

REAL ESTATE A GUIDE FOR PROJECT PARTNERS

WHAT'S NEGOTIABLE - WHAT'S NOT?

Feasibility Cost Sharing Agreements, Project Cooperation Agreements and Other Requirements

INTRODUCTION

The development and management of a Federal water resource project is guided and constrained by numerous laws, policies, professional standards and other requirements. Many of these cannot be changed without further legislation, agreements with interested parties, or other conditions that are beyond our authority to change. On the other hand, others are more flexible and there is some leeway for striking the right balance between requirements and individual project circumstances.

The following is a list of some of the requirements that are and are not negotiable in your dealings with the Corps. It includes items from the two formal project agreements between the Corps and project sponsors - the feasibility cost sharing agreement (FCSA) developed during the study phase, and the Project Cooperation Agreement (PCA) developed prior to initiation of construction and other requirements commonly encountered over the course of a project's development. It is not meant to be an exhaustive list

or provide all of the information needed for negotiation. Rather, it should serve as a starting point for identifying those items worthy of discussion as opposed to those where we cannot readily change or deviate from a requirement. Your Project Manager can explain these items so that you can be an informed negotiator.

Please keep in mind that, in our negotiations with you, we must fully and fairly represent the Federal government. While agreements are made in good faith, final control may rest at a higher level in the organization and negotiated decisions may be revised or changed in some cases.

FEASIBILITY COST SHARING AGREEMENTS (FCSA'S)

The following is a general list of items to be considered in arriving at a mutually agreeable feasibility cost sharing agreement. A model agreement is in the "Planning Guidance Notebook" (Corps regulation number ER 1105-2-100,

dated 15 September 1990); your Project Manager can provide a copy.

FCSA Negotiable Items

Scope of Studies - The specific engineering and scientific studies and management activities that need to be conducted are different for every study. For each study, agreement should be reached on:

- Tasks description - what needs to be done, and what level of detail and effort is needed?
- Task responsibilities - who will pay for or accomplish each task?
- Task milestones - how long will the task take, and when will it be done?

Study Schedule - The total time needed to complete the study will be based on the time needed for, and sequencing of, all of the study tasks that need to be accomplished. The goal is to complete a feasibility study in three years.

Study Cost - The total cost of the study will be based on the total cost of all of the study tasks that need to be accomplished.

Mix of Cash/In-Kind Products and Services - The proportion of cash and non-cash in-kind products and services that a sponsor contributes may vary, so long as the value of the sponsor's total contribution is 50% of the total study cost and the sponsor's non-cash contribution (in-kind products and services) is no more than 25% of the total study cost.

Value of In-Kind Products and Services - The dollar value of in-kind products and services provided by the sponsor will be negotiated, based on a detailed Corps estimate and sponsor proposal, as fixed price items. The value must be agreed upon before the work is started.

FCSA Amendment Trigger - The value of a study modification (as a percentage of total study cost or the cost of a work item) that triggers an amendment to the FCSA may be negotiated, up to 15% of the cost of the item.

Committee and Team Memberships - The exact list of who will be members of the study's Executive Committee and the Study Management team should be negotiated.

Coordination Mechanism - The parties should decide the best way to coordinate their mutual day-to-day activities and decision making procedures.

Review of Work - Auditable procedures for reviewing and accepting the work of both parties are negotiable.

FCSA Nonnegotiable Items

Cost Sharing - The sponsor must agree to the study cost sharing required in Section 105 of the Water Resources Development Act of 1986, which includes:

- A minimum sponsor contribution of 50% of the total study cost.

- A cap on the sponsor's contribution of in-kind products and services (non-cash contribution) limited to 25% of the total study cost.

Other Federal Funds - The sponsor may not use funds received from other Federal sources, such as grants from other Federal agencies, to meet their required non-Federal contribution to the total study cost.

Lobbying Documents - The sponsor must complete a Certificate of Lobbying and, if applicable, a Disclosure of Lobbying Activities.

