



STATE OF NORTH CAROLINA

North Carolina Department of Transportation

Request for Proposal #:54-JC-20171003

NCDOT RFP FOR PURCHASE OF PRIVATE STREAM MITIGATION BANK CREDITS

French Broad River Basin, 06010105 hydrologic unit

Date of Issue: October 11, 2017

Proposals Due: January 8, 2018, 5:00 PM EST

Direct all inquiries/comments concerning this RFP to:

Project Contact:

LeiLani Paugh
NCDOT/Environmental Analysis Unit
1020 Birch Ridge Road
Raleigh, NC 27610
lpaugh@ncdot.gov

1. PURPOSE

The North Carolina Department of Transportation (NCDOT) intends to purchase mitigation credits required for compensatory mitigation needs of transportation projects from approved sites after credit release by U.S Army Corp of Engineers, Wilmington District, Regulatory Division (USACE). However, this Request for Proposals is soliciting both released credits and/or credits anticipated to be released at a later date. NCDOT is accepting sealed proposals for the following mitigation credits:

Credit Request:

Amount and Type: 22,000 cool stream credits, 3,000 cold stream credits (With a 20% reservation for unreleased credits)

TIP Project(s): R-5836, R-5744, others

RiverBasin: French Broad

8 digit hydrologic unit: 06010105

12 digit hydrologic unit(s): 060101051101, 060101051103, 060101050301, 060101050302, 060101050303, 060101050404

Proposers are cautioned that this is a Request for Proposals, not a request to contract, and the NCDOT reserves the unqualified right to reject any and all Proposals when such rejection is deemed by NCDOT to be in the best interest of the State of North Carolina.

The NCDOT reserves the right to use this procurement to fulfill the amount of the credit request cited in this Section 1, in full or in part.

Throughout this Request for Proposals, the terms “bidder”, “offeror”, “vendor”, “banker”, “contractor”, and “proposer” are considered synonymous.

“Released credits” refers to mitigation credits that have been approved and released by the U.S. Army Corp. of Engineers (“USACE”), Wilmington District, Regulatory Division by the Proposal Due Date denoted in Section 2 of this Request for Proposal.

“Successful Proposer(s)” refers to those proposers who offered the best value credits in response to this Request for Proposal, and with whom NCDOT intends to enter into a Mitigation Credit Purchase Agreement.

“Unreleased credits” refer to mitigation credits that have not been approved and released by the U.S. Army Corp. of Engineers, Wilmington District, Regulatory Division by the Proposal Due Date denoted in Section 2 of this Request for Proposal, but are anticipated to be approved and released prior to the credit purchase schedule identified in Section 5 below. For the purposes of this RFP, Unreleased Credits are further differentiated into categories by status of an approved MBI.

“Best Value Credits” refers to those credits (or series of credits) by type with the lowest Adjusted Unit Price per Credit. If the lowest Adjusted Unit Price Credits are exhausted, then best value credits also refer to those credits (or series of credits) with the next lowest Adjusted Unit Price per Credit, and

so forth until the credit amount requested in Section 1 is fulfilled.

“Adjusted Unit Price per Credit” refers to the Unit Price per credit from Exhibit A adjusted based on credit status and maturity to determine the best value credits as outline in Section 8, Step 3 of this RFP.

2. PROCUREMENT TIMELINE

Request for Proposals Issuance:	<u>October 11, 2017</u>
Question/Comment Period Ends:	<u>October 25, 2017</u>
Proposals Due:	<u>January 8, 2018 5:00 pm EST</u>
Announcement of Successful Proposer(s):	<u>January 22, 2018</u>

3. SUBMITTAL REQUIREMENTS

One original and one electronic copy (in .pdf format on a disk or flash drive) of the Proposal, contained in a sealed envelope, must be submitted to the Project Contact by the Proposal Due Date and Time.

The Project name (Proposal for Stream Mitigation Credits, French Broad River Basin, 06010105 hydrologic unit, North Carolina) and Bidder’s name and address must be shown on the outside of the sealed envelope, addressed to and delivered by delivery service or by hand to the Project Contact. Please note that the US Postal Service does not deliver to this physical address. No submittals will be accepted after the deadline. Submittals received after the designated time will be returned unopened. Faxed or emailed proposals will not be accepted. By submitting a response to the RFP, proposer acknowledges that the information is valid for a period of 180 days after the Proposal Due Date.

Project Contact: LeiLani Paugh
 NCDOT - Environment Analysis Unit
 Century Center Building B
 1020 Birch Ridge Road
 Raleigh, NC 27610

4. QUESTIONS AND CLARIFICATIONS

Any questions concerning this Request for Proposals should be submitted by email with a Subject line of “Proposal for Stream Mitigation Credits, French Broad River Basin, 006010105 hydrologic unit” to the Project Contact by the Question/Comment Period End Date and Time. All clarifications and any supplemental instructions will be posted on the NCDOT website at the following address <https://connect.ncdot.gov/resources/Environmental/pages/permits-and-mitigation.aspx>.

5. CREDIT PURCHASE SCHEDULE

Transportation projects in the 06010105 hydrologic unit of the French Broad River basin will result in approximately 12,500 linear feet (LF) of stream impacts.

NCDOT intends to purchase after released from mitigation bank(s) with an approved Mitigation Banking Instrument 22,000 cool stream credits, 3,000 cold stream credits with Geographic Service Areas (GSAs) that include the 06010105 hydrologic unit,

to offset unavoidable project impacts. The total number of credits must be purchased by June 2024 to meet the current project schedules.

6. TECHNICAL REQUIREMENTS

The following minimum requirements must be adhered to by Proposers:

- For this RFP, NCDOT will only consider credits that have been released by the USACE from the approved banking instrument or are anticipated to be released prior to December 31, 2023.
- Proposers must be the owner, sponsor, or duly authorized agent of the owner, of the mitigation bank from which the proposed credits originate.
- Proposers will be responsible for all maintenance, stewardship or other actions necessary to ensure compliance with the applicable mitigation banking instrument and associated environmental permits.

