A. G. Contract No. KR93-2849-TRN
ECS File: JPA-93-86
FCDMC IGA No. 94001
Tempe File No. CS941331
Project: Red Mountain Fwy (202L)
RAM-600-5-513
Section: McClintock Dr. - 101L
TRACS No. H215102C/Item No. 866

INTERGOVERNMENTAL AGREEMENT
AMONG
THE STATE OF ARIZONA,
THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
AND
THE CITY OF TEMPE

THIS AGREEMENT is entered into _____, 1994, pursuant to Arizona Revised Statutes, Sections 11-951 through 11-954, as amended, between the STATE OF ARIZONA, acting by and through its DEPARTMENT OF TRANSPORTATION (the "STATE"), the FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, acting by and through its BOARD OF DIRECTORS (the "DISTRICT") and the CITY OF TEMPE, acting by and through its CITY COUNCIL (the "CITY").

RECITALS

1. The STATE is empowered by Arizona Revised Statutes Section 28-108 to enter into this agreement and has by resolution, a copy of which is attached hereto and made a part hereof, resolved to enter into this agreement and has delegated to the undersigned the authority to execute this agreement on behalf of the STATE.

2. The DISTRICT is empowered by Arizona Revised Statutes Section 48-3603 to enter into this agreement and has authorized the undersigned to execute this agreement on behalf of the DISTRICT.

3. The CITY is empowered by Arizona Revised Statutes Section 48-572 and the City Charter, Section 103 to enter into this agreement and has by resolution, a copy of which is attached hereto and made a part hereof, resolved to enter into this agreement and has authorized the undersigned to execute this agreement on behalf of the CITY.

NO. 18778
FILED WITH SECRETARY OF STATE
Date Filed 08/04/94
Richard Mahoney
Secretary of State
By Vicky Braunewell

4. The STATE, the DISTRICT and the CITY have had previous agreements related to the design, construction, operation and maintenance of the channelization of the Salt River west of McClintock Drive. The STATE, as part of the construction of the SR 202L between McClintock Drive and SR 101L, had initially intended to design and construct 10-year flood protection along the north and south banks of the river. The DISTRICT and the CITY desire that the minimum level of protection be 100-year flood protection, which is compatible with the channelization west of McClintock Drive.

5. The environmental and geotechnical studies (the "Studies") to achieve 100-year flood protection in the above area have been completed as referenced in agreement JPA 91-117, FCD IGA 92001, Secretary of State file number 17062, dated 3 September 1992.

6. The DISTRICT and the CITY desire and the STATE agrees to proceed with the 100-year flood protection of the Salt River between McClintock Drive and SR 101L in a manner similar to that which has proven successful for the channelization west of McClintock Drive and agree to continue their cooperation through the completion of construction of the 100-year flood protection in the Salt River between McClintock Drive and SR 101L. This 100-year flood protection will herein be referred to as the "PROJECT". The 100-year flood protection will consist of hard-bank along the south side of the Salt River from McClintock Drive to SR 101L. Included within the PROJECT will be such landfill remediation that is necessary to construct the PROJECT. The construction of the hard-bank will extend approximately 4,000 feet from McClintock Drive east and will connect with the existing hard-bank. Maintenance responsibilities of the DISTRICT will extend from McClintock Drive to SR 101L for both the north and south hard-bank flood protection.

7. In February 1992, authorized representatives of the three parties signed a "Letter of Intent" which defines the general responsibilities of the parties for the cost sharing and construction of the PROJECT. The STATE estimated that the construction of the 10-year flood protection of the south bank would cost $2.5 million. Based on the estimated cost of constructing the 100-year south bank flood protection, the DISTRICT committed to funding as much as $11.0 million, in addition to the STATE's $2.5 million, therefore, providing a PROJECT budget in the amount of $13.5 million. The most recent PROJECT estimate prepared for the STATE in July 1993, estimates that the PROJECT will cost $10.6 million, excluding the special handling of unsuitable materials.

8. The STATE's participation in, or performance of, this agreement is conditioned on the Environmental Protection Agency's (EPA's) written concurrence and the incorporation of the additional land required for the 100-year flood protection within agreement JPA 90-87, Secretary of State file number 16285, dated 6 December 1991, attached as Exhibit "A" and made a part hereof, hereinafter referred to as "Covenant Not to Sue". By signature of this agreement, it is understood that the parties hereto agree to ratify, comply with and adhere to, the requirements of the "Covenant Not to Sue". As of the date of this agreement, EPA has incorporated the additional land under the "Covenant Not to Sue".

