



**Mid-Currituck Bridge Project (STIP R-2576)  
REQUEST FOR PROPOSALS**

**To Engineer, Develop, Design, and Potentially Build, Finance,  
Operate, and Maintain the Mid-Currituck Bridge Project through a  
Pre-Development Agreement**

Proposed new 7-mile bridge over Currituck Sound connecting Currituck County mainland at US 158 near Aydlett and NC 12 on the Currituck County Outer Banks south of Corolla

State Transportation Improvement Program (STIP) Project No. R-2576.

**Issued September 29, 2008  
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Exhibits:

- Exhibit A     Definitions
- Exhibit B     Draft Pre-Development Agreement
- Exhibit C     PDA Task Chart
- Exhibit D     Explanation of Forms G and H

## **1. GENERAL SOLICITATION INFORMATION**

### **1.1 Overview of Solicitation**

This Request for Proposals (“RFP”) is issued by the North Carolina Turnpike Authority (“NCTA”), an agency of the State of North Carolina (“State”), to solicit competitive detailed proposals (individually, a “Proposal” and collectively, “Proposals”) from pre-approved proposers (individually a “Proposer” and collectively “Proposers”) for a public-private partnership to be evidenced initially by a Pre-Development Agreement (“PDA”). The PDA shall provide the framework for the successful Proposer under this RFP (the “Developer”) to collaborate with NCTA for the engineering, environmental, geotechnical, design and pre-development services for the Mid-Currituck Bridge Project (the “Project”). Exhibit A contains the meaning of certain terms used in this RFP.

The Services contemplated under this RFP are expected to be undertaken in two primary phases, each of which will be governed by a separate agreement. The initial phase is referred to herein as the “Pre-Development Phase” and the second phase (if the Project proceeds) is referred to herein as the “Concession Period”.

The Pre-Development Phase will be governed by the PDA. A framework for the Pre-Development Agreement is included as Exhibit B. This framework will be adjusted to incorporate the essential terms of the selected Proposal as agreed to by NCTA and negotiated provisions within the discretion of NCTA, as described more particularly in this RFP. The PDA will also govern the terms regarding any compensation to Developer during the Pre-Development Phase, including the risk of non-reimbursement. The compensation provisions will be based on the terms proposed by the Proposer (see Section 3.3.4) and agreed to by NCTA, and will be subject to negotiation (See Section 5).

The Concession Period will be governed by a Concession Agreement to be negotiated with the Developer, pursuant to the terms set forth in the PDA.

NCTA is issuing this RFP to the Short-Listed Proposers based on NCTA's evaluation of Statements of Qualifications ("SOQs") delivered to NCTA on June 30, 2008 in response to the Request for Qualifications for the Project originally issued on June 2, 2008 (the "RFQ").

## **1.2 Background Information**

NCTA has retained the following consultants to assist in developing and implementing the environmental process, procurement and PDA:

- HNTB – General Engineering Consultant
- Public Financial Management, Inc. - Financial Advisors
- PB Americas, Inc. – NEPA Studies Consultant
- PBS&J – Toll Technology Consultant
- Wilbur Smith Associates – Traffic and Revenue Consultant
- Carolina Land Acquisition – Right of Way Agents
- Nossaman LLP – Special Counsel
- Perkins Coie – NEPA Counsel

These firms may not participate on a Proposer (or Developer) team in response to this RFP. Additional subconsultants may be contracted directly under each prime firm listed above. See Section 2.5 (Organizational Conflicts of Interest).

NCTA has not determined whether it will be able to contribute any funds during the Pre-Development Phase. However, NCTA is seeking a Proposer willing to invest private resources and is seeking to obtain the maximum leverage of these funds to advance the Project to construction as rapidly as possible.

### **1.3 Project Description and Approach**

The proposed Project contemplates improvements between US 158 near Barco and NC 12 near Corolla in Currituck County, North Carolina. The Project includes construction of a bridge over Maple Swamp and Currituck Sound, an interchange and toll collection facilities at US 158 on the Currituck County mainland, and an intersection with NC 12 on the Currituck County Outer Banks. Improvements on NC 12 south of the bridge terminus for a distance of 2 to 4 miles to ensure efficient bridge operations are anticipated. In addition, improvements on US 158 for emergency evacuation may be required.

NCTA determined that a public-private partnership approach has the potential to accelerate cost-effective delivery and promote an innovative approach to carrying out the Project. This procurement and any resulting agreements will not establish, and shall not be construed as, a legal partnership between NCTA and Developer.

The Proposer may obtain additional information regarding the Project on the Website and as described in Section 2.3.

### **1.4 Key NCTA Expectations and Scope of Work For Developer**

#### **1.4.1 General**

NCTA expects that the successful Proposer will be able to perform the following functions in conjunction with NCTA to progress the Project:

- assist NCTA in the Pre-Development Phase with the Services and functions described in this RFP and the PDA;
- develop financing and implementation plans that speed Project delivery, employ innovative financing and deploy the most cost-effective Project delivery methods, which include life-cycle considerations and innovative approaches;
- design a viable technical solution and an agreed upon quality product on an agreed upon schedule;

- assist in developing and implementing successful strategies for informing the public and building consensus on how to address issues regarding the Project, its alternatives, and its potential impacts;
- potentially provide construction, financing, and operations and maintenance services as described in the Concession Agreement to be negotiated during the Pre-Development Phase as described in Section 1.5;
- provide certain Services under the PDA at Developer's cost; and
- assume certain risks during the Pre-Development Phase.

These functions will be fully evaluated during the course of this solicitation, through the application of the evaluation criteria described in Section 4. An indicative chart of the major activities during the Pre-Development Phase is attached as Exhibit C.

#### **1.4.2 Design Expectations**

During the Pre-Development Phase, NCTA expects Developer to develop designs in accordance with FHWA, AASHTO, and NCDOT standards, specifications and guidelines. NCTA will provide Developer with any required design and performance specifications. Within that framework, Developer is encouraged to use innovative approaches to developing a viable technical solution while minimizing construction costs, maintenance costs, and environmental impacts. While design exceptions are discouraged, Developer may utilize unique and innovative approaches to design and construction. Any exceptions to the FHWA and NCDOT standards must be approved by NCTA prior to implementation. At the end of the Pre-Development Phase NCTA expects Developer to have provided a design package including the following key elements:

- Design criteria for each major feature of the Project;
- Design concepts with key elements noted;
- Preliminary horizontal and vertical alignments of all roadway elements;



- Typical sections for the mainline and intersecting routes to the Project;
- Preliminary drainage designs, including tidal and storm-surge scour studies and multi-dimensional hydraulic analysis;
- Details of the bridge to be constructed, including any special design features or construction techniques needed;
- Description of any deviations or proposed design exceptions from the FHWA and NCDOT design standards;
- Identification of any retaining walls and /or noise walls; and
- Identification of environmental impacts.

In addition to including those design elements required by FHWA, AASHTO, NCTA, and/or NCDOT (as dictated by existing policies and procedures), Developer shall also evaluate and incorporate, as appropriate, the following:

#### **1.4.2.1 Aesthetic Treatments**

The design and construction of the Project shall include aesthetic treatments to roadway, bridge and other elements in a cost effective and maintenance conscious manner.

#### **1.4.2.2 Green Construction Requirements**

(a) Stormwater containment and treatment, including bridge stormwater. It is anticipated that a stormwater control system will be developed to ensure that stormwater from the Mid-Currituck Bridge is controlled and treated in some form prior to discharge. This system will be developed to comply with NCTA's State statewide NPDES permit (Permit No. NCS000523) and conditions established during project development by NC Department of Environment and Natural Resources, Division of Water Quality and Division of Coastal Management. In addition to regulatory requirements, NCTA is seeking innovative, cost effective measures to facilitate this treatment. It is expected that the "first flush" of rainwater, considered to contain the

majority of pollutants, be captured and treated in some manner. Additionally, stormwater treatments for the non-bridge elements of the Project shall be provided. Low maintenance rain gardens and similar treatments shall also be considered.

(b) Elimination of any offsite requirement for wasting of material. NCTA's goal is to create a "waste free" Project that facilitates the incorporation of any waste materials – either natural or man made – into the Project.

(c) Use of recycled materials. It is the goal of NCTA to incorporate, as much as reasonably possible, recycled materials into the construction of the Project.

(d) Permeable pavements in parking and/or sidewalk locations. Developer should consider permeable pavements in any reasonable applications.

#### **1.4.2.3 Context Sensitive Solutions**

(a) Bicycle and pedestrian accommodations across the bridge. It is the goal of NCTA to provide dedicated bike path and/or walkway opportunities on the Project, including across the Mid-Currituck Bridge. Typical sections developed by NCTA during preliminary engineering assume a 10-foot shoulder and bicycle-safe bridge rail to accommodate bicycle and pedestrian use; however, NCTA expects Developer to investigate other possible cost-effective, context-sensitive concepts as part of the PDA process.

(b) Lighting on the Mid-Currituck Bridge. Developer's plans should include consideration of cost-effective, aesthetically pleasing light elements on the Mid-Currituck Bridge for user safety, with consideration of any wildlife migration patterns that may be affected by lighting. Solar power or other "non-carbon producing" energy sources should be considered.

#### **1.4.2.4 Long Term Performance Monitoring Systems**

Developer is expected to consider long term bridge performance monitoring systems for the Mid-Currituck Bridge, including constant monitoring devices

that incorporate disaster monitoring, gauges to measure stresses and strains in the bridge structure, and displacement monitoring.

### **1.4.3 NEPA**

During the Pre-Development Phase, Developer will support NCTA in conducting analyses, as requested, to assist with addressing issues that arise during the environmental study process, including, but not limited to, environmental analyses; engineering, traffic, or other technical studies; financial feasibility and public involvement services. This work may be directly related to the Project, as well as other alternatives under study. NCTA and FHWA will retain control and responsibility for the NEPA process.

### **1.4.4 Environmental Mitigation**

During the Pre-Development Phase, NCTA intends to use the NC Ecosystem Enhancement Program's (EEP) In-Lieu Fee Program to fulfill compensatory mitigation requirements for wetland and stream impacts as required by the USACE and the NCDENR. Developer will need to determine any additional on-site mitigation requirements for wetland and/or stream impacts, as well as mitigation for impacts to submerged aquatic vegetation (SAV) and SAV habitat (waters in Currituck Sound less than 6 feet deep). Developer will be responsible for developing and ultimately implementing and monitoring mitigation plans consistent with all permit conditions.

Developer will work with NCTA during the Pre-Development Phase to investigate innovative mitigation opportunities and onsite mitigation options, and to develop mitigation and monitoring plans.

Additionally, NCTA is interested in potential opportunities for preservation in the Maple Swamp ecosystem, and expects that Developer will assist in evaluating and identifying potential areas for preservation and conservation, management partners, and available funding opportunities.

Finally, as noted above, NCTA anticipates that mitigation for impacts to SAV and/or SAV habitat will be required for the Project. This has not typically been done in North Carolina, and NCTA is expecting Developer to evaluate mitigation options that will satisfy agency requirements.

## **1.4.5 Regulatory Approvals**

During the Pre-Development Phase, Developer will be responsible for preparing all permit applications, design drawings and other related materials to be used in obtaining all Regulatory Approvals, other than NEPA approvals, necessary to implement the Project. Regulatory Approvals are expected to include: US Army Corps of Engineers (USACE) Section 404 Individual Permit; US Coast Guard Bridge Permit (USCG); NC Department of Environment and Natural Resources (NCDENR), Division of Water Quality Section 401 Water Quality Certification; and NCDENR, Division of Coastal Management Coastal Area Management Act (CAMA) Permit.

### **1.4.5.1 Section 404 Individual Permit/Section 401 Water Quality Certification**

Developer shall prepare permit applications for the Section 404 Individual Permit and Section 401 Water Quality Certification during the Pre-Development Phase and concurrent with the completion of the NEPA process. NCTA will submit the completed applications to the appropriate regulatory agencies immediately upon receipt of FHWA's Record of Decision. Coordination with the environmental agencies regarding all permitting aspects will be part of the Project development process during NEPA and through the permitting phases of the Project.

### **1.4.5.2 USCG Bridge Permit**

NCTA is currently assuming that a navigation span consistent with the existing Wright Memorial Bridge will be required for the Project by USCG, including 35-foot vertical clearance. However, USCG has indicated that there may be an opportunity to refine, and possibly reduce, this requirement during the permitting period through a public notice process. Developer will be responsible for coordinating with USCG and for obtaining the USCG Bridge Permit.

### **1.4.5.3 CAMA Permit**

The Project will require a major CAMA Permit, and Developer will prepare the applications needed to obtain this approval.

#### **1.4.5.4 Other Regulatory Approvals**

Developer will also be required to obtain any additional permits or approvals as identified during the project development process.

#### **1.4.6 Geotechnical**

During the Pre-Development Phase, Developer shall be responsible for scoping and executing all the geotechnical and design investigation activities that it determines are required to achieve its obligations and applicable deadlines under the PDA. At a minimum, these activities should include:

- foundations, to include, without limitation, structures, sound barriers, toll gantries, overhead signs, signals and toll facility buildings
- roadway embankments and cut sections to include slope stability and settlement calculations
- retaining walls
- temporary structures
- temporary or permanent shoring

Developer shall perform subsurface investigations, laboratory testing and pile load testing as deemed necessary to accurately substantiate the design and costing plans at a level sufficient to support execution of the Concession Agreement and timely achieve financial close.

Developer shall perform subsurface investigations and laboratory testing in accordance with the *NCDOT Geotechnical Unit Guidelines and Procedures Manual*.

Developer shall establish and submit for NCTA's acceptance a pre-design pile load testing program that shall be conducted in conjunction with the bridge foundation design.

Developer shall provide all data obtained from the above testing to NCTA in a format that is consistent with NCDOT procedures.

Developer shall be responsible for preparing all applications for, and obtaining all permits (as allowable by law and/or by applicable agency policy) necessary for such subsurface investigation and pile load testing.

#### **1.4.7 Right of Way**

During the Pre-Development Phase, Developer is expected to provide right of way services necessary to ensure that all the required acquisitions for the Project right of way can commence in a reasonable period of time after execution of the Concession Agreement and as required to maintain the Project schedule. In doing so, Developer shall identify all required Project right of way to be acquired, the legal description of each such parcel, the name and contact information of the owner of each such parcel, and the market value of each such parcel. All right of way acquisition will be performed in accordance with FHWA guidelines and the Uniform Act.

It shall be the responsibility of Developer to develop estimates for the cost of right of way acquisition to be incorporated in the financial plan. It is the expectation of NCTA that upon execution of the Concession Agreement, Developer will perform all services necessary for the acquisition of right of way for Project development. NCTA will exercise its condemnation authority, as needed.

#### **1.4.8 Utility Services**

During the Pre-Development Phase, Developer shall perform advanced utility coordination efforts with affected utility owners, as necessary, to design, cost and ultimately construct the Project in a timely and efficient manner. This scope of work governs all utilities known and unknown that may be encountered during design and construction of the Project. Developer shall be responsible for confirming the utility locations, confirming the type of facilities, identifying the utility owners and determining the cost responsibilities in order to coordinate the relocation of any utilities in conflict with the Project. Developer shall provide a utility relocation plan for the Project during the Pre-Development Phase, as described in Exhibit B, and shall include the anticipated costs of utility relocations in the financial plan..

For Proposers' information, several local utility owners, including Dominion Virginia Power and Currituck County, have informally expressed interest in utilizing the proposed Mid-Currituck Bridge to support utility services. Developer should investigate

any such potential utilities and provide recommendations to NCTA on the viability and/or reasonableness of any such shared use of the Project. Consideration shall be given to any existing NCTA and/or NCDOT policies that may limit utility locations on the Mid-Currituck Bridge.

Developer shall perform all utility related services and work in conformance with the “Utility Guidelines and Specifications” on the Website.

#### **1.4.9 Costing Materials**

During the Pre-Development Phase, Developer will prepare a price proposal for the Project on an Open Book Basis consistent with NCDOT plan development standards (where applicable), to be submitted to NCTA for review and verification. The price proposal will provide sufficient detail so that construction quantities, right of way requirements, utility impacts and constructability issues necessary for Developer to establish a firm fixed price for the Concession Agreement can be developed and verified independently by NCTA. The price proposal will serve as the basis for negotiations for pricing the Concession Agreement and any related design-build work or contract. As part of these negotiations, Developer shall be prepared to share all information related to quantity development, unit price estimates, estimate assumptions, right of way estimates, utility impact/relocation estimates, construction methodologies, lay down areas, location of key construction materials (asphalt plants, borrow pits, concrete batch plants, casting yards, etc.), pricing methodologies, logistical issues, applicable risks, contingencies, mark-ups, profit margins, mobilization costs, maintenance of traffic costs, escalations and any other factor utilized to develop or support the firm fixed price.

#### **1.4.10 Construction Plan**

During the Pre-Development Phase of the Project, Developer is expected to develop a phased construction plan incorporating a “CPM type” schedule. Initially, this plan should address the following:

- (a) Contract Administration efforts by both Developer and NCTA;
- (b) Quality Assurance (QA)/ and Quality Control (QC) process concepts;
- (c) Design and other engineering reviews of Developer’s work by NCTA;

(d) General Construction phasing including construction steps, major material sources and delivery considerations, maintenance of traffic considerations, and other logistical issues;

(e) Alternate construction methods with cost analysis;

(f) Risk assessment;

(g) Value engineering;

(h) Constructability considerations;

(i) Life cycle analysis;

(j) Construction phase closure and opening the project to traffic; and

(k) Utilization of local contractors, DBE's and other small business entities.

#### **1.4.11 Project Management Plan**

During the Pre-Development Phase of the Project, Developer is expected to complete the Project Management Plan (PMP) as required by the Federal Highway Administration (FHWA). This plan must be assembled to meet the requirements of the Major Projects Provisions of Title 23, Section 106(h) of the United States Code. This PMP is a requirement for obtaining a TIFIA loan from USDOT.



#### **1.4.12 Traffic and Revenue**

As part of the Services performed during the Pre-Development Phase, Developer shall procure the services of an experienced traffic and revenue consultant who shall produce a study sufficient to support the financing of the Project. That study, at a minimum, should include a 30-year forecast of traffic by segment, a projected schedule of tolls, the revenues associated with the estimated tolls and levels of traffic, a projection of operating costs and a schedule of annual maintenance and capital replacement expenses. This study shall be of such caliber that it will be acceptable to the TIFIA Joint Program Office of USDOT and to rating agencies.

#### **1.4.13 Toll Strategy**

Developer will develop a tolling strategy for the Project as part of the Pre-Development Phase. An integral component of developing the tolling strategy will be a conceptual level marketing plan for the tolled Project. An understanding of the Project purpose and environment in which the Project will be constructed is essential to establishing successful toll and market penetration strategies. The Outer Banks is a complex community comprised of year round residents (locals) and seasonal visitors, each with different mobility preferences. Therefore specific pricing strategies will have to be crafted to each category of Project patron. Tolls will need to be established specifically based on customer type to entice them to utilize the project to its fullest potential. The bridge will be required to remain open to traffic 24 hours a day, every day of the year.

The toll strategy should maximize potential revenues while maximizing the utilization of the Project during peak and off-peak periods. A variety of tolling schemes should be considered that encourage locals to utilize the Project year round and make it the facility of choice by visitors. Toll rates may depend on such factors as peak hours, peak and off peak seasons which can result in the application of variable rates for tourists, fixed rates for locals, or a combination of both.

A marketing penetration plan will be finalized during the Concession Period to address seasonal and daily demand fluctuations, varied market segments, and an approach for marketing the Project to local citizens and visitors. When developing a marketing plan for visitors, the plan should take into consideration 1) origin and destination of visitors; 2) what form of transportation they will take to get to their

destination; 3) how long visitors will stay; and 4) what is the most convenient payment plan. A similar plan should be developed when marketing to locals, but with emphasis on travel time savings and payment convenience. Therefore, Developer should investigate marketing through and partnering with Outer Banks residential rental agencies, travel agencies, and rental car agents to promote the Project to visitors. Local commodity and service providers should be considered as partners in providing locals with a convenient toll payment plan.

During the PDA Phase, Developer's marketing and public relations must be performed under the direction of NCTA. It is not necessarily the intent of NCTA that Developer provide a marketing or public relations firm as part of the PDA process. However, it is expected that marketing strategies are considered when developing the tolling strategy in order to ensure maximization of toll revenues. Additionally, the Developer shall make its own assessment of the need for a marketing firm and/or public relations firm during the PDA phase to ensure Project success.

#### **1.4.14 Community Involvement**

During the Pre-Development Phase of the Project, Developer will be expected to participate in community involvement activities, at NCTA's direction. These activities will include, at a minimum, participation in local public workshops, communication with Project stakeholders in concert with NCTA staff at NCTA's direction, and developing other community outreach efforts to ensure that the Project moves forward with a high level of community involvement. It is not the intent of NCTA that Developer provides a marketing or public relations firm for community involvement as part of the PDA process.

#### **1.4.15 Operations and Maintenance**

##### **1.4.15.1 Operations**

Currently NCTA does not have an active toll facility. The first NCTA toll facility, the Triangle Expressway, is expected to open to traffic in 2011. Developer will be expected to work with NCTA staff to develop system-wide operations policies and procedures that would be implemented for the Project and other NCTA toll facilities..

NCTA will require that the Mid-Currituck Bridge operate 24 hours a day, year round. NCTA's The schematic ROW used for NEPA purposes assumes construction of facilities for both electronic open road tolling and manual toll collection. Although NCTA has a preference for exclusive use of open road tolling on the Project, it will consider supplementing electronic toll collection with manual toll collection, at Developer's discretion, based upon operating conditions. It is anticipated that Developer will be required to utilize the same transponder technology that will be installed on the other proposed NCTA toll facilities. The procurement for the Triangle Expressway transponder and reader is expected to occur in early 2009. In order to provide a seamless operation for the customer, NCTA may require that Developer adopt the same name convention for the Project's electronic toll collection program. If it is determined that Developer will operate its own service center, interoperability and reciprocity with NCTA facilities will be required. Developer may be required to process toll violations based on NC General Statue § 136- 89.

It is expected that the Project will have a dedicated traffic management center ("TMC"). NCTA may request video feeds from the Project to the proposed NCTA statewide TMC.

By the end of the Pre-Development Phase, Developer shall have a facility operation plan that includes the following:

- Toll operations and processing
- Security and incident management plan
- NCTA interoperability plan
- Estimated operations costs

#### **1.4.15.2 Maintenance**

Developer will be responsible for the development of a maintenance program for the Project. It is expected that Developer will develop a

design that produces reasonable life-cycle costs for the Project. During the Pre-Development Phase, Developer is expected to research materials and develop construction techniques that will result in the long term reduction in cost of maintenance. At the end of the Pre-Development Phase, Developer shall have a long term maintenance plan that includes an estimate of annual maintenance costs and a schedule of major life cycle rehabilitation and reserve maintenance fund requirements.

### **1.5 Concession Agreement**

If the environmental review process yields a build alternative that includes the Project, Developer will have the right of first negotiation of a Concession Agreement. This right is predicated on Developer having satisfied all its obligations under the PDA and NCTA deciding, in its sole discretion, to proceed to the Concession Period for the Project. The “Concession Agreement” will include the management and performance of remaining Project development, acquisition, financing, design, construction, and long-term operation and maintenance of the Project. Developer under the Concession Agreement may be the same entity as under the Pre-Development Agreement, or may be an affiliated entity acceptable to NCTA. An outline of the Concession Agreement is included as Appendix G to Exhibit B. See Section 6. NCTA anticipates that the Concession Agreement will provide for revenue sharing with NCTA after certain levels of toll revenues are achieved for the Project.

### **1.6 Federal Funding Requirements; Conflicts**

Proposers are advised that NCTA anticipates that federal funds will be utilized for the Project. TIFIA financing, if utilized, dictates the same requirements as a federal-aid project. Accordingly, applicable federal law and FHWA regulations will govern the Project’s procurement and contract documents if federal funds are utilized for the Project during the Concession Period.

Under FHWA’s design-build regulations (23 C.F.R. Part 636), a Concession Agreement is considered a design-build contract. Although there is no assurance of federal funding for the Project, to preserve the ability to use federal funds as part of the Project

funding, this procurement must comply with applicable federal laws and regulations, including the rules and regulations promulgated by FHWA that relate to design-build contracts.

NCTA also anticipates that certain other federal procurement requirements may apply to the Project, including Small Business requirements, Buy America requirements, right of way acquisition requirements, Davis-Bacon wage rates and DBE requirements. Applicable federal requirements will be set forth in the Pre-Development Agreement and Concession Agreement.

## **1.7 SPSF and DBE Participation**

NCTA supports the use of SPSFs and DBEs. Due to the different types of work anticipated in the Pre-Development Phase and the Concession Period, different expectations will apply to each phase.

### **1.7.1 Pre-Development Phase**

During the Pre-Development Phase, NCTA encourages the use of the SPSF program, as developed by NCDOT. NCDOT has developed a SPSF program to provide consulting opportunities for firms that meet the eligibility criteria to compete against other consulting firms that are comparably positioned in their industries. Small businesses that NCDOT determines to be eligible for participation in the SPSF program are those meeting the size standards defined by the Small Business Administration regulation, 13 CFR Part 121 in Section 54 under the North American Industrial Classification System (NAICS). The SPSF program is a race, ethnicity, and gender neutral program designed to increase the availability of opportunities for small businesses on federal, state or locally funded contracts. SPSF participation is not contingent upon the project funding source.