7. PROPOSAL CONTENTS

A Proposer may submit multiple bank sites in response to this Request for Proposals; however, **only one bank site may be included in each response to this Request for Proposals, thereby one stream type (cool, cold) for each submittal**. Each proposal shall contain the following documents:

- a. Exhibit A – Bid Schedule (**indicate type of credits offered as cool or cold**)
- b. Exhibit B - Bidder Certification and Non-Collusion Affidavit.
- c. Service area for the mitigation bank from which credits are proposed described by the River basin, 8 digit, and 12 digit hydrologic units.
- d. For released credits, the site credit ledger indicating the current quantity and type of released credits available and the applicable USACE credit release letter.
- e. For unreleased credits, the mitigation credit release schedule with quantities and type indicated along with the site approval date and MBI approval date, or anticipated dates and site prospectus.

Trade secrets or similar proprietary data which the Proposer does not wish disclosed to other than personnel involved in the evaluation or contract administration will be kept confidential to the extent permitted by 1 N.C.A.C. § 5B.1501 and G.S. § 132-1.2 if identified as follows: Each page shall be identified in boldface at the top and bottom as "CONFIDENTIAL". Any section of the proposal which is to remain confidential shall also be so marked in boldface on the title page of that section. Cost information may not be deemed confidential. In spite of what is labeled as confidential, the determination as to whether or not it is shall be determined by North Carolina law.

8. PROPOSAL EVALUATION AND DETERMINATION OF BEST VALUE PROPOSALS

The evaluation and determination of the successful proposers will be made by examining the best value of the credits offered across all proposals as outlined in this Section 8. The evaluation will be conducted by a Technical Review Committee comprised of at least three NCDOT representatives with support from other NCDOT staff.

The evaluation process will consist of the following steps:

1. Examine proposals for clerical errors, missing information, etc.;
2. Determine the responsiveness of all proposals;
3. Determine the Adjusted Unit Price per Credit for all credits in all responsive proposals;
4. Determine those unreleased credits with the lowest Adjusted Unit Price per Credit to an extent needed to satisfy a minimum of 20% of those credits solicited in Section 1 of this Request for Proposals;
5. Examine the remaining Adjusted Unit Price per Credit for all other remaining credits, (both released and unreleased) to determine the remaining balance of the best value credits; and
6. Publish results of best value credits determination.

Step 1: NCDOT staff will review the proposals for completeness, missing information, apparent clerical errors, and other such technicalities.

If a proposer lists multiple banks in the same proposal, then the NCDOT reserves the right to notify the proposer of such error and provide the proposer up to three business days to re-submit these bank sites as multiple responses to this Request for Proposals, provided the re-submittals do not contain any new sites that differ from those presented in the first submittal.

The NCDOT reserves the right to (1) waive any technicalities or clerical errors in any Proposal; (2) notify the proposer of any such error in their proposal and provide the proposer up to three business days to re-submit their proposal to rectify the error; or (3) request further information or clarification in regards to any proposals.

In the event a re-submission of a proposal occurs in accordance with the above NCDOT rights, the proposer will not be permitted to revise the Unit Price per Credit from those amounts presented in Exhibit A of the original submission, unless such revision is required to correct the clerical error.

Step 2: The Technical Review Committee will review the proposals (and any revised information submitted pursuant to Step 1 above) for responsiveness to the Request for Proposals.

In order to be deemed responsive, a proposal must propose the type of credits requested, propose credits to be available within the timeframe cited, and propose credits within the requested 8 digit hydrologic unit, as established in Section 5 of this Request for Proposals; provided, however, that a proposal that is in non-conformance with the Technical Requirements of Section 6 or does not contain all the information cited in Section 7 may be deemed non-responsive in the discretion of NCDOT.

If a proposal is found non-responsive, it will not be considered further.

Step 3: The Technical Review committee will evaluate all credits in all Proposals and determine the Adjusted Unit Price per Credit for each credit. The NCDOT will make a best value determination based on the lowest Adjusted Unit Price per Credit. Each Unit Price per Credit contained in Exhibit A of each proposal will be adjusted in accordance with the criteria set forth herein. This Adjusted Unit Price per Credit will solely be

used in the determination of the best value credits and does not represent the purchase price.

The NCDOT will make a determination of the best value credits regardless of the quantity of credits offered in a given proposal. If the quantity of credits offered in a successful proposal does not satisfy the quantity of credits solicited in this Request for Proposals, the NCDOT may also select the next best value credits from another proposal to further meet the quantity solicited herein and may extend the selection to as many of the next best value credits from other proposals as may be necessary to fully satisfy the quantity solicited

NCDOT will review all credits submitted in accordance with this Request for Proposals and make a determination of the best value credits based on the following evaluation criteria:

- Unit Price per Credit; and
- Credit Status and Maturity.
- In the event the Adjusted Unit Price per Credit is equal among multiple sites, then NCDOT will consider credits that have the closest proximity to impacts as more favorable than other equal credits.

Unit Price per Credit: For both released credits and unreleased credits, the Unit Price per Credit from Exhibit A will be used.

Credit Status and Maturity: Contracting for unreleased credits vis-à-vis released credits can create greater risk for the NCDOT project schedules. Furthermore, unreleased credits from a bank that does not have an approved Mitigation Banking Instrument (MBI) compounds that risk. Approval of the MBI, increasing maturity of the bank, and an earlier release schedule serves to mitigate that risk. In recognition of these risks, points will be assigned to credits in accordance with the tables below. For this evaluation criterion, each point will convert to a 1% *increase* in the Unit Price per Credit in the determination of the Adjusted Unit Price per Credit.

