

# MEMORANDUM of UNDERSTANDING

## Coastal Unit SU06 Portobello to Peacehaven Cliff Erosion Risk Management.

### Version 2.3

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#### List of consultees

##### Environment Agency

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This Memorandum of Understanding is made the DD day of MMMMMM 2020

Memorandum of Understanding: Unit SU06 Portobello to Peacehaven Cliff Erosion Risk Management.

BETWEEN

Lewes District Council of Southover House, Lewes, East Sussex, BN7 1AB (“the Council”)

And

the Environment Agency of Guildbourne House, Chatsworth Road, Worthing, West Sussex, BN11 1LD (“the Agency”)

(who are collectively referred to in this Agreement as “the Parties”)

## A. The Agreement and Definitions

(i). In the Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

“Agreement”	This Memorandum of Understanding.
“Business Case”	The business case that will be developed in stages through the 5-case business model by the Agency and submitted to the Environment Agency’s Large Project Review Group for assurance.
“Contributions Agreement”	A standard legal agreement used by the Agency to secure Financial Contributions for the use in projects.
“FDGiA Funding”	Flood Defence Grant in Aid Funding provided by the Agency for the purposes of providing, maintaining and improving flood defences.
“Feasibility Study”	Work by Mott MacDonald for Lewes District Council, to develop greater understanding of the benefits and costs of the key options to manage this coast, and ascertain whether these options are economically feasible.
“Financial Contributions”	The financial contributions to be made by the Parties pursuant to Clause 6 of the Agreement.
“Funding Partner”	The partner that will take the lead for producing a strategy for securing the necessary partnership funding required by the project and will lead on the delivery of that strategy.
“Highlight Report”	A regular report produced by the project managers and distributed to the Project Board to keep them informed about the Project’s progress and performance against key criteria including progress against milestones, budget, spend, financial forecasts, risks, issues and opportunities.
“Large Projects Review	The Agency group that undertakes comprehensive

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“Group”	assurance reviews of flood and coastal erosion risk management strategies and projects from all risk management authorities that seek gain approval to spend central Government flood and coastal risk grant in aid funding.
“Lead Partner”	The Party that will take the lead in managing and delivering the Project as set out in Clause 3.
“Local Enterprise Partnership”	Voluntary partnership between local authorities and businesses, set up by the Department for Business, Innovation and Skills to help determine local economic priorities and lead economic growth and job creation within the local area
“Party”	Refers to an organisation that has signed up to this Agreement.
“Parties”	Collective reference to the organisations that have signed up to this Agreement.
“Project”	Unit SU06 Portobello to Peacehaven.
“Project Board”	The body that will be responsible for overseeing the management and supervision of the Project as set out in Clause 4.
“Project Costs”	Any costs incurred by or on behalf of the Agency in regard to delivery of the Project, subject to approval of the Project Board.
“Project Funds”	Any funds identified and secured for the purpose of delivering the Project, to include enhancements, as agreed by the Project Board and included in the overall design, to add additional benefit to the scheme.
“Project Period”	The period between the date that this Agreement is executed until Project completion (the timing of which is decided by the Sponsors Group), or both Parties agree that the Project is no longer viable or the Agreement is superseded.
“Project Team”	The team made up of staff from each Party and the Suppliers which is led by the project managers to undertake the day to day activities required to deliver the Project.
“Project Works”	Such works as are appropriate or necessary as determined or approved by the Project Board for the purposes of implementing and delivering the Project.
Service Plan / Operation and Maintenance Manual	A document delivered by the project that contains all the necessary details following delivery and closure of the project regarding the construction design, future maintenance, improvement, replacement,

	renewal or operation of any of the Flood Defences which have been constructed as part of the Project.
“Staff”	Any employees, contractors, consultants and agents of a Party who are engaged or provided by that Party for carrying out of its obligations in connection with the Agreement.
“Suppliers”	Any provider of bought in services procured to support the delivery of the project, including consultants and contractors.
“Tolerances”	Parameters set by the Sponsors Group for the Project Board and Project Team to operate within.

## **B. Aim of the Memorandum**

- (i). The Agreement sets out the terms and understanding between the Council and the Agency to govern their relationship relating to the Project. The Project seeks to build on recent studies and further explore the leading options identified to reduce the risks of cliff erosion along the vulnerable stretch of frontage, including the options of cliff defence infrastructure and adaptation to erosion. The Project aims to identify and implement the most viable coastal erosion risk management measures at Unit SU06 from Portobello to Lincoln Avenue South.