THEREFORE, in consideration of the mutual agreements expressed herein, it is agreed as follows:

I. CONTINGENCY OF AGREEMENT

The STATE's participation or performance in this agreement is conditioned upon the EPA's written concurrence and the incorporation by the EPA of the additional land required for the 100-year protection within the "Covenant Not to Sue". As of the date of this agreement being executed the incorporation and concurrence of EPA has been obtained. The incorporation and concurrence document is attached hereto as Exhibit "D".

II. SCOPE OF WORK

1. The STATE will:

a. Fund $2.5 million of the PROJECT costs to be used for the acquisition of rights of way, design, environmental testing, construction administration and construction of the PROJECT. The STATE's $2.5 million will be spent before spending DISTRICT provided funds for the PROJECT.

b. Be responsible for all costs associated with the design and construction of the 100-year flood protection of the north bank of the Salt River between McClintock Drive and SR 101L. The design will be based on the criteria provided by the DISTRICT and shown on Exhibit "B", attached hereto and made a part hereof.

c. Be responsible for providing the design plans, specifications and other documents that are required for the construction of the PROJECT. Design criteria provided by the DISTRICT and shown in Exhibit "B", shall be used to design the PROJECT.

d. Continually provide to the DISTRICT and the CITY design data, preliminary plans and specifications for the PROJECT, prior to finalization, for their review and comment. The STATE will resolve differences and/or incorporate the DISTRICT and the CITY comments into the final design plans and specifications.

e. Include the construction of the PROJECT with the earliest possible STATE contract so that the south bank protection can be completed before or concurrent with the SR 202L construction.

f. Acquire all necessary rights of way to construct, operate and maintain and to provide access for the south bank protection, provided that such purchases are covered under the provisions of the "Covenant Not to Sue". All property acquired by the STATE for the PROJECT shall remain in STATE fee ownership. The STATE will certify to the DISTRICT that it has sufficient land rights to construct the PROJECT prior to its advertising for bids.

g. Obtain/amend all necessary federal, state, and/or local permits necessary for the implementation of the PROJECT.

h. Advertise for bids and award the construction contract for the PROJECT. The STATE will provide construction management and administration services for the PROJECT. The STATE will perform all landfill remediation in accordance with the EPA approved contractor's work plan(s) and the "Covenant Not to Sue". The STATE will be responsible for any contractor claims for extra compensation due to delays or other reasons attributable to the STATE and be responsible for any claims by the contractor outside the original scope of work due to delays by outside regulatory agencies within the 10-year levee area, as shown on Exhibit "C".

i. Establish an escrow account with the DISTRICT in an amount of $5,000,000.00. Said account shall not go below $1,000,000.00 unless during the final stages of construction and additional costs are not anticipated.

j. Expend STATE funds of $2.5 million, prior to withdrawing DISTRICT's funds. Withdraw DISTRICT funds, no more frequently than monthly, from the DISTRICT established escrow account , to make payments to the contractor. The STATE will provide, on a monthly basis, a detailed accounting to the DISTRICT for all costs associated with the PROJECT and for all payments to be made from the DISTRICT's escrow account.

k. Coordinate very closely with the DISTRICT and the CITY during construction of the PROJECT, so that any unanticipated problems concerning the landfill remediation can be immediately addressed and resolved. The STATE will include the DISTRICT in all discussions, negotiations and decisions for additional landfill remediation for which DISTRICT funds will be used. The STATE will negotiate, in good faith, with the EPA, Arizona Department of Environmental Quality (ADEQ) and with contractors to minimize landfill remediation costs to the maximum extent possible, necessary to protect human health and the environment. Impacts to the PROJECT cost must be expeditiously defined and controlled so as to minimize impacts and to not, if possible, exceed the available PROJECT funding.

l. In good faith, seek full additional funding in excess of the STATE's $2.5 million PROJECT budget, should additional funding be required for clean-up costs, testing costs and landfill remediation costs for special handling of all unsuitable materials encountered in the area required for the construction of the 10-year levee, as shown on Exhibit "C", attached hereto and made a part hereof.

m. Upon completion of the construction and acceptance by the DISTRICT, the STATE will grant to the DISTRICT, sufficient easements, permits, and/or licenses, at no cost to the DISTRICT, for operation and maintenance purposes of the 100-year flood protection features constructed between McClintock Drive and SR 101L. The STATE will be responsible for the operation and maintenance of the roadway and non-flood control protection features.

