

**INTERGOVERNMENTAL AGREEMENT**

between the

**City of Mesa**

and the

**FLOOD CONTROL DISTRICT OF MARICOPA COUNTY**

**DESIGN, RIGHTS-OF-WAY ACQUISITION, AND UTILITY RELOCATIONS**

of

**Elliot Road from East Maricopa Floodway to Ellsworth Road**

**IGA FCD 2024A002**

**Agenda Item \_\_\_\_\_**

This Intergovernmental Agreement (Agreement) is entered into by and between the City of Mesa, a municipal corporation, acting by and through its City Council, hereinafter called the CITY, and the Flood Control District of Maricopa County, a political subdivision of the State of Arizona, acting by and through its Board of Directors, hereinafter called the DISTRICT. The DISTRICT and the CITY may hereinafter individually be called a PROJECT PARTNER, or collectively called the PROJECT PARTNERS.

This Agreement shall become effective as of the date it has been executed by all PROJECT PARTNERS.

**STATUTORY AUTHORIZATION**

1. The DISTRICT is empowered by Arizona Revised Statutes (A.R.S.) Section 48-3603 to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.
2. The CITY is empowered by A.R.S. § 48-572 and Section 103 of the Mesa City Charter to enter into this Agreement and has by resolution authorized the undersigned to execute this Agreement on behalf of the CITY.

**BACKGROUND**

3. Elliot Road Drainage Improvements from East Maricopa Floodway (EMF) to Hawes Road (the PROJECT) is located in the developed urban area within the City of Mesa (the CITY). The PROJECT is intended to mitigate excess stormwater runoff that impacts existing and proposed residences and businesses by using new storm drains and other drainage features to convey stormwater to the EMF.
4. The proposed improvements were studied as part of the East Mesa Area Drainage Master Plan Update (EMADMPU) prepared in November 2013. The EMADMPU provided solutions to mitigate the flood hazards in the area including the drainage improvements along Elliot Road from East Maricopa Floodway to Hawes Road.
5. On January 10, 2024, the Board of Directors of the DISTRICT adopted Resolution FCD 2023R004 (C-69-24-042-X-00), authorizing the DISTRICT to negotiate and prepare an Intergovernmental Agreement for the cost-sharing, design, right-of-way acquisition, and utility relocations of the PROJECT.

6. This Agreement is for the Design, Rights-of-Way Acquisition, and Utility Relocations of the PROJECT which will consist of storm drains and other conveyance improvements in the vicinity of Elliot Road from East Maricopa Floodway (EMF) to Hawes Road in Mesa to mitigate flooding caused by the 10-year event. The proposed PROJECT elements are shown on Exhibit A, attached hereto and made a part hereof.

### **PURPOSE OF THE AGREEMENT**

7. This Agreement identifies and defines the responsibilities of the DISTRICT and the CITY for PROJECT activities related to Design, Rights-of-Way Acquisition, and Utility Relocations for the PROJECT.

### **TERMS OF AGREEMENT**

8. The PROJECT, as referenced herein, is described in section 3 of this Agreement.
9. The PROJECT COST, as referenced herein, solely encompasses the following costs directly associated with the PROJECT, unless noted otherwise below:
  - 9.1 Development of the final design and preparation of construction documents.
  - 9.2 Acquisition of fee simple rights-of-way and/or drainage easements required for the PROJECT.
  - 9.3 Relocation of conflicting utilities with prior rights, together with associated costs. Utilities in place without prior rights will be relocated at their owners' expense.
  - 9.4 Obtaining United States Army Corps of Engineers Section 404 Permits for the PROJECT, and costs associated with the mitigation efforts required by this permit process.
  - 9.5 Each PROJECT PARTNER shall pay for, and not seek reimbursement for, its own personnel and internal administrative costs associated with this PROJECT. Including costs associated with the issuance of PROJECT permits, unless specifically identified otherwise in this Agreement.
10. The CITY shall be solely responsible for any costs that are not needed for the flood control features of the PROJECT, including but not limited to all costs associated with any fee simple estate rights-of-way and/or easements acquired at the CITY's request for non-flood control purposes. This includes the Elliot Road roadway improvements.
11. Annually, by January 1st, the CITY shall provide the DISTRICT with a written estimate detailing the anticipated funds needed from the DISTRICT for the fiscal year beginning on July 1st. Depending on funding availability, the DISTRICT may implement a payment plan based upon a mutually agreed payment schedule and amount.
12. The PROJECT COST is estimated to be \$1,400,000. This amount is an estimate based on the best information available at the time of this Agreement and is subject to change without amendment to this Agreement. Upon recognition of anticipated costs above this estimated PROJECT COST, the PROJECT PARTNERS shall communicate these anticipated increases.
13. DISTRICT funding for this PROJECT shall be from secondary flood control tax levy revenue and is contingent upon funding availability within the DISTRICT's Capital Improvement Program.
14. CITY funding for the PROJECT shall be from the CITY's Capital Improvement Program (CIP) budget.
15. The CITY shall:

- 15.1 Plan and design the PROJECT to meet the recurrence interval of the 10-year flood as determined by generally applied technical data and methodology in use at the time of PROJECT design, and this level of protection is specifically approved by the Board of Directors of the Flood Control District of Maricopa County.
- 15.2 Prior to the CITY beginning the contracting process for hiring a consultant for design related activities, coordinate with the DISTRICT to understand its funding capabilities and timing for reimbursement of these PROJECT costs.
- 15.3 Fund thirty-five (35%) of the PROJECT COST, making the CITY's estimated share \$490,000 (the "CITY's SHARE").
- 15.4 Beginning three months after the award of the design contract, invoice the DISTRICT every quarter for share of the earned contract costs to date as invoiced to the CITY by the consultant. For costs incurred by the CITY for utility relocations or for 404 Permit related costs, invoice the DISTRICT for its cost share of those costs as they are incurred.
- 15.5 Serve as the lead agency for PROJECT design and include the DISTRICT in the consultant selection process.
- 15.6 Provide the DISTRICT with interim project submittals and allow three (3) weeks for review and comment. Incorporate the DISTRICT's comments into the PROJECT as appropriate.
- 15.7 Serve as the lead agency for obtaining any necessary USACE Section 404 Permit, and for completing mitigation efforts required by any such permit process.
- 15.8 Serve as the lead agency for rights-of-way acquisition and, in that capacity:
  - 15.8.1 Obtain fee simple estate rights-of-way and/or easements required for the PROJECT. If it is mutually agreed between the PROJECT PARTNERS that, the project property is no longer needed for flood control purposes and therefore available for sale, the CITY may sell the property under the stipulation that the DISTRICT shall be paid the DISTRICT's cost share percentage of the original acquisition cost, along with its pro-rata share of any appreciation in land value from the original acquisition price of the property for the PROJECT to the final disposition price at the time that the CITY disposes of the property.
  - 15.8.2 Invoice the DISTRICT for the DISTRICT's share of the PROJECT COST for fee simple estate right-of-way and/or easement acquisition as it is incurred and upon availability of DISTRICT funding, no more frequently than quarterly, and no less frequently than annually.
  - 15.8.3 Provide all CITY owned and controlled rights-of-way necessary for the PROJECT, and not specifically purchased for this PROJECT, at no cost to the PROJECT.
- 15.9 Serve as the lead agency for PROJECT public involvement activities.
- 15.10 Prior to offering to make or making the PROJECT property available for any non-flood control uses, assure the safety and appropriateness of such use and ensure such use will not interfere with the operation and function of the PROJECT.
- 15.11 Obtain DISTRICT review and comments on the design and/or construction of any changes or modifications to the PROJECT that may affect the hydraulic function of the PROJECT and resolve and/or incorporate the DISTRICT's comments into these PROJECT modifications.

15.12 Prior to DISTRICT's final cost share payment for the design contract(s), provide written notification to the DISTRICT that all contractual obligations have been met, all project contracts closed, and all certificates of performance have been received by the CITY.

15.13 Warrant and certify that it does not currently, and agrees for the duration of the contract that it will not, use:

The forced labor of ethnic Uyghurs in the People's Republic of China.

Any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China

Any contractors, subcontractors or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.

If the CITY becomes aware during the term of the Agreement that any Contractor is not in compliance with this paragraph, the CITY shall notify the DISTRICT within five (5) business days after becoming aware of the noncompliance. Failure of CITY to provide a written certification that the appropriate contractor has remedied the noncompliance within one hundred eighty (180) days after notifying the public entity of its noncompliance, this Agreement shall terminate unless the Term of this Agreement shall end prior to said one hundred eighty (180) day period.

16. The DISTRICT shall:

16.1 Fund 65% of the PROJECT COST, making the DISTRICT's estimated share \$910,000.

16.2 Subject to the availability of funding, within 30 calendar days of receipt, pay invoices issued by the CITY in accordance with the terms of this Agreement.

16.3 Participate in PROJECT public involvement activities.

16.4 Provide review comments to the CITY within three (3) weeks of receipt of the periodic PROJECT submittals during the design process.

17. Each PROJECT PARTNER, and the PROJECT PARTNERS collectively:

17.1 Shall comply with A.R.S. Sections 41-4401 and 23-214, subsection A.

17.1.1 Each party to this Agreement retains the legal right to inspect the records of the other party's and any contractors' or subcontractors' employees performing work under this Agreement to verify compliance with A.R.S. Sections 41-4401 and 23-214, subsection A.

17.1.2 Failure by either party to this Agreement to comply with A.R.S. Sections 41-4401 and 23-214, subsection A shall be deemed a breach of this Agreement and is subject to penalties up to and including termination of the Agreement.

17.2 Shall require that any contractor selected for the PROJECT:

17.2.1 Warrant compliance with all federal immigration laws and regulations that relate to its employees and their compliance with A.R.S. section 23-214(A);

- 17.2.2 Agrees that a breach of the warranty shall be deemed a material breach of this Agreement which entitles the other party to obtain appropriate relief including termination of this Agreement;
- 17.2.3 Consent to inspection of all papers of the contractor or subcontractor employee(s) who work(s) on the PROJECT to ensure that contractor or subcontractor is complying with the warranty.
- 17.2.4 Who engages in for-profit activity and has 10 or more employees, certify it is not currently engaged in, and agrees for the duration of this Agreement to not engage in, a boycott of goods or services from Israel. This certification does not apply to a boycott prohibited by 50 U.S.C. § 4842 or a regulation issued pursuant to 50 U.S.C. § 4842.
- 17.3 Shall provide in-kind services and any permit(s), at no cost to the project, that a PROJECT PARTNER has the authority to issue and that is required for the PROJECT.
- 17.4 Has the right, following written agreement of all PROJECT PARTNERS, to delegate its responsibilities under this Agreement to another party. Any delegation, however, shall not relieve the delegating PROJECT PARTNER of its original responsibilities as defined herein.
- 17.5 Shall, in the event of any dispute arising pursuant to this Agreement, use their best efforts and enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the PROJECT PARTNERS to seek any remedies provided by law.
- 17.6 Shall take reasonable and necessary actions within its authority to ensure that only storm water is discharged into the PROJECT, and that such discharges into the PROJECT comply at the point of discharge with any applicable requirements of the U.S. Environmental Protection Agency Clean Water Act, Arizona Pollutant Discharge Elimination System or any other applicable discharge requirements, including any permit requirements.
- 17.7 Shall equally share the cost of a PROJECT compliance and cost audit to be initiated within sixty (60) days of PROJECT completion, if requested by either PROJECT PARTNER. An independent auditing firm agreed to by the PROJECT PARTNERS will perform the audit. Any payments or reimbursements necessary to bring the PROJECT into compliance with the audit findings shall be made within forty-five (45) days of acceptance by the PROJECT PARTNERS. and at the agreed upon cost share percentages set forth in Sections 14 and 15 herein.
- 17.8 Shall comply with applicable federal, state and local privacy laws. A PROJECT PARTNER may withhold CITY or DISTRICT information from the other PROJECT PARTNER if required by such privacy laws or by CITY or DISTRICT policy or regulation. This Agreement is subject to the restrictions of A.R.S. Sections 44-1373 and 44-7601.
18. Each PROJECT PARTNER shall, as “Indemnitor,” to the extent permissible by law, indemnify, defend and hold harmless the other PROJECT PARTNER (“Indemnitee”) from and against any and all loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of any act or omission of Indemnitor pursuant to this IGA, including but not limited to, reasonable attorneys’ fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the Indemnitee. Notwithstanding the above, Indemnitee shall be liable for its own negligence or wrongful acts as provided by law. In no event shall the Indemnitor owe or be obligated to pay any amounts which the Indemnitee has not actually paid or has no actual obligation to pay. In the event any agreement to pay to resolve issues of liability is not enforceable, or any agreement or settlement results in an actual obligation lower than the full amount of liability, the Indemnitor’s obligation to pay shall be limited to the

amount Indemnitee has paid or would be obligated to pay in the absence of any agreement to indemnify. Should any PROJECT PARTNER offer to make or make the PROJECT available for any non-flood control uses, the offering PROJECT PARTNER shall, to the extent permissible by law, indemnify, defend, and save harmless the DISTRICT, including agents, officers, directors, governors, and employees thereof, from any and all loss or expense incurred as a result of any claim or suit arising in whole or in part from the sanctioned non-flood control use. Such indemnification obligation is intended to be a specific indemnity obligation rather than the general indemnity obligations set forth in this paragraph regarding all other types of claims or suits and shall include the obligation to provide reasonable attorneys' fees, court costs, and other expenses relating to the defense of such claims or litigation.