## **C. Purpose of the Memorandum**

- (i). The purpose of the Agreement is to clarify the roles and responsibilities of the Parties and the general principles for their cooperation, including details of the governance structure, how and by whom the different elements of the Project will be delivered, and the management arrangements to be put in place.
- (ii). The Agreement shall be effective from the date of its execution for the Project Period as further set out in Clause 11.
- (iii). The Council and the Agency agree that the Agreement is not legally binding and does not create any legal rights or obligations. It is a statement of their shared intention to work together in a spirit of cooperation and collaboration. It is intended that the Parties remain independent of each other and that their collaboration does not create a contract, constitute a partnership or operate as any sort of legal commitment. The Agreement is a living document that may be amended as the Project develops.

## **D. Purpose of the Project**

- (i). The purpose of project is to:
  - a. reduce coastal erosion risk to people, property and infrastructure;
  - b. provide cost effective and deliverable coastal erosion risk management intervention which is technically feasible and sustainable;
  - c. maintain and where possible enhance natural, historic and built environments;
  - d. facilitate sustainable growth along the A259 corridor between Brighton and Newhaven for business and residential purposes, including access.
  - e. Work with partners to secure partnership funding and deliver wider benefits. This is likely to include Southern Water, East Sussex Highways and Telscombe Town Council in addition to wider utility providers.

## **E. Background**

- (i). Erosion assessments of the cliffs at Telscombe have identified that many clifftop properties and non-residential properties could be at risk from 2028 onwards.
- (ii). In the high level benefit assessment it has been noted that there is a large benefit from the protection of the A259. A number of wider beneficiaries have been identified by this assessment that will need to be engaged to support the delivery of the scheme due to the wider key assets that will also be protected. This includes Southern Water (SWS), East Sussex Highways, Brighton & Hove City Council, and the Local Enterprise Partnership (LEP).
- (iii). The Parties note from the studies that work needs to start on the project as soon as possible to secure contributions from partners and gain environmental permits before construction is completed in 2028.
- (iv). In addition to the need to establish strong partnerships, there is also a requirement to obtain a number of environmental permits as the site is within a Site of Special Scientific Interest (SSSI) and Marine Conservation Zone (MCZ). This will also involve significant engagement with South Downs National Park, Natural England and other key environmental groups.
- (v). The Project was recommended in the Brighton to Newhaven Coastal Management Implementation Plan that LDC commissioned in 2015.

- (vi). The Parties have agreed to act together for the purpose of delivering the Project.
- (vii). The Parties have agreed that the Agency will take the Lead Partner role and will work collaboratively with the Council according to the terms set out in this Agreement.
- (viii). Based on work previously undertaken by consultants on behalf of the Council, including the high level benefit assessment and feasibility study, the anticipated overall cost of the project is approximately £10m. The Parties are aware that the costs may change as the Project progresses and as the construction design is finalised.
- (ix). The Agency will develop a “Strategic Outline Case” to obtain funding to start an “Outline Business Case”. The Agency will submit these to the Agency’s Large Project Review Group. Based on current estimates, once approved by the Large Projects Review Group it is expected the Business Case will demonstrate that the Project is eligible for approximately £1.9m of Flood Defence Grant in Aid (FDGiA) subject to conditions.
- (x). Consequently the Parties anticipate there will be an estimated £8.1m funding gap for the Project. The Agency has agreed to take the lead in seeking to source and secure funding to bridge the funding gap.
- (xi). Appraisal on the Project will begin in April 2021, with the earliest aim to have construction complete by 2028, to minimise the risk to properties. This is dependent on the challenges faced during the design phase which include, but are not limited to: the suitability of ground conditions, the willingness of landowners and occupiers to engage with the Project, and securing the necessary access agreements, permissions and funding required.
- (xii). Both Parties understand that, given the nature and complexity of the Project, costs may increase beyond those stated in the Agreement.

## **1. The Parties’ Obligations**

### **1.1. The Parties agree:**

- 1.1.1. subject to Project Funds being secured and available, to use all practicable endeavours to deliver the objectives of the Project.