Credits from an approved site with an Approved Mitigation Banking Instrument by the Proposal Due date:

<u>Initial Credit Release by:</u>	<u>Adjustment</u>
▪ January 8, 2018	0 points

Credits from an unapproved site or without an Approved Mitigation Banking Instrument by Proposal Due date:

<u>Initial Credit Release by:</u>	<u>Adjustment</u>
▪ December 31, 2018	50 points
▪ December 31, 2019	100 points
▪ December 31, 2020	200 points

Proximity to impacts: This factor will only be considered if multiple sites have the same Adjusted Unit Price per Credit after consideration of credit status and maturity.

Step 4: In recognition of the varying maturity of mitigation banks across the state and the common interest to support the continued growth of private mitigation bank availability within the state, the NCDOT will contract for released credits in an amount no more than 80% of the total credits solicited herein. At least 20% of the credits contracted as a result of this procurement will be in the form of unreleased credits. In this step, the Technical Review Committee will therefore identify those unreleased credits with the lowest Adjusted Unit Price per Credit as calculated in Section 8, Step 3 until a minimum of 20% of the total credits solicited herein are fulfilled.

Step 5: The Adjusted Unit Price per Credit for all remaining credits (excluding those identified in Step 4 above), will be examined to identify the credits that will represent the best value credits, whether they be released or unreleased credits, to fulfill the remainder of the total credits solicited herein.

Step 6: The Unit Price per Credit and the Adjusted Unit Price per Credit of all proposers will be announced as part of the announcement of Successful Proposers.

9. TERMS OF AGREEMENT

Upon selection of Successful Proposer(s), NCDOT will enter into a formal binding contract with Successful Proposer(s). Such Agreement shall identify mutually agreeable schedules for delivery and purchase of the credits meeting the parameters outlined in paragraphs above and will be in substantially similar format and content as that contained in Exhibit C to this Request for Proposals. To be clear, NCDOT will not remit payment for any credits until the credits have been approved by the USACE in the form of released credits according to the terms of the associated MBI. In the event a bidder proposed credits, and is unable to deliver the credits for any reason in satisfaction of the Agreement, the bidder is entitled to no compensation.

If the Successful Proposer has indicated that the site from which the credits will be procured is part of an UMBI ("Umbrella Mitigation Banking Instrument"), then the Successful Proposer can use other sites under that UMBI to satisfy the Mitigation Credit Purchase Agreement, subject to the terms of the UMBI.

For this Agreement, the State requires a contract performance bond in the amount equal to the total purchase price of all released and unreleased credits. All bonds shall be in conformance with N.C.G.S. § 44A-33 and submitted at the time of execution of this Agreement. The corporate surety furnishing the bond shall be authorized to do business in the State.

In lieu of a performance bond, NCDOT may, in its sole discretion and without challenge, allow a Banker to provide security in a form acceptable to NCDOT in an amount equal to the purchase price of all released and unreleased credits identified in Section 1 of Exhibit C, Mitigation Credit Purchase Agreement. Examples of

such security include an irrevocable letter of credit, corporate or parent company guaranty, audit of accounting records and/or other means to prove the financial stability of the Banker. If the agreed form of security is a letter of credit, or corporate or parent company guaranty, the security shall not be terminable by the guarantor during the term of this Agreement without the consent of NCDOT. The security may be terminated with consent of the NCDOT so long as a new security instrument acceptable to NCDOT is in place.

A performance bond or other approved security shall remain in place until the last transfer of liability form has been signed by the U.S. Army Corps of Engineers for the applicable NCDOT permit for which the mitigation credits are to apply. In the event the mitigation credits apply to multiple NCDOT permits, then NCDOT, in its sole discretion, may consider partial release of a bond or security for the value of the mitigation credits included in a transfer of liability form signed by the U.S. Army Corps of Engineers for an applicable NCDOT permit.

Exhibit 'A', Bid Schedule

_____ (cold, cool) **Stream Credits within French Broad River Basin, 06010105**

Hydrologic Unit, North Carolina Bidders shall fill-in all blank spaces for each item offered for sale within each category. If a Bidder desires to offer credits from more than one mitigation site, then Bidder must complete a separate Proposal for each mitigation site.

Site Name: _____

12 digit hydrologic unit: _____

Contact Name: _____

Phone #: _____

Email: _____

Is this site part of an UMBI? (Yes or No): _____

Category 1:

Released Credits from an approved site with an approved Mitigation Banking Instrument as of the Proposal Due Date and offered for sale:

Number of credits offered: _____ Unit price per credit (\$ x.xx): _____

Category 2:

Unreleased Credits from an approved site with an approved Mitigation Banking Instrument as of the Proposal Due Date scheduled for future release and offered for sale (list by release date):

Scheduled Credit Release Date	Number of credits offered	Unit price per credit (\$ x.xx)
a. _____	_____	_____
b. _____	_____	_____
c. _____	_____	_____
d. _____	_____	_____
e. _____	_____	_____
f. _____	_____	_____
g. _____	_____	_____

Category 3:

Unreleased Credits from an unapproved site or without an approved Mitigation Banking Instrument as of the Proposal Due Date anticipated for future approval and offered for sale (list by anticipated release date):

Anticipated site approval date: _____ Anticipated MBI approval date: _____

Anticipated Credit Release Date	Number of credits offered	Unit price per credit (\$ x.xx)
a. _____	_____	_____
b. _____	_____	_____
c. _____	_____	_____
d. _____	_____	_____
e. _____	_____	_____
f. _____	_____	_____
g. _____	_____	_____

Exhibit B
BIDDER CERTIFICATION AND NON-COLLUSION AFFIDAVIT
(MUST BE COMPLETED AND RETURNED WITH BID)

STATE OF _____ COUNTY OF _____

The "Bidder" submits this certification in connection with NCDOT's Request for Proposal for Mitigation Credits, French Broad River Basin, 06010105 hydrologic unit, North Carolina

I (name) _____, deposes and says that:

He or She is (title) _____

Of (Bidder corporate name) _____

and that:

- (1) I am a principal or other authorized representative of the firm of said Bidder firm, and that I am authorized by said firm to execute this certification and accompanying Bid on behalf of said firm.
- (2) He or she is fully informed respecting the preparation and contents of the Bid for the project listed above and of all pertinent circumstances respecting such Bid; and
- (3) Having carefully examined the Request for Proposals, and with submission of a bid, I am in full agreement with the terms, conditions, specifications and requirements therein; and will execute a binding agreement containing such terms and conditions; and
- (4) Such Bid is genuine and neither the said Bidder nor any of its officers, partners, owners, agents, representatives, employees or parties in interest, including this Affiant, has in any way attempted to prevent competition with regard to submittal of the bid/proposal and the procurement of a contract for said Project; and
- (5) Neither the said Bidder nor any of its officers, partners, owners, agents, representatives, employees or parties in interest, including this Affiant, has in any way colluded, conspired, or agreed, directly or indirectly with any other firm or person to submit a collusive or sham Bid in connection with said Project.

By: _____

(Printed Name)

(Signature)

Subscribed and Sworn to before me this _____ day of _____, _____.

_____ My Commission Expires: _____

(Notary Public)

(SEAL)

EXHIBIT C

MITIGATION CREDIT PURCHASE AGREEMENT

PROJECT WORK ORDER: WBS/TIP/ORDER NUMBER

COUNTY:

STATE OF NORTH CAROLINA

N.C. DEPARTMENT OF TRANSPORTATION

AGREEMENT

THIS MITIGATION CREDIT SALES AGREEMENT (the “Agreement” or “Contract”) is hereby made between the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION (hereinafter referred to as “NCDOT” and/or “State”) and (NAME OF MITIGATION BANKER) (hereinafter referred to as the “BANKER” and/or “Vendor”).

WITNESSETH

WHEREAS, the NCDOT is engaging in (DESCRIBE PROJECT)(the “Project”), which activity will result in certain impacts to wetlands, streams and water quality;

WHEREAS, the NCDOT will obtain a Section 404 Permit (“404 Permit”) from the U.S. Army Corps of Engineers (USACE) and a Section 401 Water Quality Certification (“401 Certification”) from the N.C. Department of Environment Quality (NCDEQ);

WHEREAS, the Banker is (DESCRIBE BANKER – QUALIFIED/CERTIFIED BANKER UNDER USACE; OWNER OF CERTAIN MITIGATION BANKS; OTHER QUALIFYING INFORMATION);

WHEREAS, as a condition of 404 Permits and 401 Certifications, NCDOT is required to mitigate for unavoidable impacts and therefore NCDOT needs to purchase (# OF LINEAR FEET OF STREAM CREDITS; # OF ACRES OF WETLAND CREDIT; # OF SQUARE FEET OF BUFFER CREDIT; ANY OTHER CREDIT REQUIREMENTS) (collectively “Credits”); the BANKER owns and controls a portion or all of the credits needed by NCDOT; and,

WHEREAS, NCDOT desires to purchase and Banker desires to sell the Credits under the terms and conditions set forth herein.

Therefore, NCDOT and the BANKER do mutually agree as follows:

1. AGREEMENT TO PURCHASE.

A. Released Credits:

Banker agrees to sell, and NCDOT agrees to purchase (# of Released Credits at a cost of \$_____ per credit) for a total payment of \$_____ (“Purchase Price”) from (MITIGATION BANK) by [Date]; and

B. Unreleased Credits:

Provided the following currently unreleased credits are released by the Date(s) noted below:

Banker agrees to sell, and NCDOT agrees to purchase (# and type of Currently Unreleased Credits at a cost of \$_____ per credit) for a total payment of \$_____ (“Purchase Price”) from (MITIGATION BANK) by [Date XX-XX-XX]; and

Banker agrees to sell, and NCDOT agrees to purchase (# and type of Currently Unreleased Credits at a cost of \$_____ per credit) for a total payment of \$ _____ (“Purchase Price”) from (MITIGATION BANK) by [Date YY-YY-YY]; and

Banker agrees to sell, and NCDOT agrees to purchase (# and type of Currently Unreleased Credits at a cost of \$_____ per credit) for a total payment of \$_____ (“Purchase Price”) from (MITIGATION BANK) by [Date ZZ-ZZ-ZZ]; and

Nothing in this agreement obligates NCDOT to pay for unreleased credits until such time as the credits are approved and released as satisfactory mitigation credits for the applicable NCDOT project by the USACE and by the Date(s) noted above. The Banker shall bear the risk that the USACE may not approve unreleased credits for any reason by the Date(s) noted above. In the event the unreleased credits are not approved by the USACE by the Date(s) noted above, NCDOT has no obligation to pay for or accept the credits or pay the Banker any amount for work performed in pursuing the release of credits pursuant to this agreement.

1(a). OPTION TO PURCHASE ADDITIONAL CREDITS.

It is possible that NCDOT may need additional credits that have not already been satisfied by prior agreements to purchase credits, therefore, for the good and valuable consideration mentioned above, Banker further grants to NCDOT the right of first refusal and option to purchase additional Credits within two years from the Date of this Agreement (the “Option Provision”). The terms and provisions of the Option Provision shall be as follows:

a. During the term of this Option Provision, in the event the Banker possesses or obtains additional Released Credits that meet the requirements for mitigation credits needed for NCDOT projects, the Banker shall notify NCDOT and allow NCDOT the exclusive right of first refusal to purchase the additional credits at the prices stated in subsection (d) below. Banker shall allow NCDOT 15 days to exercise this option of first refusal. Banker shall not sell the additional credits to any other interested party during the time of NCDOT’s option of first

refusal. If during the time of first refusal NCDOT notifies Banker that it does not wish to exercise this option to purchase the additional credits or if after 15 days NCDOT does not respond to Banker's notification of additional available credits then the Banker may sell the credits to any other interested party. In any event, NCDOT is under no obligation to buy additional Credits and this Option Provision is contingent on the Banker having available additional Credits to sell.

b. The term of this Option Provision commences on the date of execution of this Agreement and terminates two years after the date of execution. NCDOT may, at its discretion and with the consent of the Banker, decide to renew this Option Provision for additional year(s).

c. The Banker shall provide additional Credits based on availability. Neither party guarantees the purchase or delivery of such Credits until NCDOT issues a Purchase Order to the Banker and the Banker confirms in writing the availability of the specific Credits (the "Statement of availability") to NCDOT.

d. In the event NCDOT desires to exercise its option to acquire additional Credits, the Credit price shall be mutually agreed upon by NCDOT and BANKER, but in no case shall exceed 15% above the applicable purchase price per credit detailed in Section 1 of this Agreement.

These prices are guaranteed for the term of this Agreement; including the period(s) of extension of the Option Provision of this Agreement as mutually agreed upon by NCDOT and BANKER. Any unit of NCDOT may purchase Credits under this Agreement.

2. DELIVERY BY BANKER AND TRANSFER OF CREDITS.

a. Banker Warranty. Banker represents and warrants that the Credit(s) to be sold to NCDOT are currently available and have been released by the applicable authorities, including, but not limited to the United States Army Corps of Engineers, Wilmington District. BANKER agrees to further maintain and monitor the bank site until the permitting agencies have determined that the necessary performance standards have been attained to satisfy the mitigation requirements for all applicable permits granted to NCDOT.

b. Delivery Date. Banker shall deliver the Credits to NCDOT no later than ten (10) days from the date of payment in full by NCDOT (the "Delivery Date").

c. Transfer of Credits. The delivery of the Credits to NCDOT shall be evidenced by the issuance of affidavits of credit sales and copies of the applicable bank credit ledgers (together, the "Affidavit") by the Banker within 10 days of payment. The credit ledgers are maintained by the Banker and periodically reviewed by the applicable resource agencies.

d. Disposition of Excess Credits. In the event NCDOT purchases an amount of Credits that are ultimately not needed for mitigation for NCDOT projects due to, but not limited to, reduction in environmental impacts, or cancellation or delay in project delivery; then NCDOT reserves the

right to sell to the Banker and the Banker reserves the right to buy the excess Credits back at the contracted unit price as allowed by applicable law.

3. BANKER'S RESPONSIBILITY.

The BANKER shall be fully and totally responsible for the sufficiency and accuracy of all credits transferred under this AGREEMENT and shall indemnify and save harmless NCDOT and shall be liable for any additional costs and all claims against NCDOT which may arise as a direct result of errors, omissions, or negligence of the BANKER, its agents, employees, and subcontractors in performing the transfer of credits required by this AGREEMENT.

4. COMPLIANCE WITH LAW.

The BANKER will remain independent and as such shall be wholly responsible for the work and to be responsible for compliance with all laws, ordinances, codes, rules, regulations, licensing requirements and other regulatory matters that are applicable to the conduct of his business and work performance under this AGREEMENT, including those of Federal, State, and local agencies having appropriate jurisdiction.

5. PERFORMANCE AND DEFAULT.

If, through any cause, Banker shall fail to fulfill in timely and proper manner the obligations under this contract, the State shall have the right to terminate this contract by giving written notice to the Banker and specifying the effective date thereof. In that event, all finished or unfinished deliverable items under this contract prepared by the Banker shall, at the option of the State, become its property, and the Banker shall be entitled to receive just and equitable compensation for any acceptable work completed on such materials. Notwithstanding, Banker shall not be relieved of liability to the State for damages sustained by the State by virtue of any breach of this contract, and the State may withhold any payment due the Banker for the purpose of setoff until such time as the exact amount of damages due the State from such breach can be determined. The State reserves the right to require at any time a performance bond or other acceptable alternative performance guarantees from a Banker without expense to the State.

In case of default by the Banker, the State may perform the necessary work to complete performance hereunder with its own forces, or procure performance from other sources, and hold the Banker responsible for any excess cost occasioned thereby. In addition, in the event of default by the Banker under this contract, or upon the Banker filing a petition for bankruptcy or the entering of a judgment of bankruptcy by or against the Banker, the State may immediately cease doing business with the Banker, immediately terminate this contract for cause, and may act to debar the Banker from doing future business with the State.

5(a). BOND AND SECURITY:

For this Agreement, the State requires a contract performance bond in the amount equal to the total purchase price of all released and unreleased credits. All bonds shall be in conformance

with N.C.G.S. § 44A-33 and submitted at the time of execution of this Agreement. The corporate surety furnishing the bond shall be authorized to do business in the State.

In lieu of a performance bond, NCDOT may, in its sole discretion and without challenge, allow a Banker to provide security in a form acceptable to NCDOT in an amount equal to the purchase price of all released and unreleased credits identified in Section 1 above. Examples of such security include an irrevocable letter of credit, corporate or parent company guaranty, audit of accounting records and/or other means to prove the financial stability of the Banker. If the agreed form of security is a letter of credit, or corporate or parent company guaranty, the security shall not be terminable by the guarantor during the term of this Agreement without the consent of NCDOT. The security may be terminated with consent of the NCDOT so long as a new security instrument acceptable to NCDOT is in place.

A performance bond or other approved security shall remain in place until the last transfer of liability form has been signed by the U.S. Army Corps of Engineers for the applicable NCDOT permit for which the mitigation credits are to apply. In the event the mitigation credits apply to multiple NCDOT permits, then NCDOT, in its sole discretion, may consider partial release of a bond or security for the value of the mitigation credits included in a transfer of liability form signed by the U.S. Army Corps of Engineers for an applicable NCDOT permit.

