

January 16, 2009

**MEMORANDUM OF AGREEMENT
BETWEEN
THE U.S. ARMY
AND
THE ARMY HISTORICAL FOUNDATION (AHF)
FOR
THE NATIONAL MUSEUM OF THE UNITED STATES ARMY (NMUSA)**

MEMORANDUM OF AGREEMENT made this date between the Department of the Army (Army) and the Army Historical Foundation (AHF), a § 501(c)(3) nonprofit corporation.

WHEREAS 10 U.S.C. § 4772 authorizes the Secretary of the Army to enter into an agreement with the AHF for the design, construction, and operation of a facility or group of facilities at Fort Belvoir, Virginia, for the only National Museum of the United States Army (NMUSA);

WHEREAS, the Secretary of the Army or his designee is responsible for oversight of the development of the NMUSA, at Fort Belvoir, Virginia;

WHEREAS the AHF mission is to preserve and promote the history of the Army and the heritage of the American Soldier, and has offered its assistance in making the NMUSA a reality;

WHEREAS the NMUSA is envisioned as a cooperative effort between the public and private sectors to provide a capstone museum complex which will honor the American Soldier's service, tell their stories, and educate visitors as to the contributions of the Army to the nation in a manner that will engage and inspire the American people;

WHEREAS the United States Army Corps of Engineers (hereinafter referred to as USACE) as the Army's design and construction agent per DoD Directive 4270.5, will support the NMUSA project by providing contract management and oversight responsibilities;

WHEREAS the NMUSA Project Executive Officer (hereinafter referred to as the PEO), along with the Project Director, (PD) as the Army's functional expert on the NMUSA, will oversee all aspects of the NMUSA development and the operation of the NMUSA until such time as the entire operation can be managed by the Director, NMUSA and NMUSA staff;

WHEREAS the Army and the AHF desire to accomplish a mutually beneficial construction and partial lease-back arrangement to satisfy their respective requirements; and

WHEREAS the purpose of this MEMORANDUM OF AGREEMENT (MOA) is to establish each party's responsibilities and the procedures for the funding, design, construction, lease, and operation of the NMUSA at Fort Belvoir, Virginia,

NOW THEREFORE, the parties agree as follows:

I. RESPONSIBILITIES

A. Headquarters, Department of the Army (HQDA). The Assistant Secretary of the Army, (Installations and Environment) (ASA (I&E)) is the designated Army lead for NMUSA and is responsible for:

- 1) supervising and overseeing the NMUSA project, with decision authority for the NMUSA project;
- 2) activating the NMUSA Executive Committee / Project Working Group, and tasking appropriate HQDA participation;
- 3) seeking Congressional authorization and appropriations for the project, as required;
- 4) in coordination with the Fort Belvoir Garrison Commander (GC), complying with the requirements of the National Environmental Policy Act and other applicable laws;
- 5) making available a suitable, appropriate, and partially prepared U.S. government site for this complex and providing right of entry to AHF and its contractors;
- 6) providing legal authority support for the development and operation of the NMUSA (however, the AHF will obtain its own private legal counsel for legal advice);
- 7) providing a Project Management staff that can develop, staff, and provide final approval authority for all proposed operations of the NMUSA, in coordination with the Center for Military History, especially where there are any special preservation features required, and other interested parties;
- 8) briefing the Executive Office of the Headquarters (EOH), Department of the Army on Museum Project status;
- 9) providing operational control of project office, budget, and staff;
- 10) exercising final approval authority for all proposed designs, to include ensuring that the scope and cost of the NMUSA are supportable by the Army over the life of the NMUSA;
- 11) providing timely concurrence in any contract or design review in connection with the construction of the NMUSA; and
- 12) providing timely review, via the PEO, of any commercial advertisements regarding the museum.

B. Project Executive Officer (PEO) – Appointed by the ASA (I&E) to act as the Army PEO. The PEO shall:

- 1) provide oversight to the Project Office (PO) and PD;
- 2) ensure coordinated planning, programming, and budget execution;

- 3) chair monthly Joint Planning Group meetings and ensure a coordinated effort with AHF, the USACE, Assistant Chief of Staff for Installation Management (ACSIM), Installation Management Command (IMCOM), contractors, and other stakeholders;
- 4) provide quarterly briefings for the EOH to report on progress and issues;
- 5) ensure coordination as appropriate with ACSIM and other affected HQDA elements;
- 6) be responsible for exercising any rights and fulfilling any duties of the ASA (I&E) set forth in this MOA that the ASA (I&E) chooses to assign or delegate to him;
- 7) chair NMUSA Working Group which will include representatives from Office of the Chief, Legislative Liaison, Office of the Chief, Public Affairs, Office of the Administrative Assistant, Army Budget Office, ACSIM, USACE, Office of the General Counsel, and others (e.g., AHF) as appropriate; and
- 8) act as the senior point of contact for the Army with AHF staff.