- 1.1.2. that the timely and open exchange of information is a fundamental feature of good working arrangements, and both Parties agree to provide each other with all information necessary to undertake their respective obligations, and that they will keep each other informed of data, research, other work or developments that may influence the decision or activities of the other Party.
  - 1.1.3. the Agency will be the Lead Partner in the management of the Project as set out in Clause 1.4 and Clause 3 of the Agreement, subject to the Council providing support and assistance, as far as is reasonably possible;
  - 1.1.4. subject to approval of the Project Board, that all reasonable costs incurred by the Parties in relation to the Project shall be considered to be Project Costs and, subject to funds being available, shall be claimable from the Project Funds in accordance with Clause 8 of the Agreement.
- 1.2. The Parties shall each:
- 1.2.1. undertake all reasonable endeavours to fulfil their responsibilities as set out in the Agreement;
  - 1.2.2. co-operate and use all reasonable endeavours to ensure the successful completion of the Project;
  - 1.2.3. act in good faith and in the spirit of co-operation in carrying out the Project;
  - 1.2.4. ensure that all communications between the Parties are constructive, comprehensive, timely and open;
  - 1.2.5. provide information promptly to one another relating to their involvement in the Project;
  - 1.2.6. promptly raise and use all reasonable endeavours to resolve any issues, difficulties, problems or opportunities that arise relating to the Project;
  - 1.2.7. subject to acting reasonably in their own interests, aim to reach agreement in discussions for the good of the Project;
  - 1.2.8. inform the Project Board promptly of any event that is likely to prejudice or delay the performance or completion of the Project or any part thereof, or

of any situation or event that may hinder or prevent that Party from providing its Financial Contributions or any part of them;

- 1.2.9. in carrying out their obligations under the Agreement not do anything that may damage or prejudice the reputation of the other Party or its business or other interests.

1.3. The Parties shall ensure that all of their staff involved in the Project:

- 1.3.1. are appointed with the approval of each Party's project sponsor(s) (or delegated power) respectively.
- 1.3.2. are sufficiently qualified, trained, skilled and experienced in the type of work which they are to perform;
- 1.3.3. will exercise all due skill, care, attention and diligence in their work including carrying out such in a timely manner;
- 1.3.4. will, where appropriate, liaise with the other Party in respect of their work.
- 1.3.5. will promptly inform the other Party of any difficulties, problems or opportunities that arise in their work;
- 1.3.6. will provide all reports at the times and in the manner specified in the Agreement or as otherwise agreed between the Parties or specified by the Project Board.

1.4. The Agency will:

- 1.4.1. establish a Sponsors Group, a Project Board and Project Team;
- 1.4.2. appoint the roles of project sponsor, project executive, senior user(s), assurance advisor and project manager staffed from the Agency;
- 1.4.3. upon receipt of the required approvals and funding allocations, procure who will fulfil the senior supplier roles.

1.5. The Council will:

- 1.5.1. ensure appropriate representation of itself in the Project Team;
- 1.5.2. nominate a Council project sponsor(s) to represent itself on the Sponsors Group;
- 1.5.3. nominate a Council director, and other senior personnel as appropriate, to sit on the Project Board for the Project;



- 1.5.4. nominate a project manager and Council staff (either as part of an employee's existing role that aligns to their job description, or using the Council's recruitment processes) to work as part of the Project Team to fulfil the Council's responsibilities to the Project.

## **2. Lead Partner**

- 2.1. The Agency shall be the Lead Partner for the Project.
- 2.2. As the Lead Partner for delivery of the Project, the Agency, supported by the Council, will be responsible for project governance, delivery of all the Business Cases required for assurance, the design and construction of the Project and the appointment and management of consultants and contractors.
- 2.3. The Agency will develop the Business Cases in line with the current Government Guidance and funding rules and ensure that the preferred way forward is agreed by the Parties. This will be subject to the respective Parties' formal approval processes.
- 2.4. The Lead Partner will:
  - 2.4.1. manage and review the delivery of the Project;
  - 2.4.2. provide the management and support personnel to administer the Project effectively;
  - 2.4.3. establish the Project Governance structure and roles specified in Clause 4;
  - 2.4.4. be responsible for the financial management and administrative aspects of the Project;
  - 2.4.5. be able to use or approve the use of the Project Funds (subject to any conditions to which those funds were obtained) as the Project Board considers appropriate for the purposes of the Project;
  - 2.4.6. subject to Clause 10, be responsible for overall communication and publicity of the Project.

## **3. Project Governance**

- 3.1. The Project Board will:
  - 3.1.1. oversee the management and delivery of the Project;
  - 3.1.2. be chaired by the Project Executive;