Compliance - The study and any recommended project must comply with applicable laws, regulations and standards, particularly the requirements of the Principles and Guidelines (often called the "P&G") and environmental laws.

"Boilerplate" Provisions - These are standard requirements for all PCA's, including the:

- "Disputes" article, which states we will work together to resolve any conflicts.
- "Maintenance of Records" article, which describes how records will be kept.
- "Relationship of Parties" article, which recognizes the independence of the parties.
- "Officials Not to Benefit" article, which prohibits elected officials from financially benefiting from the agreement.

- "Federal and State Laws" article, which requires sponsor compliance with all applicable Federal and State laws and regulations.

- "Covenant Against Contingent Fees" article, in which the sponsor warrants that no one was employed to secure the agreement

- "Termination or Suspension" article, which describes how the agreement will end.

PROJECT COOPERATION AGREEMENTS (PCA'S)

The following is a general list of items to be considered in arriving at a mutually agreeable Project Cooperation Agreement. Model agreements for individually authorized projects are in "Project Cooperation Agreements for New Start Construction Projects" (Corps regulation number ER 1165-2-131, dated 15 April 1989). Model agreements for Continuing Authority Program (CAP) projects are included in CAP guidance. Your Project Manager can provide copies of model agreements.

PCA Negotiable Items

Scope of the Project - Negotiable within the limits of economic justification and the legal authority for the project.

Construction Schedule, Phasing and Management - The sponsor and the Corps should jointly decide the aspects of construction based on the

availability of Federal and non-Federal funds plus the real estate acquisition schedule.

Deferred Payments - The sponsor's payment of its cash contribution may be delayed in special circumstances but only where the deferred payment plan is approved in advance by the Assistant Secretary of the Army for Civil Works (ASA(CW)).

Performance of Lands, Easements, Rights of Way, Relocations, and Dredged or Excavated Material Disposal Area (LERRD) Activities - The sponsor usually acquires all necessary lands, easements and rights-of-way and performs any necessary relocations. However, in special circumstances, the Corps may, upon request, elect to perform real estate services on behalf of a sponsor at the sponsor's request.

LERRD Schedule - The schedule for acquiring LERRD is flexible and should be coordinated with the construction schedule

Credit for Advance Work - In certain cases, where authorized, you may receive credit for work on the project that you perform before the Corps begins its construction. The request for creditable work must be approved by ASA(CW) before work commences and a written agreement signed.

Suspension of Future Contract Awards - At the request of the sponsor, a dollar cap may be included that will permit us to temporarily suspend future construction contract awards if the cumulative costs of awarded

contracts approach a negotiated amount (generally, the government's current estimate of total project cost). Should award of the next construction contract exceed this cap, it allows the sponsor time to arrange for additional funds to proceed when both parties mutually agree.

Obligation of Future Appropriations - In certain circumstances, the sponsor may request a PCA provision that recognizes limitations on future appropriations by a State legislature

Funding Mechanisms - The sponsor may provide its share of the project cost in cash, or through the use of an escrow account or letter of credit. Selection of the escrow officer should also be discussed.

Escrow Account - Frequency of Corps withdrawals from a sponsor's escrow account is negotiable.

Appraiser - The sponsor may select its real estate appraiser, with Corps approval.

Construction of Non-Federal Betterments Coincident with Project Construction - The scope and construction schedule for other features that you may wish to have constructed along with our project is negotiable. Payment for such betterments will be a non-Federal expense and must be provided in advance of an obligation.

Reporting Corps Spending of Non-Federal Funds - The Corps is required to report project expenses to the sponsor, including how the

sponsor's funds have been used, on at least a quarterly basis.

Reporting Compliance - Reporting requirements for Corps monitoring of compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646, as amended) are negotiable.

Management of Sponsor-Funded Operation and Maintenance - The question of whether the Corps or the sponsor may perform operation and maintenance activities that must be funded 100% by the sponsor is negotiable.