C. Project Director (PD) – The PD for NMUSA shall:

- 1) oversee all aspects of the development and construction of the NMUSA on behalf of the Army;
- 2) act as the operational point of contact between the AHF and the Army;
- 3) execute and implement this MOA, with guidance from PEO;
- 4) represent the PEO and the Army as required.

D. United States Army Corps of Engineers (USACE) – The USACE shall:

- 1) provide planning, real estate, design, contract management and oversight services for the Army in collaboration with the AHF for the NMUSA; and
- 2) support the Army by providing contract management and oversight services for the development, fabrication, and installation of the NMUSA exhibits.

E. The Army Historical Foundation (AHF) – Overall responsibilities of the AHF include fundraising, campus construction (i.e., interior and exterior of the museum, plus any portion of site preparation not completed by the Army), and planning and execution of museum retail operations.

- 1) Fundraising – General Fundraising Goals – The AHF agrees to engage in good-faith efforts to raise all funds necessary to cover the full cost of:
 - a. constructing the NMUSA (i.e., doing the campus construction);
 - b. providing the NMUSA to the Army in turn-key condition; and

c. maintaining an AHF endowment fund with the goal, once the campus construction has been completed, of making periodic payments to the Army to supplement appropriated funds programmed for (in conjunction with lease payments made pursuant to Part IV) the operating costs of the NMUSA.

2) Fundraising Plans – Recognizing that AHF may choose to construct the museum with a series of incremental contracts, AHF shall, at 35% design and before commencing a contractual phase of construction of the NMUSA:

- a. in coordination with USACE and NMPO, estimate/update construction costs;
- b. finalize a fundraising plan for obtaining those funds, which includes AHF's strategy for covering construction costs through the use of cash reserves, and financing; and
- c. provide the estimate and fundraising plan to the ASA (I&E), revising as necessary to maintain currency.

3) Fundraising Standards – The AHF will ensure that all fundraising activities that it conducts or arranges to have conducted on its behalf adhere to the bylaws or rules that the AHF's Board adopts and implements pursuant to Section VI.A. below.

4) Donor Recognition Program (DRP) – The AHF shall establish a DRP. Effective 1 Jul 08, the Army approved the AHF Donor Recognition plan; the criteria below were considered and remain the overarching principles.

- a. The program shall be consistent with the dignity of the Army, the educational mission of the NMUSA, and all applicable laws and regulations, and shall abide by the best practices used by other national museums, especially those of the other armed services.
- b. The AHF shall not name any buildings, exhibits, galleries, rooms, or other subdivisions of the NMUSA after any donor without specific prior approval from Secretary of the Army. It should be noted that requests of this nature will be considered on a case-by-case basis.
- c. The AHF may erect plaques stating, "This Exhibit was made possible by the generous donation of [DONOR NAME]."
- d. If the Army chooses to change any aspect of the DRP, the PEO shall inform AHF and coordinate implementation of the change.

5) Quarterly Reports – Each quarter, AHF will provide to the ASA (I&E) a report on its fundraising activities for that period and submit for approval its plans for the upcoming quarter.

6) Construction Planning – The AHF will submit their Construction Execution Plan for Phase I (which includes everything that is to be completed prior to or within one year of the museum opening), to be approved by ASA (I&E) prior to completion of 35% design. It will identify details of the construction bid document(s) to include for each phase/sub-

phase: scope, schedule, estimated construction cost, method of procurement, and associated funding arrangements. Also, the plan will include an acquisition strategy which details requirements for each document for the Architect Engineer (A-E) to conform to when preparing the bid package(s) as part of the design, and be updated as conditions change.

7) Construction Execution

- a. Each year, in coordination with USACE and NMUSA, the AHF shall review and update the estimated cost of construction for NMUSA and submit that updated estimate for approval to the ASA (I&E).
- b. The AHF will identify a Construction Management (CM) Advisor who will assist in CM activities, to include, but not be limited to: preparing the Construction Execution Plan (to identify construction bid packages, acquisition strategy, funding arrangements, etc.); selecting and retaining the services of a CM firm; reviewing all design submissions; and overseeing the efforts of the CM firm.
- c. If the estimated construction costs for a NMUSA construction contract unexpectedly increase beyond or exceed the amount which the AHF has raised:
 1. the AHF shall inform the PEO and develop a financing plan, which will be provided to the Army, to cover the increased costs;
 2. the AHF shall make good faith efforts, consistent with this MOA, to raise such additional funds as are necessary to cover the increased costs; and
 3. notwithstanding any other provision in this MOA, the ASA (I&E), in consultation with AHF, shall have the authority to direct any changes to the project or the design he deems necessary or desirable to reduce the costs, to ensure the viability of the program.
- d. Construction Contract Procurement. The AHF shall be responsible for contracting with construction firm(s) for campus construction and any other requirements for which AHF is responsible.
- e. Construction Contract Oversight. The AHF shall be responsible for oversight of construction contractor(s) for those contracts for which AHF is responsible.