- 3.1.3. be comprised of the Agency's Project Executive, senior users from the Agency and the Council (representatives as agreed by each organisation's senior leadership team), and senior supplier(s);
  - 3.1.4. be attended by the project managers, with optional attendance by the project sponsors and assurance advisor, and any other person(s) deemed necessary by the Project Board;
  - 3.1.5. meet at least every 6 weeks or when required by exception;
  - 3.1.6. provide overall direction and management of the Project;
  - 3.1.7. make decisions based on the group majority where the majority includes at least one member from LDC and the EA, or escalate to the Sponsors Group;
  - 3.1.8. ensure sufficient resources are allocated to the Project Team for the delivery of the Project;
  - 3.1.9. monitor the overall progress of the Project against the objectives/deliverables in the Business Case, including the appendices and any revisions made to these documents;
  - 3.1.10. have overall responsibility for the financial management of the Project;
  - 3.1.11. consider changes to the Project form and timing;
  - 3.1.12. be the first point of referral for any disputes arising at the Project Team.
- 3.2. The Project Team will:
- 3.2.1. be led by the project managers;
  - 3.2.2. undertake the day to day activities required to deliver the Project;
  - 3.2.3. meet weekly or as required;
  - 3.2.4. give due consideration to the Tolerances set by the Sponsors Group and escalate issues, difficulties, problems or opportunities to the Project Board accordingly;
  - 3.2.5. make decisions based on the agreement of the Project Mangers from LDC and the EA, or escalate to the Project Board;
  - 3.2.6. be comprised of representatives from each Party and the Suppliers procured to deliver the Project (as shown in the Project Structure; Appendix 1 and agreed by the Project Board).

## **4. Reporting**

- 4.1. The project managers will provide regular “Highlight Reports” to the Project Board on a frequency and in a format to be agreed by the Project Board, which will include, but is not limited to, key information relating to the Project’s progress against milestones, budget, spend, financial forecasts, risks, issues and opportunities.
- 4.2. In the event that one of the Tolerances specified by the Sponsors Group is expected or suspected to be exceeded, the Agency’s project manager will, as soon as reasonably possible, send a notification to the Project Executive and any other roles specified in the terms of the Tolerances.
- 4.3. As soon as reasonably possible after the identification of an actual exceedance of one of the Tolerances specified by the Sponsors Group, the Agency’s project manager will send a notification to the project executive and any other roles specified in the terms of the Tolerances and create an exceedance report that will detail the situation, causes, potential impacts and options for mitigating the impacts.

## **5. Financial Contributions**

- 5.1. The Parties understand that successful delivery of the Project relies on securing sufficient partnership funding to the value determined by the Business Case.
- 5.2. The Parties agree that all FDGiA Funding allocated to the Project following the approval of the Business Case, shall be classified as Project Funds.
- 5.3. The Agency will be the Funding Partner and, supported by the Council, will endeavour to source and secure funding for the Project from wider partners in accordance with the Business Case.
- 5.4. Subject to the Council being satisfied that any terms under which funding has been secured can and will be met, the Council understands that any grants or other funding obtained by it for the purposes of the Project will need to be paid to the Agency under the terms of a standard Agency Contributions Agreement(s) which will be separate and legally binding agreement(s) and will require agreement by both the Council’s Legal and Finance Teams. The details of the Contributions Agreement(s) will be developed as the project progresses and as potential contributions are identified. Once payments are

made under the terms of a Contributions Agreement they shall be regarded as Project Funds.

- 5.5. The parties will share the risk of any potential grant clawback for not meeting the conditions of any funding that has been secured.
- 5.6. The Agency as the Lead Partner will:
  - 5.6.1. produce a strategy for securing the necessary partnership funding required for the Project;
  - 5.6.2. put in place such resources as are necessary to implement such strategy;
  - 5.6.3. provide regular updates to Project Team and Project Board meetings;
  - 5.6.4. consult with the Council on the terms and conditions of any potential grants;
  - 5.6.5. remain responsible for compliance with any terms and conditions that are within its remit as the Environment Agency and/or Lead Partner subject to which grants or funding have been obtained for the Project.
- 5.7. Lewes District Council agrees:
  - 5.7.1. to support the Agency to identify and bid for funding, and where appropriate and in agreement with both Parties, write and submit funding applications on behalf of the Project where appropriate;
  - 5.7.2. remain responsible for compliance with any terms and conditions that are within its remit as the Local Authority subject to which grants or funding have been obtained for the Project..

## **6. Financial Management**

- 6.1. The Parties agree:
  - 6.1.1. that Project Funds may be used by the Agency for any purposes consistent with the aims and objectives of delivering the Project;
  - 6.1.2. that as the Lead Partner, the Agency shall be responsible for holding the Project Funds.
- 6.2. The Agency shall put in place appropriate financial management and auditing procedures for the Project to control expenditure and ensure that costs are properly incurred and can be clearly identified.