Project Coordination Team - establishment of a Project Coordination Team with representatives of the sponsor and Corps is recommended to facilitate good communication between the partners during construction.

PCA Nonnegotiable Item

Cost Sharing - Minimum cost sharing requirements prescribe in the Water Resources Development Act of 1986, and 1996 as well as other applicable Federal laws are not negotiable. The proportion of non-Federal (sponsor) funds required varies for each project purpose.

Lands, Easements, Rights-of-Way, Relocation and Disposal Areas (LERRD) - Sponsors are responsible for providing all necessary LERRD requirements as prescribed in the Water Resources Development Act of 1986.

Relocation Assistance - Cost of moving and related expenses,

replacement housing payments, and other incidental expenses associated with real property acquisition and relocation of displaced individuals, families, businesses and farms pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and its implementing regulations are the sponsor's responsibility.

Interest Rate - The interest rate charged on delinquent payments is fixed by Federal law and tied to the current market rate.

In-Kind Services for Construction - We can accept engineering and design and supervision and administration type activities only where authorized by the specific project authorization, Section 215 of the 1968 Flood Control Act, as amended, or Sections 104 or 204 of the Water Resources Development Act of 1986, or Section 4 of the Flood Control Act of 1944, as amended (for recreation facilities).

Cap on Expenditures - The PCA may not include a cap on total project expenditures, or limit the sponsor's total contribution, except by the "902 cap" (see below).

"902 Cap" - The total cost of certain projects may not be increased by more than an amount that is determined by using a fixed formula without further Congressional authorization, pursuant to Section 902 of the Water Resources Development Act of 1986.

Operation and Maintenance - The sponsor is responsible for ongoing project operation and maintenance

costs including repairs, major replacements and rehabilitation for most project purposes. The operation and maintenance sponsor need not be the same agency as the project construction sponsor.

Betterments - Betterments are improvements desired by the sponsor that are not a part of the Federal project. Costs for all betterments are to be paid by the sponsor.

Hazardous Toxic and Radioactive Waste (HTRW) - If hazardous or toxic waste is discovered on lands necessary for the project, and the parties nevertheless agree to proceed with the project, the sponsor is responsible, as between the Government and sponsor, for any costs for cleanup and response.

Other Federal Funds - The sponsor may not use funds received from other Federal sources, such as grants from other Federal agencies, to meet their required non-Federal contribution of the total project cost, unless the expenditure of such funds is expressly authorized by statute as verified in writing by the granting agency.

Lobbying Documents - Federal law requires that the sponsor complete a Certificate of Lobbying and, if applicable, a Disclosure of Lobbying Activities.

“Boilerplate Provisions” - These are standard requirements for all PCA’s, including the:

- “Disputes” article, which states we will work together to resolve any conflicts.
- “Release of Claims” or “Indemnification” article, in which the sponsor agrees to hold and save the Corps free from damages arising from the construction, operation and maintenance of the project, except for damages due to the fault or negligence of the government or its contractors.
- “Maintenance of Records” article, which describes how records will be kept.
- “Government Audit” article, which provides for Corps audits of the sponsor’s project records.
- “Federal and State Laws” article, which requires sponsor compliance with all applicable Federal and State laws and regulations.
- “Relationship of Parties” article, which recognizes the independence of the parties.
- “Officials Not to Benefit” article, which prohibits elected officials from financially benefiting from the agreement.
- “Covenant Against Contingent Fees” article, in which the sponsor warrants that no one was employed to secure the agreement.
- “Termination or Suspension” article, which describes how the agreement will end.

- “Notices” article, which lists the Corps' and sponsor's mailing addresses.
- “Confidentiality” article, which assures mutual confidentiality of the parties.

Certificate of Authority - The sponsor's principal legal officer must attach this statement to the PCA.