F. Fort Belvoir GC – All Fort Belvoir installation support will be negotiated and formalized through a separate Installation Support Agreement.

II. PRE-CONSTRUCTION PREPARATIONS

A. Design of the NMUSA

- 1) The Army shall not be required to engage in preparation of a potential design under this Section II.A until:
 - a. the feasibility and environmental assessments permit selection of a suitable site;

- b. the Army notifies Congress of its intent to spend funds under this Section II.A; and
 - c. the statutorily required waiting period following such notification expires without any inquiries or objections remaining unresolved.
- 2) Once a preferred site has been identified, the USACE shall award a Task Order to the selected A-E to design the NMUSA.
- 3) The USACE shall direct the A-E firm to ensure that the potential design:
- a. fulfills NMUSA's requirements for exhibit space and other programming and activities, as determined by the ASA (I&E);
 - b. optimizes life-cycle costs;
 - c. includes all anticipated facilities comprising the NMUSA in phase I; and
 - d. adheres to all applicable directives, including directives concerning energy conservation and utility privatization.
- 4) The USACE shall prepare a Statement of Work for Phase I design (see paragraph I.E.6) that, including USACE efforts, does not exceed ten million dollars (\$10,000,000.00) for the portion defined by PN 60084, Army National Museum, Phase I. This cost excludes the cost of the MCA project, PN 71149, Infrastructure, Army Museum, which may be funded separately with MILCON P&D funds.
- 5) Insofar as the cost of the Phase I NMUSA design for the portion defined by PN 60084, Army National Museum, Phase I exceeds \$10,000,000, one or more of the following may occur under the approval of ASA (I&E):
- a. The ASA(I&E) in his discretion approves a higher amount. The ASA (I&E) is under no obligation to issue such an approval under any circumstances;
 - b. the AHF may contribute the funds to fulfill the funding requirements; or
 - c. the scope of Phase I may be reduced.
- 6) The USACE shall require the A-E firm to consider the comments submitted during the designated comment review period and recommendations of the ASA (I&E), the PEO, USACE, the Fort Belvoir Department of Public Works, and the AHF, in crafting the potential design. The USACE also shall make any changes or modifications to the potential design it deems necessary or desirable.

B. Planning and Environmental Studies and Legal Approvals

- 1) The USACE shall arrange for preparation of a Feasibility Study and National Environmental Policy Act (NEPA) documentation in order to obtain Final Site Approval. The Feasibility Study shall contain sufficient information to determine from an engineering

standpoint the suitability of each site investigated. USACE will review studies and documentation to ensure compliance with applicable federal and state laws. The Fort Belvoir GC shall assist in all required environmental documentation.

2) Upon receipt of the Feasibility Study results and based on the information contained therein (as well as any other considerations he deems relevant), the ASA (I&E) shall:

- a. determine the site to designate as the preferred site for NEPA documentation purposes;
- b. recommend to the GC the preferred site after NEPA documentation is completed for Final Site Approval;
- c. direct the A-E firm to make whatever changes or modifications to the potential design he deems necessary or desirable; and
- d. approve the initial conceptual design for the NMUSA.

3) When the ASA (I&E) has approved a site and initial design, the USACE and AHF shall engage in good-faith efforts to obtain all permits, approvals, and waivers necessary or convenient for construction of the NMUSA on the site in accordance with the design. If USACE and/or AHF are unable with reasonable effort to obtain a necessary or otherwise desirable permit, approval, or waiver, the ASA (I&E) shall have the right to either terminate this MOA in accordance with Part VII or modify the site and/or design as necessary to obtain the permit, approval, or waiver.

C. Master Project Plan – No more than sixty (60) days following the site selection and initiation of design, the AHF, in coordination with USACE and NMUSA, shall prepare and submit for approval to the ASA (I&E) a Master Project Plan that specifies, for each phase of the NMUSA’s construction:

- 1) the construction schedule and budget, and
- 2) the AHF’s Construction Execution Plan.

D. Site Preparation

1) A Military Construction Army (MCA) project entitled “Infrastructure, Army Museum”, is proposed by the Army for FY10. The scope of this project will, if approved, include traditional site preparation tasks, such as: drainage, water, gas, sewer, electrical and telecom infrastructure, new access road, improvements to existing road, intersection improvements, site clearing and demolition, cut and fill, and drainage. Consistent with fiscal law, the Army can incur no legal obligation for payment for site preparation until Congress has authorized and appropriated funds for that purpose. If the Army determines that there are discrete tasks such as landscaping, parking, and paving which are properly associated with campus construction, the AHF will fund those tasks. There will be no improper augmentation of Army funds or impermissible co-mingling of appropriated and private funds on any contract. Any use of appropriated and private funds in the same contract will require prior written Army legal opinion which indicates that there are no fiscal law violations. The Army will also consider and ensure there are no impermissible

cost variation violations of 10 U.S.C. section 2853 in the process. If the amount provided by AHF is inadequate by a specified amount, ASA (I&E) shall have the right within his discretion to:

- a. approve such higher costs;
- b. terminate this MOA pursuant to Part VIII;
- c. modify the design as necessary to reduce the cost of site preparation; or
- d. seek an alternate site within Fort Belvoir.

2) Since appropriated funds cannot be used for golf courses per Title 10 U.S.C. section 2246 and to ensure the viability of 27 playable holes of the golf course, the AHF is responsible for items required during the site preparation phase such as fencing to segregate the museum campus from the golf course.

3) No site preparation work may commence unless the AHF establishes to the satisfaction of the ASA (I&E) that it will have funds sufficient to cover the costs identified in Subsection II D. 1) and 2) above, as well as III below.

III. CONSTRUCTION

A. Construction in Phases – Construction of the NMUSA shall occur in phases. Each phase shall result in a complete and usable building, structure, or facility on the site. Phase I, which is defined in paragraph I.E.6) above, may consist of more than one sub-phase, which will be detailed in AHF's Construction Execution Plan.

B. Fundraising Requirements – The AHF may not attempt to negotiate or execute any construction contracts or begin construction work on any portion of the NMUSA until it establishes to the satisfaction of the ASA (I&E) that it has sufficient funds (100%) based on the latest estimated construction cost for that sub-phase of construction, as determined pursuant to paragraph I.E.6). The parties agree that this Section is intended to ensure that the AHF is financially able to handle unexpected construction cost overruns without jeopardizing the continuation or completion of a phase of construction.

C. AHF Responsibilities – In accordance with law and the governing statute (Title 10 U.S.C. section 4772), the AHF shall build; oversee; bear legal liability for (until transfer to and acceptance by the Army); and pay all costs associated with, arising from, or related to construction of the NMUSA building and grounds, including site preparation tasks associated with campus construction, such as landscaping and parking. The AHF shall procure and award construction contract(s) for the construction for which it is responsible and be responsible for certain agreed portions or segments of the site preparations specified herein or by separate agreement. AHF shall make reasonable efforts to ensure that each phase is constructed within the estimated budget and in accordance with industry standards, the design, the Master Project Plan, and all applicable legal and regulatory standards.

D. Selection of Construction Firm – Once the AHF has raised the funds necessary to build a sub-phase of the project, the AHF, with the approval of the ASA (I&E), shall select one or more construction firms (Construction Firms) to erect that phase. The Construction Firms shall be

selected IAW the approved Construction Execution Plan. The AHF may choose to provide funds to USACE for execution of construction activities within AHF auspices, if AHF concludes that alternative is preferable and the Army approves the AHF request. Under this scenario, the AHF would be an active participant in the selection of the USACE construction firm.

E. Construction Contract – The AHF may not enter into, modify, or terminate any contract relating to construction of the NMUSA without prior coordination with the ASA (I&E). Each construction contract for the NMUSA shall:

- 1) be coordinated with the USACE;
- 2) contain all available extended warranties with reasonable terms, including but not limited to warranties concerning serviceability, merchantability, construction, equipment, labor, materials, and parts;
- 3) provide that all warranties be fully transferrable to the Army upon completion of the construction work and acceptance by the Army;
- 4) provide that the U.S. Government may, at its option, be substituted as the real party-in-interest in any litigation relating to or arising from the construction contract or any warranty, regardless of whether title to the facility or building underlying the litigation has yet been transferred to the Army;
- 5) be consistent with requirements of the Davis-Bacon Act, 40 U.S.C. §§ 3141-48 if it is determined that the Act applies to the contract; and
- 6) specify that each warranty shall extend for at least five (5) years.
- 7) The AHF may provide funds to USACE for execution of construction activities within AHF auspices if determined to be in the best interest of the project. Under this scenario, the AHF would be an active participant in the selection of the USACE construction firm.

F. Construction Management Firm – The AHF shall identify and hire a construction management firm to administer construction of the phase being erected and execute a technical review of its constructability whenever necessary. The CM firm shall be under contract before the 35% design submittal.

G. Design During Construction (DDC). – The AHF shall hire the services of the A-E of record, or a suitable alternative such as USACE, for DDC services.

H. Army Assistance in Construction

- 1) The USACE shall provide quality assurance oversight for all aspects of the construction under the purview of AHF and such other reasonable assistance as the Army deems appropriate to help the AHF present a completed Phase I of the NMUSA to the Army as an operating museum.
- 2) All inspections and quality assurance oversight work performed by the USACE in regards to paragraph III.H. 1) above shall be purely advisory in nature. If the USACE is not the construction agent, then the United States, USACE, and the Army (and their

officials, officers, members, and employees) assume no liability in connection with construction of the NMUSA, including but not limited to liability for:

- a. non-compliance with design specifications;
- b. violation of legal or regulatory requirements;
- c. failure to comply with the terms of permits or variances;
- d. poor construction, workmanship, or materials; or
- e. problems or defects that the USACE fails to identify or have remediated.

3) USACE shall provide Quality Assurance for any MCA project.

4) The Fort Belvoir GC shall provide engineering assistance as he or she deems necessary to allow the NMUSA to function, in accordance with the design and other approved schematics or blueprints, with the infrastructure and utilities available on the site.

I. Site Access – Notwithstanding any other provision of this MOA or any other agreement between the parties, the ASA (I&E), the USACE, the Project Office (PO) and the GC shall at all times have right of entry and full access to all areas of the site and NMUSA facilities. The PEO and the GC shall have the right at all times to control or deny access to Fort Belvoir, the site, and NMUSA facilities for any reason to any person, including but not limited to construction workers and all other AHF contractors, subcontractors, employees, agents, and volunteers.

J. Phase Completion and Title Transfer

1) Upon the completion of a phase of construction, the ASA (I&E), once he or she determines, in coordination with USACE and the GC, that the facility, building, structure, or other improvement erected or completed satisfies all applicable legal and design requirements, may request transfer. Upon this determination, the AHF will promptly donate the building or facility, and transfer all applicable warranties, to the Army. The AHF and their contractor will be responsible for completing the DD Form 1354 – Transfer and Acceptance of Military Real Property – to the satisfaction of the Fort Belvoir GC and USACE.

2) If the ASA (I&E) determines in his judgment that the facility, building, structure, or other improvement erected or completed does not satisfy one or more significant requirements, the AHF shall remediate any such deficiencies to the satisfaction of the ASA (I&E) prior to transfer.

K. Warranty Enforcement

1) Prior to completion of a phase and its acceptance by the Army, the AHF shall enforce all warranties pertaining to that phase. The U.S. Government shall have the right at its discretion to take control of any resulting litigation and be substituted as the real party-in-interest.

2) Following completion of a phase and its acceptance by the Army, the Army shall be exclusively responsible for enforcing all warranties concerning the facilities, buildings, structures, or other improvements erected during that phase.

IV. LEASING

A. Leases – The ASA (I&E) shall lease to the AHF appropriate space within the NMUSA for:

- 1) administrative office space;
- 2) retail space for book stores, gift shops, concession stands, restaurants, parking-related services, or similar businesses; and/or,
- 3) rental space to be sub-let to third parties to provide goods, services, or presentations (such as lectures, films, panel discussions, or other events) appropriate for the NMUSA.

B. Terms of Leases – The ASA (I&E) shall have final discretion over the amount and location of space within the NMUSA or on the site to be leased to the AHF. The term of each lease for office space shall be ninety-nine (99) years, but the term of any lease for retail space or rental space shall be five (5) years.

C. Lease Rates – To defray annual operating fees, the AHF shall provide the higher amount of either: 25% of the net retail revenues of the AHF at the Museum for the previous year or commercially reasonable rental fees, for all leased retail space, as well as the interest gained on any endowment funds raised for the museum.

- 1) The ASA (I&E) shall use all funds that he receives from the AHF as lease or rental payments to defray the operating costs of the NMUSA.
- 2) If the ASA (I&E) determines that the total amount the AHF owes in rental fees in any year under all of its leases for space in the NMUSA exceeded the actual operating costs for the NMUSA for that year, the ASA (I&E) will permit the AHF to retain the excess funds in the AHF's endowment for the NMUSA discussed in paragraph I.E. 1) c.

D. Subleases – Before the AHF subleases space within the NMUSA to a third party, the ASA (I&E) must approve the sublease and may reject or deny it for any reasonable cause.

E. Termination – Notwithstanding any other provision of any lease or sublease, all leases with the AHF, and all subleases between the AHF and third parties, shall terminate immediately if:

- 1) this MOA is terminated pursuant to Part VIII;
- 2) the AHF violates any provision of this MOA or materially breaches any lease; or
- 3) the ASA (I&E) determines in his sole discretion that security or operational concerns require termination.

F. Reservation of Rights – Notwithstanding any other provisions of the leases, the ASA (I&E), the PEO, and the GC shall at all times retain the right to enter, inspect, and search the leased areas without prior notice, and deny entry to Fort Belvoir or the leased areas to any person for cause.