Real-time information about SPSF that is certified by NCDOT through North Carolina's Unified Certification Program is available in the Directory of Transportation Firms. The Directory can be accessed by the link on the NCDOT's homepage or by entering <https://apps.dot.state.nc.us/vendor/directory/> in the address bar of a web browser.

The listing of an individual firm in NCDOT's directory shall not be construed as an endorsement of the firm by NCTA or NCDOT.

No specific SPSF goals are identified for the Pre-Development Phase, however, the proposed use of qualified SPSFs will be considered in the evaluation of the Proposals.

### **1.7.2 Concession Period**

During the Concession Period it is expected that DBEs as defined in 49 CFR Part 26 shall have equal opportunity to compete fairly for and to participate in the performance of contracts financed in whole or in part by federal funds. Developer will be required to comply with applicable requirements of 49 CFR Part 26 in performing work and services for the Project.

Specific DBE construction goals will be developed during the Pre-Development Phase and set forth in the Concession Agreement based on a determination of availability and capability within the marketplace and the volume and types of construction work that will be a part of the concession agreement.

In general, the DBE requirements for the Concession Period of the Project will be:

- To ensure that diverse groups, including disadvantaged, minority, women and emerging small businesses, will be ensured equality of opportunity;
- To recognize and support the value of diverse businesses and a diverse workforce;
- To ensure that NCTA will meet all applicable federal requirements for federally-funded activities and any applicable state law and NCTA policy;
- To ensure that NCTA and Developer work towards meeting diversity goals and aspirations without discrimination against any person on the basis of any classification protected by law; and
- To narrowly tailor any race, minority or gender conscious measures consistent with legal requirements.

## **1.8 NEPA Studies**

NCTA and FHWA are currently completing studies in compliance with NEPA to evaluate potential improvements to improve traffic flow, reduce travel time, and reduce emergency evacuation clearance times in the Project area. NCTA has retained the private engineering firm PB Americas, Inc. to complete these studies and related documentation. NCTA and FHWA must retain control and responsibility of the NEPA process, and appropriate safeguards must be built into any agreements with Developer to ensure that conflicts of interest are avoided.

In addition, East Carolina University (“ECU”) has access to certain federal funds to assist in the development of this Project, and NCTA contracted with ECU to provide services in support of the environmental studies. The contract between NCTA and ECU is provided for Proposer’s information on the FTP Site, as well as the scope of work and other documentation with respect to this matter. Proposers are encouraged to review this contract and related documentation for purposes of determining how ECU may be effectively utilized in the Project during the Pre-Development Phase. Proposer shall not contact ECU, either directly or indirectly, with respect to this RFP, the Project or the contract between NCTA and ECU.

### **1.8.1 Detailed Study Alternatives**

The Project, as described in Section 1.3, is one alternative that will be evaluated in detail in a Draft Environmental Impact Statement (DEIS).

NCTA is evaluating the following range of alternatives in the DEIS, which will be given equal consideration in the DEIS:

#### **1.8.1.1 No-Build Alternative**

No bridge and no improvements to existing roads.

**1.8.1.2 ER2 – Upgrading Existing Roads Without a Mid-Currituck Bridge with Major Improvements to Existing Roads**

(a) Adding a third northbound lane on US 158 from the Wright Memorial Bridge north to NC 168 at Barco as a hurricane evacuation improvement or using the center turn lane as a third northbound evacuation lane;

(b) Widening US 158 to eight lanes between the Wright Memorial Bridge and the NC 12 intersection; and

(c) Widening NC 12 to three lanes between US 158 and the point where the NC 12 right of way expands to 100 feet wide in Currituck County and to four lanes between the point where the NC 12 right of way expands to 100 feet wide and Corolla.

**1.8.1.3 MCB2 – Mid-Currituck Bridge**

(a) Constructing a two-lane toll bridge across Maple Swamp and the Currituck Sound in Currituck County;

(b) Adding a third northbound lane on US 158 from Aydlett Road (SR 1140) to NC 168 at Barco as a hurricane evacuation improvement or using the center turn lane as a third northbound evacuation lane;

(c) Widening US 158 to six lanes between the Wright Memorial Bridge and Jupiter Trail/Wal-Mart entrance and eight lanes from Jupiter Trail/Wal-Mart entrance to the NC 12 area; and

(d) Widening NC 12 to three lanes between US 158 and the point where the NC 12 right of way expands to 100 feet wide in Currituck County and to four lanes between the point where the NC 12 right of way expands to 100 feet wide and Corolla.



#### **1.8.1.4 MCB4 -- Mid-Currituck Bridge with Minimal Improvements to Existing Roads**

(a) Constructing a two-lane toll bridge across Maple Swamp and the Currituck Sound in Currituck County;

(b) Adding a third northbound lane on US 158 from Aydlett Road (SR 1140) to NC 168 at Barco as a hurricane evacuation improvement or using the center turn lane as a third northbound evacuation lane; and

(c) Adding a third northbound lane on US 158 between the Wright Memorial Bridge and NC 12 as a hurricane evacuation improvement or using the center turn lane as a third northbound evacuation lane.

#### **1.8.2 Bridge Alignment Alternatives**

Two alternative bridge alignments will be evaluated in the DEIS (Corridors C1 and C2). On the mainland, C1 and C2 share a single approach corridor, which parallels an existing power line easement north of Aydlett Road (SR 1140). On the Outer Banks, C1 and C2 have different termini – C2 is in the Albacore Street (SR 1402) area, and C1 is approximately 2 miles north of Albacore Street (SR 1402). NCTA intends to recommend a preferred bridge location in the DEIS.

##### **1.8.2.1 Two-Lane Bridge**

NEPA studies are evaluating a two-lane toll bridge across Maple Swamp and Currituck Sound. The decision to evaluate a two-lane bridge, rather than a four-lane or a three-lane bridge, was based on traffic forecasts, travel time, safety, and cost.

##### **1.8.2.2 US 158 Interchange**

An interchange with US 158 is assumed with the Mid-Currituck Bridge. NCTA has selected a “compressed Y” interchange configuration for detailed study because it would affect the least area of wetlands, provide a high capacity to move traffic, and be the least expensive of several interchange concepts considered.

### **1.8.2.3 NC 12 widening**

An intersection is assumed between the Mid-Currituck Bridge and NC 12. NC 12 would be widened to four lanes between the bridge terminus and Currituck Clubhouse Drive (a future signalized intersection) to ensure that southbound traffic on NC 12 would not queue back onto the Mid-Currituck Bridge. The length of this widening would be approximately 2 to 4 miles depending on the location of the intersection between the bridge and NC 12. The typical section for these improvements includes four 12-foot lanes with a 17.5-foot median and a 10-foot multi-use path, which will generally fit within the existing 100-foot right of way.

### **1.8.2.4 Hurricane Evacuation Improvements**

A stated purpose of the project is “to substantially reduce hurricane clearance time for residents and visitors who use NC 168 and US 158 during a coastal evacuation.” US 158 in Currituck and Dare counties, from NC 168 to NC 12 was found to be the road in the project area that would control future hurricane clearance times. Without improvements in the northbound capacity of this portion of US 158, future hurricane evacuation clearance times would not decrease, even if NC 12 were widened, or a Mid-Currituck Bridge were built. NCTA is considering, as alternatives for adding northbound capacity on US 158, the addition of a third northbound lane (essentially a paved shoulder) or using the existing center turn lane as a third northbound lane. These lanes would only be used in emergency situations to assist in evacuations.

## **1.8.3 Environmental Schedule**

The anticipated schedule for milestones in the environmental review process for the Project is as follows:

- DEIS and NCTA Preferred Alternative Recommendation expected in Spring 2009
- Selection of the Least Environmentally Damaging Practicable Alternative expected in Summer 2009

- Final EIS expected in Fall 2009
- Record of Decision expected in early 2010

The environmental schedule is currently under review and subject to change. Developer's input on the environmental schedule during the PDA will be sought by NCTA to ensure there is adequate time to perform the Services under the PDA. Although Developer will not be responsible for the NEPA process, it may be required to contribute information and conduct environmental analyses in support of that process. One of NCTA's key expectations is that during the Pre-Development Phase, Developer will assist NCTA in undertaking studies to address any issues that arise during the course of the environmental evaluation process. Any such work submitted by Developer with respect to the environmental process will be independently reviewed and approved by NCTA before being incorporated by NCTA in its environmental documents, in accordance with the terms of the PDA. This may include work directly related to the Project, as well as other alternatives being evaluated in the DEIS.

This RFP does not commit NCTA to a particular set of transportation improvements, but rather represents a commitment to enter into detailed negotiations with a prospective Developer. If an alternative other than the Project is selected as the "Least Environmentally Damaging Practicable Alternative" or a Record of Decision is not obtained for the Project, NCTA or Developer may elect to terminate the Project pursuant to the provisions set forth therein,.

The Project will be subject to FHWA authorization for construction only if the Project includes federal-aid funds in the plan of finance and following issuance of a ROD.

## **2. RFP PROCESS**

### **2.1 Proposer Questions; Clarification Notices**

Except for communications expressly permitted elsewhere by this RFP, all questions and other communications regarding the Project and this RFP shall comply with this Section 2.1.

Proposers may submit written clarification questions to NCTA at any time; provided, however, that no questions will be considered after November 4, 2008, two weeks before the Proposal Due Date. Proposers must submit any clarification requests to NCTA through the e-mail address [p3@ncturnpike.org](mailto:p3@ncturnpike.org).

The questions and NCTA's responses will be in writing via e-mail. All written responses to questions will be delivered to all Proposers, except that NCTA intends to respond directly to Proposers with respect to those questions identified by a Proposer and accepted deemed by NCTA as containing confidential or proprietary information. NCTA reserves the right to disagree with Proposer's assessment regarding confidentiality of information, in the interest of maintaining a fair process or complying with applicable law, in which case NCTA may allow Proposer to withdraw the question. In its sole discretion, NCTA may rephrase questions as it deems appropriate and may consolidate similar questions and/or choose only to promulgate answers rather than the stated questions themselves, or amend the transaction documents to reflect changes prompted by Proposer questions.

NCTA will provide responses to Proposer clarification requests within a reasonable time following receipt, but no later than November 11, 2008.

No requests for additional information or clarification to any other NCTA contact, consultant or employee are permitted (see Section 2.2).

NCTA's final answers to the questions posed under this Section 2.1 shall in no event be deemed part of this RFP or the Pre-Development Agreement or Concession Agreement and shall not be relevant in interpreting such documents except as they may clarify

provisions otherwise considered ambiguous, or are included in an Addendum to this RFP.

## **2.2 Rules of Contact**

During the procurement process, commencing with issuance of the RFP and continuing until award of a Pre-Development Agreement (or cancellation of the procurement), the following rules of contact shall apply to every employee, member or agent of any Proposer (including any such person or entity who has agreed or plans to join a Proposer):

**2.2.1** Contact between the Proposers and NCTA (questions and responses to questions) shall only be through NCTA's and Proposers' designated representatives.

**2.2.2** The Proposer shall not contact stakeholder staff regarding this RFP or the requirements for the Project. Stakeholder staff include employees of NCTA, NCDOT, the State, FHWA, East Carolina University, local governments or any of their contractors or consultants involved with the procurement, as well as, members of the Board (see Section 1.2), except for communications expressly permitted by this RFP.

**2.2.3** NCTA will not be responsible for any oral communication or any other information or contact that occurs outside the official communication process specified herein.

**2.2.4** The foregoing restrictions shall not, however, preclude or restrict communications with regard to matters unrelated to this RFP.

**2.2.5** NCTA may disqualify any Proposer engaging in prohibited communications at NCTA's sole discretion.

## **2.3 Examination**

The Proposer shall be solely responsible for examining, with appropriate care and diligence, this RFP, including any addenda to this RFP, and material posted on the Website and FTP Site, and for informing itself with respect to any and all conditions

which may in any way affect its Proposal, or the performance of the obligations following award if the Proposer enters into a Pre-Development Agreement with NCTA, and for requesting clarification or interpretation of any discrepancy, deficiency, ambiguity, error or omission contained therein, or of any provision which the Proposer fails to understand.

NCTA will post a copy of any addenda, clarification notices and other information regarding this RFP on the Website and will email a notice of such information to each Proposer Contact (defined below). The Proposer shall acknowledge receipt of any such email notification by promptly sending a return receipt email to the Procurement Officer. To allow receipt of addenda, clarification notices and other information regarding this RFP, the Proposer is solely responsible for ensuring that the Procurement Officer has the Proposer's contact person name, telephone number and email address ("Proposer Contact"). NCTA is not responsible for any missed communications, including any missed communications that result from a Proposer's misidentifying or not identifying its Proposer Contact.

The Proposer assumes the sole risk of failing to comply with this Section 2.3 and NCTA is not obligated to provide any relief for the Proposer's error or omission for failure to examine and inform itself of any changes concerning this RFP and the procurement.

## **2.4 Procurement Schedule**

NCTA anticipates the following procurement schedule for this RFP:

Issue Draft RFP to Short-Listed Proposers	August 11, 2008
Review of Draft RFP with Shortlisted Proposers	August – September 2008
Issue Final RFP	September 29, 2008
Proposal Due Date	November 18, 2008
Post-Proposal Interviews with Shortlisted Proposers	December 3, 2008

Announce Selected Proposer

December 5, 2008

Execute PDA

January 2009

This schedule is subject to modification at the sole discretion of NCTA. The deadline for submitting clarification questions to NCTA regarding the RFP is November 4, 2008, (two weeks prior to the Proposal Due Date).

## **2.5 Organizational Conflicts of Interest**

Proposers are advised that the following entities and individuals are precluded from participating as an Equity Member, Major Non-Equity Member, Major Subcontractor or subcontractor/subconsultant to a Proposer:

**2.5.1** Any consultant firm that has been contracted by NCTA to serve as owner's representative or construction engineering inspection services on the Project, or to aid in the development of the RFQ, RFP, estimates, or scope of services for the Project, or to participate in any manner in the evaluation of SOQs or Proposals, including the firms identified in Section 1.2;

**2.5.2** Any entity that is a parent, affiliate, or subsidiary of any of the foregoing entities, or that is under common ownership, control or management with any of the foregoing entities;

**2.5.3** Any employee or former employee of any of the foregoing entities who was involved with the Project while serving as an employee of such entity within the last 2 years; and

**2.5.4** Any entity or individual who has performed work related to the Project for either NCTA and/or NCDOT in any capacity or magnitude within in the last 2 years which may be considered a conflict or perceived conflict. Proposers are directed to seek approval in writing from NCTA for any entity or individual on the Proposer's team who has performed work for the Project for either NCTA or NCDOT.

## **2.6 One-on-One Meetings**

NCTA intends to conduct one-on-one meetings with each Short-Listed Proposer to discuss issues and clarifications regarding this RFP and the Project. NCTA reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings. NCTA does not intend to disclose information that NCTA determines, in its sole discretion, would reveal a Proposer's confidential business strategies.

## **2.7 Addenda**

NCTA may revise this RFP by issuing written addenda to this RFP at any time prior to the Proposal Due Date. NCTA will post a copy of any addenda on the Website and will email a notice of the addendum to each Proposer Contact. Proposer is deemed to receive addenda published on the Website upon receipt of the email notification from NCTA for any such addenda. Proposer must acknowledge receipt of any such email notification by promptly sending a return receipt email to the Procurement Officer.

Changes to this RFP will be recognized only if in the form of written addenda issued by NCTA. Oral instructions or information concerning this RFP or its requirements given by NCTA shall not be binding unless documented by written addenda. NCTA may extend the Proposal Due Date if NCTA finds an extension is necessary.

## **2.8 Public Records**

NCTA may maintain the confidentiality of information only as authorized in NCGS § 132-1 *et. seq.* A Proposer, having formed a good faith opinion, upon consultation with legal or other knowledgeable advisors that information submitted may contain a trade secret as defined in NCGS § 66-152 or other information exempted from the North Carolina Public Records Act pursuant to NCGS § 132-1.2, may so designate appropriate portions of its proposal by marking the top and bottom of pages containing confidential information in boldface type "CONFIDENTIAL." NCTA, however, may serve only as a custodian of information a Proposer deems confidential. NCTA shall not act as an arbiter or defender of any claims related to assertions of confidential information. If a request is made for disclosure of information submitted, or an action is



brought to compel NCTA to disclose information marked confidential pursuant to NCGS § 132-1 et seq. NCTA will notify the affected Proposer of such request or action.

In submitting a Proposal in response to this RFP, a Proposer agrees to: (i) defend its assertions of confidentiality by instituting appropriate legal proceedings, at its own expense and through its counsel, or intervening in an action brought against NCTA to compel disclosure, to defend its assertions of confidentiality; and (ii) hold the State and NCTA, and any officials or employees thereof harmless from any and all damages, costs, and attorney's fees awarded against the State and NCTA arising out of any such actions. Nothing in this section shall preclude the State or NCTA from participating in the defense of such actions, at its option and expense through its counsel. NCTA shall have no liability to a Proposer with respect to the disclosure of any information, including confidential information, subject to an order by a court of competent jurisdiction pursuant to NCGS§ 132-9 or any other applicable law.

## **2.9 Press Release**

Following receipt of the Proposals, NCTA may issue a press release identifying the Principal Participants of the Proposers and a brief summary of the Proposals, based on the Executive Summaries.

## **2.10 Protests**

This Section 2.10 sets forth the exclusive NCTA protest remedies available with respect to these RFP Documents. Each Proposer, by submitting its Proposal, expressly recognizes the limitation on its rights to protest contained herein, expressly waives all other rights and remedies, and agrees that the decision on any protest, as provided herein, shall be final and conclusive. These provisions are included in these RFP Documents expressly in consideration for such waiver and agreement by the Proposers. If a Proposer disregards, disputes, or does not follow the exclusive protest remedies set forth in these RFP Documents, it shall indemnify, defend, and hold NCTA and NCDOT, and their respective Board members, directors, officers, officials, employees, agents, representatives, and consultants, harmless from and against all

liabilities, expenses, costs (including attorneys' fees and costs), fees, and damages incurred or suffered as a result of such Proposer actions. The submission of a Proposal shall be deemed the Proposer's irrevocable and unconditional agreement with such indemnification obligation.

All protests must be in writing and filed with NCTA Chief Engineer at the address specified below. Any protest not set forth in writing, including oral objections, is not a protest and shall be null and void.

Mr. Steven D. DeWitt, PE  
NCTA Chief Engineer  
5400 Glenwood Avenue, Suite 400  
Raleigh, NC 27612

All protests must include the following:

- (a) Name and Address of Protestor;
- (b) Proposal or Contract number;
- (c) Reasons for protest; and
- (d) Supporting exhibits, evidence or documents to support the protest.

A protest based on alleged improprieties in the RFP or addendum thereto, which were apparent or reasonably should have been recognized before the Proposal Due Date, shall be filed no later than 7 days after receipt of the final RFP addendum. Any other protest shall be filed no later than 7 days after the basis for the protest is known or should have been known, whichever is earlier.

A decision on a protest will be made by NCTA Chief Engineer in writing as expeditiously as possible after receiving all relevant, requested information. .

The protest decision will include:

- (a) A description of the controversy;

- (b) A statement of the decision, with supporting material; and
- (c) If the protest is not sustained, a statement clarifying the next step for the protester as allowed under the terms of the RFP and applicable law.

NCTA Chief Engineer will furnish a copy of the protest decision to the protester and all other interested parties, by certified mail, return receipt requested, or by any other method that provides evidence of its receipt.

Written notice of an appeal of a protest decision must be filed with NCTA Executive Director within 10 days from the date the protester receives the protest decision. .

An appeal received by NCTA Executive Director after the time prescribed in above may not be considered unless it was sent by registered or certified mail not later than the fifth day before the final date for filing the appeal. A date affixed by postage meter will not be considered as evidence of the actual mailing date. The only acceptable evidence to establish the date of mailing shall be the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. If the postmark is illegible, the appeal shall be deemed to have been filed when received by NCTA Executive Director.

All Proposals shall be irrevocable until final administrative and judicial disposition of a protest, provided that such period shall not extend beyond the 180-day Proposal validity period set forth in Section 7.

## **2.11 Changes to the Proposer's Organization**

In the event that a Short-Listed Proposer seeks to change the composition of its team (including additions to a Proposer team) or the percentage of equity participation of one or more Equity Members of its team, the Short-Listed Proposer shall promptly seek NCTA's approval of the proposed change and provide NCTA with sufficient details of the proposed change so as to facilitate NCTA's consideration thereof. NCTA may in its sole discretion accept, reject or seek additional information regarding a Short-Listed Proposer's request to change its team, and will base its decision on whether the Short-

Listed Proposer as a whole still meets the minimum criteria contained in the RFQ and whether NCTA would still have Short-Listed the team if the change had occurred before the Short-Listed Proposer submitted its SOQ. If a Short-Listed Proposer seeks to add one or more new Equity Members or Major Non-Equity Members to its team, the proposed new member(s) shall provide all of the information that is required in the RFQ regarding Equity Members and Major-Non-Equity Members of a Proposer team.

Any request for NCTA approval pursuant to this Section 2.11 shall be submitted in writing via e-mail by November 4, 2008 to [p3@ncturnpike.org](mailto:p3@ncturnpike.org).

### **3. PROPOSAL SUBMISSION REQUIREMENTS**

#### **3.1 Submitting the Proposal**

The Proposer must submit by hand or mail one hard copy original of the Proposal (including all certificates), stamped as "Signed Original," containing the original signature in blue ink of the authorized representative(s) of the Proposer, along with 15 hard copies of the fully signed Proposal and two electronic copies "PDF" format to the following recipient and address to be received no later than 4:00 p.m. local time on the Proposal Due Date:

North Carolina Turnpike Authority  
5400 Glenwood Avenue, Suite 400  
Raleigh, NC 27612  
Attn: Steven D. DeWitt, PE

The Proposal shall be sealed in mailing envelopes or packages bearing the Proposer's name, address, the Procurement Officer's name and the words "Mid-Currituck Bridge Project Proposal" clearly written on the outside.

Acknowledgment of receipt of a Proposal will be evidenced by the issuance of a receipt by a member of NCTA staff. NCTA will not accept facsimile or other electronically submitted Proposals.

NCTA shall not accept any Proposal delivered after the Proposal Due Date. Any Proposal received after such time will be rejected and not considered. Proposers are

solely responsible for assuring that NCTA receives their Proposal by this deadline. NCTA shall not be responsible for delays in delivery caused by weather, difficulties experienced by couriers or delivery services, misrouting of packages by courier or delivery services, improper, incorrect or incomplete addressing of deliveries and other occurrences beyond the control of NCTA.

### **3.2 Proposal Format**

The Proposal shall consist of the following components:

- Front Cover
- Tab 1
- Tabs 2 – 4

Tabs 2 – 4 (combined) shall not exceed 40 double-sided 8-1/2 x 11 inch pages in length (excluding the table of contents and section dividers). Anything exceeding or appending the 80 pages included in Tabs 2 -4 will not be considered or evaluated by NCTA, provided, however, that resumes of Key Personnel attached separately from Tabs 2 – 4 will not count toward the 80-page limit. 11” x 17” fold out sheets may be used; each such page will count as two pages. Each page of Tabs 2 – 4 shall be sequentially numbered, not to exceed 80 sequential pages (a total of 40 double-sided pages). Other than the Executive Summary, which is limited to six (6) pages, Tab 1 does not have a page limit. Except for graphics, tables and the front cover, the type face shall be no smaller than 12-point font. There are no font requirements regarding the text on graphics, tables, and the front cover .

All correspondence and submissions regarding the RFP, Proposal, and PDA are to be in the English language. If any original documents required for the Proposal are in any other language, Proposer shall provide a certified English translation, which shall take precedence in the event of conflict with the original language.

### **3.3 Proposal Contents**

The Proposer is solely responsible for ensuring that its Proposal is clear, correct and internally consistent. The Proposal shall include the following information, as well as make specific reference to and address the applicable evaluation criteria set forth in Section 4.3.4, separated by tabs as herein described:

#### **3.3.1 Tab 1: Required forms of Information**

**3.3.1.1** Provide Form A (Proposal Cover Sheet). If the Proposer is a joint venture, Form A must be executed by all joint venture members.

**3.3.1.2** Provide a list of any proprietary information included in the Proposal which the Proposer considers protected trade secrets or other information exempted from disclosure pursuant to Section 2.8.

**3.3.1.3** Provide an Executive Summary, not to exceed six (6) pages in length, written in a non-technical style that contains sufficient information to familiarize reviewers with the Proposer's Project and Project approach and its ability to satisfy the financial, legal and technical requirements of the Project and PDA. NCTA may release information in the Executive Summary to the public (see Section 2.9).

**3.3.1.4** Provide the name, address, email address, telephone number and fax number of a person within the Proposer who may be contacted for further information.

**3.3.1.5** Provide evidence for each such entity that is a corporation, limited liability company or limited partnership that the Proposer and its general partners and joint venture members are currently in good standing in the state of their respective organization/formation. Such evidence shall be in the form of good standing certificates dated no earlier than 90 calendar days before the Proposal Due Date, along with an affirmative statement that no significant changes have occurred to affect the good standing of the entities, or if there have been any such changes, a list of the changes.

