

**MODIFICATION NO. 4 TO THE
AGREEMENT BETWEEN
THE DEPARTMENT OF THE ARMY
AND
BRAZOS RIVER HARBOR NAVIGATION DISTRICT
OF BRAZORIA COUNTY, TEXAS FOR LOCAL COOPERATION ON THE
FREEPORT HARBOR, TEXAS (1970 ACT)
NAVIGATION PROJECT**

**THIS MODIFICATION, entered into this 15th day of July, 1997,
by and between the DEPARTMENT OF THE ARMY (hereinafter referred to as the
"Government"), represented by the Assistant Secretary of the Army (Civil Works) and the
BRAZOS RIVER HARBOR NAVIGATION DISTRICT OF BRAZORIA COUNTY, TEXAS
(hereinafter referred to as the "Local Sponsor"),**

WITNESSETH THAT:

**WHEREAS, by a Local Cooperation Agreement dated June 26, 1986 (hereinafter referred to as
the "Agreement"), the Government and the Local Sponsor shall cooperate in the construction of
the Freeport Harbor, Texas (1970 Act) Project (hereinafter referred to as the "Project"); and**

**WHEREAS, this Agreement was amended by Modification Nos. 1, 2, and 3, dated March 19,
1987, July 19, 1991, and, July 19, 1991, respectively; and**

**WHEREAS, Section 562 of Title 33, United States Code, provides that after a project "becomes
operational the channel dimensions specified shall be understood to admit of such increases at the
entrances, bends, sidings, and turning places as may be necessary to allow of the free movement
of boats," and**

**WHEREAS, a letter report dated August 1, 1996 and approved by Headquarters, U.S. Army
Corps of Engineers, on October 7, 1996 (hereinafter the "Letter Report"), recommends
refinement of design from the original Phase II GDM to resolve navigation problems that have
prevented accruing full benefit from the Project to date; and**

**WHEREAS, Section 201 of the Water Resources Development Act of 1996 amends Section
101(a) and 101(b) of the Water Resources Development Act of 1986, as amended, to provide
specific requirements relating to the construction, operation and maintenance of land-based and
aquatic dredged material disposal facilities required for the Project and for which a contract for
construction of such facilities is awarded subsequent to October 12, 1996; and**

**WHEREAS, the Government and the Local Sponsor desire to amend the referenced Agreement
to incorporate the refinements of design as noted in the letter report so that the full benefits of the
Project can be realized.**

NOW, THEREFORE, the parties agree to amend the referenced Agreement as follows:

1. Article I -DEFINITIONS, is amended by adding the following to paragraph 1:

The term "general navigation features of the Project" shall also mean dredging a strip about 70 feet wide on the north side of the jetty channel from Station 47+00 to Station 71+00 (approximately 270,000 cubic yards); dredging a strip about 100 feet wide on the south side of the jetty channel from Station 59+00 to Station 77+00 (approximately 155,000 cubic yards); dredging a strip on the south side of the main channel an average of about 200 feet wide from Station 134+00 to Station 164+00 (approximately 1,365,000 cubic yards); and necessary dredged material disposal facilities.

2. Article I - DEFINITIONS, is amended by deleting paragraph 5. in its entirety and by adding a new paragraph 5. as follows:

5. The term "dredged material disposal areas" as used in Articles I.2., II.e., and III.a. of this Agreement shall mean facilities necessary to enable the proper disposal of dredged or excavated material for which a contract for construction was awarded prior to October 13, 1996. Dredged material disposal facilities for which a contract was awarded subsequent to October 12, 1996 shall be considered part of the general navigation features of the Project and cost shared in accordance with the provisions of this Agreement.

3. Article II - OBLIGATIONS OF THE PARTIES - is amended by deleting "\$9,437,000" from paragraph e., as amended, and substituting "\$11,011,000."

4. Article III - LANDS, FACILITIES AND RELOCATION ASSISTANCE is amended by amending paragraph c. by deleting "2,300" and substituting "4,300."

5. Article V - PHASING AND MANAGEMENT, is amended by deleting the reference to "the Contracting Officer" in paragraphs b. and c. and substituting "the District Engineer."

6. Article V - PHASING AND MANAGEMENT is amended by renumbering paragraph d.2. and d.3. as d.3. and d.4., respectively. Add a new paragraph d.2. as follows:

The second construction segment, designated as Phase I.A., shall consist of the following:

The construction of the design refinement features, as contained in the Letter Report, to resolve navigation problems. These features consist of channel adjustments at three specific areas along the existing channel. This work shall consist of :

- A. Dredging a strip about 70 feet wide on the north side of the jetty channel from Station 47+00 to Station 71+00 (approximately 270,000 cubic yards);
- B. Dredging a strip about 100 feet wide on the south side of the jetty channel from Station 59+00 to Station 77+00 (approximately 155,000 cubic yards); and
- C. Dredging a strip on the south side of the main channel an average of about 200 feet wide from Station 134+00 to Station 164+00 (approximately 1,365,000 cubic yards).

Renumbered paragraph d.3. is amended to read as follows:

The third construction segment, designated as Phase II, shall consist of all work necessary to complete the Project not accomplished in construction segments Phase I and Phase I.A.

7. Article VI - METHOD OF PAYMENT is amended in paragraph a. by deleting the costs "\$91,764,000", "\$22,941,000", "\$2,660,000", and "\$1,330,000" and substituting "\$94,560,000", "\$31,398,000", "\$1,730,000", and "\$865,000", respectively.

8. Article VIII - OPERATION, MAINTENANCE, AND REHABILITATION is amended by adding a new paragraph d. as follows:

d. The Government shall be responsible for constructing new dredged material disposal facilities necessary for the disposal of dredged or excavated material required for the operation and maintenance of the general navigation features of the Project. The Local Sponsor shall contribute a share of the costs of such facilities in accordance with Article II.d. of this Agreement. The Local Sponsor shall pay such costs in accordance with the provisions of Article VI of this Agreement.

9. Add a new Article XVIII titled HAZARDOUS SUBSTANCES, as follows:

ARTICLE XVIII -HAZARDOUS SUBSTANCES

a. After execution of Modification No. 4 to this Agreement and upon direction by the District Engineer, the Local Sponsor shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the Local Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, or

rights-of-way necessary for the construction, operation, or maintenance of the general navigation features. However, for lands, easements, or rights-of-way subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Local Sponsor with prior specific written direction, in which case the Local Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Local Sponsor or the Government before the end of construction of the Project for such investigations for hazardous substances shall be included in the total cost of construction of the general navigation features and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Local Sponsor after the end of construction of the Project for such investigations for hazardous substances shall be considered as incidental costs relating to the value of lands and facilities under Article IV and be credited pursuant to Article II.e. of this Agreement, subject to an audit in accordance with Article X of this Agreement to determine reasonableness, allocability, and allowability of costs.

3. All actual costs incurred by the Government after the end of construction of the Project for such investigations for hazardous substances shall be considered financial obligations for operation and maintenance of the general navigation features and shared in accordance with Article VIII.d. of this Agreement.

b. The Local Sponsor may perform, or cause to be performed, any investigations it determines to be necessary to identify the existence and extent of any hazardous substances regulated under CERCLA that may exist in, on, or under lands, easements, or rights-of-way necessary solely for the construction, operation, or maintenance of the terminal facilities. However, for any of those lands subject to the navigation servitude, the Local Sponsor must obtain prior written instructions from the District Engineer regarding the method of testing and must perform such investigations only in accordance with those instructions. The costs of any investigations performed under this paragraph shall be borne entirely by the Local Sponsor. The Government shall have no obligation under this Agreement for the costs of any investigations performed under this paragraph.

c. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the general navigation features, the Local Sponsor and the Government shall, in addition to providing any other notice required by applicable law, provide prompt written notice to each other, and the

Local Sponsor shall not proceed with the acquisition of the real property interests until both parties agree that the Local Sponsor should proceed. In the event it is discovered through any means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the terminal facilities, the Local Sponsor and the Government shall, in addition to providing any other notice required by applicable law, provide prompt written notice to each other.

d. The Government and the Local Sponsor shall determine whether to initiate construction, operation, or maintenance of the general navigation features, or, if already in construction, operation, or maintenance, whether to continue with construction, operation, or maintenance of the general navigation features, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way necessary for the construction, operation, or maintenance of the general navigation features. Should the Government and the Local Sponsor determine to initiate or continue with construction, operation, or maintenance after considering any liability that may arise under CERCLA, the Local Sponsor shall be responsible, as between the Government and the Local Sponsor, for the costs of clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of the total cost of construction of the general navigation features. In the event the Local Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Local Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the general navigation features. The Government shall have no obligation under this Agreement for the costs of any clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination, on lands, easements, or rights-of-way necessary solely for the terminal facilities.

e. The Local Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary clean up and response costs as defined in CERCLA. Any decision made pursuant to paragraph d. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

f. To the maximum extent practicable, the Government and the Local Sponsor shall perform their responsibilities under this Agreement in a manner that will not cause liability to arise under CERCLA.