G. Profits – Each year, the AHF shall calculate the total amount of revenue it earned through its retail activities in its leased space and from sub-letting leased space to third parties. If that total amount of revenue exceeds the total rental fees that are due for its leased space in that year, the AHF shall transfer any such excess funds to its endowment fund for the NMUSA discussed in paragraph I.E. 1) c.

V. OPERATIONS

A. General Responsibility – The Army shall be primarily responsible for operating each completed phase of the NMUSA upon assuming title to it.

1) ASA (I&E) – The ASA (I&E), as the Army lead, shall have final authority over the NMUSA’s operations and policies, future planned expansions, exhibits, space allocations, budget, and staffing, as well as other factors affecting its mission until handoff of an operational Army museum to the Administrative Assistant to the Secretary of the Army at a mutually agreeable date. The ASA (I&E) may convene an advisory Executive Committee and/or Project Work Group to assist with these oversight responsibilities.

2) Museum Director (MD) – Upon completion of Phase I, the PD shall assume the duties of MD of the NMUSA. The MD shall have day-to-day responsibility for the NMUSA’s operations and shall, among other things: hire necessary personnel; review and approve exhibits; implement the Visitor Experience Plan and a master exhibit plan; ensure (in coordination with the GC) that the NMUSA is safe and secure; maintain the NMUSA’s buildings, facilities, and grounds; manage the volunteer program; plan and execute all NMUSA programs and special events; manage the NMUSA’s public relations and communications with the media; and submit input to the Army’s Future Years Development Program as well as an annual budget request to the Army and the AHF which reflects funds needed to cover the cost of the NMUSA’s operations for the upcoming year.

3) GC, U.S. Army Garrison, Fort Belvoir – The GC shall provide security, as negotiated in the ISA, for the NMUSA; ensure environmental compliance; provide facility engineers to assist with the ongoing operation of the NMUSA; offer such other reasonable support as the MD requests; and, have the right to exclude any person from the site, NMUSA, and Fort Belvoir for cause.

4) USACE – The USACE shall be responsible for operating as the agent of the Army through the ASA (I&E), the PEO, and the PD in designing, crafting, installing, maintaining, and preserving exhibits for all available exhibit areas, subject to the approval and control of the ASA (I&E). The USACE may enter into contracts as necessary to fulfill these obligations. The USACE shall discuss and coordinate the nature and substantive content of the exhibits with the AHF, but the ASA (I&E) shall retain final authority over all decisions relating to exhibits.

B. Advisory Committee – The AHF shall establish an Internal Advisory Committee to comment on NMUSA exhibits, activities, and operations. The MD shall participate as a liaison to the AHF.

C. Publicity – The AHF shall have primary responsibility, in coordination with the Army Chief of Public Affairs, as well as the Fort Belvoir and National Museum Project Office Public Affairs

Officers, for publicizing the NMUSA and attempting to draw visitors. It shall develop and implement, in a cost-effective manner, a master public relations plan and a calendar of events containing all NMUSA and AHF activities of public interest leading up to, and continuing after, the official opening of Phase I to the general public. The Army cannot use official publication assets to advertise AHF activities and events.

D. Revenue-Raising Activities – The AHF shall enter into a written Operating Agreement along with each lease it enters into with the Army under Part IV for retail space or rental space.

1) Each Operating Agreement shall contain a detailed statement concerning the use to which the leased space will be put and the anticipated and historic revenues and costs arising from the retail or rental activity in the space being leased.

2) The AHF shall ensure that the retail and rental spaces within the NMUSA are dedicated to a variety of uses that will enhance the experience of visitors, such as gift shops; concession stands; interactive virtual-reality experiences or simulations related to the Army; restaurants and food courts; book stores; theaters for films related to the NMUSA or the American Soldier; and, self-parking, valet parking, and shuttle services.

E. Volunteer Program – Prior to the opening of Phase I of the NMUSA to the public, the AHF, in coordination with NMUSA, shall commence reasonable efforts to assist with recruiting, training, and providing volunteers IAW the volunteer program established by NMUSA. The MD shall have ultimate responsibility for and authority over the volunteer program.

F. AHF Endowment – Upon completion of NMUSA construction, the AHF agrees to employ good-faith efforts to raise funds for the creation of a permanent AHF endowment, consistent with paragraph I.E. 1), to subsidize the NMUSA's ongoing operating costs. The AHF shall establish a target amount for the endowment, subject to the approval of the ASA (I&E), that is sufficient to provide revenues to satisfy the NMUSA's annual financial requirements as evidenced by the Army's annual budget for NMUSA.

G. Supplemental Operating Funds – The Army shall be responsible for providing funding for the NMUSA's operations and maintenance if and to the extent that such costs cannot be paid entirely through the AHF's rent for the leased areas, funds specifically appropriated and authorized by Congress for the NMUSA, the AHF's fundraising efforts, other donations, or payments from the NMUSA's endowment.

VI. THE FOUNDATION

A. Bylaws and Rules – The Board shall incorporate into its bylaws the principles and best practices of governance for not-for-profit corporations. It shall also incorporate into its Bylaws or otherwise adopt as part of the official rules governing the AHF the Code of Ethical Principles and Standards of Professional Practice promulgated in October 2004 (and as later modified) by the Association of Fundraising Professionals or successor organization.

B. Audits and Other Reports

1) The AHF shall provide the ASA (I&E) with a financial statement verified by an independent auditor or accountant that documents the expenditures of all funds that the Army may provide to the AHF by contract or otherwise.

2) The AHF shall continue to hire an outside independent auditor or accountant to conduct an annual audit of its finances and fiscal practices and prepare its IRS Form 990.

3) The ASA (I&E) may request an audit of the AHF's books, records, finances, and fiscal practices, at the Army's expense, by Army personnel, employees or contractors, to the extent required to validate the appropriate expenditure of any congressionally appropriated Army funds which AHF may receive. The AHF shall fully cooperate with any such Army Audit.

C. AHF Records

1) Upon request by the Army, the AHF, a 501(c)(3) organization, shall make available for review, or produce a complete copy of, any documents relating to its NMUSA fundraising, expenditures, audits, IRS filings, or finances, and all other documents related to NMUSA mentioned in Section VI.F.

2) The AHF shall make available to the Army the following documents relating to NMUSA activities as the AHF creates or receives them:

- a. all audits, financial statements, and IRS Form 990s for the AHF;
- b. all AHF Bylaws, including amendments;
- c. minutes of all Board meetings;
- d. all resolutions and other actions voted on or passed by the Board or EEC;
- e. notices of proposed projects and fundraising campaigns;
- f. advertisements, solicitations, and other promotional materials; and
- g. copies of all correspondence, documents, or other papers sent to or received from a governmental entity relating to or discussing the NMUSA.

D. Other Requests for Information – The AHF shall respond to any NMUSA-related request for information from the Army in a timely fashion (but not to exceed fifteen (15) business days), and when requested to do so, shall assist the Army in keeping Congress informed of developments concerning the NMUSA, including but not limited to AHF fundraising efforts and construction and operation of the NMUSA.

E. AHF Program Manager – The AHF, with the consent of the ASA (I&E), shall appoint an AHF employee, officer, or Board Member to act as AHF Program Manager for the NMUSA.

F. Exemption From Certain Rules – With respect to retail sales activities authorized within the NMUSA, the AHF shall be permitted to conduct revenue generating activities on the NMUSA site; however, if activities are to be conducted at Fort Belvoir but beyond the geographic boundaries of the NMUSA site, they must coordinate with MWR or AAFES regarding exceptions to any agreements normally executed, enforced, or implemented at Fort Belvoir.

VII. RESTRICTIONS

A. No Official Involvement in Fundraising

- 1) In accordance with DoD Joint Ethics Regulations pertaining to non-federal entities, neither the Army, nor any Army official, officer, member or employee acting in his or her official capacity, may endorse the AHF or assist or participate in its fundraising efforts; however, they may endorse NMUSA in approved AHF-sponsored and public forums.
- 2) The AHF shall not make, or have made on its behalf, any representations that may tend to suggest that the Army, or any Army official, officer, member, or employee acting in his official capacity, endorses, or has assisted or participated in, the AHF's fundraising efforts.
- 3) Neither the AHF nor any other non-federal entity affiliated with NMUSA shall use any marks in which the United States Government, Department of Defense, Department of the Army, or any agency thereof has a proprietary or intellectual property interest, including but not limited to trademarks, seals, symbols, and service marks without specific authorization from the owners thereof. The ASA (I&E), through the PEO, will promptly coordinate such requests within the Army for uses of the NMUSA and Army logos or other protected items by AHF.

B. Right to Refuse Donations

- 1) The AHF shall inform the ASA (I&E) in writing of the identity of a donor at least ten (10) business days prior to:
 - a. erecting any plaque bearing the donor's name;
 - b. printing the donor's name in any materials to be disseminated to the general public or museum patrons if the name is to be given special recognition or printed more prominently than the names of the lowest-level donors recognized in the publication at issue; or
 - c. including the donor's name in any display or website if the name is to be given special recognition or appear more prominently than the names of the lowest-level donors recognized in that display or website.
- 2) If the ASA (I&E), in his discretion, determines that the reputation of the Army or NMUSA may be adversely affected by association with any donor, he may restrict or prohibit the AHF from publicly recognizing the donor.

C. Fundraising Coordination – The AHF shall provide detailed fundraising information in quarterly reports to I&E and consider any guidance on fundraising the ASA (I&E) shall choose to provide, including but not limited to any comments regarding:

- 1) the per-unit cost of direct-mail solicitations or public awareness mailings;
- 2) the fees for renting mailing lists; and
- 3) the percentage of AHF revenues which may be spent on fundraising solicitations or public awareness efforts.

