
TO DESIGN, BUILD, FINANCE, OPERATE AND MAINTAIN A PORTION OF THE
FARGO-MOORHEAD METROPOLITAN AREA
FLOOD RISK MANAGEMENT PROJECT

THIS MEMORANDUM OF UNDERSTANDING (hereinafter this “MOU”) is entered into this 11th day of July, 2016, by and between the Department of the Army (hereinafter the “Government”), represented by the U.S. Army Engineer, St. Paul District (hereinafter the “District Engineer”); and the City of Fargo, North Dakota, represented by its Mayor; the City of Moorhead, Minnesota, represented by its Mayor and Interim City Manager; and the Metro Flood Diversion Authority, represented by its Chair and two Deputy Executive Directors (hereinafter collectively referred to as the “Non-Federal Sponsors”).

WITNESSETH, THAT:

WHEREAS, construction of the locally preferred plan for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project at the Fargo, North Dakota and Moorhead, Minnesota Metropolitan Area (hereinafter the “Project”), as described in the Report of the Chief of Engineers dated December 19, 2011 (hereinafter the “Chief’s Report”), was authorized by Section 7002(2) of the Water Resources Reform and Development Act of 2014, Public Law 113-121;

WHEREAS, the Government and the Non-Federal Sponsors entered into a Project Partnership Agreement on or around the date of this MOU (hereinafter the “PPA”) for implementation of the Project;

WHEREAS, the Project consists of the Non-Federal Work which will be undertaken by the Non-Federal Sponsors and the Federal Work which will be undertaken by the Government, as set forth in the PPA;

WHEREAS, the Non-Federal Sponsors plan to use a Public-Private Partnership (P3) delivery process for a portion of the Non-Federal Work (hereinafter the “P3 Work”); and

WHEREAS, the purpose of this MOU is to facilitate implementation of the PPA through outlining the P3 delivery process and the consultation procedures between the Government and the Non-Federal Sponsors in connection with the P3 Work.

NOW, THEREFORE, the Government and the Non-Federal Sponsors understand as follows:

1. The Metro Flood Diversion Authority (or such other entity as is formed by one or more of the Non-Federal Sponsors for the purposes of entering into contractual arrangements concerning the P3 Work) (the "Diversion Authority") will enter into a project agreement (the "Project Agreement") with a third party (hereinafter the "P3 Developer") for design, construction, financing, operation and maintenance of the P3 Work.
2. The Government and the Non-Federal Sponsors will develop and maintain the Project Management Plan (hereinafter the "PMP") that specifies the scope and schedule for the Project. The Government, in consultation with the Non-Federal Sponsors, will develop and maintain elements of the PMP for the Federal Work, and the Non-Federal Sponsors, in consultation with the Government, will develop and maintain elements of the PMP for the Non-Federal Work, including the P3 Work. The PMP will describe how the Government and the Non-Federal Sponsors intend to fulfill their responsibilities under the PPA and this MOU, including development of the Technical Requirements (as defined below) and the procurement process for the P3 Work, and timeframes related thereto. The parties will work to agree to an initial version of the PMP by August 31, 2016.
3. The Non-Federal Sponsors, consistent with the timeframes in the PMP, will provide the Government with draft performance standards and specifications for the design, construction, operation and maintenance of the P3 Work, including design criteria that relate to a potential for loss of life or flood damage from uncontrolled release of water upon breach (hereinafter the "Technical Requirements"). The Technical Requirements will contain performance standards and specifications that will allow the Non-Federal Sponsors to achieve compliance with (1) the Chief's Report; (2) the National Environmental Policy Act (NEPA); and (3) commitments and requirements reflected in (i) the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management, dated July 2011, (ii) the Record of Decision, dated April 3, 2012, (iii) the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and (iv) the Finding of No Significant Impact signed by the District Engineer, dated September 19, 2013 (the documents listed in (i) – (iv), collectively, the "NEPA Compliance Documentation"). The Technical Requirements will be incorporated into the delivery of the P3 Work and the Non-Federal Sponsors will require that the P3 Developer comply with them under the terms of the Project Agreement. The Government will review, comment on, and agree to the draft Technical Requirements within the timeframes set forth in the PMP. The Government will not withhold agreement to the Technical Requirements if the Technical Requirements provide for design, construction, operation and maintenance of the P3 Work consistent with (1) the Chief's Report; (2) the commitments and requirements reflected in the NEPA Compliance Documentation for the P3 Work; and (3) applicable Federal, State, and local laws and regulations. It is the intention of the parties that the Technical Requirements will be developed so as to

encourage innovation, cost savings, and value to the Non-Federal Sponsors, with due consideration of the objective to minimize the possibility that changes to the NEPA Compliance Documentation will be needed to accommodate P3 Developer designs that comply with the Technical Requirements. After the Government has agreed to the Technical Requirements and other than in respect of immaterial changes or clarifications introduced by the Non-Federal Sponsors, such requirements may only be modified as part of the innovative technical concept ("ITC") process forming part of the P3 solicitation for the P3 Work, or as otherwise agreed by the parties. For the purposes of this MOU, any proposed change or clarification to the Technical Requirements will be regarded as a material change and will require the agreement of the Government if it could materially impact (i) the potential for loss of life or flood damage from uncontrolled release of water upon breach or (ii) any one of a list of elements of the Technical Requirements that the Government and the Non-Federal Sponsors agree in writing are "fundamental" prior to the issuance of the request for proposals for the P3 Work ("RFP") by the Diversion Authority.

4. As part of the P3 solicitation process, bidders for the P3 Developer role ("Proposers") will be allowed to submit proposals for one or more ITCs. ITCs eligible for consideration will be limited to those variances that result in performance, quality, and/or value of the end product that is equal to or better than that which would result from full compliance with the Technical Requirements. Except as provided in paragraph 3, approvals or denials of proposed ITCs will be made by the Non-Federal Sponsors in their sole discretion, consistent with applicable Federal laws, regulations, Executive Orders, and the Chief's Report. ITCs that, if implemented, would require further environmental evaluation of the P3 Work may be allowed, provided that the Proposer will bear the schedule risks and cost impacts associated with such additional environmental evaluation after award of the Project Agreement. Upon written request from the Non-Federal Sponsors, the Government will provide the Non-Federal Sponsors with an opinion of whether any modifications to NEPA Compliance Documentation or Additional NEPA Compliance Documentation (as defined below) are needed, and will provide non-binding estimates of the extent of such modifications or additions that would be required and the timeframe and projected Government costs for such review. For ITCs that would require approval by a governmental authority, including the Government, the Proposer will have the full responsibility for, and bear the full risk of, obtaining any such approvals (including any required changes to the NEPA Compliance Documentation) and submitting required or relevant data. Notwithstanding the above, a Proposer shall not submit information to the Government requesting any approval (including any required change to the NEPA Compliance Documentation) until after award of the Project Agreement to such Proposer, and the Government will not consider any requests for approvals (including in relation to any required changes to the NEPA Compliance Documentation) until after such award. Any required or relevant data necessary for changes to the NEPA Compliance Documentation, the Clean Water Act Section 404 permit and the Section 401 water quality certification, will be provided through or on behalf of the Non-Federal Sponsors, provided that the Non-Federal Sponsors will be copied on the transmission of any data provided by a third party to the Government on behalf of the Non-Federal Sponsors. In the event that all required approvals are not

obtained for the ITC, the Proposer will be obligated to comply with the Technical Requirements as originally prescribed without any amendment to take into account the relevant ITC. In any instance where an ITC is approved, the Non-Federal Sponsors will provide the Government with notification in writing as soon as practically possible after the date of submission of final proposals by the Proposers.

5. Throughout implementation of the Project Agreement, the Non-Federal Sponsors will work with the Government in evaluating proposed configurations of the P3 Work with respect to compliance with the design criteria that relate to a potential for loss of life or flood damage from uncontrolled release of water upon breach, Chief's Report, NEPA, and commitments and requirements reflected in the NEPA Compliance Documentation or additional NEPA-related compliance documentation finalized prior to issuance of the RFP or arising from ITCs thereafter (together the "Additional NEPA Compliance Documentation"). The Government will evaluate information provided through or on behalf of the Non-Federal Sponsors, regarding proposed ITCs and designs for the P3 Work produced by the P3 Developer to determine if a modification to the NEPA Compliance Documentation or Additional NEPA Compliance Documentation is required; provided that, the Non-Federal Sponsors shall be copied on the transmission of any data provided by a third party to the Government on behalf of the Non-Federal Sponsors. Upon written request from the Non-Federal Sponsors, the Government will provide the Non-Federal Sponsors with an opinion of whether any modifications to NEPA Compliance Documentation or Additional NEPA Compliance Documentation are needed and non-binding estimates of the extent of such modifications or additions that would be required and the timeframe and projected Government costs for such review. ITCs and designs for the P3 Work that require modifications to the NEPA Compliance Documentation or Additional NEPA Compliance Documentation will be reviewed, coordinated, and processed by the Government for possible approval. Information required for the environmental analysis and documentation, and the related Clean Water Act Section 404 permit and Section 401 water quality certification, will be provided through or on behalf of the Non-Federal Sponsors; provided that, the Non-Federal Sponsors will be copied on the transmission of any data provided by a third party to the Government on behalf of the Non-Federal Sponsors. The Government's processing times will vary depending on the impacts associated with the changes, and will be defined by the Government, in consultation with the Non-Federal Sponsors, after the Government reviews the documentation provided. Approvals or denials of proposed changes will be made consistent with applicable Federal laws, regulations, Executive Orders, and the Chief's Report.