6. GOVERNMENTAL RESTRICTIONS.

In the event any Governmental restrictions are imposed which necessitate alteration of the material, quality, workmanship or performance of the goods or services offered prior to their delivery, it shall be the responsibility of the Banker to notify, in writing, the Contract Lead at once, indicating the specific regulation which required such alterations. The State reserves the right to accept any such alterations, including any price adjustments occasioned thereby, or to cancel the Contract.

7. AVAILABILITY OF FUNDS.

General Statute § 143C-6-11. (h) Highway Appropriation is hereby incorporated verbatim in this contract as follows:

“(h) Amounts Encumbered – Transportation project appropriations may be encumbered in the amount of allotments made to the Department of Transportation by the Director for the estimated payments for transportation project contract work to be performed in the appropriation fiscal year. The allotments shall be multiyear allotments and shall be based on estimated revenues and shall be subject to the maximum contract authority contained in General Statute § 143C-6-11(c). Payment for transportation project work performed pursuant to contract in any fiscal year other than the current fiscal year is subject to appropriations by the General Assembly. Transportation project contracts shall contain a schedule of estimated completion progress, and any acceleration of this progress shall be subject to the approval of the Department of Transportation provided funds are available. The State reserves the right to terminate or suspend any transportation project contract, and any transportation project contract shall be so terminated or suspended if funds will not be available for payment of the work to be performed during that fiscal year pursuant to the contract. In the event of termination of any contract, the contractor shall be given

a written notice of termination at least 60 days before completion of scheduled work for which funds are available. In the event of termination, the contractor shall be paid for the work already performed in accordance with the contract specifications.”

8. TAXES.

Any applicable taxes shall be invoiced as a separate item.

- a) G.S. § 143-59.1 bars the Secretary of Administration from entering into Contracts with Vendors if the Vendor or its affiliates meet one of the conditions of G.S. 105-164.8(b) and refuses to collect use tax on sales of tangible personal property to purchasers in North Carolina. Conditions under G.S. 105-164.8(b) include: (1) Maintenance of a retail establishment or office, (2) Presence of representatives in the State that solicit sales or transact business on behalf of the Vendor and (3) Systematic exploitation of the market by media-assisted, media-facilitated, or media-solicited means. By execution of the proposal document the Vendor certifies that it and all of its affiliates, (if it has affiliates), collect(s) the appropriate taxes.
- b) All agencies participating in this Contract are exempt from Federal Taxes, such as excise and transportation. Exemption forms submitted by the Vendor will be executed and returned by the using agency.
- c) Prices offered are not to include any personal property taxes, nor any sales or use tax (or fees) unless required by the North Carolina Department of Revenue.

9. SITUS.

The place of this Contract, its situs and forum, shall be North Carolina, where all matters, whether sounding in Contract or tort, relating to its validity, construction, interpretation and enforcement shall be determined.

10. GOVERNING LAWS.

This Contract is made under and shall be governed, construed and enforced in accordance with the laws of the State of North Carolina, without regard to its conflict of laws rules.

11. AFFIRMATIVE ACTION.

The Vendor will take affirmative action in complying with all Federal and State requirements concerning fair employment and employment of people with disabilities, and concerning the treatment of all employees without regard to discrimination by reason of race, color, religion, sex, national origin or disability.

12. INTELLECTUAL PROPERTY INDEMNITY.

Vendor shall hold and save the State, its officers, agents and employees, harmless from liability of any kind, including costs and expenses, resulting from infringement of the rights of any third

party in any copyrighted material, patented or unpatented invention, articles, device or appliance delivered in connection with this contract.

13. ADVERTISING.

Vendor agrees not to use the existence of this Contract or the name of the State of North Carolina as part of any commercial advertising or marketing of products or services. A Vendor may inquire whether the State is willing to act as a reference by providing factual information directly to other prospective customers.

14. ACCESS TO PERSONS AND RECORDS.

During and after the term hereof, the State Auditor and any using agency's internal auditors shall have access to persons and records related to this Contract to verify accounts and data affecting fees or performance under the Contract, as provided in G.S. § 143-49(9).

15. ASSIGNMENT.

No assignment of the Vendor's obligations or the Vendor's right to receive payment hereunder shall be permitted.

However, upon written request approved by the issuing purchasing authority and solely as a convenience to the Vendor, the State may:

- a. Forward the Vendor's payment check directly to any person or entity designated by the Vendor, and
- b. Include any person or entity designated by Vendor as a joint payee on the Vendor's payment check.

In no event shall such approval and action obligate the State to anyone other than the Vendor and the Vendor shall remain responsible for fulfillment of all Contract obligations. Upon advance written request, the State may, in its unfettered discretion, approve an assignment to the surviving entity of a merger, acquisition or corporate reorganization, if made as part of the transfer of all or substantially all of the Vendor's assets. Any purported assignment made in violation of this provision shall be void and a material breach of this Contract.

16. INSURANCE.

COVERAGE - During the term of the Contract, the Vendor at its sole cost and expense shall provide commercial insurance of such type and with such terms and limits as may be reasonably associated with the Contract. As a minimum, the Vendor shall provide and maintain the following coverage and limits:

- a. **Worker's Compensation** - The Vendor shall provide and maintain Worker's Compensation Insurance, as required by the laws of North Carolina, as well as employer's liability coverage with minimum limits of \$500,000.00, covering all of Vendor's employees who are engaged in any work under the Contract. If any work is sub-contracted, the Vendor shall require the sub-Contractor to provide the same coverage for any of his employees engaged in any work under the Contract.