2. The DISTRICT will:

a. Provide continuous review and comments on all designs, plans, and specifications for the PROJECT that are developed by the STATE, and have the right of approval for all flood control features to be operated and maintained by the DISTRICT.

b. Be included in the State's approval process of contractor payments.

c. Establish an escrow account from which the STATE will withdraw DISTRICT funds, no more frequently than monthly, to pay for State approved contractor invoices, in accordance with the provisions included in II(1)(i) above.

d. Deposit $5.0 million in the escrow account prior to the STATE's advertising for bids. The DISTRICT will ensure that sufficient funds are on account to fund the STATE's withdrawals.

e. Fund the PROJECT costs over and above the STATE's $2.5 million to a maximum funding limit of $11.0 million. The estimated PROJECT cost, based on the July 1993 estimate, is $10.6 million; therefore, the DISTRICT's estimated cost is $8.1 million.

f. Be responsible for all PROJECT costs, over and above the STATE's $2.5 million, including clean-up costs, testing costs, and landfill remediation costs for special handling of all unsuitable materials encountered in the area required to construct the 100-year levee, in excess of the rights of way necessary to construct the 10-year levee, as shown on Exhibit "C", and in accordance with the provisions of II(1)(k), above. The DISTRICT staff will, in good faith, seek full additional funding in excess of the $11.0 million funding limit identified above, should additional funding be required to accomplish the required landfill remediation and complete the PROJECT.

g. Monitor construction of the PROJECT and inspect and approve, in writing, the completed features that it will be assuming for operations and maintenance. The DISTRICT will be responsible for any contractor claims for extra compensation due to delays or whatever reason attributable to the DISTRICT and be responsible for any claims by the contractor outside the original scope of work due to delays by outside regulatory agencies within the 100-year levee area, as shown on Exhibit "C".

h. Assume the operations and maintenance responsibility for the 100-year flood protection features constructed between McClintock Drive and SR 101L in the Salt River, after the construction of the features is approved by the DISTRICT, in writing, and upon the granting of the necessary easements, permits and/or licenses to the DISTRICT by the STATE.

i. Not hold the STATE or the CITY responsible for any future flood control operation and maintenance costs associated with the DISTRICT approved 100-year flood control features constructed between McClintock Drive and SR 101L as shown on Exhibit "E", attached hereto and made a part hereof.

j. Assist the CITY in its application to the Federal Emergency Management Agency for revising the floodplain delineation of the Salt River within the CITY.

3. The CITY will:

a. Have the right to review and comment on all designs, plans, and specifications developed by the STATE for the PROJECT. The CITY agrees to provide any technical or environmental data pertinent to the PROJECT that it has developed to the STATE and the DISTRICT.

b. Provide to the STATE at no cost, CITY granted permits necessary for the construction of the PROJECT.

c. Be responsible for any contractor claims for extra compensation due to delays for whatever reason attributable to the CITY.

d. Apply, with the DISTRICT's assistance, to the Federal Emergency Management Agency for the revision of the floodplain delineation of the Salt River within the CITY caused by the PROJECT.

III. MISCELLANEOUS PROVISIONS

1. Indemnification and Responsibility

a. Each party to this agreement (indemnitor) will indemnify, defend and save harmless the others (indemnitees) including agents, officers, directors, governor and employees thereof, from and against any loss or expense incurred as a result of any claim or suit of any nature whatsoever which arises out of indemnitor's acts or omissions pursuant to this agreement. Such indemnification obligation shall encompass any personal injury, death or property damages resulting from the indemnitor's acts or omissions, as well as reasonable attorney's fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the indemnitees. Indemnitees shall be liable for their own negligence or wrongful acts as provided by law.

b. Environmental - As stated in paragraph II(1)(1) the STATE, and as stated in paragraph II(2)(f) the DISTRICT, will be responsible for all testing, clean up and remedial costs for any contaminates on the property, which was not caused by one of the parties to this agreement in the performance of this agreement. As to any contamination caused by one of the parties to this agreement during the performance of the agreement, the party causing the contamination will be responsible for all costs associated with testing, clean up, or remediation and shall hold the other parties harmless therefrom including court costs, attorneys fees, expert witness fees and all other expenses.