10. All other provisions of the Agreement, as amended, remain unchanged.

IN WITNESS WHEREOF, the parties hereto shall execute this Modification, which shall then become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

THE DEPARTMENT OF THE ARMY

BY: Eric R. Potts

Eric R. Potts
Colonel, Corps of Engineers
District Engineer

DATE: 15 JUL 1997

THE LOCAL SPONSOR

BY: J. M. Lowrey

J. M. Lowrey, Chairman
Board of Navigation and Canal
Commissioners
Brazos River Harbor
Navigation District
Brazoria County, Texas

DATE: 7-11-97

I, Linda Mitchell, certify that this is a true and correct copy of a Resolution adopted by the Board of Navigation and Canal Commissioners of the Brazos River Harbor Navigation District at a meeting held May 22, 1997, approving Modification No. 4 to the "Local Cooperation Agreement between the District and the Department of the Army for the Construction of the Freeport Harbor, Texas (1970 Act) Project".

A handwritten signature in cursive script that reads "Linda Mitchell". The signature is written in black ink and is positioned above a horizontal line.

Linda Mitchell
Notary Public

**RESOLUTION APPROVING MODIFICATION NO. 4
TO LOCAL COOPERATION AGREEMENT**

At a regular meeting of the Board of Navigation and Canal Commissioners of the Brazos River Harbor Navigation District held at the office of said District at 1001 Pine Street, Freeport, Texas, on the 22nd day of May, 1997, among other business came on to be considered the following resolution, which, upon motion duly made and seconded, was adopted by vote of all commissioners present:

WHEREAS, due and proper notice of the date, time, place and purpose of this meeting has been duly given in accordance with the provisions of the Texas Open Meetings Act, and such meeting has been conducted in accordance with said Open Meetings Act; and

WHEREAS, On 26 June 1986, the Brazos River Harbor Navigation District and the United States of America, acting through the Assistant Secretary of the Army (Civil Works), entered into an agreement entitled "*Local Cooperation Agreement Between the Department of the Army and the Brazos River Harbor Navigation District of Brazoria County, Texas for the Construction of the Freeport Harbor, Texas (1970 Act) Project*"; and

WHEREAS, the United States of America, acting through the Assistant Secretary of the Army, and the District have previously entered into Modifications No. 1, 2 and 3 dated March 19, 1987, July 19, 1991, and July 19, 1991, respectively; and

WHEREAS, the Assistant Secretary of the Army (Civil Works) has submitted to the District a document entitled "*Modification No. 4 to the Agreement Between the Department of the Army and Brazos River Harbor Navigation District of Brazoria County, Texas for Local Cooperation on the Freeport Harbor, Texas (1970 Act) Navigation Project*," for the purpose of modifying said Local Cooperation Agreement dated June 26, 1986, as modified by Modifications No. 1, 2 and 3; and

WHEREAS, the Board of Navigation and Canal Commissioners finds and determines that it is in the best interest of the Navigation District to execute said proposed Modification No. 4 to said Local Cooperation Agreement as herein provided:

NOW, THEREFORE, BE IT RESOLVED by the Board of Navigation and Canal Commissioners of the Brazos River Harbor Navigation District, that the terms and provisions

contained in the document entitled "*Modification No. 4 to the Agreement Between the Department of the Army and Brazos River Harbor Navigation District of Brazoria County, Texas for Local Cooperation on the Freeport Harbor, Texas (1970 Act) Navigation Project,*" be, and the same are hereby approved, and the Chairman of the Board is hereby authorized to execute said Modification No. 4 on behalf of this District and deliver same to the Assistant Secretary of the Army (Civil Works).

CERTIFICATE OF AUTHORITY

I, LELAND B. KEE, do hereby certify that I am the chief legal officer of the Brazos River Harbor Navigation District; that the said Brazos River Harbor Navigation District is a legally constituted public body with full authority and legal capability to perform the terms of the agreement entitled "*Modification No. 4 to the Agreement Between the Department of the Army and Brazos River Harbor Navigation District of Brazoria County, Texas for Local Cooperation on the Freeport Harbor, Texas (1970 Act) Navigation Project*," attached hereto, between the United States of America and the Brazos River Harbor Navigation District in connection with the Freeport Harbor, Texas (1970 Act) Project and to pay damages, if necessary, in the event of failure to perform, and that the person who has executed the Agreement on behalf of the Brazos River Harbor Navigation District has acted within his statutory authority.

IN WITNESS WHEREOF, I have made and executed this Certificate on this 22nd day of May, 1997.



Leland B. Kee
Legal Counsel

CERTIFICATION OF LEGAL REVIEW

Modification No. 4 to the Agreement Between the Department of the Army and Brazos River Harbor Navigation District of Brazoria County, Texas, for Local Cooperation on the Freeport Harbor, Texas, (1970 Act) Project, Navigation Project, has been fully reviewed by the Office of Counsel, USAED, Galveston.

Edward V. Hammit, ACTING
THOMAS H. MOORE
District Counsel

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