- b. Commercial General Liability - General Liability Coverage on a Comprehensive Broad Form on an occurrence basis in the minimum amount of \$1,000,000.00 Combined Single Limit. (Defense cost shall be in excess of the limit of liability.)
- c. Automobile - Automobile Liability Insurance, to include liability coverage, covering all owned, hired and non-owned vehicles, used in connection with the Contract. The minimum combined single limit shall be \$250,000.00 bodily injury and property damage; \$250,000.00 uninsured/under insured motorist; and \$2,500.00 medical payment.

REQUIREMENTS - Providing and maintaining adequate insurance coverage is a material obligation of the Vendor and is of the essence of this Contract. All such insurance shall meet all laws of the State of North Carolina. Such insurance coverage shall be obtained from companies that are authorized to provide such coverage and that are authorized by the Commissioner of Insurance to do business in North Carolina. The Vendor shall at all times comply with the terms of such insurance policies, and all requirements of the insurer under any such insurance policies, except as they may conflict with existing North Carolina laws or this Contract. The limits of coverage under each insurance policy maintained by the Vendor shall not be interpreted as limiting the Vendor's liability and obligations under the Contract.

17. GENERAL INDEMNITY.

The Vendor shall hold and save the State, its officers, agents, and employees, harmless from liability of any kind, including all claims and losses accruing or resulting to any other person, firm, or corporation furnishing or supplying work, services, materials, or supplies in connection with the performance of this Contract, and from any and all claims and losses accruing or resulting to any person, firm, or corporation that may be injured or damaged by the Vendor in the performance of this Contract and that are attributable to the negligence or intentionally tortious acts of the Vendor provided that the Vendor is notified in writing within 30 days that the State has knowledge of such claims. The Vendor represents and warrants that it shall make no claim of any kind or nature against the State's agents who are involved in the delivery or processing of Vendor goods or services to the State. The representation and warranty in the preceding sentence shall survive the termination or expiration of this Contract.

18. INDEPENDENT CONTRACTOR.

Vendor shall be considered to be an independent contractor and as such shall be wholly responsible for the work to be performed and for the supervision of its employees. Vendor represents that it has, or will secure at its own expense, all personnel required in performing the services under this contract. Such employees shall not be employees of, or have any individual contractual relationship with the State.

19. KEY PERSONNEL.

Vendor shall not substitute key personnel assigned to the performance of this contract without prior written approval by the State's assigned Contract Lead. The individuals designated as key

personnel for purposes of this contract are those specified in the RFP and persons identified in Vendor's proposal.

20. SUBCONTRACTING.

Work proposed to be performed after execution of this contract by the Vendor or its employees shall not be subcontracted without prior written approval of the State's assigned Contract Administrator.

21. TERMINATION FOR CONVENIENCE.

The State may terminate this contract at any time by providing 90 days' notice in writing from the State to the Vendor. In that event, all finished or unfinished deliverable items prepared by the Vendor under this contract shall, at the option of the State, become its property. If the contract is terminated by the State as provided in this section, the State shall pay for items and services satisfactorily completed by the Vendor, less any payment or compensation previously made.

22. CARE OF PROPERTY.

The Vendor agrees that it shall be responsible for the proper custody and care of any property furnished it by the State for use in connection with the performance of this contract or purchased by or for the State for this contract, and Vendor will reimburse the State for loss or damage of such property while in Vendor's custody.

23. ENTIRE AGREEMENT.

The RFP and any documents incorporated specifically by reference represent the entire agreement between the parties and supersede all prior oral or written statements or agreements. The RFP, any addenda thereto, and the Vendor's proposal are incorporated herein by reference as though set forth verbatim.

All promises, requirements, terms, conditions, provisions, representations, guarantees, and warranties contained herein shall survive the contract expiration or termination date unless specifically provided otherwise herein, or unless superseded by applicable Federal or State statutes of limitation.

24. AMENDMENTS.

This contract may be amended only by a written amendment duly executed by the State and the Vendor. The NC Division of Purchase and Contract shall give prior approval to any amendment to a contract awarded through that office.

25. WAIVER.

The failure to enforce or the waiver by the State of any right or an event of breach or default on one occasion or instance shall not constitute the waiver of such right, breach or default on any subsequent occasion or instance.

26. FORCE MAJEURE.

Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations as a result of events beyond its reasonable control, including without limitation, fire, power failures, any act of war, hostile foreign action, nuclear explosion, riot, strikes or failures or refusals to perform under subcontracts, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

27. SOVEREIGN IMMUNITY.

Notwithstanding any other term or provision in this contract, nothing herein is intended nor shall be interpreted as waiving any claim or defense based on the principle of sovereign immunity that otherwise would be available to the State under applicable law.

31. GIFTS AND FAVORS.

By Executive Order 24, issued by Governor Perdue, and N.C.G.S. § 133-32, it is unlawful for any vendor or contractor (i.e. architect, bidder, contractor, construction manager, design professional, engineer, landlord, offeror, seller, subcontractor, supplier, or vendor), to make gifts or to give favors to any State employee of the Governor’s Cabinet Agencies (i.e., Administration, Commerce, Correction, Crime Control and Public Safety, Cultural Resources, Environment and Natural Resources, Health and Human Services, Juvenile Justice and Delinquency Prevention, Revenue, Transportation, and the Office of the Governor). This prohibition covers those vendors and contractors who:

- (1) have a contract with a governmental agency; or
- (2) have performed under such a contract within the past year; or
- (3) anticipate bidding on such a contract in the future.

For additional information regarding the specific requirements and exemptions, vendors and contractors are encouraged to review Executive Order 24 and G.S. Sec. 133-32.

Executive Order 24 also encouraged and invited other State Agencies to implement the requirements and prohibitions of the Executive Order to their agencies. Vendors and contractors should contact other State Agencies to determine if those agencies have adopted Executive Order 24.