D. Ethics Guidelines – No director, officer, employee, or volunteer of the AHF, or the Army, may receive any payment, gift, or gratuity (whether monetary or in-kind) from:

- 1) any contractor, subcontractor, construction firm, design firm, supplier, vendor, insurer, management firm, or other entity involved in or related to construction of the NMUSA;
- 2) any vendor, supplier, tenant, lessee, sub-lessee, insurer, or other person or entity that does business with or provides goods or services to the NMUSA;
- 3) any financial institution responsible for holding, managing, or investing the AHF's or NMUSA's accounts; or
- 4) any director, officer, employee, or volunteer of any entity listed in paragraphs VII.D.1) through VII.D.3) above.

VIII. TERMINATION OF THE MOA

A. Criteria for Termination – Either party may terminate this MOA upon ten (10) business days' written notice if:

- 1) the AHF fails to meet the minimum fundraising requirements set forth throughout this MOA;
- 2) Congress fails to appropriate or authorize any of the funds or expenditures expressly contemplated by this MOA;
- 3) the other party materially breaches this MOA;
- 4) construction of Phase I of the NMUSA has not begun by January 1, 2017;
- 5) Fort Belvoir closes; or
- 6) prior to the Army's approval of a design for the NMUSA under paragraph II.B, either party decides to withdraw for any reason.

B. Rights Upon Termination – Once a termination of this MOA takes effect, both parties' obligations under this MOA shall immediately cease, except the AHF must immediately and irrevocably transfer or assign to the Army unencumbered title, possession, custody, control, and full legal rights to:

- 1) all land, buildings, facilities, and grounds comprising the Site and the NMUSA;
- 2) all outstanding contracts and warranties relating to the NMUSA;
- 3) all unexpended funds the AHF obtained from Congress, the Department of Defense, the Department of the Army, or the United States Treasury in connection with the NMUSA.

The ASA (I&E) shall determine the uses to which such land, property, and funds shall be dedicated.

C. Congressional Appropriations – If this MOA is terminated, and Congress has authorized and appropriated funds for the NMUSA or the AHF:

- 1) the AHF agrees not to accept, receive, or spend such funds; and
- 2) the Army shall have the right to ask that Congress transfer or reprogram those funds for other Army-related programs, purposes, or activities unrelated to the NMUSA.

VIX. GENERAL

A. No Additional Remedies – Nothing in this MOA shall be construed as creating or giving rise to, or permitting the AHF or any other person or entity to maintain, a claim or lawsuit, regardless of its nature, against the United States Government or the Department of the Army, or their officers, employees, officials, volunteers, or subordinate agencies.

B. Sovereign Immunity – Nothing in this MOA shall be construed as a waiver of sovereign immunity by the United States or the Department of the Army.

C. Release --

- 1) The AHF hereby indemnifies, releases, and holds harmless the United States Government and the Department of the Army and their officers, employees, officials, volunteers, and subordinate agencies, from any claims, losses, suits, injuries, damages, harm, or liability of any nature because of, arising from, or otherwise relating to this MOA or the NMUSA.
- 2) However, the AHF shall not be liable for any claims, losses, suits, injuries, damages, or harm that arise from:
 - a. any discrete portion of the site preparation work that is performed exclusively by the USACE or other Army personnel, or
 - b. willful misconduct by an Army official, officer, employee, or member.

D. Amendments – Any amendment to or modification of this MOA shall be null, void, and unenforceable unless it is in writing and signed by both parties.

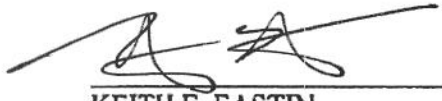
E. Waivers – Any waiver of either party's rights under this MOA shall be null, void, and unenforceable unless it is in writing and signed by both parties.

F. Anti-Deficiency Act Statement – Pursuant to the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1), the Army's obligations under this MOA are subject to the availability of appropriated and authorized funds from which payments of these obligations may be made. The Army shall not be required to fulfill its responsibilities under this MOA unless and until funds to fulfill such responsibilities are authorized, appropriated, and made available by Congress.

G. Dispute Resolution – The Army and AHF agree to submit all disputes to arbitration by the Army Office of General Counsel Alternative Dispute Resolution office.

FOR THE DEPARTMENT OF THE ARMY:

FOR THE ARMY HISTORICAL FOUNDATION:



KEITH E. EASTIN
Assistant Secretary of the Army
(Installations and Environment)

March 11, 2009
(Date)



WILLIAM W. HARTZOG
President
Army Historical Foundation

3/11/09



DAVID H. HUNTOON, JR.
Lieutenant General, USA
Director of the Army Staff

11 Mar 09
(Date)