2. This agreement shall remain in force and effect until completion of said PROJECT and payment; except any provisions herein for maintenance, which shall be perpetual. This agreement, may be cancelled at any time prior to the award of a construction contract, upon thirty (30) days written notice to the other parties.

3. This agreement shall become effective upon filing with the Secretary of State.

4. This agreement may be cancelled in accordance with Arizona Revised Statutes Section 38-511.

5. The provisions of Arizona Revised Statutes Section 35-214 are applicable to this contract.

6. In the event of any controversy which may arise out of this agreement, the parties hereto agree to abide by required arbitration as is set forth for public works contracts in Arizona Revised Statutes Section 12-1518.

7. All notices or demands upon any party to this agreement shall be in writing and shall be delivered in person or sent by mail addressed as follows:

Arizona Department of Transportation
Joint Project Administration
205 South 17th Avenue, Mail Drop 616E
Phoenix, AZ 85007

Flood Control District
of Maricopa County
2801 W. Durango Street
Phoenix, AZ 85009

City of Tempe
Engineering
115 E. 5th Street
Tempe, AZ 85282

8. Attached hereto and incorporated herein is the written determination of each party's legal counsel that the parties are authorized under the laws of this state to enter into this agreement and that the agreement is in proper form.

9. It is not the intention of this agreement to change the environmental liability that any third party property owner may have under the law.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first above written.

CITY OF TEMPE

By _____
Harry E. Mitchell
Mayor

Attest:

By _____
City Clerk

STATE OF ARIZONA
Department of Transportation

By _____
ROBERT P. MICKELSON, P.E.
Chief Deputy State Engineer

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
a Municipal Corporation
and
Political Subdivision
of the State of Arizona

Recommended by:

By: _____ Date: 6/13/94
D. E. Sagramoso, P.E.
Interim Chief Engineer and General Manager

Approved and Accepted:

By: _____
Chairman, Board of Directors

ATTEST:

By: _____ DEPUTY CLERK
Clerk of the Board

Date: JUL 20 1994

This Intergovernmental Agreement has been reviewed pursuant to Arizona Revised Statutes 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

By: _____
District, General Counsel

Date: June 15, 1994

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11JUN94

RESOLUTION NO. 94.31

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH THE STATE OF ARIZONA, DEPARTMENT OF TRANSPORTATION AND THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
* *

WHEREAS, it is to the mutual BENEFIT of the State of Arizona, Department of Transportation, the Flood Control District of Maricopa County and the City of Tempe to enter into an agreement for design and construction of Salt River channel improvements east of McClintock Drive, and

WHEREAS, the Arizona Department of Transportation has prepared an agreement setting forth the responsibilities for design, construction, operation and maintenance for each party.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

That the Mayor of the City of Tempe is hereby authorized to execute an agreement with the State of Arizona, Department of Transportation and Flood Control District of Maricopa County setting forth the provisions and responsibilities for the design, construction, operation and maintenance responsibilities for the channelization of the Salt River east of McClintock Drive.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA

this 19th day of May, 1994.

Harry E. Mitchell
Mayor

ATTEST:

Helen R. Fowler
City Clerk

APPROVED AS TO FORM:

City Attorney

I, Helen R. Fowler, the duly appointed City Clerk of the City of Tempe, Maricopa County, Arizona, do hereby certify the above to be a true and exact copy of Resolution No. 94. 31, passed and adopted at the Regular Council Meeting of May 19, 1994, by the Tempe City Council, Tempe, AZ.

DATED this 5th day of July, 1994.