32. CERTIFICATION OF ELIGIBILITY UNDER THE IRAN DIVESTMENT ACT.

As a result of the Iran Divestment Act of 2015 (Act), Article 6E, N.C. General Statute § 147-86.55, the State Treasurer published the Final Divestment List (List) which includes the Final Divestment List-Iran, and the Parent and Subsidiary Guidance-Iran. These lists identify companies and persons engaged in investment activities in Iran and will be updated every 180

days. The List can be found at <https://www.nctreasurer.com/inside-thedepartment/OpenGovernment/Pages/Iran-Divestment-Act-Resources.aspx>

By submitting the proposal, the Banker certifies that, as of the date of this bid, it is not on the then-current List created by the State Treasurer. The Banker must notify the Department immediately if, at any time before the award of the contract, it is added to the List.

As an ongoing obligation, the Banker must notify the Department immediately if, at any time during the contract term, it is added to the List. Consistent with § 147-86.59, the Banker shall not contract with any person to perform a part of the work if, at the time the subcontract is signed, that person is on the then-current List.

During the term of the agreement, should the Department receive information that a person is in violation of the Act as stated above, the Department will offer the person an opportunity to respond and the Department will take action as appropriate and provided for by law, rule, or contract.

33. MISCELLANEOUS.

a. The benefits and obligations of the covenants herein shall inure to the benefit of and bind the respective heirs, executors, administrators, successors and assigns of the parties hereto.

b. This Agreement shall impose no lien, charge or encumbrance upon any property.

c. The effective date of this Agreement shall be the day upon which the last of the parties hereto shall have executed this Agreement.

d. This Agreement shall be interpreted as drafted by both parties hereto equally, and no rule of strict construction shall be applied against any party.

e. Nothing herein contained shall create or be construed as creating a partnership between NCDOT and the Banker or to constitute the Banker as an agent of NCDOT.

f. If any portion of this Agreement is held to be void, invalid, or otherwise unenforceable, in whole or in part, the remaining portion of this Agreement shall remain in effect.

36. NOTICES

All notices from NCDOT to the Banker shall be deemed duly served if mailed to Banker at the following Address:

Insert Name and Address

All Notices from the Banker to NCDOT shall be deemed duly served if mailed to the NCDOT at the following Address:

Insert Name and Address

IN TESTIMONY WHEREOF, the parties hereto have caused these presents to be executed by their proper officials thereunto duly authorized as of the dates below indicated:

EXECUTED by NCDOT this _____ day of _____, _____.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By: _____

RECOMMENDED FOR APPROVAL:

By: _____

EXECUTED BY the BANKER this _____ of _____, _____.

SEAL:

FIRM NAME: _____

By: _____

Title: _____

Attests By: _____

Title: _____

Approved by Secretary of Transportation _____

CERTIFICATION OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

I hereby certify that I am the Director of the Technical Services Division of the Department of Transportation of the State of North Carolina, and that the above BANKER or his representative has not been required, directly or indirectly as an expressed or implied condition in connection with obtaining or carrying out this AGREEMENT to:

- (a) employ or retain, or agree to employ or retain, any firm or person, or
- (b) pay, or agree to pay, to any firm, person, or organization, any fee, contribution, donation, or consideration of any kind;

except as here expressly stated (if any):

I acknowledge that this certificate is to be furnished to the North Carolina Department of Transportation and the Federal Highway Administration, U. S. Department of Transportation, in connection with this AGREEMENT involving participation of Federal-Aid highway funds, and is subject to applicable state and federal laws; both criminal and civil.

N.C.G.S. § 133-32 and Executive Order 24 prohibit the offer to, or acceptance by, any State Employee of any gift from anyone with a contract with the State, or from any person seeking to do business with the State. By execution of any response in this procurement, you attest, for your entire organization and its employees or agents, that you are not aware that any such gift has been offered, accepted, or promised by any employees of your organization.

(Date)

Rodger Rochelle, PE
Director of Technical Services

CERTIFICATION OF BANKER

_____, being duly sworn, certify that I am the _____ and duly authorized representative of _____ whose address is _____ and that neither I nor the above firm I represent or any of its principals:

- (a) has employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me or the above firm) to solicit or secure this agreement;
- (b) has agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the agreement, or
- (c) has paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the above firm) any fee, contribution, donation, or consideration of any kind for, or in connection with procuring or carrying out the agreement;
- (d) is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- (e) has within a three-year period preceding this agreement been convicted of or had a civil judgement rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records; making false statements; or receiving stolen property;
- (f) is presently indicted for or otherwise criminally or civilly charged by governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph e. of this certification; and
- (g) has within a three-year period preceding this agreement had one or more public transactions (Federal, State or local) terminated for cause or default.

except as here expressly stated (if any):

I acknowledge that this certification is executed according to EXHIBIT A, which is also a part of this agreement, and that if future certifications are required of subconsultants and suppliers, under US DOT Order 4200.5E and 2 CFR Part 180, I shall obtain them.

I acknowledge that this certificate is to be furnished to the North Carolina Department of Transportation and the Federal Highway Administration, U. S. Department of Transportation, in connection with this agreement and is subject to applicable State and Federal laws, both criminal and civil.

(Date)

(Signature)

Subscribed and sworn to before me this the _____ day of _____, _____.

Notary

My Commission Expires: _____

EXHIBIT A

Certification Regarding Debarment,

Suspension, and Other Responsibility

Matters – Primary Covered Transactions

Instructions for Certification

1. By signing and submitting this AGREEMENT, the prospective primary participant is providing the certification set out below.
2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit a explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.
3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.
4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this AGREEMENT is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "agreement," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this agreement is being submitted for assistance in obtaining a copy of those regulations.
6. The prospective primary participant agrees by submitting this AGREEMENT that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.
7. The prospective primary participant further agrees by submitting this AGREEMENT that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
10. Except for transactions authorized under paragraph 6 of these instruction, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.