**3.3.1.6** Describe any changes in the legal structure and/or organization of the Proposer and Equity Members since submission of the SOQ and provide an organization chart outlining any such changes. Include copies of

organizational documentation for any newly formed entities of the Proposer and any new equity owner as required in Section 5.2.1(f) of the RFQ.

**3.3.1.7** Provide an organizational chart for Proposer. Describe any material changes in the financial condition of the Proposer and Equity Members since submission of the SOQ and provide a detailed explanation for any such change. Include copies of all financial documentation which illustrate such changes, including those documents required in Section 5.2.2(e) of the RFQ. Include a copy of the most recent quarterly financial statements for the Proposer and each Equity Member and the Major Non-Equity Member.

**3.3.1.8** Attach evidence to the Proposal and to each letter that the person signing has authority to do so. With respect to authorization of execution and delivery of the Proposal and the Pre-Development Agreement, if any signature is provided pursuant to a power of attorney, provide a copy of the power of attorney as well as a certified copy of corporate or other appropriate resolutions authorizing said power of attorney or other lawful evidence. If the Proposer/Equity Member is a corporation, such evidence shall be in the form of a resolution of its governing body certified by an appropriate officer of the corporation. If the Proposer/Equity Member is a limited liability company, such evidence shall be in the form of a limited liability company resolution and a managing member resolution providing such authorization, certified by an appropriate officer of the managing member. If Proposer/Equity Member is a partnership or a joint venture, such evidence shall be provided for the governing body of Proposer/Equity Member and for the governing bodies of each of its general partners/joint venture members, at all tiers, and in all cases certified by an appropriate officer.

**3.3.1.9** Provide Form B (Non-Collusion Affidavit). Duplicate or modify this form as necessary so that it accurately describes the entity making the Proposal and so that it is signed on behalf of all Equity Members and Major Non-Equity members or joint venturers of the Proposer).

**3.3.1.10** Provide Form C (Equal Employment Opportunity Certification) for the Proposer, each Equity Member and non-exempt subcontractors identified as of the Proposal Due Date.

**3.3.1.11** Provide Form D (Debarment and Suspension Certification). Duplicate or modify this form as necessary so that it accurately describes the entity

making the Proposal and so that it is signed on behalf of all partners, Equity Members, Major Non-Equity Members or joint venturers of the Proposer and all Major Subcontractors.

**3.3.1.12** Provide Form E (Certification Regarding use of Contract Funds for Lobbying). Duplicate or modify this form as necessary so that it accurately describes the entity making the Proposal and so that it is signed on behalf of all partners, Equity Members, Major Non-Equity Members or joint venturers of the Proposer and all Major Subcontractors. If applicable, provide Standard Form – LLL, “Disclosure of Lobbying Activities,” referenced in Form E.

**3.3.1.13** Provide Form F (Conflict of Interest Disclosure Form) for the Proposer, its Equity Members, Major Non-Equity Members and its identified Major Subcontractors as of the Proposal submission date. The Proposer must file an amended Conflict of Interest Disclosure Form with the Procurement Officer within 10 calendar days of any material change in the information required under this paragraph. The Proposer may submit a single Form F for the Proposer including disclosures of its Equity Members, Major Non-Equity Members and identified Major Subcontractors or may submit separate disclosures of its Equity Members, Major Non-Equity Members and identified Major Subcontractors, but in either case the Proposer will be responsible for assuring that the Form F as been completed as the Form requires.

**3.3.1.14** Provide a completed Form G (PDA Cost Estimate and Compensation Schedule). See Exhibit D for explanation of Form G.

**3.3.1.15** Provide a completed Form H (Termination Event and Compensation Matrix). See Exhibit D for explanation of Form H.

**3.3.2 Tab 2: Design, Construction and Environmental Approach**

**3.3.2.1** Provide a detailed description of Proposer’s approach to designing the Project in the Pre-Development Phase, including relevant experience.

**3.3.2.2** Provide a detailed plan outlining Proposer’s approach to developing appropriate aesthetic designs that incorporates considerations of the unique coastal ecosystem and community attributes and that addresses opportunities for incorporation of aesthetically pleasing lighting elements to the Project, as well as



alternative energy sources. This approach shall also address effective means of obtaining community and other stakeholder input and buy-in to any aesthetic concepts.

**3.3.2.3** Provide a detailed plan outlining potential approaches to develop and implement a stormwater control system. Outline long-term maintenance stormwater considerations in this plan.

**3.3.2.4** Provide a detailed plan outlining opportunities for incorporation of recycled materials into all Project elements including designated bike paths, walkways, parking areas, etc.

**3.3.2.5** Provide a detailed plan for creating a “waste free” Project.

**3.3.2.6** Provide a detailed plan outlining opportunities for utilization of permeable pavements for any parking areas, sidewalks, bike paths, or other hard impermeable surface elements.

**3.3.2.7** Describe Proposer’s approach and concepts for providing long term performance measuring systems for the Mid-Currituck Bridge.

**3.3.2.8** Provide a detailed plan and timeline outlining Proposer’s approach and considerations to performing the geotechnical, right of way, traffic and revenue, and utility services for the Project. The plan should distinguish between the Pre-Development Phase and the Concession Period and should identify relevant experience for each category.

**3.3.2.9** Discuss the approach to determining the appropriate construction method for the Project, including critical issues, data needs, cost considerations, phasing, and schedule.

**3.3.2.10** Describe Proposer’s approach to preparing and completing the PMP and an effective Construction Plan during the Pre-Development Phase, including NCTA involvement.

**3.3.2.11** Provide a strategy with respect to the manner in which NCTA and Developer can involve East Carolina University in the Pre-Development Phase. In doing so, Proposers are encouraged to review the SAFETEA-LU legislation and earmark, as well as East Carolina University’s contract with NCDOT and NCTA and current task

order scopes of work. Proposers should describe potential future work tasks or other involvement to ensure effective utilization of the available funds toward the Project.

**3.3.2.12** Provide a detailed description and analysis of Proposer's understanding of the alternative bridge alignments under consideration in the DEIS. The description should include, at a minimum, Proposer's position on the decision for a two-lane bridge and the proposed typical section for the bridge, as well as, opportunities for further refinements, including cost savings, impact minimization, or operational improvements. Additionally, the description and analysis shall address the proposed 2 to 4 miles of NC 12 widening improvement (as outlined in Section 1.3 Project Description and Approach), including, the need for such improvement, the proposed typical section, and potential for phased construction.

**3.3.2.13** Provide a detailed approach for validating the findings of the hurricane evacuation studies completed to date and for implementing improvements to achieve this component of the Project's purpose. The approach shall address the development and assessment of options for increasing northbound capacity on US 158 as needed to accommodate emergency evacuation, coordination with stakeholders to determine a preferred plan, and any impacts to the financial viability of the Project.

**3.3.2.14** Provide a detailed plan outlining the approach and proposed schedule for obtaining Section 404 and 401 approvals. Identify Proposer's approach for coordinating with regulatory agencies and any opportunities for expediting permit approvals. Identify perceived risks in the permitting process based on the history of the Project and known environmental issues, as well as the Proposer's perceptions as to actions NCTA may pursue during the environmental study process to minimize risk.

**3.3.2.15** Identify the person assigned to leading the permitting efforts and provide a detailed discussion of that individual's qualifications in terms of experience on similar projects. Provide an approach and schedule for obtaining the required permits (other than Section 404 and 401 approvals), and any efforts that could be completed during the Pre-Development Phase to expedite the permitting process. Identify other opportunities for satisfying USCG requirements that could be explored.

**3.3.2.16** Provide a detailed strategy for determining preservation areas and preservation management within the Project area, particularly in Maple Swamp. Address and discuss SAV and SAV mitigation opportunities, as well as other

onsite mitigation opportunities for wetland impacts from the Project. Discuss any experience with these issues on other projects.

**3.3.2.17** Address how sea level rise in the Project area during the Concession Period should be considered in determining the long-term viability of the Project.

### **3.3.3 Tab 3: Project Approach**

**3.3.3.1** Address how the Proposer intends to interface with NCTA and to successfully introduce and integrate tolling to the Project and community.

**3.3.3.2** Identify the Proposer's traffic and revenue consultant. Outline an approach for coordinating with local and regional tourism agencies to develop appropriate toll strategies and, ultimately, marketing plans to maximize use and revenue of the Project, including partnering with Outer Banks residential agencies, travel agencies, and rental car agents to promote the Project and to provide a convenient toll payment plan. Discuss anticipated seasonal and daily demand fluctuations, different market segments, and approaches for marketing the Project to local citizens and visitors. Discuss toll strategies that will maximize potential revenues, while maximizing utilization of the Project during peak and off-peak periods.

**3.3.3.3** Provide a detailed description of Proposer's approach and assumptions to developing, operating and maintaining the Project in a manner that minimizes operation and maintenance costs. Address why the stated assumptions are reasonable. Identify relevant experience in operation and maintenance on similar projects.

**3.3.3.4** Provide a detailed description of Proposer's approach to developing a plan of finance for the Project. Provide a schedule for steps required to achieve financial closing, specifically identifying those steps required under the PDA and those required after execution of the Concession Agreement..

**3.3.3.5** Provide an evaluation of NCTA's current cost estimate for the Project. Identify efforts that will be taken by the Proposer to minimize Project costs. Describe majors drivers of the cost of this Project.

**3.3.3.6** Provide a plan for interfacing with NCTA for toll collection interoperability and reciprocity, considering that interfacing costs will be the responsibility of Developer and that Developer will be required to utilize the transponder/reader system selected by NCTA. Provide a detailed traffic management plan for coordinating the interface with NCTA and NCDOT.

**3.3.3.7** Identify any other planned projects that could impact the anticipated revenues for the Project.

**3.3.3.8** Identify and describe the availability and time commitment of the Key Personnel for Proposer's team. Identify and explain the staffing during the Pre-Development Phase and the Concession Period, including the role and commitment of Developer's Project Manager during each such phase. Describe Proposer's transition plan from the Pre-Development Phase to the Concession Period.

**3.3.3.9** Provide a detailed plan for involving the SPSF community in the Project during the Pre-Development Phase. Provide a listing of all known SPSFs that will participate in the performance of the work anticipated in the Pre-Development Phase. Any listed SPSF shall be pre-qualified by NCTA or NCDOT to perform the work for which they are listed.

#### **3.3.4 Tab 4: Compensation and Termination**

**3.3.4.1** Identify the tasks and activities that Proposer proposes to undertake during the Pre-Development Phase and the maximum proposed price for such activities by completing Form G. (the negotiated and approved form of which will be included as Appendix D to the Pre-Development Agreement (Exhibit B)). Identify any additional tasks or subtasks not included in Form G that Proposer proposes to undertake during the Pre-Development Phase and the maximum proposed price for each such task or subtask.

**3.3.4.2** Identify the terms of Developer compensation in the event the Pre-Development Agreement is terminated prior to execution of the Concession Agreement or financial closing by completing Form H (the negotiated and approved form of which will be included in the Pre-Development Agreement (Exhibit B)). Identify any other events not otherwise listed in Form H. that would give rise to a right of either or both parties to terminate the PDA, and the termination compensation, if any, that the Proposer

would request upon occurrence of such event. Address and describe the mechanism for determining NCTA's payment amount for such work product, including any proprietary concepts.

#### **4. PROPOSAL EVALUATION**

NCTA anticipates opening all the Proposals that are timely received shortly after the Proposal Due Date. Such Proposal opening will occur in a secure area under the custody of the Procurement Officer and will not be open to the public.

##### **4.1 Responsiveness**

The Proposer shall submit a Proposal that provides all the information required by this RFP, in the required format and on any required forms. If the Proposal does not substantially comply with the instructions and requirements contained in this RFP, NCTA may determine it to be non-responsive and decide to disqualify the Proposal from evaluation.

NCTA will review each Proposal for compliance with this RFP and for completeness on a pass/fail basis, based on the factors set forth in the checklist below. Failure to achieve a "pass" rating on any "pass/fail" factor may result in NCTA determining that the Proposal is non-responsive and that the Proposal is disqualified.

PASS/FAIL CHECKLIST
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- The Proposal deadline and delivery requirements are met per Section 3.1.
- At least one hard copy original Proposal is submitted per Section 3.1.
- Every document required to be in Tab 1 is submitted per Section 3.3.1.
- The Proposal contains the required submissions for Tabs 2 – 4 per Section 3.3.
- The Proposer's team does not include any unacceptable debarred, suspended or voluntarily excluded persons (see Section 3.3.1.11).

## **4.2 Additional Information**

### **4.2.1 Proposer Disclosures**

Based on the facts disclosed in Form F as part of the Proposal, NCTA may determine that, as of the Proposal submittal date, conflict of interest does not prevent a firm from being a Proposer or on a Proposer team, that a conflict of interest exists but is acceptable under certain conditions, that additional information is needed, or that the firm is rejected from being a Proposer or on a Proposer team.

In addition to the disclosure requirements required to be in the Proposal, NCTA may impose, after the submission of a Proposal, any other special disclosure requirements NCTA determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any Proposer. Required disclosures may include a request that the Proposer demonstrate that it can provide documents that will be required to be delivered in connection with the Pre-Development Agreement (see Exhibit B, Section 2), including but not limited to opinions of counsel, certificates of formation, insurance certificates, evidence of bonding capacity, evidence of licensure, and evidence as to the authority, power and capacity of proposed signatories to bind the Proposer to a contract.

### **4.2.2 Interviews**

NCTA will interview each of the Proposers for the purpose of understanding and clarifying their Proposals. The proposed Project Manager and other Key Personnel designated by NCTA are required to attend the interview scheduled for December 3, 2008. The Proposal may receive a lower evaluation if the persons attending the interview do not exhibit a comprehensive understanding of the Project and the Proposal. NCTA will inform such Proposers of the definitive schedule and format for such interviews following receipt of the Proposals.

### 4.2.3 Information

Information may be exchanged as part of the Proposal evaluation and selection process. NCTA may request clarifications to address minor informalities or clerical errors in the Proposal *and additional information to supplement a Proposal*. In such cases, the Proposer shall provide the requested information in writing by the date and time indicated by NCTA. If NCTA does not timely receive the requested information, the Proposer's evaluation and ranking may be adversely affected and/or the Proposal may be declared non-responsive.

## 4.3 Proposal Evaluation and Ranking Per NCTA Project

### 4.3.1 Proposal Evaluation and Ranking Process

After completion of the pass/fail and initial responsiveness review, the Proposal will be evaluated and ranked based on the evaluation criteria set forth below to determine whether it includes any improvements over the RFP requirements and brings additional benefits and/or value to NCTA and the Project.

### 4.3.2 Weighting

The components of the Proposal (exclusive of the pass/fail components described in Section 4.1) will be weighted in five overall categories, as follows:

<b>Category</b>	<b>Weighting</b>
Development Approach (Section 4.3.4.1)	30%
Risk Sharing (Section 4.3.4.2)	30%
Revenue Planning and Strategy (Section 4.3.4.3)	20%
Commitment of Personnel and Resources (Section 4.3.4.4)	10%
Technical Expertise and Innovation (Section 4.3.4.5)	10%

### 4.3.3 Methodology

NCTA will review each Proposal with reference to the above categories and in accordance with the guidelines provided in this Section 4.3.3. The components of each category will be qualitatively evaluated and assigned a rating as follows:

ADJECTIVE RATING	DESCRIPTION
Exceptional /-	The Proposer has demonstrated an approach which is considered to significantly exceed stated requirements/objectives and provides a consistently outstanding level of quality. There is very little or no risk that the Proposer would fail to meet the requirements of the RFP. There are essentially no weaknesses.
Good +/-	The Proposer has demonstrated an approach which is considered to exceed stated requirements/objectives and offers a generally better than acceptable quality. There is little risk that the Proposer would fail to meet the requirements of the RFP. Weaknesses, if any, are very minor.
Acceptable +/-	The Proposer has demonstrated an approach which is considered to meet the stated requirements/objectives and has an acceptable level of quality. The Proposer demonstrates a reasonable probability of meeting the requirements of the RFP. Weaknesses are minor.
Unacceptable	The Proposer has demonstrated an approach which is considered to fail to meet the stated requirements/objectives and/or provides unacceptable quality and/or demonstrates no reasonable likelihood of meeting the requirements of the RFP and/or contains weaknesses that are so major and/or extensive that a major revision to the Proposal would be necessary.

In assigning ratings, NCTA may assign “+” or “-” (such as, “Exceptional -”, “Good +”, and “Acceptable +”) to the ratings to better differentiate within a rating in order to more clearly differentiate between the technical evaluation factors and the overall Project



Development Plans. However, NCTA will not assign ratings of “Unacceptable +”, “Unacceptable –“ or “Exceptional +.”

The term “weakness,” as used herein, means any flaw in the Proposal that increases the risk of unsuccessful contract performance.

#### **4.3.4 Evaluation Criteria**

The evaluation and ranking of Proposals will be based on information contained in the Proposals, gleaned from references and obtained from the mandatory interview. NCTA reserves the right to reject all Proposals, at any time prior to signing of the PDA, regardless of evaluation and ranking, in relative or absolute terms.

NCTA will assess the Proposals based on the following factors:

##### **4.3.4.1 Development Approach (30%)**

Does the Proposer demonstrate an effective, knowledgeable and realistic approach to Project design? Does the Proposer demonstrate a thorough understanding of the unique characteristics and challenges related to the Project? Does the Proposer understand the Project and have an effective strategy to perform the Services required in the Pre-Development Phase, including the use of qualified SPSFs?

(a) Design. Does the Proposer demonstrate an ability to properly design the Project, including the bridge, interchanges, intersections and other ancillary features? Does the Proposer demonstrate an understanding of applicable NCDOT design standards, specifications, procedures and guidelines? Does the Proposer demonstrate an understanding of the critical considerations, approvals and trade-offs associated with any design exceptions and/or variances?

(b) NEPA, Permitting and Regulatory Approvals. Has the Proposer identified the necessary local, State or federal services or assistance required under the PDA and Concession Agreement? Has the Proposer clearly identified the challenges and necessary requirements for the completion of the environmental process and clearly outline their support role in that process? Does the Proposer demonstrate a thorough understanding of the permitting process and tasks that can be

performed during the Pre-Development Phase to expedite the permitting under the Concession Agreement? Does the Proposer present a clear, concise and responsive plan for developing necessary permit applications and supporting materials, building consensus and obtaining regulatory approvals with minimal support and oversight from NCTA? Does the Proposer integrate the regulatory approval process with an overall project implementation plan and other critical project milestones?

(c) Mitigation. Does the Proposer demonstrate an understanding of the likely project environmental impacts and regulatory agency concerns? Does the Proposer present a menu of appropriate and likely mitigation elements as well as an understanding of how mitigation affects project scope, schedule and cost?

(d) Construction. Considering the Project setting, does the Proposer demonstrate applicable experience and capabilities to construct the Project? Does the Proposer offer a specific construction plan relative to Project staging, sequencing, techniques, erection, etc that provides value via lower construction costs, reduced construction time, reduced environmental impacts, green features, etc.

(e) Right of Way and Utilities. Has the Proposer properly identified the issues surrounding utility impacts/relocations and right of way impacts/acquisitions? Has the Proposer presented a plan for their activities during the PDA and as part of the Concession Agreement? How does the Proposer plan to address utility and right of way costs during the open-book negotiations from a scope, cost, schedule and risk perspective?

(f) Concession Agreement Negotiations. Has the Proposer presented a clear and transparent plan for negotiating the Concession Agreement and the Open Book Basis negotiations of the design-build contract?

#### **4.3.4.2 Risk Sharing Approach (30%)**

Does the Proposer express a willingness to share appropriate risk with NCTA during the Pre-Development Phase and the Concession Period? Does the Proposer demonstrate a clear understanding of the need to share risk with NCTA? Does the Proposer demonstrate a reasonable approach to risk sharing to ensure

appropriate development and progress of the Project during the Pre-Development Phase, as set forth in the completed Form G?

(a) Risk Sharing. Does the Proposer appropriately and reasonably distribute risk among the Proposer, NCTA and others with regard to proposed costs? Is the Proposer willing to defer payment until financial close? Is the Proposer willing to share or assume payment and other risks if the PDA is terminated in the circumstances described in Proposer's submission in Tab 4?

(b) Payment Amount. Does the Proposer provide reasonable cost/payment amounts in Form G and in response to Tab 4 with respect to the value received for the services to be provided by the Proposer? Does the Proposer submit a plan to leverage NCTA and other public funds by use of Proposer funds? Does the Proposer provide for reasonable compensation with respect to the termination events set forth in Form H?

(c) Payment Timing. Does the Proposer present a reasonable timing for payments under both the PDA and Concession Agreement? Does the Proposer clearly demonstrate an understanding of how payment timing impacts Project costs?

#### **4.3.4.3 Revenue Planning and Strategy (20%)**

Does the Proposer demonstrate a tolling strategy that is focused on maximizing Project revenue? Does the Proposer have a realistic approach to bring the Project to financing and implementation? Has the Proposer demonstrated sufficient understanding of the public support issues and proposed a reasonable and effective plan for garnering that support with respect to developing the Project? Does the Proposer have a sufficient understanding and approach to gaining public support and input for tolling the Project?

(a) Success Factors and Innovation. Has the Proposer adequately addressed the necessary success factors and schedule to accomplish Developer obligations in the PDA and Concession Agreement? Has the Proposer demonstrated innovative approaches and methods that provide added value and maximize toll revenue ?

(b) Cost Effectiveness. Has the Proposer identified the key cost drivers of the Project and provided a detailed plan outlining specific approaches, techniques, materials, etc to reduce cost? Has the Proposer demonstrated a proper and appropriate balance of up-front capital cost expenditures versus long term maintenance and life-cycle costs? Has the Proposer crafted a plan with an approach as a long-term partner which will deliver the most cost effective project and holistically considers the entire Project life, as well as, hand-back requirements?

(c) Tolling. Does the plan for tolling adequately address coordination and implementation for tolling the Project? Does the plan for tolling identify the necessary success factors for achieving maximum user fees during peak and non-peak periods? Does the plan provide innovative approaches for the collection of user fees from both the indigenous local market and the tourist market? Does the Proposer provide a detailed plan for toll strategies and marketing?

(d) Traffic and Revenue. Does the Proposer present a customized plan for assessing traffic and revenue potential on the Project? Does the Proposer provide innovative features of the traffic and revenue assessment would be applicable to the Project? Does the plan include enforcement, violation, technology, leakage considerations? Does the Proposer present a plan based upon the unique markets of the Project and the patrons likely to utilize the Project? Does the plan address the challenges and opportunities that exist in developing a traffic and revenue study sufficient for bonds, loans and/or equity investment?

(e) Financing. Does the Proposer demonstrate evidence of its experience, ability and commitment to provide a sufficient private-sector contribution or other innovative financing contribution of funds or resources to the Project as well as the ability to obtain the other necessary financing? Has the Proposer submitted a plan for developing a financing plan for the Project that is feasible and demonstrates understanding of the realities of the Project and the potentialities for financing the Project?

#### **4.3.4.4 Commitment of Personnel and Resources (10%)**

Does the Proposer provide sufficient resources and qualified personnel to successfully complete its obligations under the PDA? Does the Proposer

provide a clear understanding of the Project specific needs with respect to resources and personnel?

(a) Management Plan. Has the Proposer provided a clear depiction of their management role and obligations during the PDA and Concession Agreement?

(b) Schedule. Has the Proposer provided an integrated workplan including activities and milestones for all deliverables? Does the Proposer present a plan for identifying activity sequences, milestones, tracking critical path activities and mobilizing sufficient resources in order to minimize the implementation timeframe of the Project?

(c) Key Personnel and Resources. Has the Proposer provided for the commitment of Key Personnel necessary to perform its obligations under the PDA? Does the Proposer currently have the resources to perform the obligations required under the PDA? Are the proposed Key Personnel adequately qualified for their assigned roles? Is the Proposer able to demonstrate the availability of its Key Personnel and resources for the Pre-Development Phase? Does the Proposer provide for any of its Key Personnel to continue through the Concession Period?

#### **4.3.4.5 Technical Expertise and Innovation (10%)**

Does the Proposer demonstrate technical expertise useful and applicable to the Project? Does the Proposer present innovative ideas or methods that are specific to the Project?

(a) Operation and Ownership. Has the Proposer adequately addressed the necessary success factors and schedule to accomplish Developer's operation and maintenance of the Project under the Concession Agreement? Has the Proposer demonstrated a detailed understanding and reasonable approach with respect to interoperability and interfacing with NCTA in operating and maintaining the Project?

(b) Geotechnical Explorations. Has the Proposer outlined a plan for obtaining necessary geotechnical information during the PDA phase? What information will be obtained and to what level of detail? Has the Proposer

provided a detailed linkage between proposed up-front geotechnical investigations and risk and contingencies, including potential archaeological issues? Has the Proposer presented a plan for optimizing the geotechnical data collection during the PDA phase?

(c) Aesthetic Treatments and Green Techniques. Does the Proposer demonstrate an understanding of NCTA goals relative to Project aesthetics, stormwater drainage, offsite spoil wasting, recycled materials, permeable pavements, etc? Has the Proposer provided a meaningful, innovative and feasible plan to incorporate some or all of these “green” features into the Project in a cost effective manner?

(d) Context Sensitive Solutions. Does the Proposer demonstrate an understanding and appreciation for the Project environment and unique issues and context of the Currituck Sound? Does the Proposer present innovative and appropriate Context Sensitive Solutions as well as a plan and development framework to ensure that Context Sensitive Solutions remain important considerations during project development, implementation and beyond?

#### **4.4 Ranking of Proposals**

The ranking of each of the Proposals will be based on an integrated qualitative assessment of each of the evaluation criteria. After assigning qualitative ratings to each component of the weighted categories, an overall qualitative rating for each such category will be assigned based on the assigned weightings of the components. The Proposals will be ranked from highest to lowest based on the overall qualitative scores in each category. The highest ranked Proposal will represent the best value to NCTA. Proposals receiving an "unacceptable" rating for any component of the overall score may be disqualified or ranked substantially lower, in NCTA's discretion.

#### **4.5 Value Determination**

Prior to seeking Board approval to proceed with negotiations regarding the highest ranked Proposal for the Project (if any), NCTA will determine whether such Proposal offers an approach that will likely accelerate cost-effective delivery or promote innovative approaches to carrying out the Project. NCTA makes no assurances that it

will select and negotiate an agreement with any of the ranked Proposals for the Project. After evaluating and ranking the Proposals, NCTA may determine that none of the Proposals offer a Project approach that is of satisfactory value to NCTA.

If NCTA determines that none of the Proposals offer satisfactory value to NCTA, NCTA may decide to reject all the Proposals and make no recommendation to award a Proposal for the Project, or it may issue a request for Proposal Revisions.

#### **4.6 Request for Proposal Revisions**

NCTA may, at any time after receipt of Proposals and prior to execution of the PDA, determine that it is appropriate to request changes to the Proposals (“Proposal Revisions”). If Proposal Revisions are requested, NCTA will follow the procedures for revised proposals described in 23 CFR Part 636. NCTA may request Proposal Revisions with or without discussions as described therein. The request for Proposal Revisions will identify any revisions to the RFP and will specify terms and conditions applicable to the Proposal Revisions, including identifying a time and date for delivery. In the event that Proposal Revisions are requested, the term “Proposal,” as used in the RFP, shall mean the original Proposal, as modified by the Proposal Revisions.

Upon receipt of Proposal Revisions, NCTA will re-evaluate the Proposals as revised, following the evaluation process described herein.

#### **4.7 Board Approval**

If NCTA determines after the evaluations, rankings and value determinations (either under this RFP or pursuant to a request for Proposal Revisions), that it is going to recommend award of the highest ranked Proposal, NCTA will recommend that the Board approve proceeding with potential negotiations on the highest ranked Proposal for the Project.

NCTA will provide written notice to all Proposers informing them whether or not the Board approved their Proposal for potential negotiations.

## **5. NEGOTIATIONS AND EXECUTION OF PRE-DEVELOPMENT AGREEMENT; AWARD**

### **5.1 Pre-Development Agreement Negotiations**

Upon conclusion of the evaluation process and approval of the Board, NCTA will attempt to negotiate in good faith a Pre-Development Agreement for the highest ranked Proposal selected under Section 4 for the purpose of determining the final terms and conditions of the Pre-Development Agreement.

Negotiations may address any matters allowed by applicable law and deemed advisable by NCTA. NCTA's commencement of negotiations with a selected Proposer does not require NCTA to accept or include particular terms from the selected Proposal in the negotiated Pre-Development Agreement, including, without limitation, the risk allocations or compensation terms.

If a PDA satisfactory to NCTA cannot be negotiated with the highest ranked Proposer, NCTA will formally end negotiations with that Proposer and take action consistent with the direction provided by the Board. Such action may include (a) rejection of all Proposals, (b) issuance of a request for Proposal Revisions to Proposers; or (c) proceeding to the next most highly ranked Proposal to finalize or attempt to negotiate a PDA with that Proposer in accordance with this Section 5.1 and applicable law. If negotiations fail with such second ranked Proposer, NCTA may request permission from the Board to commence negotiations of a PDA with the third ranked Proposer in accordance with this Section 5.1.

### **5.2 Board Approval**

If NCTA and Developer successfully negotiate a Pre-Development Agreement, NCTA will recommend that the Board approve the agreement. The Pre-Development Agreement may be entered into only upon condition that Board has approved the agreement.



### **5.3 Award; Execution of Pre-Development Agreement**

Following final negotiations and completion of the Pre-Development Agreement, and approval by the Board, NCTA will award the Pre-Development Agreement with the right of first negotiation of a Concession Agreement with the selected Proposer. NCTA will deliver four (4) sets of execution copies of the Pre-Development Agreement to the selected Proposer and the selected Proposer shall deliver to NCTA, within 10 calendar days of receipt of the execution copies of the Pre-Development Agreement from NCTA, the following:

- The Pre-Development Agreement, executed on behalf of Developer; and
- The Closing Documents described in the Pre-Development Agreement (see Section 2 of Exhibit B).

NCTA will return one copy of the Pre-Development Agreement executed by NCTA within 10 calendar days of receipt of all required documents from the Proposer. The Pre-Development Agreement will take effect when NCTA delivers the fully executed Pre-Development Agreement to Developer.

## **6. NEGOTIATIONS AND EXECUTION OF CONCESSION AGREEMENT**

### **6.1 Conditions for Proceeding to Concession Agreement**

The Pre-Development Agreement will:

- Identify conditions precedent for execution of a Concession Agreement.
- Describe the extent of negotiation rights Developer will acquire as a result of satisfying specified obligations under the Pre-Development Agreement.
- Describe the scope of the Project which may be included within a Concession Agreement.
- Outline the services and work expected for the Concession Period.

- Attach or describe key terms and conditions of the Concession Agreement that the parties contemplate at the time of entering into the Pre-Development Agreement, including the standard NCTA terms and conditions that will apply.
- Describe uncertainties or risks regarding the Concession Period and the manner in which Developer will address those uncertainties and risks.

## **6.2 Concession Agreement Negotiations**

During the Pre-Development Phase, NCTA and Developer will commence good faith negotiations of a Concession Agreement for the Project. NCTA expects to brief the Board during the course of negotiations. Developer shall have 60 days from satisfaction of all the conditions precedent set forth in the Pre-Development Agreement to execute a Concession Agreement with NCTA, and then another 120 days to close Project financing. Developer's failure to timely satisfy the required conditions precedent may result in the termination of the PDA. While the Pre-Development Phase is intended to allow Developer the opportunity to define the Concession Period successfully and Developer will acquire certain conditional rights to negotiate a Concession Agreement under the Pre-Development Agreement, there is no assurance that the Project will proceed to negotiations or that Developer will awarded a Concession Agreement.

Negotiations of the Concession Agreement will include the matters identified in the Pre-Development Agreement, including matters newly discovered as a result of the Services under the Pre-Development Agreement, other changes affecting the Project, and any other matters allowed by applicable law and deemed advisable by NCTA. NCTA and Developer will each have the right under the PDA to suspend, discontinue and/or terminate Concession Agreement negotiations at any time prior to execution of a Concession Agreement. In such case, NCTA will have the right to proceed under a separate solicitation for the Project or terminate or suspend the Project. The Pre-Development Agreement will describe the rights of the parties to use work product in negotiating and executing a Concession Agreement, and generally Developer will not acquire any exclusive rights with regard to the Project and the Concession Period if

NCTA and Developer fail to negotiate a Concession Agreement successfully or the Pre-Development Agreement is otherwise terminated.

### **6.3 Terms and Conditions of Concession Agreement**

The precise terms of the Concession Agreement cannot currently be specified with any certainty. As a result, NCTA will require in the Concession Agreement certain contractual provisions that are referenced herein or included in the Pre-Development Agreement, but other provisions of the Concession Agreement will be developed and negotiated at that time.

The Pre-Development Agreement will anticipate and the Concession Agreement will specify:

- The related closing documents that must be executed and delivered for the Concession Agreement to become effective.
- Standard NCTA terms and conditions that apply to the Concession Agreement.
- Provisions regarding performance and payment bonds, guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the Project.
- The manner in which prevailing wage statutes and other State and federal requirements will apply under the Concession Period.
- The work to be performed by Developer and other parties to the Concession Agreement, the standards applicable to such work and the delivery schedule.
- Plans for financing, operations, regulatory compliance, community outreach and compensation.
- Revenue sharing with NCTA.

- Handback provisions.
- Other terms and conditions appropriate to the form of Concession Agreement.

Additionally, if the parties anticipate any payments from NCTA to Developer as part of the Concession Agreement, that agreement will provide for the terms under which such payments will be made.

#### **6.4 Concession Agreement Approval**

If NCTA and Developer successfully negotiate a Concession Agreement, NCTA will recommend that the Board approve the agreement for execution. The Concession Agreement may be entered into only upon condition that the Board has approved the executable form of the agreement.

#### **6.5 Execution of Concession Agreement**

Following final negotiation of a Concession Agreement and approval by the Board and FHWA, if applicable, NCTA will deliver execution copies of the Concession Agreement to Developer. Developer shall execute and deliver the Concession Agreement, together with such other closing documents as the Pre-Development Agreement will specify.

NCTA will execute the Concession Agreement when all applicable conditions precedent set forth in the Pre-Development Agreement are satisfied. The Concession Agreement will take effect when NCTA delivers the fully executed Concession Agreement to Developer. The Concession Agreement will require Developer to close Project financing within 120 days of execution of the Concession Agreement..

### **7. RESERVATION OF NCTA RIGHTS**

In connection with this procurement, NCTA reserves to itself all rights (which rights shall be exercisable by NCTA in its sole discretion) available to it under applicable law, including without limitation, with or without cause and with or without notice, the right to:

- (a) Develop the Project in any manner that it, in its sole discretion, deems necessary. If NCTA does not execute a PDA to its satisfaction with the highest ranking Proposer, it may negotiate with the next highest rated Proposer, terminate this procurement and pursue other development or solicitations relating to the Project, or exercise such other rights under the provisions of State law as it deems appropriate.
- (b) Cancel this RFP in whole or in part at any time prior to the execution by NCTA of a PDA, without incurring any cost obligations or liabilities.
- (c) Reject at any time any and all submittals, responses and Proposals.
- (d) Modify all dates set or projected in this RFP.
- (e) Terminate at any time evaluations of Proposals.
- (f) Suspend and terminate PDA discussions and clarifications at any time, elect not to commence PDA discussions and clarifications with any responding Proposer, and/or engage in discussions and clarifications with a Proposer that is not the highest ranked Proposer.
- (g) Issue addenda, supplements and modifications to this RFP.
- (h) Appoint evaluation committees to review Proposals, make recommendations to the Project Selection Committee and seek the assistance of outside technical experts and consultants in Proposal evaluation.
- (i) Require confirmation of information furnished by a Proposer, require additional information from a Proposer concerning its Proposal and require additional evidence of qualifications to perform the work described in this RFP

- (j) Seek or obtain data from any source that has the potential to improve the understanding and evaluation of the Proposals.
- (k) Add or delete Proposer responsibilities from the information contained in this RFP.
- (l) Waive administrative and otherwise immaterial deficiencies in a Proposal or permit clarifications or supplements to a Proposal.
- (m) Disqualify any Proposer who changes its SOQ or Proposal without NCTA approval.
- (n) Exercise any other right reserved or afforded to NCTA under this RFP and applicable law, including waiving deficiencies in a Proposal or accept and review a non-conforming Proposal.

This RFP does not commit NCTA to select a Developer, to enter into a PDA, or to proceed with the procurement described herein. NCTA and the State assume no obligations, responsibilities, and liabilities, fiscal or otherwise, to reimburse all or part of the costs incurred or alleged to have been incurred by parties considering a response to and/or responding to this RFP. All of such costs shall be borne solely by each Proposer.

The Proposer agrees that NCTA shall be entitled to use all work product (including concepts, ideas, technology, techniques, methods, processes, drawings, reports, plans and specifications) contained in its Proposal or generated by or on behalf of the Proposer for the purpose of developing its Proposal, in consideration for NCTA's agreement to receive and evaluate its Proposal as provided herein, without any further compensation or consideration to the Proposer; provided, however, that NCTA shall not be entitled to the use of (a) patented rights in previously existing proprietary technology or (b) any other information submitted to the NCTA which has been specifically designated as trade secret or confidential in accordance with NCGS § 66-152. In no event shall NCTA be bound by, or liable for, any obligations with respect to the Project

until such time (if at all) as a PDA, in form and substance satisfactory to NCTA, has been executed and authorized by NCTA, and then, only to the extent set forth therein.

Subject to Section 2.8, each Proposer, by submitting a Proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism or embarrassment that may result from any disclosure or publication of any material or information required or requested by NCTA in connection with the Proposer's submission of a Proposal. In submitting a Proposal, the Proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against NCTA, the State, and their officers and employees, for any damages that may arise therefrom.

NCTA may reject any Proposal not in compliance with all prescribed procedures and requirements and other applicable laws.

Proposals shall be valid for award by NCTA for a period of 180 calendar days after the Proposal Due Date.

## EXHIBIT A: DEFINITIONS

As used in the RFP to which this Exhibit A is attached, the following terms shall have the meanings set forth below. References to Sections, Exhibits and Appendices shall mean Sections, Exhibits and Appendices of the RFP unless otherwise specified.

### Acronyms and Abbreviations

AASHTO	American Association of State Highway and Transportation Officials
CFR	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
EEO	Equal Employment Opportunity
EIS	Environmental Impact Statement
FHWA	Federal Highway Administration
NCDOT	North Carolina Department of Transportation
N.C.G.S.	North Carolina General Statutes
NCTA	North Carolina Turnpike Authority
NEPA	National Environmental Policy Act
PABs	Private Activity Bonds
PMP	Project Management Plan
SPSF	Small Professional Services Firm
STIP	Statewide Transportation Improvement Program
TIFIA	Transportation Infrastructure Finance and Innovation Act
U.S.C.	United States Code
USDOT	United States Department of Transportation

### Definitions

**“Board”** means the board of directors for NCTA.

**“Certification Regarding use of Contract Funds for Lobbying”** refers to Form E to be completed by the Proposer.

**“Closing Documents”** refers to the documents described in Exhibit B, Section 2.



**“Concession Agreement”** has the meaning set forth in Section 1.5.

**“Concession Period”** has the meaning set forth in Section 1.5.

**“Conflict of Interest Disclosure Form”** refers to Form F to be completed by the Proposer.

**“Construction Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing the construction aspects of the Project.

**“Construction Plan”** means the plan described in Section 1.4.10.

**“Davis-Bacon requirements”** refers to the requirements of 29 C.F.R. Parts 1, 3, and 5.

**“Debarment and Suspension Certification”** means Form D, to be completed by the Proposer.

**“Design Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing the design aspects of the Project.

**“Developer”** has the meaning set forth in Section 1.1, the Short-Listed Proposer determined by NCTA to have submitted the Proposal that presents the best value to NCTA and the State, and who thereafter executes a Pre-Development Agreement with NCTA.

**“Disadvantaged Business Enterprises”** has the meaning given to it in 49 C.F.R. 26. “Equal Employment Opportunity Certification” refers to Form C to be completed by the Proposer.

**“Environmental Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing the environmental aspects of the Project.

**“Equity Member”** means a member of a Proposer team that will (i) contribute shareholders’ equity to Developer as part of the financing plan for the Project or (ii) assume a portion or allocation of Project risk during the Pre-Development Phase.

**“Executive Summary”** has the meaning given to it in Section 3.3.1.3.

**“Financial Advisor”** means the individual with the primary responsibility of advising and overseeing the financial aspects of the Project.

**“FTP Site”** means the secured website for the Project located at [www.ncturnpike.org/teac](http://www.ncturnpike.org/teac).

**“Geotechnical Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing the geotechnical aspects of the Project.

**“Key Personnel”** means the Proposer’s Project Manager, Design Manager, Construction Manager, Financial Advisor, Utilities Manager, Right of Way Manager, Environmental Manager, Geotechnical Manager, Tolling and Marketing Manager, Regulatory Manager, and Operations and Maintenance Manager.

**“Major Non-Equity Member”** means the Proposer’s Lead Engineering Firm and Lead Contractor. If any of these entities qualify as an Equity Member, then that entity shall not be treated as a Major Non-Equity Member.

**“Major Subcontractor”** means the Proposer’s lead design subcontractor, any at-risk design subcontractor of Proposer, toll systems subcontractor and any subcontractor of a Proposer designated in the SOQ to perform 10% or more of the scope of work for the Pre-Development Phase.

**“NEPA”** means the National Environmental Policy Act of 1969, as amended.

**“Non-Collusion Affidavit”** refers to Form B to be completed by the Proposer.

**“Open Book Basis”** means allowing NCTA to review all underlying assumptions and data associated with the financial model (as updated), schedule of values, payment request, pricing or compensation (whether of Developer or NCTA) or adjustments thereto, including assumptions as to costs of the work, schedule, composition of

equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, traffic volumes by user classification, toll revenues, changes in toll rates, and other items reasonably required by NCTA to satisfy itself as to the reasonableness of the amount.

**“Operations and Maintenance Manager”** means the individual with the primary responsibility of planning, managing, coordinating and overseeing the operations and maintenance of the Project.

**“Pre-Development Agreement”** has the meaning set forth in Section 1.1.

**“Pre-Development Phase”** has the meaning set forth in Section 1.1.

**“Principal Participant”** means each Equity Member and each Major Non-Equity Member.

**“Procurement Officer”** means NCTA Chief Engineer or his designated representative.

**“Project”** has the meaning set forth in Section 1.1.

**“Project Development Plan”** or **“PMP”** is the project management plan required by FHWA, as described in Section 3.9.

**“Project Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing all aspects of the Project.

**“Proposal”** has the meaning set forth in Section 1.1.

**“Proposal Cover Sheet”** refers to Form A to be completed by the Proposer.

**“Proposal Due Date”** means the date and time listed in Section 2.4 for the Proposal Due Date.

**“Proposer”** has the meaning set forth in Section 1.1.

**“Proposer Contact”** has the meaning set forth in Section 2.3.

**“Regulatory Approvals”** has the meaning set forth in Section 1.4.5.

**“Regulatory Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing the regulatory and permitting aspects of the Project.

**“Right of Way Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing all aspects of determining and acquiring the required right of way for the Project.

**“Services”** means the services and work needed by NCTA for this Project, including engineering, environmental, geotechnical and pre-development services, design, and potentially construction, financing, maintenance and operation of the Project, as described in Section 1.4 and Exhibit B.

**“Short-Listed Proposers”** means Proposers who were selected by NCTA from their SOQs as qualified to submit detailed proposals in response to the RFP.

**“Small Business Requirements”** means the requirements imposed under Title 15, United States Code, Sections 631 et seq.

**“State”** means the State of North Carolina.

**“Tolling and Marketing Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing tolling and marketing strategy of the Project.

**“Utilities Manager”** means the individual with the primary responsibility of managing, coordinating and overseeing all of the utility issues impacting the Project.

**“Website”** means the Project website found at  
<https://www.ncdot.gov/projects/mid-currituck-bridge/>

## **EXHIBIT B: FORM OF PRE-DEVELOPMENT AGREEMENT**

### North Carolina Turnpike Authority -- Mid-Currituck Bridge Project Pre-Development Agreement Outline

[THIS OUTLINE IS INTENDED TO PROVIDE THE FRAMEWORK FOR NEGOTIATIONS OF AN ULTIMATE AGREEMENT.]

This Pre-Development Agreement (this “Agreement”) is made and entered into as of \_\_\_\_\_ (“Agreement Date”), by and the North Carolina Turnpike Authority (“NCTA”), an agency of the State of North Carolina and \_\_\_\_\_ (“Developer”).

#### RECITALS

A. NCTA was created by the North Carolina General Assembly by the Act to Authorize Public Toll Roads And Bridges in North Carolina and the Creation of a Turnpike Authority in North Carolina General Statute 136 89.180, et seq. (the “Act”), to accelerate the implementation of needed transportation improvements by funding specifically identified projects with tolls.

B. NCTA is authorized by the North Carolina General Assembly under the Act to study, plan, develop, design, establish, purchase, construct, operate and maintain certain Turnpike Projects, including the Mid-Currituck Bridge (the “Project”).

C. Pursuant to N.C.G.S. 136-89.183(a)(17), NCTA is authorized to enter into agreements with private entities for the purpose of financing the cost of acquiring, constructing, equipping, operating or maintaining turnpike projects.

D. Pursuant to N.C.G.S 136-89.194(c), NCTA is authorized to utilize alternative contracting methods.

E. On November 14, 2007, the Board of NCTA authorized NCTA to seek proposals from private sector firms for developing the Project as a public-private partnership.

F. On September 29, 2008, pursuant to the Enabling Laws, NCTA issued an RFP relating to the Project.

G. On \_\_\_\_\_, 200\_, NCTA received a number of proposals for the Project, including a proposal ("Proposal") from Developer.

H. On \_\_\_\_\_, 200\_, NCTA selected Developer's Proposal for the negotiation of an agreement to develop the Project, subject to satisfaction of certain terms and conditions.

NOW, THEREFORE, in consideration of the terms, conditions, covenants and performance contained herein, including the appendices attached hereto and made a part hereof, the parties hereto agree as follows:

## **1. Background**

### **1.1 Definitions**

Appendix A sets forth the meanings of capitalized terms used in this Agreement.

### **1.2 Public-Private Partnership**

The parties hereto intend to pursue a highly cooperative and collaborative effort to engage Developer's innovation, private sector resources, entrepreneurial skills, risk sharing capabilities, management capabilities and technical and financial expertise, and to engage NCTA's governmental authority, planning capabilities, risk sharing capabilities, management capabilities and technical and financial expertise, to bring the Project to fruition.

### 1.3 Phases

1.3.1 The relationship is expected to proceed in phases.

1.3.2 This Agreement governs the first phase (“Pre-Development Phase”), and is intended to provide the framework for a long-term relationship between NCTA and Developer to analyze, identify, plan, develop, design, construct, maintain, operate and/or finance the Project. This Agreement does not establish, and shall not be construed as, a legal partnership between NCTA and Developer.

1.3.3 During the Pre-Development Phase, the parties hereto will work to advance certain Project elements including the environmental and permitting processes, funding and engineering to the point needed to close financing for and enter into the next phase of the Project.

1.3.4 If the Project continues, the parties hereto intend to negotiate a new agreement (“Concession Agreement”) to govern the second phase (“Concession Period”). The Concession Period will include finance, design, construction, operations and maintenance.

### 1.4 Project

The initial Project is described in Appendix B. Included by reference in Appendix B are certain technical aspects of Developer’s Proposal that are considered modifications to the Project as outlined in the RFP. The Project description may also be revised as a result of the environmental and permitting processes.

### 1.5 Agreement Documents

This Agreement consists of the entire agreement between NCTA and Developer with respect to the Project. All of the Appendices and Developer’s Proposal are incorporated into this Agreement by this reference.

## 1.6 Environmental and Land Use Process

### 1.6.1 NCTA's Rights and Responsibilities

1.6.1.1 The identification of a preferred alternative is exclusively within the control and decision-making authority of NCTA, in conjunction with FHWA as the lead federal agency for NEPA. Nothing in this Agreement shall in any manner limit the full discretion that NCTA will exercise in conducting its environmental review and preparing the environmental documents for the Project, including the unfettered discretion of NCTA and FHWA as the lead federal agency for NEPA to choose a no-action alternative for the Project.

1.6.1.2 Until the environmental documentation is completed and a Record of Decision (ROD), Finding of No Significant Impact (FONSI) or other decision documents is entered for the Project, all references to a Project are understood to mean a potential Project.

### 1.6.2 Developer's Rights and Responsibilities

As part of the Services, Developer may provide engineering, technical and other support services to NCTA and to any consultants retained by NCTA to prepare the environmental review documents and/or other services. Developer shall have no right or obligation to perform, and is expressly prohibited from performing, services that would violate conflict of interest rules under NEPA regarding the preparation, review, revision and decisions on scope and content of draft and final environmental review documents.

### 1.6.3 Selection of No-Action or Substantially Different Alternative

1.6.3.1 Developer understands and acknowledges the possibility that the NEPA process may result in a no-action alternative for the Project, or a Project description or alignment that differs from the description and alignment designated in its Proposal. Nothing contained in this Agreement shall commit NCTA or Developer to any Project alternative.



1.6.3.2 If a no-action alternative is selected for the Project, then this Agreement will terminate. See Section 13.3.

## **2. Closing Documents**

Developer shall deliver the following documents (the “Closing Documents”) to NCTA and NCTA will accept such documents as a condition precedent to the effectiveness of this Agreement:

- Evidence of authorization to execute this Agreement, in the form of a certified resolution of the governing body of Developer expressly stating such body’s authorization to execute this Agreement and, if Developer is a partnership, joint venture, unincorporated association, or limited liability company, of the governing bodies of the entity’s partners or members;
- The insurance policies, endorsements, and/or certificates required under Section 7;
- Evidence that Developer, its Equity Members, and other identified Subcontractors hold all licenses as of award necessary to perform the Services;
- A Certificate of Good Standing dated no earlier than 30 calendar days before the Agreement Date from the North Carolina Secretary of State for Developer and each Equity Member;
- A favorable written opinion from counsel for Developer, which counsel shall be approved by NCTA (which may be in-house or outside counsel, provided that the enforceability opinion shall be provided by an attorney licensed in the State), in substantially the form attached hereto as Appendix H (Form of Opinion of Counsel);
- Updated versions of the certifications and disclosures required in connection with the RFP.

### **3. Performance of Services Developer Obligations and Rights**

#### **3.1 Scope of Services**

Developer shall perform the services described in this Section 3 (the “Services”) by the Progress Milestone deadlines set forth on Appendix E.

#### **3.2 Key Personnel**

Developer acknowledges and agrees that NCTA selected Developer, and is entering into this Agreement because of the special qualifications of Developer’s Key Personnel. In particular, NCTA, through this Agreement is engaging the expertise, experience, judgment and personal attention of those persons listed in Appendix F (collectively, the “Key Personnel” or individually, a “Key Person”). Each Key Person shall be in place for a minimum of two years from the Agreement Date and shall not delegate performance of any management powers and/or other responsibilities he/she is required to provide under this Agreement to another of Developer’s personnel without first obtaining the prior written consent of NCTA. Further, Developer shall not re-assign or transfer any Key Person to other duties or positions such that the Key Person is no longer available to provide NCTA with his/her expertise, experience, judgment and personal attention under this Agreement, without first obtaining NCTA’s prior written consent to such re-assignment or transfer. Developer shall promptly notify NCTA in writing of any resignation, removal, termination or death of any Key Person and the proposed changes to such Key Person. NCTA shall have the right to interview, review the qualifications of and accept or not accept the proposed replacement(s) for the Key Person. Any accepted substitute or replacement for a Key Person shall be deemed to be a Key Person under this Agreement. NCTA shall have the right to access liquidated damages in the amount of \$100,000 for each instance that Developer fails to obtain prior NCTA approval in a change to the Project Manager, Design Manager, Construction Manager or Regulatory Manager. Failure of Developer to obtain prior NCTA approval in a change to a Key Person is a Developer Default under this Agreement.

### 3.3 Coordination

Developer shall be required to coordinate with certain third-parties in performing the Services, including utilities, consultants to NCTA, and permitting agencies.

### 3.4 Design

Developer shall prepare a design package, for NCTA approval, including the following key elements, in accordance with all applicable guidelines and regulations:

- Design criteria for each major feature of the Project.
- Design concepts with key elements noted.
- Preliminary horizontal and vertical alignments of all roadway elements.
- Typical sections for the mainline and intersecting routes to the Project.
- Preliminary drainage designs.
- Details of the bridge to be constructed, including any special design features or construction techniques needed.
- Description of any deviations or proposed design exceptions from the FHWA and NCDOT design standards.
- Identification of any retaining walls and /or noise walls.
- Identification of environmental impacts.

### 3.5 Utilities

Developer shall obtain the services of a private engineering firm (“PEF”) knowledgeable in the NCDOT Utility Coordination Process, involved with utility relocation /installation and highway construction. Developer shall be responsible for

preparing a utility relocation plan for the Project, for NCTA's approval, that can be effectively utilized when the Concession Agreement is executed. In preparing the utility relocation plan, Developer shall be responsible for identifying all necessary utility relocations, coordinating with utility owners on the utility relocations, and determining the cost responsibility for the utility relocations. Coordination shall include the negotiation of any necessary utility relocation agreements, when applicable.

During the Concession Period, Developer shall be responsible for all costs associated with utility relocations due to haul roads and / or any other temporary conditions resulting from Developer's methods of operation or sequence of work. NCTA will be the approving authority for all utility agreements and approval of plans. The Project will be responsible for non-betterment utility relocation costs when the utility company has prior rights of way / compensable interest. The utility company shall be responsible for the relocation costs if they can not furnish evidence of prior rights of way or a compensable interest in their facilities.

### 3.6 Right of Way

Developer shall provide all initial right of way services necessary to ensure that the required acquisitions for the Project right of way can immediately commence upon execution of a the Concession Agreement. In doing so, Developer shall determine all right of way acquisitions necessary under each of the Project build alternatives set forth in the DEIS. With respect to each such parcel required to be acquired, Developer shall provide the legal description, and the name and address of the owner(s).

Developer shall perform all services necessary for the acquisition of right of way for Project development under the Concession Agreement. NCTA will retain all rights and responsibilities as it relates to condemnation requirements.

### 3.7 Geotechnical

All geotechnical services shall be performed by a firm acceptable to NCTA and pre-qualified by NCDOT. The pre-qualified geotechnical firm shall be responsible for the following supporting geotechnical and design investigation:

- foundations, to include, without limitation, structures, sound barriers, toll gantries, overhead signs, signals and toll facility buildings
- roadway embankments and cut sections to include slope stability and settlement calculations
- retaining walls
- temporary structures
- temporary or permanent shoring

Prior to any geotechnical design submittal, the foundation design recommendation reports shall be sealed by a professional engineer registered in the State who has completed a minimum of three geotechnical design projects of scope and complexity similar to that anticipated for this Project, using the load and resistance factor design (LRFD) method in accordance with the latest edition of the *AASHTO LRFD Bridge Design Specifications*. If the engineer of record does not demonstrate the aforementioned LRFD experience, then the design must undergo a peer review by an individual with such experience. In such case, the reviewer must be a registered professional engineer, but is not required to be registered in the State.

Prior to the first geotechnical design submittal, Developer shall provide a letter to NCTA that documents the reviewer's LRFD experience for review and acceptance. Furthermore, with each geotechnical design submittal, the reviewer shall provide a sealed letter stating that he / she has carefully reviewed and approved the specific submittal details.

Developer shall perform subsurface investigations, laboratory testing and pile load testing as deemed necessary to accurately substantiate the design and costing plans.

Developer shall perform subsurface investigations and laboratory testing in accordance with the *NCDOT Geotechnical Unit Guidelines and Procedures Manual*.

Developer shall establish and submit for NCTA's acceptance a pre-design pile load testing program that shall be conducted in conjunction with the bridge foundation design.

Developer shall provide all data obtained from the above testing to NCTA in a format that is consistent with NCDOT procedures.

Developer shall be responsible for obtaining all permits necessary for such subsurface investigation and pile load testing.

### 3.8 NEPA Assistance

Developer shall support NCTA in conducting analyses, as requested, to assist with addressing issues that arise during the environmental study process, including, but not limited to, environmental analyses; engineering, traffic, or other technical studies; financial feasibility and public involvement services. This work may be directly related to the Project, as well as other alternatives under study. NCTA and FHWA will retain control and responsibility for the NEPA process.

### 3.9 PMP

Developer shall complete the Project Management Plan (PMP) as required by the Federal Highway Administration (FHWA). This plan must be assembled to meet the requirements of the Major Projects Provisions of Title 23, Section 106(h) of the United States Code. This PMP is a requirement for obtaining a TIFIA loan from USDOT.

### 3.10 Costing Materials

During the Pre-Development Phase, Developer will prepare costing plans for the Project. These costing plans will include drawings (consistent with NCDOT plan development standards) in sufficient detail so that construction quantities, right of way requirements, utility impacts and constructability issues necessary for Developer to establish a firm fixed price can be developed and verified independently by NCTA. The costing plans and other cost estimating materials will be utilized for the Open Book Basis negotiations for Developer's compensation and scope of work during the Concession Period. As part of these negotiations, Developer shall be prepared to share all information related to quantity development, unit price estimates, estimate assumptions, right of way estimates, utility impact/relocation estimates, construction methodologies, lay down areas, location of key construction materials (asphalt plants, borrow pits, concrete batch plants, casting yards, etc.), pricing methodologies, logistical issues, applicable risks, contingencies, mark-ups, profit margins, mobilization costs, maintenance of traffic costs, escalations and any other factor utilized to develop or support the firm fixed price.

### 3.11 Traffic and Revenue Studies

Developer shall procure the services of an experienced traffic and revenue consultant who shall produce a study sufficient to support the financing of the Project. That study, at a minimum, should include a 30-year forecasts of traffic by segment, a projected schedule of tolls, the revenues associated with the estimated tolls and levels of traffic, a projection of operating costs and a schedule of annual maintenance and capital replacement expenses. Such study shall be of such caliber that it will be acceptable to TIFIA and to the rating agencies.

### 3.12 Toll Strategy and Marketing

Developer shall be responsible for developing a tolling strategy and marketing plan for the Project. Marketing plans and tolls will need to be established based on specific customer type to entice them to utilize the Project to its fullest potential.

The toll strategy should maximize potential revenues while maximizing the utilization of the Project during peak and off-peak periods. A variety of tolling schemes should be considered that encourages locals to utilize the Project year round and make it the facility of choice by visitors. Toll rates may depend on such factors as peak hours, peak and off peak seasons which can result in the application of variable rates for tourists, fixed rates for locals, or a combination of both.

A marketing plan should address seasonal and daily demand fluctuations, varied market segments, and an approach for marketing the Project to local citizens and visitors. When developing a marketing plan for visitors, the plan should take into consideration 1) origin and destination of visitors; 2) what form of transportation they will take to get to their destination; 3) how long visitors will stay; and 4) what is the most convenient payment plan. A similar plan should be developed when marketing to locals, but with emphasis on travel time savings and payment convenience. Therefore, Developer should investigate marketing through and partnering with Outer Banks residential rental agencies, travel agencies, and rental car agencies to promote the Project to visitors. Local commodity and service providers should be considered as partners in providing locals with a convenient toll payment plan.

### 3.13 Operations and Maintenance

Developer shall research materials and develop construction techniques that will result in the long term reduction in cost of maintenance. At the end of the Pre-Development Phase, NCTA expects to have a long term operations and maintenance plan including the following key elements:

- Security and incident management plan.



- Estimate of annual operation and maintenance costs.
- Schedule of major life cycle rehabilitation and reserve maintenance fund requirements.

### 3.14 Regulatory Approvals

Developer shall be responsible for developing a plan to effectively obtain all Regulatory Approvals necessary to implement the Project during the Concession Period. Developer will work with NCTA during the Pre-Development Phase to explore and determine opportunities which may expedite the permitting process once the Concession Agreement is executed.

### 3.15 Environmental Mitigation

Developer shall work with NCTA during the Pre-Development Phase to investigate onsite and innovative mitigation opportunities and develop mitigation and monitoring plans.

### 3.16 Construction Plan

Developer shall complete a phased construction plan. Initially, this plan should address the following:

- a. Contract Administration efforts by both Developer and NCTA
- b. Quality Assurance (QA)/ and Quality Control (QC) process concepts
- c. Design and other engineering reviews of Developers work by NCTA
- d. General Construction phasing including construction steps, major material sources and delivery considerations, maintenance of traffic considerations, and other logistical issues
- e. Alternate construction methods with cost analysis
- f. Risk assessment

- g. Value Engineering processes
- h. Constructability processes
- i. Life cycle analysis
- j. Construction phase maintenance of traffic considerations
- k. Utilization of local contractors, SPSF's and other small business entities

### 3.17 Community Involvement

Developer will be required to participate in community involvement activities at the direction of NCTA. These activities will include, at a minimum, participation in local public workshops, communication with Project stakeholders in concert with NCTA staff, and developing other community outreach efforts to ensure that the Project moves forward with a high level of community involvement.

### 3.18 Rights of Entry

NCTA does not own the Project right of way during the Pre-Development Phase. However, NCTA and Developer will have access to the Project right of way during the Pre-Development Phase in accordance with State law. Developer, as NCTA's agent, will have the legal right to enter onto the Project right of way to gather information concerning Project feasibility, route desirability, utility locations, site conditions and characteristics of the Project. This legal right of entry includes the right to inspect, measure, survey, analyze, study, test and take borings and samples. Developer's rights granted in this Section are limited by and conditioned on, applicable provisions of State law, as set forth in N.C.G.S 136-89,194(d) and 136-120.

### 3.19 Financing Plan

NCTA and Developer will work together to develop a finance plan to be approved by NCTA for the Project ("Financing Plan"). The Financing Plan must provide for sufficient funds to be available at the times and due dates expected to pay for

Project costs under the design-build contract and to provide contingency funds for unforeseen conditions and such other expenses that are incurred by NCTA or Developer, including but not limited to right of way acquisition costs, utility relocation costs, and all reasonably foreseeable costs of design and construction. The Financing Plan shall also provide for a reasonable rate of return on Developer equity. There shall be no requirement of NCTA or other State financial participation in the Project, except as otherwise specifically agreed to by NCTA.

The Financing Plan will include the following information:

(a) Amount and timing of the anticipated uses of funds, including:

- Costs of the development services
- Right of way acquisition costs
- Cost of design-build phases
- Operation and maintenance costs;
- Other “soft costs” required to complete the Project, such as financing charges.

(b) Amount and timing of the anticipated sources of funds, including:

- Equity contributions
- Debt proceeds (taxable and PABs)
- TIFIA loan proceeds

### 3.20 Implementation Plan

NCTA and Developer will work together to develop an implementation plan to be approved by NCTA for the Project (“Implementation Plan”). The Implementation Plan shall provide a fully integrated and all-inclusive approach and timeline for the Concession Period, including, without limitation, right of way acquisition, Regulatory Approvals, utility relocations, environmental mitigation, construction, tolling plans, marketing, and operations and maintenance.

#### **4. NCTA Obligations and Rights**

##### **4.1 Environmental and Permitting Process**

NCTA will prepare the NEPA document for the Project. Regulatory Approvals concerning permits for the Project will be the responsibility of Developer.

##### **4.2 Oversight Services**

[to be provided]

##### **4.3 Community Outreach/Public Information Program**

NCTA will participate in community involvement activities and provide direction to Developer in all aspects of community outreach efforts to ensure that the Project moves forward with a high level of community involvement.

##### **4.4 Right of Way Acquisition**

NCTA will retain the right and authority, as necessary, to condemn property for Project development, in accordance with State law.

##### **4.5 Exclusive Right**

During the term of this Agreement, NCTA will not execute a Concession Agreement with another firm or firms that would be inconsistent with Developer pursuing the Concession Period in accordance with the terms of this Agreement; provided, however, that nothing in this Section 4.5 will in any way limit NCTA's right to terminate this Agreement in accordance with the terms hereof and pursue the development of the Project under a concession agreement or any other arrangement with other firms after this Agreement terminates.

## **5. Compensation**

### **5.1 Calculation and Payment of Compensation**

5.1.1 Except as otherwise provided, Developer shall not be entitled to receive any compensation from NCTA for Services under this Agreement. Compensation for such Services by NCTA, if any, will be addressed in the Concession Agreement and will be obtained from proceeds of any Developer financing or revenues received under the Concession Agreement.

5.1.2 Developer acknowledges and agrees that payment under Section 5.3 may not fully compensate Developer for all of its costs and therefore may require Developer to carry or absorb some or all of its costs.

5.1.3 Developer may be entitled to compensation for certain unpaid costs as set forth in Appendix D in the event of a termination, as described herein. Developer will be entitled to compensation for certain work product that NCTA retains in the event of termination, as described herein; provided, however, that NCTA shall not be entitled to non-assignable proprietary and intellectual interests attached to Developer's work product as otherwise provided herein.

5.1.4 The payment set forth in Appendix D shall be full compensation for all Services and other obligations under this Agreement, including (a) all labor, materials, supplies, expenses, design, equipment, insurance premiums, overhead, profit, subcontracts, intellectual property rights and incidentals necessary to complete the Services and other obligations, (b) the cost of obtaining all applicable Regulatory Approvals required for performance of the Services and other obligations (excluding only such services and obligations which this Agreement specify will be undertaken by other Persons) and compliance with such Regulatory Approvals and Law and (c) payment of any duties, taxes and other fees, costs and/or royalties imposed with respect to the Services or other obligations. Developer releases NCTA from and waives any claims against NCTA for any additional payment arising out of the Services for any

reason, including extensions of time for completion, changes of conditions, unforeseen circumstances, governmental action and Force Majeure.

## 5.2 Invoicing and Payment

5.2.1 Payment, if any, will be made within 14 calendar days of NCTA's receipt of written notification of the occurrence of the event described in Section 5.3 giving rise to the right to receive such payment and satisfaction of the requirements set forth in Section 5.2.4.

5.2.2 The invoices for payment shall be in form acceptable to NCTA. NCTA will process invoices regarding compensation for the Services in accordance with its standard practices and procedures.

5.2.3 NCTA's obligation to make a payment is conditioned on (a) Developer's submission to NCTA of an acceptable invoice, (b) verification by NCTA that the event giving rise to the right to compensation has occurred and (d) Developer not being in material breach of this Agreement, or having acted or failed to act in a way which, with the giving of notice or passage of time, would be a default under this Agreement.

5.2.4 NCTA will make payment due Developer after NCTA verifies that Developer has met all of the requirements of the Services, including the requirements set forth in Appendices D and E, contingent upon receipt of all Work Product and all materials, equipment and fixtures purchased to carry out this Agreement. Acceptance of such payment by Developer shall constitute a release of all claims for payment which Developer may have against NCTA unless such claims are specifically reserved in writing and transmitted to NCTA by Developer prior to its acceptance of final payment. Said payment shall not, however, be a bar to any claims that NCTA may have against Developer or to any remedies NCTA may pursue with respect to such claims.

5.2.5 The payment of any billing will not constitute agreement as to the appropriateness of any item or Services; and at the time of final audit, all required

adjustments will be made and reflected in a final payment. In the event that such final audit reveals an overpayment to Developer, Developer agrees to refund such overpayment to NCTA within 15 calendar days of notice of any such overpayment. Such refund shall not constitute a waiver by Developer for any claims relating to the validity of a finding by NCTA of overpayment. Developer has 15 calendar days after receipt of the final post audit to begin the appeal process to NCTA for audit findings. To begin the appeal process, Developer must deliver to NCTA written notice of appeal, setting forth the entire and complete basis for appeal. If Developer for any reason does not deliver such written notice within such 15-calendar day period, the audit results shall be final, binding and non-appealable.

5.3 Right to Compensation

[to come based on Proposals]

5.4 Payment Procedures

[to come]

**6. Schedule of Performance**

6.1 Cure Period

If Developer fails to perform any of its obligations within the time period set forth in this Agreement, Developer shall have 15 calendar days from the date NCTA delivers notice of Developer's default to cure the default, prior to NCTA exercising its available remedies for such default.

6.2 Obligation to Achieve Progress Milestones

[Process for Developer to notify NCTA of its achievement of each milestone and NCTA to verify such achievement to be added]

Developer shall achieve each Progress Milestone by the applicable deadline set forth on Appendix E.

### 6.3 Failure to Achieve Progress Milestones

If Developer fails to achieve any Progress Milestone by its deadline set forth on Appendix E, this Agreement may be terminable by NCTA, as set forth in Section 13.2.

### 6.4 Extension of Progress Milestones

6.4.1 If Developer is rendered wholly or partly unable to meet any Progress Milestone by the Milestone Deadline set forth on Appendix E because of an event of Force Majeure or NCTA Delay, Developer's time to meet such milestone date may be extended to the extent such delay impacted its ability to maintain its schedule by a number of calendar days not to exceed the actual number of calendar days Developer was delayed to meet any such milestone date as a direct and proximate result of such event of Force Majeure or NCTA Delay.

6.4.2 As a condition precedent to Developer's entitlement to an appropriate extension of time to the Progress Milestones, Developer shall deliver to NCTA written notice, describing in reasonable detail the event of delay, its cause, when and how Developer obtained knowledge of the event and of the actual or anticipated delay caused thereby and the date the event commenced or occurred, not later than 15 calendar days after the date Developer obtains both (a) knowledge that such event has commenced or occurred and (b) knowledge or reasonable cause to believe that the event either has resulted in or may result in delay in achieving a Progress Milestone. Developer understands that it shall be forever barred from receiving a time extension under this Section 6.4 if it fails to give notice of any act, or failure to act, by NCTA or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper notice, and thereafter complies with the remaining requirements of this Section 6.4.

6.4.3 Developer shall use diligent efforts to remedy any inability to perform and minimize the impact of any delay.



## 6.5 Suspension of Services

6.5.1 NCTA may order Developer in writing to suspend, delay, or interrupt all or any part of the Services, as NCTA may determine to be appropriate for the convenience of NCTA. Developer shall have the right to demobilize after 90 calendar days of such continuous suspension of all Services.

6.5.1.1 For any suspension for convenience in excess of 24 hours, Developer shall have the right to negotiate with NCTA an appropriate extension of time in those milestones subject to extension and increase in compensation. Milestones not subject to extension will not be affected, and this Agreement will terminate on the date specified unless this Agreement is amended to authorize additional time.

6.5.1.2 Developer shall resume full performance of the Services within five calendar days of receipt of written notice from NCTA to resume the Services.

6.5.1.3 Except for reasonable demobilization and remobilization costs, NCTA assumes no liability for Services performed or costs incurred prior to the date authorized by NCTA to begin Services, during periods when the Services are suspended, or after the term of this Agreement.

6.5.2 NCTA has the authority to suspend the Services wholly or in part for such period as NCTA deems necessary because of the failure on the part of Developer to perform any requirements of this Agreement (without any compensation), the Regulatory Approvals or Law. Developer shall promptly comply with the written order of NCTA to suspend the Services wholly or in part. Developer shall resume full performance of the Services immediately upon receipt of written notice from NCTA to resume the Services, subject to the termination provisions set forth herein.

## **7. Indemnification, Insurance and Liability**

### 7.1 Insurance Requirements

#### 7.1.1 Coverage

During the term of this Agreement, Developer shall maintain in full force, at its own expense, from companies licensed to do business in the State, the following insurance coverages:

7.1.1.1 Developer shall provide professional liability/errors and omissions and “tail” coverage insurance with a combined single limit, or the equivalent, of not less than \$2,000,000 for each claim, incident or occurrence. This is to cover damages caused by error, omission or negligent acts related to the professional services to be provided under this Agreement. This coverage is not a limitation on Developer’s liability or responsibility under the terms of this Agreement.

7.1.1.2 Developer shall provide general liability insurance with a combined single limit, or the equivalent, of not less than \$2,000,000 for each occurrence for Bodily Injury and Property Damage. It shall include contractual liability coverage for the indemnity provided under this Agreement.

7.1.1.3 Developer shall provide automobile liability insurance with a combined single limit, or the equivalent, of not less than \$2,000,000 for each accident for Bodily Injury and Property Damage, including coverage for owned, hired or non owned vehicles, as applicable.

#### 7.1.2 Notice of Cancellation or Change

There shall be no cancellation, material change, reduction of limits or intent not to renew the insurance coverage(s) without 30 calendar days prior written notice from Developer or its insurer(s) to NCTA.

#### 7.1.3 Certificate of Insurance

As evidence of the insurance coverages required by this Agreement, Developer shall furnish acceptable insurance certificates to NCTA prior to commencing the Services. The certificate(s) for the required insurance will specify “The State of North Carolina, The Board of Directors for the North Carolina Turnpike Authority and its members, the North Carolina Turnpike Authority, its officers and employees, The North

Carolina Board of Transportation and its members, and the North Carolina Department of Transportation, its officers and employees” as Additional Insureds for Automobile and General Liability. It need not reference this Agreement name or number. Insuring companies or entities are subject to State acceptance. If requested, complete copies of insurance policies, trust agreements, etc. shall be provided to the State. Developer shall be financially responsible for all pertinent deductibles, self insured retentions and/or self insurance.

## 7.2 Indemnity

### 7.2.1 Claims for Other than Professional Liability

Developer shall indemnify, hold harmless and defend the State and NCTA, their officers, agents and employees from all claims, suits or actions of whatsoever nature, resulting from or arising out of the activities of Developer or its Subcontractors, agents or employees under this Agreement.

### 7.2.2 Claims for Professional Liability

Developer shall defend, save and hold harmless the State and NCTA, their officers, agents and employees from all claims, suits or actions arising out of the professional negligent acts, errors or omissions of Developer or its Subcontractors and Subcontractors agents or employees in performance of professional services under this Agreement.

### 7.2.3 State Rights

Notwithstanding the foregoing defense obligations under Sections 7.2.1 and 7.2.2, neither Developer nor any attorney engaged by Developer shall defend any claim in the name of the State or any agency of the State, nor purport to act as legal representative of the State or any of its agencies, without the prior written consent of the North Carolina Attorney General. The State may, at any time at its election, assume its own defense and settlement in the event that it determines that Developer is prohibited from defending the State, or that Developer is not adequately

defending the State's interests, or that an important governmental principle is at issue or that it is in the best interests of the State to do so. The State reserves all rights to pursue any claims it may have against Developer if the State elects to assume its own defense.

## **8. Certifications; Contracting Practices**

### **8.1 Developer Certifications**

#### **8.1.1 Lobbying Activities**

Developer certifies that to the best of Developer's knowledge and belief:

8.1.1.1 No Federal appropriated funds have been paid or will be paid by or on behalf of Developer, to any person for influencing or attempting to influence an employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement.

#### **8.1.2 Nondiscrimination**

Developer certifies that:

8.1.2.1 Neither Developer nor its Subcontractors shall discriminate on the basis of race, color, national origin or sex in the performance of the Services. Developer shall carry out, and shall cause the Subcontractors to carry out, applicable requirements of 49 CFR Part 26 in the award and administration of FHWA-assisted agreements. Failure by Developer to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as NCTA deems appropriate.

8.1.2.2 Developer shall include the above in every Subcontract (including purchase orders and in every Subcontract of any Developer-related entity member for Services), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

8.1.2.3 Developer will not discriminate against minority, women or emerging small business enterprises in obtaining any subcontracts.

8.1.2.4 Developer will not discriminate on the basis of race, color, national origin or sex in the award of subcontracts.

### 8.1.3 Use of Registered Subcontractors

Developer certifies that it shall require and ensure that all Subcontractors performing the Services are licensed by the State to the extent required by law before such Subcontractors commence the Services and for the duration of the subcontract.

### 8.1.4 SPSF Compliance

During the Pre-Development Phase, Developer will use good faith efforts to utilize the SPSF program, as developed by NCDOT, to the greatest extent possible. NCDOT has developed a SPSF program to provide consulting opportunities for firms that meet the eligibility criteria to compete against other consulting firms that are comparably positioned in their industries. Small businesses that NCDOT determines to be eligible for participation in the SPSF program are those meeting the size standards defined by the Small Business Administration regulation, 13 CFR Part 121 in Section 54 under the North American Industrial Classification System (NAICS). The SPSF program is a race, ethnicity, and gender neutral program designed to increase the availability of opportunities for small businesses on federal, state or locally funded contracts. SPSF participation is not contingent upon the project funding source.

Real-time information about SPSF that is certified by NCDOT through North Carolina's Unified Certification Program is available in the Directory of

Transportation Firms. The Directory can be accessed by the link on the NCDOT's homepage or by entering <https://apps.dot.state.nc.us/vendor/directory/> in the address bar of a web browser.

The listing of an individual firm in NCDOT's directory shall not be construed as an endorsement of the firm by NCTA or NCDOT. Developer shall submit a listing of all known SPSF firms that will participate in the performance of the proposed work prior to executing this Agreement. The participation shall be submitted on the NCDOT's Prime Form RS-2 and/or Subconsultant Form RS-2.

[insert any SPSF goals provided in Developer's Proposal]

#### 8.1.5 NCTA Standards of Performance; Licenses

The Services will be performed in accordance with the professional standard of skill and care ordinarily exercised by members of the profession applicable to the particular Service involved, under similar conditions and circumstances. Developer and its Subcontractors shall, at all times during the term of this Agreement be duly licensed to perform the Services, and if there is no licensing requirement for the profession or Services, be duly qualified and professionally competent.

#### 8.1.6 Compliance with Applicable Law

Developer shall comply with all federal, State and local laws, regulations, executive orders and ordinances applicable to the Services under this Agreement ("Law"). Without limiting the generality of the foregoing, Developer expressly agrees to comply with: (i) Title VI of the Civil Rights Act of 1964; (ii) Section V of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.

With respect to any right of way or utilities Services, Developer shall comply with the Uniform Relocation and Real Property Acquisition Policies Act of 1970, as amended, and 23 C.F.R. part 710.

#### 8.1.7 Regulatory Approvals

Developer shall obtain all Regulatory Approvals necessary, if any, to accomplish the Services. Developer shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect, all Regulatory Approvals, except to the extent that such responsibility is expressly assigned in this Agreement to another Person.

#### 8.1.8 Taxes

Developer shall pay all applicable federal, State and local sales, consumer, use and similar taxes, property taxes and any other taxes, fee, charges or levies imposed by a governmental entity, whether direct or indirect, relating to, or incurred in connection with, the performance of the Services.

#### 8.1.9 Debarment and Suspension

Developer shall include the requirement to comply with 49 CFR 29.300 et seq. in each Subcontract and shall require each Subcontractor to include the same provision in lower-tier Subcontracts.

### **9. Representations and Warranties**

9.1.1 Developer represents and warrants to NCTA as follows.

(a) Developer is a duly organized \_\_\_\_\_ created under the laws of the State of \_\_\_\_\_, is duly authorized to conduct its business in the State of North Carolina, has the requisite power and has or will timely have all required licenses to carry on its present and proposed activities and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of Developer provided

for herein. [If Developer is a joint venture, identify its members and provide similar representations and warranties regarding each member.]

(b) Developer has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement, and this Agreement constitutes the legal, valid and binding agreement of Developer, enforceable against Developer in accordance with its terms.

(c) Each person executing this Agreement in the name of Developer has been duly authorized to do so on behalf of Developer.

(d) Neither the execution and delivery by Developer of this Agreement nor the consummation of the transactions contemplated hereby is in conflict with the governing instruments of Developer [or any of its members], any order or decree of any judicial or administrative tribunal or any other agreements or instruments to which Developer [or any of its members] is a party or by which Developer [or any of its members] is bound or, to the knowledge of Developer, in conflict with any federal or state law or regulation to which Developer is subject.

(e) Upon the execution and delivery by NCTA and Developer, this Agreement shall constitute a legal, valid and binding agreement of Developer, enforceable in accordance with its terms, subject to all Laws, Regulations and Ordinances respecting bankruptcy and insolvency and to principles of equity.

(f) There is no litigation pending and served on Developer [or any of its members] which challenges Developer's [or any of its member's] authority to execute, deliver or perform this Agreement, and Developer has disclosed to NCTA any threatened litigation with respect to such matters of which Developer [or any of its members] is aware.

(g) Developer [and each of its members] is in material compliance with all laws, regulations and ordinances applicable to Developer's activities in connection with this Agreement.

9.1.2 NCTA represents and warrants to Developer as follows.

(a) NCTA has the requisite authority to enter into this Agreement and to perform each and all of the obligations of NCTA provided for herein.



(b) NCTA has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement.

(c) Each person executing this Agreement on behalf of Developer has been duly authorized to do so on behalf of NCTA.

(d) Upon the execution and delivery by NCTA and Developer, this Agreement shall constitute a legal, valid and binding agreement of NCTA, enforceable in accordance with its terms, subject to all Laws, Regulations and Ordinances respecting bankruptcy and insolvency and to principles of equity.

(e) There is no litigation pending and served on NCTA which challenges authority to execute, deliver or perform this Agreement.

## **10. Concession Period**

### **10.1 Developer Right to Negotiate Concession Agreement**

Developer shall have the exclusive right to negotiate a Concession Agreement with NCTA for a period of 60 calendar days from the date that all the following conditions precedent have been satisfied:

10.1.1 There shall exist no default under this Agreement and no circumstance or event which with the giving of notice or passage of time would become a default under this Agreement.

10.1.2 Developer has achieved each Progress Milestone in a manner acceptable to NCTA up to “Final Negotiation of Concession Agreement” by its deadline set forth on Appendix E. [refer to milestone acceptance process in Section 6.2]

10.1.3 Developer has prepared and NCTA has approved the costing plans, the Financing Plan, the Implementation Plan, the PMP, the right of way and utility

relocation plans, and all other submittals and plans required to be provided by Developer under Section 3 of this Agreement.

10.1.4 Developer has prepared and NCTA has approved the applicable standards for the Project.

10.1.5 The ROD approves a preferred build alternative for the Project.

10.1.6 Developer has prepared and NCTA has approved the Project definition and scope.

10.1.7 NCTA has obtained an independent evaluation of the Project costs, business terms and constructability.

10.1.8 A firm fixed price for the Concession Agreement has been mutually agreed upon between the parties.

10.1.9 All required Regulatory Approvals for the Project have been issued.

10.1.10 A toll consultant approved by NCTA has delivered to NCTA a traffic and revenue study for the Project in form and substance acceptable to the rating agencies and/or financing entities, and NCTA is satisfied with the analysis, methodology, revenue projections, data, information and conclusions set forth therein.

10.1.11 Developer has provided satisfactory letters of support from its lenders clearly stating the lender's willingness to lend the proposed amounts to Developer for the Project under the terms of the Concession Agreement and Financing Plan, including reaching financial close within 120 calendar days from the effective date of the Concession Agreement, which period may be extended for an additional 30 days by mutual agreement of the parties.

## 10.2 Final Negotiation and Execution of Concession Agreement

10.2.1 Upon satisfaction of the conditions precedent set forth in Section 10.1, NCTA and Developer shall commence diligent, good faith negotiations in an attempt to

reach final agreement on the terms of an executable Concession Agreement granting Developer [or an affiliate] the exclusive right to develop, design, acquire, finance and potentially operate and maintain the Project in accordance with the approved Implementation Plan, Proposal and the outline set forth on Appendix G.

10.2.2 If the parties hereto have not reached agreement on the final terms of the Concession Agreement within 60 calendar days after satisfaction of the conditions precedent set forth in Section 10.1, or such longer or shorter period as may be mutually agreed between the parties, (a) either party may withdraw from further negotiations concerning the Concession Agreement without obligation or liability and (b) NCTA shall have the unrestricted right to address the Project in any manner it deems appropriate, including procurement of the Project by means of a competitive procurement, or by declining to proceed further with the Project. Nothing in this Section 10.2.2 is intended or shall be construed as obligating either party to accept any specific terms or conditions for a Concession Agreement.

10.2.3 If this agreement is terminated and NCTA enters into a concession agreement with any other party within 12 months of termination of this Agreement on substantially the same terms and conditions offered by Developer prior to such termination, NCTA shall compensate the Developer in accordance with the Section 13.1 (Termination for Convenience); provided, however, that Developer has not otherwise received compensation under this Agreement at such termination.

10.2.4 Following final negotiations and completion of the Concession Agreement, and approval by the Board and, if applicable, FHWA, NCTA will deliver four (4) sets of execution copies of the Concession Agreement to Developer and Developer shall deliver to NCTA, within 10 calendar days of receipt of the execution copies of the Concession Agreement from NCTA, the following:

- The Concession Agreement, executed on behalf of Developer; and
- The documents set forth in Section 10.2.5.

NCTA will return one copy of the Concession Agreement executed by NCTA within 10 calendar days of receipt of all required documents from Developer. The Concession Agreement will take effect when NCTA delivers the fully executed Concession Agreement to Developer.

NCTA will not execute the Concession Agreement in the event there is any litigation, arbitration or judicial or administrative proceeding pending or threatened which does or could materially and adversely affect (a) the Project or its design, permitting, financing, constructing, tolling management or operation, (b) the financial ability or creditworthiness of Developer [or any contractor, co-obligor or guarantor], (c) the right or authority of NCTA to enter into and perform the Concession Agreement or (d) the timely performance of the obligations of any party to the Concession Agreement.

10.2.5 Developer shall deliver the following documents, in satisfactory form and content to NCTA, with the executed Concession Agreement:

- Any agreements and/or certifications required prior to execution of the Concession Agreement have been fully executed by the necessary parties, including the certification to meet DBE goals;
- Evidence of all required guaranties, bonds, and evidence of insurance;
- Evidence that Developer complies with all applicable federal and State requirements, including requirements regarding DBE, EEO, Buy America, Davis Bacon and prevailing wages.
- Evidence of authorization to execute the Concession Agreement, in the form of a certified resolution of the governing body of Developer expressly stating such body's authorization to execute the Concession Agreement and, if Developer is a partnership, joint venture, unincorporated association, or limited liability company, of the governing bodies of the entity's partners or members is provided;

- Evidence that Developer, its Equity Members, and other identified Subcontractors currently hold all licenses necessary to perform the work and services under the Concession Agreement;
- A Certificate of Good Standing dated within 30 calendar days from the North Carolina Secretary of State for Developer and each Equity Member; and
- A favorable written opinion from counsel for Developer, which counsel shall be approved by NCTA (which may be in-house or outside counsel, provided that the enforceability opinion shall be provided by an attorney licensed in the State), in substantially the form attached hereto as Appendix H (Form of Opinion of Counsel), with changes applicable to execution of the Concession Agreement.

### 10.3 Close of Finance

Developer shall have 120 calendar days from the effective date of the Concession Agreement to reach close of finance, which period may be extended for an additional 30 days by mutual agreement of the parties. The Concession Agreement shall include the following conditions precedent for the close of finance:

10.3.1 There shall exist no default under the Concession Agreement and no circumstance or event which with the giving of notice or passage of time would become a default under the Concession Agreement.

10.3.2 Developer has satisfied any condition under Section 10.1 waived by NCTA.

10.3.3 Any concession fee or payment to NCTA shall be paid within 2 days of the close of finance.

10.3.4 Concession Period Developer has provided to NCTA evidence that financing commitments are in place sufficient to pay the full cost of design, construction, operation and maintenance of the Project, and concession fee, if applicable..

#### 10.4 Construction NTP

A NTP to commence construction under the Concession Agreement will be conditioned on the close of finance by the required deadline, as well as additional conditions for construction set forth in the Concession Agreement. Such additional conditions may include:

[to be provided]

### **11. Disputes**

All disputes with respect to this Agreement shall be governed by the terms and procedures set forth in Appendix C.

### **12. Defaults and Remedies**

#### 12.1 Defaults

Developer's events of default shall be as provided in [to be provided]. In addition to the acts listed in [to be provided], the following shall also be considered defaults:

12.1.1 Developer or its consultants no longer hold any license or certificate that is required to perform the Services or any portion thereof;

12.1.2 Developer fails to perform any portion of the Services as to endanger Developer's performance under this Agreement in accordance with its terms, and such breach, default or failure is not cured within the time periods and requirements of [to be provided];

12.1.3 Developer made knowing or reckless misrepresentations, concealed facts, or failed to disclose information in Developer's Proposal. Such shall constitute fraudulent inducements, and shall entitle NCTA to recover reliance damages, in addition to any other available remedies to which it may show itself entitled.

## 12.2 Developer's Remedies

12.2.1 Subject to Section \_\_\_\_, Developer will have the right to terminate this Agreement and recover compensation as more particularly set forth in, and subject to the terms and conditions of, Section \_\_\_\_\_. [this will tie to termination events and compensation]

12.2.2 In the event NCTA wrongfully withholds an approval or consent required under this Agreement, or wrongfully issues an objection to or disapproval of a submittal or other matter under this Agreement, Developer's sole remedies against NCTA shall be extensions of time to the extent provided in Section\_\_\_\_\_.

12.2.3 The measure of compensation available to Developer as set forth in this Agreement for a Compensation Event or an event of termination shall constitute the sole and exclusive monetary relief and damages available to Developer from the State or NCTA arising out of or relating to such event; and Developer irrevocably waives and releases any right to any other or additional damages or compensation from the State or NCTA. No award of compensation or damages shall be duplicative.

## **13. Termination**

### 13.1 Termination for Convenience

13.1.1 NCTA may terminate this Agreement in whole, but not in part, if NCTA determines, in its sole discretion, that a termination is in NCTA's best interest (a "Termination for Convenience"). Termination of this Agreement shall not relieve Developer (or any guarantor) of its obligation for any claims arising prior to termination.

13.1.2 NCTA may exercise Termination for Convenience by delivering to Developer a written Notice of Termination for Convenience specifying the election to terminate.

13.1.3 In the event of a Termination for Convenience, Developer will be entitled to compensation determined in accordance with Section \_\_\_\_\_. Payment will be due and payable as and when provided in Section \_\_\_\_\_.

13.1.4 If NCTA terminates this Agreement on grounds or in circumstances beyond NCTA's termination rights specifically set forth in this Agreement, such termination shall be deemed a Termination for Convenience for the purpose of determining the Termination Compensation due.

### 13.2 Termination for Failure to Meet Progress Milestones

If Developer fails to satisfy any Progress Milestone by the deadline set forth on Appendix E, as such deadlines may be extended pursuant to Section 6.4, NCTA, in NCTA's discretion, shall have the right to terminate this Agreement.

### 13.3 Termination in Certain Events

Either Developer or NCTA shall have the right to terminate this Agreement upon the occurrence of any of the following events:

- (a) Issuance of a Final EIS and ROD that does not include the Project;
- (b) Failure of the parties to negotiate a Concession Agreement satisfactory to both parties by April 2011, as may be mutually extended by the parties;
- (c) Action by a court or other adjudicative body or the North Carolina Legislature prohibiting continuation of the Project.
- (d) Agreement by both parties that the Project is not financeable with the available public funds and private equity.
- (e) Failure of the issuance of a ROD that includes the Project by December 2010. ]

### 13.4 Termination Process

[to be negotiated]



### 13.5 Termination Compensation

[to come from Proposal and negotiations]

## **14. Records, Work Product and Reporting**

### 14.1 Maintenance and Inspection of Records

14.1.1 Developer shall maintain all Work Product in a reasonably accessible location within the County of Wake in the State.

14.1.2 Developer shall submit a proposed project development file system plan to NCTA within 30 calendar days of the Agreement Date, for review by NCTA to determine whether the proposed file system is satisfactory. NCTA shall deliver its approval or disapproval of, or comments or changes to, the proposed plan to Developer within 14 calendar days following NCTA's receipt thereof. Within seven calendar days following receipt of any NCTA comments or changes, Developer shall deliver a revised project development file system plan adequately addressing and/or incorporating all such comments and changes.

14.1.3 The file system shall be developed so as to enable Developer and NCTA to keep track of all Services and relevant products and shall include a comprehensive indexing process to enable the Work Product to be easily located at all times. The file system plan shall in addition provide for all Work Product to be maintained so as to enable a clear distinction to be made between direct and indirect costs related to the Project and the costs of other projects, operations and tasks undertaken by Developer.

14.1.4 Developer shall index, file and maintain all Work Product and other records relating to the Project in accordance with the approved file system plan.

14.1.5 Developer shall retain and preserve all Work Product and other records relating to the Project for a period of six years after final payment, or until all disputes, if any, concerning this Agreement or the Project have been resolved,

whichever occurs later, or for such longer period as may be required by law (the "Record Retention Period").

14.1.6 For the duration of this Agreement and the Record Retention Period, within two working days after receipt of written request therefor, Developer shall make all Work Product and other records relating to the Project available during normal business hours for inspection, audit or copying by NCTA and NCTA's representatives, including the North Carolina Secretary of State accountants and auditors, for any purpose related to this Agreement, including but not limited to monitoring Developer's performance, verifying Developer's compliance with the terms and conditions of this Agreement and substantiating costs payable under this Agreement.

14.1.7 Developer shall require each Subcontractor to retain its Work Product and other records relating to the Project for duration of the Subcontract and the Record Retention Period, and to provide equivalent access to such records to NCTA and NCTA's representatives, including the North Carolina Secretary of State accountants and auditors. Developer shall require each Subcontractor to include in lower-tier Subcontracts the same project record retention and access requirements.

14.1.8 Upon completion of each Progress Milestone and each Payment Milestone and within 15 calendar days of receipt by Developer of NCTA's written request, Developer shall deliver to NCTA all Work Product generated in the performance of the Services up to that milestone date or request date (whether paid or not). Developer may make and retain copies of any such Work Product at its own expense.

## 14.2 Public Records

NCTA may maintain the confidentiality of information only as authorized in NCGS § 132-1 et. seq. If a request is made for disclosure of information submitted to NCTA by Developer, or an action is brought to compel NCTA to disclose information marked confidential pursuant to NCGS § 132-1 et seq., NCTA will notify Developer of such request or action.

Developer agrees to: (i) defend its assertions of confidentiality by instituting appropriate legal proceedings, at its own expense and through its counsel, or intervening in an action brought against NCTA to compel disclosure, to defend its assertions of confidentiality; and (ii) hold the State and NCTA, and any officials or employees thereof harmless from any and all damages, costs, and attorney's fees awarded against the State and NCTA arising out of any such actions. Nothing in this section shall preclude the State or NCTA from participating in the defense of such actions, at its option and expense through its counsel. NCTA shall have no liability to Developer with respect to the disclosure of any information, including confidential information, subject to an order by a court of competent jurisdiction pursuant to NCGS§ 132-9 or any other applicable law.

### 14.3 Ownership and Use of Work Product

#### 14.3.1 Work Product

All Work Product created by Developer, including derivative works and compilations, and whether or not such Work Product is considered a “work made for hire” or an employment to invent shall be the exclusive property of NCTA, subject to the termination provisions set forth herein. NCTA and Developer agree that such original works of authorship are “work made for hire” of which NCTA is the author within the meaning of the United States Copyright Act. If for any reason the original Work Product created pursuant to this Agreement is not “work made for hire”, Developer hereby irrevocably assigns to NCTA any and all of its rights, title and interest in all original Work Product created pursuant to this Agreement, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon NCTA’s request, Developer shall execute such further documents and instruments necessary to fully vest such rights in NCTA. Developer forever waives any and all rights relating to original Work Product created pursuant to this Agreement, including any and all rights arising under 17 U.S.C. § 106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.

#### 14.3.2 Developer Intellectual Property

In the event that Work Product is Developer Intellectual Property, Developer hereby grants to NCTA an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use Developer Intellectual Property, including the right of NCTA to authorize Developer, consultants and others to use Developer Intellectual Property, for the purposes described in this Agreement or any Subcontract.

#### 14.3.3 Third Party Works

In the event that Work Product is Third Party Intellectual Property, Developer shall secure on NCTA’s behalf and in the name of NCTA, an irrevocable,

non-exclusive, non-transferable, perpetual, royalty-free license to use the Third Party Intellectual Property, including the right of NCTA to authorize Developers, consultants and others to use the Third Party Intellectual Property, for the purposes described in this Agreement or any Subcontract.

#### 14.3.4 Developer Intellectual Property-Derivative Work

In the event that Work Product created by Developer under this Agreement is a derivative work based on Developer Intellectual Property, or is a compilation that includes Developer Intellectual Property, Developer hereby grants to NCTA an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of Developer Intellectual Property employed in a Subcontract Work Product, including the right of NCTA to authorize Developers, consultants and others to use the pre-existing elements of Developer Intellectual Property employed in a Subcontract Work Product, for the purposes described in this Agreement or any Subcontract.

#### 14.3.5 Third Party Works-Derivative Work

In the event that Work Product created by Developer under this Agreement is a derivative work based on Third Party Intellectual Property, or is a compilation that includes Third Party Intellectual Property, Developer shall secure on NCTA's behalf and in the name of NCTA an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of the Third Party Intellectual Property employed in a Subcontract Work Product, including the right to authorize Developers, consultants and others to use the pre-existing elements of the Third Party Intellectual Property employed in a Subcontract Work Product, for the purposes described in this Agreement or any Subcontract.

#### 14.3.6 Developer Use of Work Product

Developer, despite other conditions of this provision, shall have the right to utilize the Work Product on its brochures or other literature that it may utilize for

its sales and, in addition, unless specifically otherwise exempted, Developer may use standard line drawings, specifications and calculations on other, unrelated projects.

#### 14.3.7 Confidential Information

Developer acknowledges that it and its employees or agents may, in the course of performing their responsibilities under this Agreement, be exposed to or acquire information that is confidential to NCTA or NCTA's clients. Any and all information marked confidential, or identified as confidential in a separate writing, that NCTA provides to Developer or its employees or agents in the performance of this Agreement shall be deemed to be confidential information of NCTA ("Confidential Information"). Any reports or other documents or items (including software) that result from the use of the Confidential Information by Developer shall be treated with respect to confidentiality in the same manner as the Confidential Information. Confidential Information shall be deemed not to include information that (a) is or becomes (other than by disclosure by Developer) publicly known, (b) is furnished by NCTA to others without restrictions similar to those imposed by this Contract, (c) is rightfully in Developer's possession without the obligation of nondisclosure prior to the time of its disclosure under this Contract, (d) is obtained from a source other than NCTA without the obligation of confidentiality, (e) is disclosed with the written consent of NCTA or (f) is independently developed by employees or agents of Developer who can be shown to have had no access to the Confidential Information.

#### 14.3.8 Non-Disclosure

Developer agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Developer uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties, or use Confidential Information for any purposes whatsoever other than the provision of Services to NCTA hereunder, and to advise each of its employees and agents of their obligations to keep Confidential Information

confidential. Developer shall use its best efforts to assist NCTA in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the generality of the foregoing, Developer shall advise NCTA immediately in the event Developer learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and Developer will at its expense cooperate with NCTA in seeking injunctive or other equitable relief in the name of NCTA or Developer against any such person. Developer agrees that, except as directed by NCTA, Developer will not at any time during or after the term of this Agreement disclose, directly or indirectly, any Confidential Information to any person, except in accordance with this Agreement, and that upon termination of this Agreement or at NCTA's request, Developer will turn over to NCTA all documents, papers, and other matter in Developer's possession that embody Confidential Information.

#### 14.3.9 Injunctive Relief

Developer acknowledges that breach of this Section 14.3, including disclosure of any Confidential Information, will give rise to irreparable injury to NCTA that is inadequately compensable in damages. Accordingly, NCTA may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies that may be available. Developer acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of NCTA and are reasonable in scope and content.

#### 14.3.10 Publicity

Developer agrees that news releases and other publicity relating to the subject of this Agreement will be made only with the prior written consent of NCTA.

#### 14.3.11 Information Technology Terms and Conditions

To the extent Developer will perform information technology ("IT") services under this Agreement and any Subcontract arising therefrom, Developer shall

perform any such IT services according to the IT terms and conditions set forth in Appendix I.

#### 14.4 Reporting

14.4.1 Developer shall prepare a monthly progress report, in a form approved by NCTA, that will outline in written and graphical form the various phases and the order of performance of the Services and update Developer's progress with respect to each Progress Milestone in sufficient detail so that NCTA can easily evaluate the progress of the Services.