6. Other than the Government's involvement with the Technical Requirements and any changes to the NEPA Compliance Documentation or Additional NEPA Compliance Documentation, all aspects of the design, construction, and implementation of the P3 Work, including the contents of solicitations, award of contracts, or commencement of design using the Non-Federal Sponsors' own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the P3 Work will be exclusively within the control of the Non-Federal Sponsors, including compliance with applicable Federal, State, and local laws and regulations. The Non-Federal Sponsors will

include appropriate provisions in their contracts for the P3 Work, as necessary, to require compliance with such laws and regulations.

7. The Government may, in coordination with the Non-Federal Sponsors, and in compliance with all applicable laws and regulations and the P3 Developer's applicable Project site policies and procedures, observe the construction, operation and/or maintenance of the P3 Work, at reasonable times, upon reasonable notice and in a reasonable manner, and request information from the Non-Federal Sponsors regarding the P3 Work as necessary to ensure that the P3 Work is carried out in compliance with the Technical Requirements (as modified by any successful ITC) and all applicable Federal, State, and local laws and regulations. Pursuant to Article IV.C of the PPA, the Government may audit any costs of the Non-Federal Sponsors to determine their "reasonableness, allocability and allowability". The Government intends that payments made to the P3 Developer pursuant to the Project Agreement will be deemed reasonable for the purposes of Article IV.C of the PPA. The Government will not perform quality assurance monitoring, but may monitor the P3 Work for compliance with environmental permits and cultural resources commitments in line with the role typically played by the Government for projects similar to the P3 Work.

8. Upon request of the Non-Federal Sponsors, the Government may provide support to the Non-Federal Sponsors during design and construction of the P3 Work, with the Government's costs for such support included in the overall construction costs for the Project and the Federal Participation Amount in accordance with the PPA.

9. Article II.I of the PPA, and each paragraph thereof, pertain to the operation, maintenance, repair, rehabilitation, and replacement of the Project. Articles II.I.1 and II.I.2 of the PPA each grant the Government the right to undertake operation, maintenance, repair, rehabilitation, and replacement work necessary to the functioning of the Project (including the P3 Work) under specified circumstances. The Government intends that with respect to the P3 Work, it will not undertake any work to be performed by the P3 Developer (i) under Article II.I.1 of the PPA if the Non-Federal Sponsors, the P3 Developer or any other party to the arrangements governing the P3 Work (including the P3 Developer's contractors and lenders) (collectively, the "P3 Parties") are undertaking the P3 Work and (ii) under Article II.I.2 of the PPA if any of the P3 Parties are taking steps to remedy or rectify the relevant failure(s) to perform, which steps may include provision of, and diligent compliance with, a rectification plan.

Notwithstanding the foregoing, if at any time the Government reasonably believes that circumstances exist in which an emergency is imminent as a result of a continuing failure of the Non-Federal Sponsors and the P3 Parties to operate, maintain, repair, rehabilitate or replace the P3 Work, and none of the Non-Federal Sponsors or the P3 Parties have submitted an adequate plan to manage the circumstances giving rise to the emergency or, if a plan has been submitted, the Non-Federal Sponsors or the P3 Parties (as applicable) are failing to implement such plan, then the parties intend that the Government may undertake the relevant work pursuant to Articles II.I.1 and II.I.2 of the PPA. For the purposes of this paragraph, "emergency" means any unplanned event affecting the Project that presents an

immediate or imminent hazard to the public or an imminent structural failure or that is a declared state of emergency pursuant to North Dakota or Minnesota law or Federal law.