19. 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:

Flood Control District of Maricopa County  
Chief Engineer and General Manager  
2801 West Durango Street  
Phoenix, AZ 85009-6399

City of Mesa  
City Manager  
PO Box 1466  
Mesa, AZ 85211-1466

20. This Agreement shall expire either (a) 10 years from the effective date, or (b) upon completion of the PROJECT and after all funding obligations and reimbursements have been satisfied in accordance with this Agreement, whichever is the first to occur. However, by mutual written agreement of all parties, this Agreement may be amended or terminated. The operation, maintenance, and indemnification provisions, of this Agreement, shall survive the expiration of this Agreement.
21. This Agreement is subject to cancellation by any party pursuant to the provisions of A.R.S. Section 38-511.
22. Attached to this Agreement or contained herein are the written determinations by the appropriate attorneys for the parties to this Agreement, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.
23. If legislation is enacted after the effective date of this Agreement that changes the relationship or structure of one or more parties to this Agreement, the parties agree that this Agreement shall be renegotiated at the written request of any party.



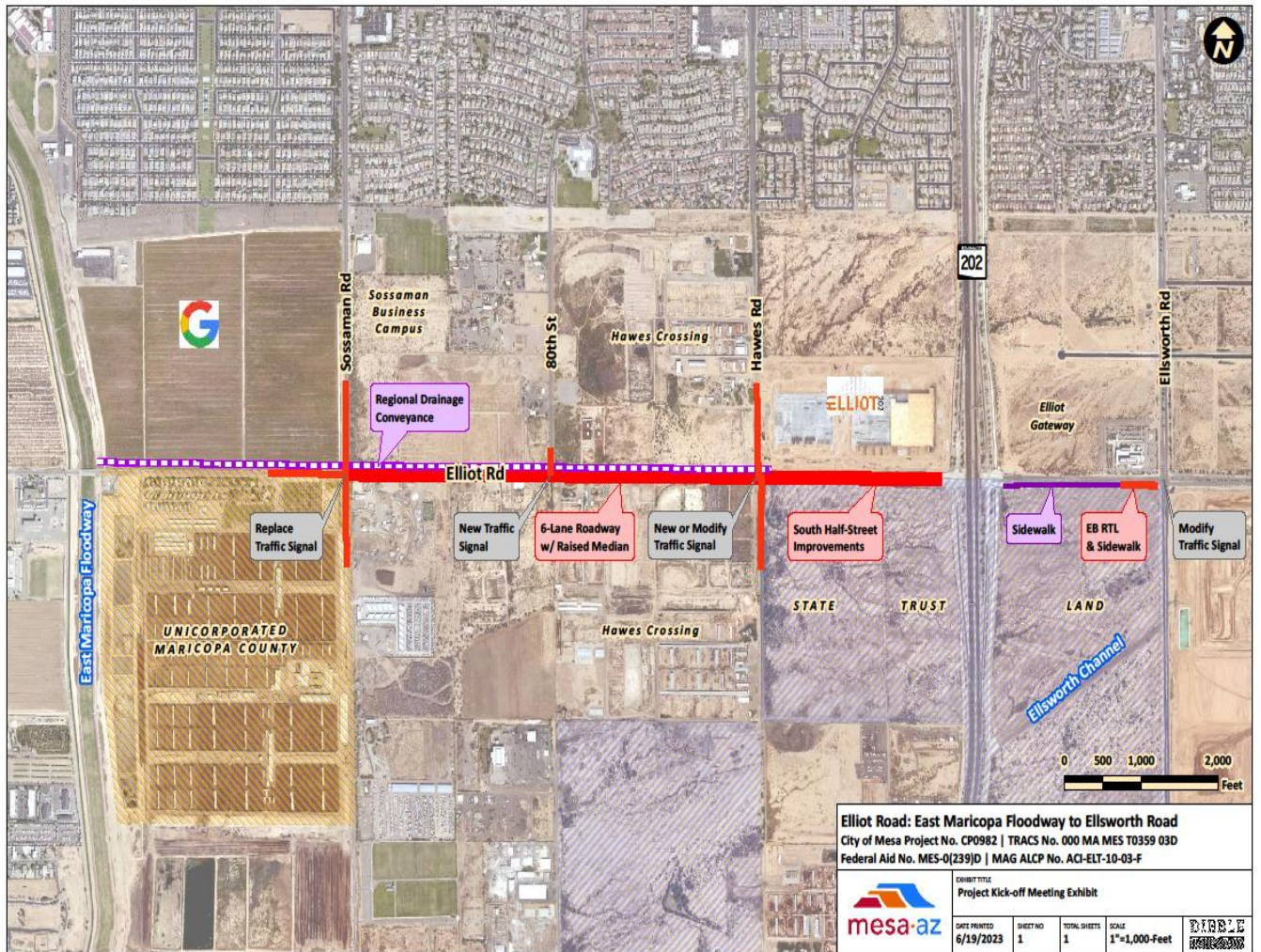




# IGA FCD 2024A002

## EXHIBIT A

Elliot Road from East Maricopa Floodway to Ellsworth Road\*



\*Approximate Locations