14.4.2 Each report Developer submits to NCTA shall be accompanied by a written certification in a format acceptable to NCTA executed by an authorized representative of Developer to the effect that (a) the representations and warranties of Developer contained in this Agreement are true and correct as if made on the certification date, (b) Developer is in compliance with all covenants contained in this Agreement to be performed by Developer on or before the certification date, (c) all compensation computations performed by Developer and submitted to NCTA are accurate and consistent with the terms and provisions herein, and (d) as of the certification date, Developer is in compliance with all provisions of this Agreement.

14.4.3 Not later than five calendar days after Developer or any Subcontractor becomes the subject of any pending or threatened litigation pertaining to or that could potentially impact the Project, the Services or this Agreement, Developer shall notify NCTA of that fact, shall thereafter keep NCTA currently informed of the status of such matters and shall provide NCTA such information concerning the same and true and correct copies of related documents as NCTA may reasonably request.

14.4.4 Developer shall not issue any media releases, written statements generally available to the public, public involvement plans or other public information materials related to the Project without the prior written approval of NCTA, the timing and/or content of which NCTA may approve or disapprove in its sole discretion.



14.4.5 Developer shall furnish or cause to be furnished to NCTA such other documents, reports and information relating to the Project as NCTA may reasonably request from time to time.

## **15. Miscellaneous**

### **15.1 Notices**

Except as otherwise expressly provided in this Agreement, any notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Developer or NCTA at the address or number set forth on the signature page of this Agreement, or to such other addresses or numbers as either party may hereafter indicate pursuant to this Section 15.1. Any notice so addressed and mailed shall be deemed to be given five calendar days after mailing. Any notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. To be effective against NCTA, such facsimile transmission must be confirmed by telephone notice to NCTA's Contract Administrator. Any notice by personal delivery shall be deemed to be given when actually delivered. Regular, day-to-day communications between the parties hereto may be transmitted through one of the methods set forth above, in person, by telephone, by email or by other similar electronic transmission.

### **15.2 Standard for Approvals**

In all cases where approvals or consents are required to be provided by NCTA or Developer hereunder, such approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution hereunder.

### **15.3 Successors and Assigns**

15.3.1 Developer shall not enter into any subcontracts for any of the Services required by this Agreement, or assign or transfer any of its interest in this Agreement,

without NCTA's prior written consent. In addition to any other provisions NCTA may require, Developer shall include in any permitted subcontract under this Agreement provisions to ensure that NCTA will receive the benefit of Subcontractor performance, as if the Subcontractor were Developer. NCTA's consent to any subcontract shall not relieve Developer of any of its duties or obligations under this Agreement. Payment under the terms of this Agreement will be made to Developer, and Subcontractors have no right to payment directly from NCTA.

15.3.2 The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and permitted assigns, if any.

#### 15.4 Survival

All rights and obligations shall cease upon termination or expiration of this Agreement, except as otherwise expressly set forth herein.

#### 15.5 No Third Party Beneficiaries

NCTA and Developer are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

## 15.6 Waiver

No waiver, consent, modification or change of terms of this Agreement shall bind either party hereto unless in writing and signed by all parties and all necessary State governmental approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of NCTA to enforce any provision of this Agreement shall not constitute a waiver by NCTA of that or any other provision.

## 15.7 Governing Law, Jurisdiction and Venue

This Agreement shall be governed by and construed in accordance with the laws of the State without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively "Claim") between NCTA and Developer that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the General Court of Justice in Wake County, North Carolina; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the Eastern District of North Carolina. In no event shall this Section be construed as a waiver by the State of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise. DEVELOPER, BY EXECUTION OF THIS AGREEMENT, CONSENTS TO THE PERSONAL JURISDICTION OF SUCH COURTS AND COVENANTS NOT TO SEEK CHANGE OF VENUE.

## 15.8 Construction and Interpretation of Agreement

15.8.1 References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, appendices, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. The captions of the sections of this Agreement are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement. In this Agreement, where

appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to; the words “including,” “included,” “includes,” and “include” are deemed to be followed by the words “without limitation”; unless the context requires otherwise, in phrases involving performance by a Person, the word “shall” indicates a requirement imposed on the Person; unless otherwise indicated, references to sections, appendices and appendices are to the document which contains such references; words such as “herein,” “hereof,” and “hereunder” refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings; and words of any gender used herein include each other gender where appropriate.

15.8.2 Developer acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review this Agreement and to bring to NCTA’s attention any conflicts or ambiguities contained therein. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm’s length and careful negotiation over a period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be used.

#### 15.9 Entire Agreement

This Agreement and the attached Appendices to this Agreement constitute the entire agreement between the parties hereto on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

No waiver, consent, modification or change of terms of this Agreement shall bind either party hereto unless in writing and signed by all parties and all necessary State governmental approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of NCTA to enforce any provision of this Agreement shall not constitute a waiver by NCTA of that or any other provision.

#### 15.10 Counterparts

This Agreement may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all parties hereto, notwithstanding that all parties are not signatories to the same counterpart. Each copy of the Agreement so executed shall constitute an original.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Agreement as of the date first written above.

**Appendices to Pre-Development Agreement**  
**Appendix A: Definitions**

Acronyms and Abbreviations

AASHTO	American Association of State Highway and Transportation Officials
C.F.R.	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
EEO	Equal Employment Opportunity
EIS	Environmental Impact Statement
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
NCDOT	North Carolina Department of Transportation
N.C.G.S.	North Carolina General Statutes
NCTA	North Carolina Turnpike Authority
NEPA	National Environmental Policy Act
NTP	Notice to Proceed
PABs	Private Activity Bonds
PMP	Project Management Plan
RFP	Request for Proposals
ROD	Record of Decision
SPSF	Small Professional Services Firm
STIP	Statewide Transportation Improvement Program
TIFIA	Transportation Infrastructure Finance and Innovation Act
U.S.C.	United States Code
USDOT	United States Department of Transportation

**Definitions**

“**Agreement**” has the meaning set forth in the opening paragraph.

“**Agreement Date**” has the meaning set forth in the opening paragraph.

**“Closing Documents”** has the meaning set forth in Section Error! Reference source not found.

**“Compensation Milestones”** means the milestones set forth in Appendix D.

**“Concession Period”** has the meaning set forth in Section 1.3.4.**“Confidential Information”** has the meaning set forth in Section 14.3.7.

**“Developer”** has the meaning set forth in the opening paragraph.

**“Developer Intellectual Property”** means any intellectual property owned by Developer and developed independently from this Agreement.

**“Enabling Laws”** has the meaning set forth in Recital A.

**“Financing Plan”** means the financing plan described in Section 3.19.

**“Force Majeure”** means delay or default caused by fire, riot, acts of God, or war where such cause was beyond the reasonable control of NCTA or Developer, respectively.

**“Concession Agreement”** has the meaning set forth in Section 1.3.4.

**“Implementation Plan”** means the implementation plan described in Section 3.20.

**“Key Person”** has the meaning set forth in Section 3.2.

**“Law”** has the meaning set forth in Section 8.1.6.

**“NCTA Delay”** means any of the following events, to the extent they result in a material delay or interruption in performance of any obligation under the Agreement, and provided such events are beyond Developer’s control and are not due to any act, omission, negligence, recklessness, willful misconduct, breach of contract or law of any of Developer or the Subcontractors, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Developer or the Subcontractor:

- (a) NCTA directed changes to the scope of work or Services under the Agreement;  
or
- (b) Failure of NCTA to provide responses to proposed schedules, plans, design documents, and other submittals and matters submitted to NCTA after the Agreement Date for which response is required under the Agreement as an express prerequisite to Developer's right to proceed or act, within the time periods (if any) indicated in the Agreement, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the submittal or matter, following delivery of written notice from Developer requesting such action in accordance with the terms and requirements of the Agreement; or
- (c) Failure of NCTA to cooperate in good faith with Developer with respect to joint obligations or tasks.

**“Open Book Basis”** means allowing NCTA to review all underlying assumptions and data associated with the financial model (as updated), schedule of values, payment request, pricing or compensation (whether of Developer or NCTA) or adjustments thereto, including assumptions as to costs of the work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, traffic volumes by user classification, toll revenues, changes in toll rates, and other items reasonably required by NCTA to satisfy itself as to the reasonableness of the amount..

**“Person”** means any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity, including NCTA.

**“Pre-Development Phase”** has the meaning set forth in Section 1.3.2.

**“Progress Milestones”** means the milestones set forth in Appendix E.



**“Project”** has the meaning set forth in Recital F.

**“Project Management Plan”** or **“PMP”** means the project management plan required by FHWA to be assembled to meet the requirements of the Major Projects Provisions of Title 23, Section 106(h) of the United States Code.

**“Proposal”** has the meaning set forth in Recital F.

**“Proposal Due Date”** means November 18, 2008.

**“Record Retention Period”** has the meaning set forth in Section 14.1.5.

**“Regulatory Approvals”** means those regulatory approvals necessary to implement the Project, as described in Section.

**“Request for Proposals”** means Request for Proposals issued by NCTA on September 29, 2008.

**“Services”** has the meaning set forth in Section 3.1.

**“State”** means the State of North Carolina.

**“Subcontractor”** means contractors and consultants (including suppliers) and any other persons or entities performing any of the Services whom Developer may be legally or contractually responsible, and the employees, agents, officers, directors, shareholders, representatives, consultants, successors and assign of any of the foregoing; provided, however, that “Subcontractor” excludes NCTA.

**“Third Party Intellectual Property”** means any intellectual property owned by parties other than NCTA or Developer.

**“Uniform Act”** means the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, P.L. 91-646, as amended.

**“Work Product”** means every design, drawing, report, study, plan, document, correspondence, memorandum, specification, note, invention, discovery, work of

authorship, trade secret and all other work product, other tangible or intangible item and intellectual property rights therein relating to the Services.

**Appendix B: Project Description**

[to be included prior to execution]

## Appendix C

### DISPUTE RESOLUTION

#### DISPUTE REVIEW BOARD (DRB)

##### I GENERAL

###### A. Definitions

Dispute – A contractual issue that involves cost and/or time (either credits or additions) that remains unresolved following good faith negotiations between authorized representatives of Developer and NCTA.

Dispute Review Board (DRB) – three neutral individuals mutually selected by Developer and NCTA to review Disputes and render findings and recommendations based on the Agreement.

###### B. Formal DRB Review

This provision provides for a formal DRB review process.

Any of the procedures for the formal DRB Review established by this provision may be altered or modified by mutual written agreement of Developer and NCTA to better suit the needs of a particular Dispute.

###### C. Summary

A DRB will be established to assist in the analysis of Disputes that arise between Developer and NCTA, to include, but not limited to, Articles 104-4, 104-8(B) or 108-10 of the Standard Special Provision, Division One, contained elsewhere in this RFP.

It is not intended for NCTA or Developer to default on their normal responsibilities to cooperatively and fairly settle their differences by indiscriminately assigning them to the DRB. It is intended that the DRB encourage NCTA and Developer to resolve potential disputes without resorting to this alternative resolution procedure.

Utilization of the DRB does not relieve Developer or NCTA from complying with all Agreement terms and conditions, and does not waive any notice or timeliness requirements of the Standard Specifications for Roads and Structures. However, if a Dispute is referred to the DRB, the claim submittal and review time frames may be superseded by time frames established by the DRB, and agreed to in writing by both Developer and NCTA.

Either Developer or NCTA may refer a Dispute to the DRB. Such referral should be initiated as soon as it appears that the normal NCTA-Developer dispute resolution effort is not succeeding. However, prior to referring a Dispute to the DRB, NCTA and Developer must agree on the central or core issue to bring before the DRB.

Promptly thereafter, the DRB will impartially consider the Dispute(s) referred to it. The DRB will provide non-binding written findings and recommendations to Developer and NCTA.

Although the findings and recommendations of the DRB should carry great weight for both Developer and NCTA, they are not binding on either Developer or NCTA. However, the findings and recommendations are admissible in subsequent claim resolution proceedings as per the Dispute Review Board, Review of Disputes, Admissibility section contained elsewhere in this provision.

The Dispute Review Board is a condition of this Agreement. NCTA and Developer agree that the submission of any unresolved dispute or claim to the DRB is a condition precedent to Developer having the right to proceed with its final claim.

D. Scope

This provision describes the purpose, procedure, function, and features of the DRB. A Three-Party Agreement among NCTA, Developer, and the selected DRB members will formalize creation of the DRB and establish the scope of its services and the rights and responsibilities of Developer and NCTA. In the event of a conflict between this Specification and the Three-Party Agreement, the latter governs. The form of the Three-Party Agreement will be provided by NCTA.

E. Purpose

The purpose of the DRB is to provide an independent and impartial review of the Dispute and provide non-binding written findings and recommendations, in accordance with the 2006 NCDOT Standard Specifications for Roads and Structures, based on the Agreement, applicable contract law, industry practices, and the facts presented.

It is not the purpose, or responsibility, of the DRB to resolve the Dispute. That responsibility remains with Developer and NCTA. However, it is anticipated that the DRB review will assist Developer and NCTA in resolving the Dispute.

Creation of the DRB is not intended as a substitute for NCTA or Developer responsibility to make a good-faith effort to settle the Dispute. Indiscriminate referral of disputes to the DRB without prior attempts by Developer and NCTA to resolve them shall be avoided. Developer or NCTA shall exhaust resolution through the escalation process defined in the formal partnering process prior to escalating an issue to the DRB.

F. Continuance of Work

Both Developer and NCTA shall proceed diligently with the work and comply with all applicable Agreement provisions while the DRB considers a Dispute.

G. Tenure of DRB

The DRB will be deemed established after NCTA, Developer and the DRB execute the Three-Party Agreement.

The DRB will be dissolved as of the end of the warranty period to Developer unless earlier terminated or dissolved by mutual agreement of Developer and NCTA. If mutually agreed upon by Developer and NCTA, the DRB may be dissolved on the date of final payment to Developer and a new DRB established as outlined herein to serve for the life of the warranty period.

## II MEMBERSHIP

### A. General

The DRB will consist of three members selected jointly by Developer and NCTA. One member will serve as Chairperson.

### B. Criteria

#### 1. Experience:

(a) It is desirable that all DRB members be experienced with the construction process including design, construction, contract administration, contract law, and resolution of construction disputes.

(b) It is not necessary that the DRB members be intimately familiar with the specific type of construction involved in the Dispute. The DRB may consult technical experts if the need arises under provisions provided for elsewhere in this Special Provision. See the Dispute Review Board, Review of Disputes, Admissibility section contained elsewhere in this provision.

#### 2. Neutrality:

(a) It is imperative that the DRB members be neutral, act impartially, and be free of any conflict of interest.

(b) For purposes of this subparagraph, the term “member” also includes the member’s current primary or full-time employer, and “involved” means having a contractual relationship with either Developer or NCTA, such as a subcontractor, architect, engineer, or construction manager.

(c) Prohibitions; disqualifying relationships for prospective members:

(i) An ownership interest in any entity involved in the Project or Agreement, or a financial interest in the Agreement, except for payment for services on this Dispute Review Board;

(ii) Previous employment by, or financial ties to, any party involved in the Agreement within a period of eighteen (18) months prior to award of the Agreement, except for fee-based consulting services on other projects;

(iii) A close professional or personal relationship with any key member of any entity involved in the Agreement which, in the judgment of either Developer or NCTA, could suggest partiality; or

(iv) Prior involvement in the project of a nature that could compromise the prospective member's ability to participate impartially in the DRB's activities.

(d) Prohibitions; disqualifying relationships for members:

(i) Employment, including fee-based consulting services, by any entity involved in the construction contract except with the express approval of both Developer and NCTA;

(ii) Discussion concerning, or the making of, an agreement with any entity involved in the Agreement regarding employment after the Agreement is completed.

(e) Any of the provisions of 1 through 4 above may be waived by mutual written agreement of Developer and NCTA.

### C. Disclosure Statement

As a part of the selection process, all prospective DRB members will be required to submit complete disclosure statements for the approval of both Developer and NCTA. Each statement shall include a resume of experience, together with a declaration describing all past, present, and anticipated or planned future relationships, including indirect relationships through the prospective member's primary or full-time employer, to this project and with Developer or NCTA, or others involved in the Agreement, including subcontractors, suppliers, design professionals, and consultants. Disclosure of close professional or personal relationships with all key members of Developer or NCTA or other parties involved in the construction Agreement shall be included.



#### D. Selection Process

Within 30 calendar days of Notice to Proceed, or as otherwise mutually agreed upon by Developer and NCTA, Developer and NCTA will jointly select the DRB using the following procedure:

1. To form a DRB, NCTA will provide to Developer a copy of the resume and references of the person proposed for the DRB. Likewise, Developer will provide NCTA the resume and references for their proposed DRB Member. Developer and NCTA will confirm the availability, neutrality, experience, and expertise of the nominees. Both NCTA and Developer will have the ability to reject the others nominee. The parties shall continue to exchange nominee information until each party has selected a nominee which is agreeable to the other party. NCTA shall be responsible for notifying the nominees of their selection.

2. Once the two mutually agreeable nominees have confirmed their participation within the DRB, they shall be responsible for selecting a third DRB member, who shall become the DRB Chairperson that is mutually agreeable to Developer and NCTA.

3. This DRB should serve for the life of the Agreement. Should the need arise to select a replacement DRB member, the remaining DRB members shall be responsible for selecting an additional member that is mutually agreeable to Developer and NCTA.

#### E. Three-Party Agreement

The DRB members and the authorized representatives of Developer and NCTA shall execute the Dispute Review Board Three-Party Agreement within 2 weeks after the selections are made.

### III **OPERATION**

#### A. General

In general, the DRB will operate in accordance with this provision. However, it is not desirable to adopt hard-and-fast rules for the functioning of the DRB. The entire procedure shall be kept flexible to adapt to changing situations. The DRB

may initiate, with NCTA's and Developer's concurrence, new procedures or modifications to existing procedures whenever this is deemed appropriate.

**B. Agreement Documents, Reports and Information**

NCTA will provide a set of the Agreement documents to each DRB member.

The DRB members will be kept informed of construction activity and other developments by means of timely transmittal of relevant information requested by the DRB and prepared by Developer and NCTA in the normal course of construction, including, but not limited to, periodic reports and minutes of progress meetings. At any time, the DRB may request copies of documents that are normally generated by Developer or NCTA during the course of business throughout the Project. Only during the resolution of a specific dispute may the DRB request reports, documents or other information that is not normally generated during the course of business, and this information shall be limited to that which is specific to this dispute.

**C. Periodic Meetings and Visits**

If requested, the DRB may participate in the formal partnering process as outlined in the contract. Additional meetings or site visits may be needed as mutually agreed among NCTA, Developer, and the DRB.

Site visits should cover all active segments of the work. Representatives of both Developer and NCTA shall accompany the DRB during project meetings or site visits.

The DRB shall be provided "issue logs" and "Supplemental Agreement/Change Order Logs" throughout the life of the contract.

**IV REVIEW OF DISPUTES**

**A. General**

Developer and NCTA will cooperate to ensure that the DRB considers Disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.

Procedures and time periods may be modified by mutual agreement.

B. Prerequisites to Review

A Dispute is subject to referral to the DRB when either Developer or NCTA believes that bilateral negotiations have reached an impasse. However, NCTA and Developer must agree on the central or core issue to bring before the DRB prior to referring a dispute to the DRB.

C. Requesting Review

Either Developer or NCTA may refer a dispute to the DRB. Requests for DRB review shall be submitted in writing to the Chairperson of the DRB. The Request for Review shall state clearly and in full detail the specific core issue of the Dispute to be considered by the DRB. A copy of the request shall be simultaneously provided to the other party.

After conferring with both Developer and NCTA, the DRB Chairperson will establish a submittal/presentation schedule.

Concise written position statements shall be prepared by both Developer and NCTA, with page number references to any supporting documentation, and submitted to each DRB member and simultaneously to the other party 30 days prior to presentation, unless both parties mutually agree otherwise.

Any rebuttals information to the position statements shall be submitted to each DRB member and simultaneously to the other party 14 days prior to presentation, unless both parties mutually agree otherwise.

D. Presentation

Unless otherwise agreed by the DRB, Developer and NCTA, the presentation will be conducted at NCTA office. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private deliberations of the DRB may be held at any convenient location.

Developer and NCTA shall have representatives in attendance at all presentations. The party which brought the dispute before the DRB will make its

presentation first. A full presentation of the dispute shall be allowed without interruption, except from the DRB. Once all information is presented the other party may provide a rebuttal, at which time each party will be allowed successive rebuttals until all aspects of the dispute are fully covered. The DRB members, Developer and NCTA may ask questions, request clarification, or ask for additional data. In difficult or complex cases, additional presentations may be necessary in order to facilitate full consideration and understanding of all the evidence presented by both Developer and NCTA. Both Developer and NCTA shall be provided adequate opportunity to present their evidence, documentation, and statement regarding all issues before the DRB. No documents, materials, reports, analysis or other information of any type shall be referenced in the presentations or considered by the DRB in its review unless the same was previously provided to the other party as supporting documentation for the position statement.

Unless otherwise agreed by Developer and NCTA, presentations will relate to issues of entitlement only. Agreement time extensions and compensation will be resolved between NCTA and Developer, in accordance with the provisions of the Standard Special Provision entitled "Division One" contained elsewhere in this RFP.

Normally, a formal transcript of the presentations will not be prepared. When requested by either Developer or NCTA, the DRB may allow recordation and transcription with the cost to be allocated to the party requesting such documentation. Such transcript, when prepared, shall not constitute the official record of the DRB Review. The record prepared by the DRB shall be the official record of the DRB Review. The DRB may provide for audio or video recordings of the presentations for the use of the DRB only.

Developer and NCTA shall not have their attorneys in attendance at the presentations to counsel and/or advise them.

If either Developer or NCTA fails to appear before the DRB on the date scheduled for the presentations, without justifiable cause, the dispute will continue under the applicable provisions of the 2006 NCDOT Standard Specifications for Roads and Structures and this RFP to include, but not limited to, Articles 104-8, 108-10 107-25 and 109-10 of the Standard Special Provision, Division One found elsewhere in this RFP.

E. Deliberations

After the presentation is concluded, the DRB will confer to formulate its findings and recommendations. All DRB deliberations shall be conducted in private, with all individual views kept confidential.

If the DRB desires technical assistance, the DRB will make a request in writing to both parties (Developer and NCTA) briefly defining the scope and estimated budget for the services. Direct attorney advisement or assistance is prohibited. If mutually agreeable, Developer and NCTA will execute an agreement with a service provider. Developer and NCTA will equally share the costs for the service provider. In the typical situation the special services provider will respond to the DRB's questions in private consultation between the provider and the DRB and no permanent record of the questions or responses will be required by Developer or NCTA. However, if mutually agreeable, these typical operating procedures may be modified. In arriving at its findings and recommendations the DRB will not be bound by any information provided by the special service provider.

F. Findings and Recommendations

The findings and recommendations of the DRB concerning any dispute are non-binding but admissible (see Admissibility section included in this provision).

It is not the responsibility of the DRB to resolve the Dispute, only to make a recommendation based upon the contract documents and information supplied and presented before them. It shall remain the responsibility of Developer and NCTA to resolve all Disputes.

The DRB's findings and recommendations will be provided in writing, by certified mail, return receipt requested, to both Developer and NCTA within 14 calendar days of the completion of the presentations. The DRB should set forth, as clearly as possible, the logic and reasoning behind its findings and recommendations. The findings and recommendations will address entitlement only. In difficult or complex cases, and in consideration of the DRB's schedule, this time may be extended by mutual agreement of the DRB, Developer and NCTA.

If the three person DRB is unable to reach unanimity in its findings and recommendations, the DRB will so advise Developer and NCTA in the report of the

DRB. The dissenting member shall prepare a minority report to be included with the DRB report.

G. Acceptance or Rejection

Within 30 calendar days of the date of the DRB's findings and recommendations, or such other time specified by the DRB, both Developer and NCTA shall provide, by certified mail return receipt requested, written notice to the other and to the DRB of acceptance or rejection of the DRB's findings and recommendations.

If, with the aid of the DRB's findings and recommendations, Developer and NCTA are able to resolve their Dispute, NCTA will promptly process any required Agreement changes.

If either Developer or NCTA rejects the findings and recommendations of the DRB, the Dispute will continue under the applicable provisions of the NCDOT Standard Specifications for Roads and Structures and this RFP to include, but not be limited to, Articles 104-8, 108-10 107-25 and 109-10 of the Standard Special Provision, Division One found elsewhere in this RFP.

H. Clarification and Reconsideration

Should the dispute remain unresolved because of a request for clarifications of the recommendation or new information or material becomes available which was not available at the time of the presentation, either Developer or NCTA may within the 7 calendar day period following the date of the DRB's findings and recommendations, request in writing, by certified mail return receipt requested, that the DRB clarify or reconsider its findings and recommendations. This information shall be supplied simultaneously to the other party.

Should new information be made available, the other party shall have an opportunity to review such information and respond appropriately.

I. Admissibility

If the DRB's findings and recommendations do not resolve the Dispute, the Agreement, the written findings and recommendations, including any minority report, and the qualifications of the DRB members will be admissible as evidence to the

extent permitted by law in any subsequent dispute resolution proceeding or forum to establish (a) that a DRB considered the Dispute, (b) the qualifications of the DRB members, and (c) the DRB's findings and recommendations that resulted from the process.

J. Legal Relations

Each DRB member, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either Developer or NCTA.