10. Pursuant to Article XII of the PPA, to the extent permitted by the laws governing each party, each party intends to maintain the confidentiality of information disclosed by the other party in connection with the P3 Work, including any information provided by or on behalf of the Proposers or the P3 Developer. The Non-Federal Sponsors do not intend to relinquish control of documentation that they produce or that has been provided by the Proposers or the P3 Developer by allowing the Government to view such documentation, and the Government will have limited access to such documentation. If the Government receives a request for information regarding the P3 Work, it will be processed using Freedom of Information Act (FOIA) regulations and procedures. To the extent possible within the deadlines established by FOIA and applicable regulations, the Government will notify the Non-Federal Sponsors of the request if the Government determines there are any responsive agency records and will allow the Non-Federal Sponsors to provide justification for why any information in what is deemed a responsive agency record should not be disclosed pursuant to any exemption under applicable Federal law. Each Government employee that has access to information related to the P3 solicitation will certify in writing that such information is not to be disclosed to individuals or entities outside the Government or within the Government if they have not signed a non-disclosure certificate, except pursuant to FOIA or other applicable Federal law; the Non-Federal Sponsors understand that the non-disclosure certificates are not enforceable by the Non-Federal Sponsors, the Proposers, or the P3 Developer.

11. In the event of a conflict between this MOU and the PPA, the PPA will control.

12. This MOU is to be construed in a manner consistent with all applicable Federal, State and local laws and regulations.

13. Nothing in this MOU creates any right or obligation, either substantive or procedural, enforceable by any third party.

14. All provisions of this MOU pertaining to the Government shall be subject to the availability of funds pursuant to the PPA, including funds that may be provided by the Non-Federal Sponsors under Article II.D of the PPA.

15. Throughout the procurement process for the P3 Work and the term of the P3 contractual arrangements, the parties intend to enter into good faith discussions regarding any potential amendments to the PPA that may be requested by either party.

16. This MOU may only be modified by the written concurrence of all parties.

17. This MOU will continue in effect until the PPA is terminated in accordance with its terms.

18. Any notice, request, demand, or other communication required or permitted to be given under this MOU will be deemed to have been duly given if in writing and delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Sponsors:

Mayor of Fargo
200 Third Street North
Fargo, North Dakota 58102-4809

Mayor of Moorhead
500 Center Avenue
PO Box 779
Moorhead, Minnesota 56561-0779

Chair and Executive Director, Metro Flood Diversion Authority
Box 2806
211 Ninth Street South
Fargo, North Dakota 58108-2806

If to the Government:

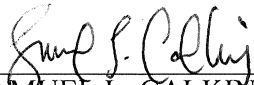
District Engineer
St. Paul District, U.S. Army Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul, Minnesota 55101-1678

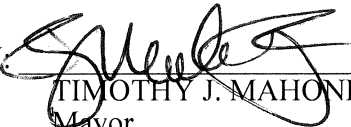
A party may change the recipient or address to which such communications are to be directed by giving written notice to the other parties in the manner provided in this paragraph.

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

DEPARTMENT OF THE ARMY

CITY OF FARGO, NORTH DAKOTA

BY: 
SAMUEL L. CALKINS
Colonel, Corps of Engineers
District Engineer


BY: 
TIMOTHY J. MAHONEY
Mayor
City of Fargo, North Dakota

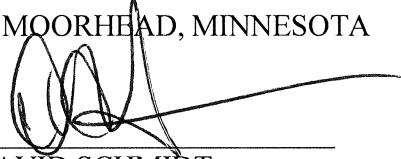
DATE: 11 July 2016

DATE: July 11, 2016

CITY OF MOORHEAD, MINNESOTA

CITY OF MOORHEAD, MINNESOTA

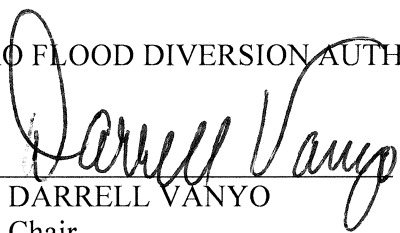
BY: 
DEL RAE WILLIAMS
Mayor
City of Moorhead, Minnesota

BY: 
DAVID SCHMIDT
Interim City Manager
City of Moorhead, Minnesota


DATE: 7/11/2016

DATE: 07/11/2016


METRO FLOOD DIVERSION AUTHORITY

BY: 
DARRELL VANYO
Chair
Metro Flood Diversion Authority

DATE: 7/11/16

BY: 
BRUCE GRUBB
Deputy Executive Director
Metro Flood Diversion Authority

DATE: 7/11/16

BY: 
KEITH BERNDT
Deputy Executive Director
Metro Flood Diversion Authority

DATE: 7/11/16