Conditions for Signing - Before the Assistant Secretary of the Army for Civil Works will sign a PCA, the following conditions must be met:

- The project document on which the PCA will be based is approved.
- Funds to start project construction are included in a Federal law (usually the Corps' Annual Appropriations Act).
- The sponsor's financing plan is approved by the Assistant Secretary of the Army for Civil Works by the District or Division Commander under delegated authority.
- The requirements of the National Environmental Policy Act (NEPA) and other applicable environmental mandates have been fully satisfied.

OTHER REQUIREMENTS

In addition to the specific items involved in the two formal project agreements, there are a wide variety of standards, practices, and other requirements encountered over the life cycle of a project. The following is a list of some of those

requirements. Flexibility to alter the plan of improvements on other aspects of the project generally decreases as a project moves from the early planning stages to construction and as the project grows more defined and less subject to changes.

Other Negotiable Items

Project Management Plan - While the project management plan (PMP) must, as a minimum, include a baseline cost estimate and schedule, the details of these estimates and additional contents of the PMP are negotiable.

Level of Detail - Numbers of samples, methodologies in conducting analysis, amount of documentation, and other parameters related to level of detail for studies and investigations must be adequate to meet their intended purpose and are usually negotiable unless specifically defined otherwise.

Project Scope - Areas served by a project, level of project outputs and other aspects of project scope are variables to be evaluated. Project scope becomes progressively more difficult or expensive to change as a project moves from the early planning stages to construction.

Level of Protection - There is no minimum or maximum level of protection required for flood control projects, although public safety and project cost sharing are crucial considerations in determining the protection to be recommended for

any given area subject to flood damages.

NED Plan Selection - The national economic development (NED) plan must be identified. In certain situations, a different plan other than the NED Plan may be selected and recommended.

Budget Request - Project activities should be budgeted to ensure the earliest practicable completion, with consideration given to the availability of both Federal and sponsor funds.

Other Nonnegotiable Items

Environmental Compliance - Corps projects and other Federal actions must comply with the requirements of applicable environmental laws, some of the more well known:

- National Environmental Policy Act of 1969, as amended
- Fish and Wildlife Coordination Act of 1958, as amended
- Endangered Species Act of 1973
- National Historic Preservation Act of 1966, as amended
- Clean Water Act of 1972, as amended

Corps Permits - For sponsor work beyond the Federal project, Corps permits will be required for certain activities, such as construction of harbor docks and dredging of berthing areas.

Design Criteria - Corps projects must be designed and constructed using established technical standards and prudent engineering practices. Project designers should clearly explain necessary design criteria.

Contracting Requirements - Many contracting requirements concerning types of contracts that can be used, certain contract clauses, and others are mandated by Federal laws and regulations and cannot be negotiated.

Recommendation Responsibility - Commanders are responsible for making recommendations to their higher authorities.

Project Management - All projects will be managed under the Program and Project Management Business Process (PMBP), ER 5-1-11, February 27, 1998.

NEED MORE INFORMATION?

Your Project Manager can provide more information about what may be negotiable in the particular circumstances of your study or project. In addition, the following publications explain much of the Corps guidance about the feasibility cost sharing agreement, Project Cooperation Agreement, and other requirements:

- “Annual and Budget Request for Civil Works Activities, Corps of Engineers, Fiscal Year XXXX” (Corps circular number EC 11-2-XXX, issued annually) - This provides guidance for the development and submittal of the Civil Works ten fiscal year program and annual budget request.

- “Management Program and Project Management” (Corps regulation ER 5-1-11, February 27, 1998).
- “Project Cooperation Agreements for New Start Construction Projects” (Corps regulation number ER 1165-2-131, dated April 15, 1989) -This provides guidance for the Project Cooperation Agreement
- “Planning Guidance” (Corps regulation number ER 1105-2-100, dated September 15, 1990) often called the 'Planning Guidance Notebook'. This provides guidance for the feasibility cost sharing agreement and other planning requirements.
- “Procedures for Implementing NEPA” (Corps regulation number ER 200-2-2, dated 4 March 1988) - This provides guidance for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended.