

REAL ESTATE A GUIDE FOR PROJECT PARTNERS

COMMONLY ENCOUNTERED PITFALLS IN LAND ACQUISITION

INTRODUCTION

As in any undertaking that involves the coordination of many different entities, there can be problems in all facets of the project. One area that can produce the most problems for the Non-Federal Sponsor is the acquisition of real estate for the project. The following is included as a guide to help preclude acquisition difficulties for this most important phase.

ESTATES TO BE GRANTED TO THE NON-FEDERAL SPONSOR

The Corps of Engineers is provided access to the lands necessary to construct the project by means of a right-of-entry from the Non-Federal Sponsor. The rights granted in this right-of-entry are extensions of the interests acquired by the Non-Federal Sponsor. The Corps has standardized the real estate interests it requires in terms of "estates", time-tested language used to create the provisions for the grants. Any substantive deviations from these standard estates require the recommendation of the Real Estate Division and approval from our Washington headquarters, a lengthy process.

Generally, credits are given only for the minimum rights required for the project.

FEDERAL COMMITMENTS

No governmental entity may make any commitment for the United States of America without the prior consent of the Congress. The Corps of Engineers, therefore, has no authority to accept or commit to open-ended responsibilities or restrictions to which a Non-Federal Sponsor may bind itself. Numerous ramifications emanate from this authority restriction, for example:

✧ The Corps of Engineers will not indemnify third parties for its activities. Congress has authorized recovery for claims by injured parties solely under the Federal Tort Claims Act.

✧ The District Engineer's ability to direct construction of the project must be unrestricted.

✧ In any contracts with third parties, the Non-Federal Sponsor may not commit the Corps of Engineers to expand or contract its operation and maintenance obligations, should the Corps of Engineers take over the operation of the project.

ENVIRONMENTAL MITIGATION

In order for a project to be approved by Congress, a National Environmental Policy Act (NEPA) document must be prepared. Frequently, in order to minimize the impact to the environment, the project must include wetland and wildlife habitat mitigation and other conservation measures. The remedial actions proposed in the NEPA document then become a part of the project scope from which the Corps of Engineers cannot substantially deviate without amending the

document. Any use restrictions placed on the lands, which are inconsistent with these measures, should not be considered.

HAZARDOUS, TOXIC, AND RADIOACTIVE WASTE

The increasingly stringent regulatory requirements regarding hazardous toxic and radioactive wastes (HTRW), including the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund)(CERCLA), Toxic Substance Control Act (TOSCA), the Clean Water Act, Resource Conservation Recovery Act (RCRA), and state and local regulations are a mutual concern for the Corps of Engineers and its project partners. When evaluating the feasibility of Federal interest in a project, an Environmental Evaluation is performed to explore the potential for HTRW on the site. The intent of this Evaluation is to analyze the risk of HTRW prior to making substantial investment. If the Evaluation discloses a substantial risk from HTRW, further study will focus on alternative design possibilities, delay or inability to use the lands and the cost impacts. The agreement with our partners, however, contemplates that the lands will be delivered free of HTRW and assigns responsibility for any necessary cleanup, as well as all related costs, to the Non-Federal Sponsor.

ACQUISITION SCHEDULE

The scheduling of acquisition activities is often inadequately planned. The plan should track backwards from the start of construction taking into account: the resources needed to accomplish the work, the length of time required for surveying, appraisals, mapping, title reports,

negotiations and condemnation proceedings and other work required in the acquisition process. Additional time should be provided for dealings with entities such as corporations, utilities and railroads and public agencies that frequently require a significant amount of time to secure the approvals necessary to complete a transaction. Some cushion should be built into the plan to insure that the construction awards won't be held up pending completion of acquisition. Inasmuch as the Real Estate Division is expected to certify to the capability of the Non-Federal Sponsor to perform this work, this schedule will be closely coordinated with you. Electronic systems have been developed to share information regarding acquisition status.

RIGHTS-OF-WAY

During planning, the most frequently overlooked real estate interests to be acquired relate to right-of-ways controlled by public utilities and local agencies. On several projects construction has been held up pending resolution of needed rights over pipelines, roadways and utilities. In mapping ownership tracts, care should be taken to include all tracts and easement areas. State legal requirements and case law in this area should be closely scrutinized, particularly concerning applicability and extent of compensation.

BETTERMENTS

Relocation negotiations often focus around providing the displaced with replacement facilities which are satisfactory to them. The displaced often seek special concessions, anticipating that the Non-Federal Sponsor may be reluctant to initiate condemnation proceedings. If a Non-

Federal Sponsor chooses to grant concessions it should be aware that the costs for "betterments" are not eligible for credit. Credit will be given only for the value of equivalent facilities.

UTILITY RELOCATIONS

The relocation of utilities frequently involves complex and protracted negotiations. Timing, expansion capability, environmental concerns, engineering solutions and costs are typical key issues requiring internal discussions and approvals through many layers of management of the affected utility company. Furthermore, condemnation proceedings against these utilities can require hearings and approval by the state's utility commission, which are subject to appeal. Only after this process is completed can the condemnation proceedings be heard. These factors must be considered when preparing the acquisition schedule.

CONTRACTS FOR OPERATION AND MAINTENANCE

Non-Federal Sponsors may and often do contract the operations and maintenance to others. When the work is contracted, care should be taken in negotiating and drafting the agreement to insure that the contractor's responsibilities mirror the Project Cooperation Agreement and Operations and Maintenance Manual, obligations, particularly during the period when operations are first turned over by the Corps of Engineers.

CONTRACTING FOR APPRAISALS

Included among the Non-Federal Sponsor's responsibilities is the obligation to furnish appraisals for required land and estates. The appraisal, which forms the basis for the offer of just compensation for lands and estates within the project limits, must conform to government requirements. They are subject to review and approval by the Real Estate Division. At times, the appraisals submitted do not meet government requirements and must be revised. Contract appraisers frequently resist demands to redraft their reports, particularly if they have been paid in full by the Non-Federal Sponsor. A model contract, which is used by the Corps of Engineers, has been made a part of this guide. Although this model does not provide for any fee holdbacks, it does provide for payment only when a report is acceptable to the government.