Helen R. Fowler
Helen R. Fowler, CMC
City Clerk

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
AGENDA FORM

Contract/Lease for ☐ NEW ☐ RENEWAL ☐ AMENDMENT ☐ CANCELLATION
LOW ORG. NO. 6900 DEPARTMENT: Flood Control District NUMBER: FCD-1589
ENCUMBRANCE NO. 08941331 AGENCY: CONTROL NUMBER: PW218

1. BRIEF DESCRIPTION OF PROPOSAL AND REQUESTED BOARD ACTION: It is requested that the Board of Directors approve Intergovernmental Agreement (IGA) FCD-94001 with the Arizona Department of Transportation (ADOT) and the City of Tempe for the purpose of cost-sharing the acquisition of rights-of-way, design, construction, and the operations and maintenance of the channelization of the Salt River between McClintock Drive and the future Pima Freeway (SR101L). The parties have cooperated in the channelization of the river west of McClintock Drive, providing a minimum of 100-year flood protection for Tempe and the new Red Mountain Freeway. This cost-sharing agreement will continue that successful cooperation for the mile of channelization east of McClintock Drive. The work includes removal of landfill materials from the south river bank within Tempe and an unincorporated Maricopa County island. The cost of the work is dependent on the amount of landfill materials encountered. The District's maximum cost-share is estimated to be $11.0 million and construction will occur during FY 94/95 and FY 95/96.

2. Compliance with Maricopa County Procurement Code
10 (article) MC1-1004 (paragraph) — Procurement Officer

SOLE SOURCE JUSTIFICATION:

Please return an executed copy to the Clerk of the Board of Supervisors.

3. CONTINUED FROM MEETING OF
DISCUSSED IN MEETING OF

4. ☐ **THIS DEPARTMENT WILL CAUSE PUBLICATION**
☐ **CLERK OF THE BOARD TO CAUSE PUBLICATION**

5. MOTION: It is moved that the Flood Control District of Maricopa County Board of Directors ...approve Intergovernmental Agreement FCD-94001 among the Flood Control District of Maricopa County, the Arizona Department of Transportation, and the City of Tempe for cost-sharing the acquisition of rights-of-way, design, construction, and the operations and maintenance for the channelization of the Salt River between McClintock Drive and the Pima Freeway. The estimated cost to the District is $11.0 million.

6. FINANCIAL: ☐ Expenditure ☐ Revenue ☐ Budgeted ☐ Contingency ☐ Budgeted Amendment ☐ Transfer ☐ Grant or Other

TOTAL	FUND	FINANCIAL OFFICER	DATE
$5,000,000.00	FY94/95		
$6,000,000.00	FY95/96 991FCD		

7. PERSONNEL:
PERSONNEL DIRECTOR — DATE

8. FLOOD CONTROL DISTRICT:
ACTION RECOMMENDED BY — Date 6/13/94

9. MATERIALS MANAGEMENT:
A. MATERIALS MGMT. DIR. — DATE
B. W/MBE REPRESENTATIVE — DATE

10. LEGAL: Approved as to form and within the powers and authority granted under the laws of the State of Arizona to the Flood Control District of Maricopa County Board of Directors.
General Counsel — DATE 6/15/94

11. OTHER:
SIGNATURE — DATE

12. APPROVED FOR AGENDA:
APPROVING OFFICIAL — DATE 6-14-94

13. OTHER:
SIGNATURE — DATE

14. BOARD OF DIRECTORS: Action taken:
☒ Approved ☐ Amended ☐ Disapproved ☐ Deleted
Continued to: (Date and type of meeting)
CLERK OF THE BOARD — DATE JUL 20 1994
DEPUTY CLERK

15. RECOMMENDATION OF COUNTY MANAGER:
☒ Approve ☐ Disapprove
Comments:
COUNTY MANAGER — DATE

JPA 93-86

APPROVAL OF THE TEMPE CITY ATTORNEY

I have reviewed the above referenced proposed intergovernmental agreement, between the DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION, the COUNTY OF MARICOPA and the CITY OF TEMPE, and declare this agreement to be in proper form and within the powers and authority granted to the City under the laws of the State of Arizona.

DATED this 7th day of July, 1994.

David R. Merkel

City Attorney

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JPA 93-86

APPROVAL OF THE FLOOD CONTROL DISTRICT

OF MARICOPA COUNTY GENERAL COUNSEL

I have reviewed the above referenced proposed intergovernmental agreement, between the DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION, the CITY OF TEMPE, and the FLOOD CONTROL DISTRICT OF MARICOPA COUNTY and declare this agreement to be in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

DATED this 15th day of June, 1994.

Julie M. Lemmon

General Counsel