## **7. Reimbursement to Parties of Project Costs**

- 7.1. All costs incurred by the Agency or the Council for the purposes of the Project should be forecast and approved at the appropriate level as dictated by the Tolerances.
- 7.2. Costs incurred by the Agency or the Council under the direction of the Agency's project manager or the Project Board for the purposes of the Project will be Project Costs and, subject to Project Funds being available, will be reimbursable to the respective Parties.
- 7.3. Each stage of the Project will require confirmed and agreed funding before progress to the next project stage is agreed by the Project Board.
- 7.4. Claims for costs will be submitted by the Council to the Agency's project manager on a quarterly basis. Such claims may be subject to approval by the Project Board, depending on the Tolerances defined by the Sponsors Group. Any dispute on costs will be settled in accordance with the dispute resolution procedure as set out in Clause 12.

## **8. Design, Construction, Permissions and Consents**

- 8.1. In carrying out its role as the Lead Partner, the Agency will be responsible for:
  - 8.1.1. the design and construction of the Project Works;
  - 8.1.2. obtaining all necessary permissions and consents statutory or otherwise necessary for carrying out the Project Works and ensuring compliance with any such consents or permissions.
- 8.2. The Council agrees to provide support and assistance as may be required, by the Project Board or the Agency's project manager in assisting the Agency, depending upon resource availability.
- 8.3. Where appropriate and in agreement with all Parties, the Council may undertake elements of work in areas that they are better placed to deliver including, but not limited to; Town and Country Planning; quantifying potential growth benefits of the Project; and engaging and negotiating with business groups, individual businesses and landowners.
- 8.4. The Parties agree that as and where appropriate, they will exercise their powers as may be required by the Project Board or the project managers for the furtherance and implementation of the Project.

## **9. Maintenance and Ownership of Defences**

- 9.1. Following completion of any new Sea Defence Assets, or such other date as mutually agreed between the parties, the new assets will be transferred to Lewes District Council/relevant landowner, who will then be responsible for their ongoing inspection, monitoring, maintenance and repair.

## **10. Publication, Publicity and Use of Logos**

- 10.1. The Parties will seek to ensure consistent and coordinated messages when working with the government, delivery partners, stakeholders, public and the media.
- 10.2. The Parties agree to develop project-specific branding to the satisfaction of both Parties, which can be used for the external promotion of the Project via the internet, social media and in hard copy formats.
- 10.3. All external correspondence and publicity messages relating to the Project shall be agreed in advance by Project Board members for each Party, and neither Party will make any public announcement, disclosure or statement concerning the Project without prior approval of the Project Board.
- 10.4. The Parties acknowledge that they are each bound by freedom of information legislation and that they are each subject to statutory obligations regarding the disclosure and publication of certain information, and as such are unable to give any undertaking not to release information about the Project or the Agreement which conflicts with such obligations.
- 10.5. Neither Party will make use of another Party's branding, logos or trademark in any publications without prior permission in writing. Such authority may be provided in advance for specific purposes if agreed by all Parties on the Project Board.

## **11. Ending the Agreement**

- 11.1. The Agreement will end by default at the end of the Project Period or if the Agreement is superseded.
- 11.2. Either Party may choose to end the Agreement early if there is a significant change in circumstances. This could include, but is not limited to, the Parties agreeing that the Project is unaffordable or is not technically feasible, or a change in the legal responsibilities of either Party.

- 11.3. Any Party wishing to end the Agreement early will give 12 weeks' notice to the other Party.

## **12. Dispute Resolution**

- 12.1. During the Project Period, the Project Team shall attempt to resolve all disputes and differences between themselves. If they are unable to do so, the matter shall be referred to the Project Board.
- 12.2. If the Project Board is unable to resolve the dispute or difference to the satisfaction of the Parties within 4 weeks, the matter shall be referred to the Sponsors Group for a final decision.
- 12.3. If the matter referred to the Parties' senior managers pursuant to Clauses 3.1.6, 12.1 or 12.2 cannot be resolved, the Parties in dispute shall consider referring the matter to mediation. If those Parties acting in good faith do not consider that mediation is an appropriate method of dispute resolution they shall consider such other methods of alternative dispute resolution as they reasonably consider to be appropriate in the circumstances and shall seek to resolve the matter using such methods as they may agree.

## **13. Review and Variations of the Agreement**

- 13.1. No change or variation to the Agreement will be effective unless and until it is agreed in writing and signed by all Parties and annexed to the Agreement.

## 14. Disclaimer

14.1. By signing this document the Parties are not committing to legally binding obligations. It is intended that the Parties remain independent of each other and that their collaboration and any use of the term "partner" does not constitute the creation of a partnership at law or a legal entity, nor authorise the entry into a commitment for or on behalf of each other.

Signed for on behalf of Lewes District  
Council:

Signed for on behalf of the Environment  
Agency:

.....  
**Robert Cottrill**  
Chief Executive,  
Lewes District Council

.....  
**James Humphrys**  
Area Director,  
Environment Agency





# Appendix 1