Each DRB member is acting in a capacity intended to facilitate resolution of Disputes. Accordingly, Developer and NCTA agree that to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or decisions associated with the review and findings and recommendations of Disputes referred to the DRB. No DRB member may be called as a witness by either Developer or NCTA in subsequent proceedings on the dispute. The DRB shall, upon completion of their findings, turn all records of the DRB over to NCTA for storage and preservation.

By execution of the Three-Party Agreement, Developer and NCTA agree not to pursue legal proceedings against a DRB member for activities related to or consequences resulting from their participation in the DRB.

**V PAYMENT**

A. Method of Measurement

Developer and NCTA shall equally bear the costs and expenses of the DRB.

The DRB members should not engage in activities related to the project, for which compensation is expected, unless requested by either NCTA or Developer.

Time spent at formalized meetings or Reviewing the Dispute – Each DRB member will be compensated for actual time spent at the rate of \$250 per hour with a maximum of \$2,000 per day. This rate shall include all normal incidental expenses such as telephone, fax, postage, courier, printing, and computer services. The DRB activity must be preauthorized by both Developer and NCTA.

Travel Time to and from Preauthorized Meetings – Each DRB member will be compensated for actual travel time to and from DRB meetings at the rate of \$50 per hour with a maximum of \$200 each way.

Travel Expenses – Travel expenses will be reimbursed at standard NC state rates for transportation, lodging, and meals for each day, or portion thereof, that the DRB member is traveling to or from, or attending, an authorized DRB activity. Expense receipts are required.

NCTA will provide, at no cost to Developer, administrative services such as conference facilities, meeting rooms and copying services during DRB presentations.

The Three Party Agreement and the Special Provisions contain all of the provisions for compensation and expenses of the DRB. All DRB members shall be compensated at the same daily and hourly rate.

Each DRB member may submit invoices for payment for work completed and qualified expenses no more often than once per month during the progress of work. Such invoices shall be in a format approved by NCTA, and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the DRB member together with qualified expenses incurred.

The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of NCTA or Developer for 5 years after final payment.

No additional compensation for services associated with the DRB, beyond that detailed above, will be provided to the DRB members.

B. Basis of Payment

Payment for accepted work will be made as follows:

Developer shall pay the invoices of all DRB members after approval by both Developer and NCTA. Developer shall then bill NCTA for one-half of such



invoices, which shall be processed in accordance with Article 104-7 of the Standard Special Provision, Division One, located elsewhere in this RFP.

There shall be no markups applied to expenses connected with the DRB, either by the DRB members or by Developer. Regardless of the DRB recommendation, neither NCTA nor Developer shall be entitled to reimbursement of DRB costs from the other party.

If the DRB desires special technical services, both Developer and NCTA must agree to provide the special services, following the procedures included in the Dispute Review Board, Review of Disputes, Deliberations section, contained elsewhere in this provision. If such services are approved and rendered, payment will be made under these provisions in accordance with the Dispute Review Board, Review of Disputes, Deliberations section, contained elsewhere in this provision.

These special provisions and the Three Party Agreement contain all of the provisions for compensation and expenses of the DRB. All DRB members shall be compensated at the same daily and hourly rate.

## **Appendix D: Compensation Milestones**

[to be included from the Proposal, as revised by negotiations, prior to execution; appropriate changes to be made to the document if Compensation Milestones are not proposed]

## Appendix E: Progress Milestones

Progress Milestone	Milestone Deadline
Developer has furnished to NCTA and NCTA has approved the Costing and Construction Plans	
Developer has furnished to NCTA and NCTA has approved the Financing Plan	
Developer has furnished to NCTA and NCTA has approved the Implementation Plan	
FHWA issues a record of decision (ROD), for the Project	
Negotiation of Concession Agreement	
Local approvals, if applicable	
Regulatory approvals and permits in place, as applicable	
Environmental mitigation plan(s) approved by NCTA and environmental agencies, as applicable	
Concession Period NTP	
[others, as may be negotiated or provided in Proposal]	

## **Appendix F: Key Personnel**

[to be provided with RFP]

## **Appendix G: Concession Agreement Outline**

The form of the Concession Agreement will depend on the type of relationship offered in the Proposal and accepted by NCTA, but is expected to include provisions relating to:

1. Term of agreement
2. Return on investment/equity/toll setting
3. Design, construction, operation and maintenance standards
4. Conditions precedent to construction, including:
  - satisfaction of all requirements of the quality manual that are conditions to construction;
  - all governmental approvals necessary for construction of such portion of the Project have been obtained and all conditions of such governmental approvals that are a prerequisite to commencement of such construction have been performed;
  - all insurance policies and bonds required to be delivered to NCTA have been received and approved by NCTA and remain in full force and effect;
  - all necessary rights of access for such portion of the Project have been obtained.
5. DBE; EEO; Davis Bacon; Buy America; State prevailing wages; State diversity requirements; State construction requirements
  - [State prevailing wages (as of the effective date of the Concession Agreement) and Davis Bacon wages will be attached to the agreement.]

6. Other required contract provisions for federal-aid construction contracts
  - In the event of any conflict between any applicable federal requirements and the other requirements of the Concession Agreement, the federal requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.
7. Subcontracts; key personnel
8. Payment and performance bonds
9. Community outreach
10. Schedule
11. Right of way and utilities
12. Force majeure, differing site conditions, contaminated materials
13. Representations and warranties
14. Insurance
15. Risk allocations
16. Termination
17. Defaults and remedies
18. Indemnification
19. Dispute resolution
20. Operations and maintenance
21. Documents and records
22. Warranties

### 23. Policing Services

See Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9 to this Appendix G, which are incorporated herein by this reference.

## EXHIBIT 1 TO APPENDIX G

### Federal Requirements For Federal-Aid Construction Projects

1. GENERAL.—Certain work herein proposed will be financed in whole or in part with Federal funds, and therefore all of the statutes, rules and regulations promulgated by the Federal Government and applicable to work financed in whole or in part with Federal funds will apply to such work. The "Required Contract Provisions, Federal-Aid Construction Contracts, FHWA Form 1273," are included in this Appendix G. Whenever in said required contract provisions references are made to "SHA contracting officer", "SHA resident engineer", or "authorized representative of the SHA", such references shall be construed to mean NCTA or its authorized representative.

2. PERFORMANCE OF PREVIOUS CONTRACT.—In addition to the provisions in Section II, "Nondiscrimination," and Section VII, "Subletting or Assigning the Contract," of the Form 1273 required contract provisions, Developer shall comply with the following:

No request for subletting or assigning any portion of the contract in excess of \$10,000 will be considered under the provisions of Section VII of FHWA Form 1273 unless such request is accompanied by the CERTIFICATION WITH REGARD TO THE PERFORMANCE OF PREVIOUS CONTRACTS OR SUBCONTRACTS SUBJECT TO THE EQUAL OPPORTUNITY CLAUSE AND THE FILING OF REQUIRED REPORTS (RFP Form C), executed by the proposed subcontractor.

3. NON-COLLUSION PROVISION.—Title 23, United States Code, Section 112, requires as a condition precedent to approval by the Federal Highway Administrator of the contract for this work that each bidder file a sworn statement executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any



collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the submitted bid. A form to make the non-collusion affidavit statement required by Section 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C., Sec. 1746, is included in the Proposal.

4. CONVICT PRODUCED MATERIALS.

a. FHWA Federal-aid projects are subject to 23 CFR § 635.417, Convict produced materials.

b. Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal aid highway construction project if such materials have been: (i) produced by convicts who are on parole, supervised release, or probation from a prison, or (ii) produced in a prison facility in which convicts, during the 12 month period ending July 1, 1987, produced materials for use in Federal aid highway construction projects, and the cumulative annual production amount of such materials for use in Federal aid highway construction does not exceed the amount of such materials produced in such facility for use in Federal aid highway construction during the 12 month period ending July 1, 1987.

5. SUBCONTRACTING CLAUSE.

Paragraphs 1 and 2 are deleted from Section VII of FHWA Form 1273.

**EXHIBIT 2 TO APPENDIX G**  
**REQUIRED CONTRACT PROVISIONS**  
**FEDERAL-AID CONSTRUCTION CONTRACTS**

**FHWA Form 1273**

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## I. GENERAL

1. These contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

2. Except as otherwise provided for in each section, the contractor shall insert in each subcontract all of the stipulations contained in these Required Contract Provisions, and further require their inclusion in any lower tier subcontract or purchase order that may in turn be made. The Required Contract Provisions shall not be incorporated by reference in any case. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with these Required Contract Provisions.

3. A breach of any of the stipulations contained in these Required Contract Provisions shall be sufficient grounds for termination of the contract.

4. A breach of the following clauses of the Required Contract Provisions may also be grounds for debarment as provided in 29 CFR 5.12:

Section I, paragraph 2;

Section IV, paragraphs 1, 2, 3, 4, and 7;

Section V, paragraphs 1 and 2a through 2g.

5. Disputes arising out of the labor standards provisions of Section IV (except paragraph 5) and Section V of these Required Contract Provisions shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the U.S. Department of Labor (DOL) as set forth in 29 CFR 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the DOL, or the contractor's employees or their representatives.

6. Selection of Labor: During the performance of this contract, the contractor shall not:

a. discriminate against labor from any other State, possession, or territory of the United States, or

b. employ convict labor for any purpose within the limits of the project unless it is labor performed by convicts who are on parole, supervised release, or probation.

## II. NONDISCRIMINATION

(Applicable to all Federal-aid construction contracts and to all related subcontracts of \$10,000 or more.)

### 1. Equal Employment Opportunity

Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630 and 41 CFR 60) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The Equal Opportunity Construction Contract Specifications set forth under 41 CFR 60-4.3 and the provisions of the American Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the State highway agency (SHA) and the Federal Government in carrying out EEO obligations and in their review of his/her activities under the contract.

b. The contractor will accept as his operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, preapprenticeship, and/or on-the-job training."

2. EEO Officer

The contractor will designate and make known to the SHA contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active contractor program of EEO and who must be assigned adequate authority and responsibility to do so.

3. Dissemination of Policy

All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minority group employees.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

#### 4. Recruitment

When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minority groups in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority group applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, he is expected to observe the provisions of that agreement to the extent that the system permits the contractor's compliance with EEO contract provisions. (The DOL has held that where implementation of such agreements have the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Executive Order 11246, as amended.)

c. The contractor will encourage his present employees to refer minority group applicants for employment. Information and procedures with regard to referring minority group applicants will be discussed with employees.

## 5. Personnel Actions

Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with his obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of his avenues of appeal.

## 6. Training and Promotion

a. The contractor will assist in locating, qualifying, and increasing the skills of minority group and women employees, and applicants for employment.



b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. Where feasible, 25 percent of apprentices or trainees in each occupation shall be in their first year of apprenticeship or training. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision.

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of minority group and women employees and will encourage eligible employees to apply for such training and promotion.

## 7. Unions

If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use his/her best efforts to obtain the cooperation of such unions to increase opportunities for minority groups and women within the unions, and to effect referrals by such unions of minority and female employees. Actions by the contractor either directly or through a contractor's association acting as agent will include the procedures set forth below:

a. The contractor will use best efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minority group members and women for membership in the unions and increasing the skills of minority group employees and women so that they may qualify for higher paying employment.

b. The contractor will use best efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the SHA and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of minority and women referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minority group persons and women. (The DOL has held that it shall be no excuse that the union with which the contractor has a collective bargaining agreement providing for exclusive referral failed to refer minority employees.) In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the SHA.

8. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment

The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment.

a. The contractor shall notify all potential subcontractors and suppliers of his/her EEO obligations under this contract.

b. Disadvantaged business enterprises (DBE), as defined in 49 CFR 26, shall have equal opportunity to compete for and perform subcontracts which the contractor enters into pursuant to this contract. The contractor will use his best efforts to solicit bids from and to utilize DBE subcontractors or subcontractors with meaningful minority group and female representation among their employees. Developers shall obtain lists of DBE construction firms from SHA personnel.

c. The contractor will use his best efforts to ensure subcontractor compliance with their EEO obligations.

## 9. Records and Reports

The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of the SHA and the FHWA.

a. The records kept by the contractor shall document the following:

i. The number of minority and non-minority group members and women employed in each work classification on the project;

ii. The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women;

iii. The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees; and

iv. The progress and efforts being made in securing the services of DBE subcontractors or subcontractors with meaningful minority and female representation among their employees.

b. The contractors will submit an annual report to the SHA each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. If on-the job training is being required by special provision, the contractor will be required to collect and report training data.

### III. NONSEGREGATED FACILITIES

(Applicable to all Federal-aid construction contracts and to all related subcontracts of \$10,000 or more.)

1. By submission of this bid, the execution of this contract or subcontract, or the consummation of this material supply agreement or purchase order, as appropriate, the bidder, Federal-aid construction contractor, subcontractor, material supplier, or vendor, as appropriate, certifies that the firm does not maintain or provide for its employees any segregated facilities at any of its establishments, and that the firm does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The firm agrees that a breach of this certification is a violation of the EEO provisions of this contract. The firm further certifies that no employee will be denied access to adequate facilities on the basis of sex or disability.

2. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, timeclocks, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive, or are, in fact, segregated on the basis of race, color, religion, national origin, age or disability, because of habit, local custom, or otherwise. The only exception will be for the disabled when the demands for accessibility override (e.g. disabled parking).

3. The contractor agrees that it has obtained or will obtain identical certification from proposed subcontractors or material suppliers prior to award of subcontracts or consummation of material supply agreements of \$10,000 or more and that it will retain such certifications in its files.

#### IV. PAYMENT OF PREDETERMINED MINIMUM WAGE

(Applicable to all Federal-aid construction contracts exceeding \$2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural minor collectors, which are exempt.)

##### 1. General

a. All mechanics and laborers employed or working upon the site of the work will be paid unconditionally and not less often than once a week and without subsequent deduction or rebate on any account [except such payroll deductions as are permitted by regulations (29 CFR 3) issued by the Secretary of Labor under the Copeland Act (40 U.S.C. 276c)] the full amounts of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment. The payment shall be computed at wage rates not less than those contained in the wage determination of the Secretary of Labor (hereinafter "the wage determination") which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor or its subcontractors and such laborers and mechanics. The wage determination (including any additional classifications and wage rates conformed under paragraph 2 of this Section IV and the DOL poster (WH-1321) or Form FHWA-1495) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers. For the purpose of this Section, contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act (40 U.S.C. 276a) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of Section IV, paragraph 3b, hereof. Also, for the purpose of this Section, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs, which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in paragraphs 4 and 5 of this Section IV.

b. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein, provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

c. All rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 CFR 1, 3, and 5 are herein incorporated by reference in this contract.

## 2. Classification

a. The SHA contracting officer shall require that any class of laborers or mechanics employed under the contract, which is not listed in the wage determination, shall be classified in conformance with the wage determination.

b. The contracting officer shall approve an additional classification, wage rate and fringe benefits only when the following criteria have been met:

i. the work to be performed by the additional classification requested is not performed by a classification in the wage determination;

ii. the additional classification is utilized in the area by the construction industry;

iii. the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

iv. with respect to helpers, when such a classification prevails in the area in which the work is performed.

c. If the contractor or subcontractors, as appropriate, the laborers and mechanics (if known) to be employed in the additional classification or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the

action taken shall be sent by the contracting officer to the DOL, Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, D.C. 20210. The Wage and Hour Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

d. In the event the contractor or subcontractors, as appropriate, the laborers or mechanics to be employed in the additional classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. Said Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary

e. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph 2c or 2d of this Section IV shall be paid to all workers performing work in the additional classification from the first day on which work is performed in the classification.

### 3. Payment of Fringe Benefits

a. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor or subcontractors, as appropriate, shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly case equivalent thereof.

b. If the contractor or subcontractor, as appropriate, does not make payments to a trustee or other third person, he/she may consider as a part of the wages

of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided, that the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

4. Apprentices and Trainees (Programs of the U.S. DOL) and Helpers

a. Apprentices:

i. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the DOL, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or if a person is employed in his/her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice.

ii. The allowable ratio of apprentices to journeyman-level employees on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate listed in the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually



performed. Where a contractor or subcontractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman-level hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

iii. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator for the Wage and Hour Division determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

iv. In the event the Bureau of Apprenticeship and Training, or a State apprenticeship agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor or subcontractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the comparable work performed by regular employees until an acceptable program is approved.

b. Trainees:

i. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the DOL, Employment and Training Administration.

ii. The ratio of trainees to journeyman-level employees on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

iii. Every trainee must be paid at not less than the rate specified in the approved program for his/her level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman-level wage rate on the wage determination which provides for less than full fringe benefits for apprentices, in which case such trainees shall receive the same fringe benefits as apprentices.

iv. In the event the Employment and Training Administration withdraws approval of a training program, the contractor or subcontractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Helpers

Helpers will be permitted to work on a project if the helper classification is specified and defined on the applicable wage determination or is approved pursuant to the conformance procedure set forth in Section IV.2. Any worker listed on a payroll at a helper wage rate, who is not a helper under a approved definition, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.

5. Apprentices and Trainees (Programs of the U.S. DOT)

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

6. Withholding

The SHA shall upon its own action or upon written request of an authorized representative of the DOL withhold, or cause to be withheld, from the contractor or subcontractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements which is held by the same prime contractor, as much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the SHA contracting officer may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

7. Overtime Requirements

No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, watchmen, or guards (including apprentices, trainees, and helpers described in paragraphs 4 and 5 above) shall require or permit any laborer, mechanic, watchman, or guard in any workweek in which he/she is employed on such work, to work in excess of 40 hours in such workweek unless such laborer, mechanic, watchman, or guard receives compensation at a rate not less than one-and-one-half times his/her basic rate of pay for all hours worked in excess of 40 hours in such workweek.

8. Violation

Liability for Unpaid Wages; Liquidated Damages: In the event of any violation of the clause set forth in paragraph 7 above, the contractor and any subcontractor responsible thereof shall be liable to the affected employee for his/her unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, watchman, or guard employed in violation of the clause set forth in paragraph 7, in the sum of \$10 for each calendar day on which such employee was required or permitted to work in excess of the standard work week of 40 hours without payment of the overtime wages required by the clause set forth in paragraph 7.

9. Withholding for Unpaid Wages and Liquidated Damages

The SHA shall upon its own action or upon written request of any authorized representative of the DOL withhold, or cause to be withheld, from any monies payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph 8 above.

## V. STATEMENTS AND PAYROLLS

(Applicable to all Federal-aid construction contracts exceeding \$2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural collectors, which are exempt.)

### 1. Compliance with Copeland Regulations (29 CFR 3)

The contractor shall comply with the Copeland Regulations of the Secretary of Labor which are herein incorporated by reference.

### 2. Payrolls and Payroll Records

a. Payrolls and basic records relating thereto shall be maintained by the contractor and each subcontractor during the course of the work and preserved for a period of 3 years from the date of completion of the contract for all laborers, mechanics, apprentices, trainees, watchmen, helpers, and guards working at the site of the work.

b. The payroll records shall contain the name, social security number, and address of each such employee; his or her correct classification; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalent thereof the types described in Section 1(b)(2)(B) of the Davis Bacon Act); daily and weekly number of hours worked; deductions made; and actual wages paid. In addition, for Appalachian contracts, the payroll records shall contain a notation indicating whether the employee does, or does not, normally reside in the labor area as defined in Attachment A, paragraph 1. Whenever the Secretary of Labor, pursuant to Section IV, paragraph IV3b, has found that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis Bacon Act, the contractor and each subcontractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and show the cost anticipated or the actual cost

incurred in providing benefits. Developers or subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprentices and trainees, and ratios and wage rates prescribed in the applicable programs.

c. Each contractor and subcontractor shall furnish, each week in which any contract work is performed, to the SHA resident engineer a payroll of wages paid each of its employees (including apprentices, trainees, and helpers, described in Section IV, paragraphs 4 and 5, and watchmen and guards engaged on work during the preceding weekly payroll period). The payroll submitted shall set out accurately and completely all of the information required to be maintained under paragraph 2b of this Section V. This information may be submitted in any form desired. Optional Form WH-47 is available for this purpose and may be purchased from the Superintendent of Documents (Federal stock number 029-005-0014-1), U.S. Government Printing Office, Washington, D.C. 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

d. Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his/her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

i. that the payroll for the payroll period contains the information required to be maintained under paragraph 2b of this Section V and that such information is correct and complete;

ii. that such laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR 3;

iii. that each laborer or mechanic has been paid not less than the applicable wage rate and fringe benefits or cash equivalent for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

e. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 2d of this Section V.

f. The falsification of any of the above certifications may subject the contractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 231.

g. The contractor or subcontractor shall make the records required under paragraph 2b of this Section V available for inspection, copying, or transcription by authorized representatives of the SHA, the FHWA, or the DOL, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the SHA, the FHWA, the DOL, or all may, after written notice to the contractor, sponsor, applicant, or owner, take such actions as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

## VI. RECORD OF MATERIALS, SUPPLIES, AND LABOR

1. On all Federal-aid contracts on the National Highway System, except those which provide solely for the installation of protective devices at railroad grade crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than \$1,000,000 (23 CFR 635) the contractor shall:

a. Become familiar with the list of specific materials and supplies contained in Form FHWA-47, "Statement of Materials and Labor Used by Developer of

Highway Construction Involving Federal Funds," prior to the commencement of work under this contract.

b. Maintain a record of the total cost of all materials and supplies purchased for and incorporated in the work, and also of the quantities of those specific materials and supplies listed on Form FHWA-47, and in the units shown on Form FHWA-47.

c. Furnish, upon the completion of the contract, to the SHA resident engineer on Form FHWA-47 together with the data required in paragraph 1b relative to materials and supplies, a final labor summary of all contract work indicating the total hours worked and the total amount earned.

2. At the prime contractor's option, either a single report covering all contract work or separate reports for the contractor and for each subcontract shall be submitted.

## VII. SUBLETTING OR ASSIGNING THE CONTRACT

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the State. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635).

a. "Its own organization" shall be construed to include only workers employed and paid directly by the prime contractor and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor, assignee, or agent of the prime contractor.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in



the type of contracting organizations qualified and expected to bid on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph 1 of Section VII is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the SHA contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the SHA contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the SHA has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

#### VIII. SAFETY: ACCIDENT PREVENTION

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the SHA contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

#### IX. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, the following notice shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

NOTICE TO ALL PERSONNEL ENGAGED ON  
FEDERAL-AID HIGHWAY PROJECTS

18 U.S.C. 1020 reads as follows:

- "Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or
- Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or
- Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;
- Shall be fined not more than \$10,000 or imprisoned not more than 5 years or both."

X. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

(Applicable to all Federal-aid construction contracts and to all related subcontracts of \$100,000 or more.)

By submission of this bid or the execution of this contract, or subcontract, as appropriate, the bidder, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any facility that is or will be utilized in the performance of this contract, unless such contract is exempt under the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub.L. 91-604), and under the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Pub.L. 92-500), Executive Order 11738, and regulations in implementation thereof (40 CFR 15) is not listed, on the date of contract award, on the U.S. Environmental Protection Agency (EPA) List of Violating Facilities pursuant to 40 CFR 15.20.

2. That the firm agrees to comply and remain in compliance with all the requirements of Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder.

3. That the firm shall promptly notify the SHA of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility that is or will be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities.

4. That the firm agrees to include or cause to be included the requirements of paragraphs 1 through 4 of this Section X in every nonexempt subcontract, and further agrees to take such action as the government may direct as a means of enforcing such requirements.

## XI. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

### 1. Instructions for Certification - Primary Covered Transactions

(Applicable to all Federal-aid contracts - 49 CFR 29)

a. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an 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 a person from participation in this transaction.

c. 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.

d. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is submitted for assistance in obtaining a copy of those regulations.

f. The prospective primary participant agrees by submitting this proposal 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.

g. The prospective primary participant further agrees by submitting this proposal 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.

h. 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 portion of the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs" (Nonprocurement List) which is compiled by the General Services Administration.

i. 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 participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph f of these instructions, 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 or default.

\* \* \* \* \*

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--  
Primary Covered Transactions

1. The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

b. Have not within a 3-year period preceding this proposal been convicted of or had a civil judgment 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;

c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph 1b of this certification; and

d. Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

\* \* \* \* \*

3. Instructions for Certification - Lower Tier Covered Transactions

(Applicable to all subcontracts, purchase orders and other lower tier transactions of \$25,000 or more - 49 CFR 29)

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "primary covered transaction," "participant," "person," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

e. The prospective lower tier participant agrees by submitting this proposal 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 with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

g. 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.

h. 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 participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, 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 with which this transaction originated may pursue available remedies, including suspension and/or debarment.

\* \* \* \* \*

Certification Regarding Debarment, Suspension Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

\* \* \* \* \*

## XII. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

(Applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000 - 49 CFR 20)

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and

submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

3. The prospective participant also agrees by submitting his or her bid or proposal that he or she shall require that the language of this certification be included in all lower tier subcontracts, which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.

**EXHIBIT 3 TO APPENDIX G [CONFORM TO NCTA REQUIREMENTS]**

**SUPPLEMENTAL REQUIRED CONTRACT PROVISIONS  
FEDERAL AID PROJECT**

**ON SITE WORK FORCE  
AFFIRMATIVE ACTION REQUIREMENTS FOR WOMEN AND MINORITIES**

**SPECIAL PROVISIONS**

These provisions shall be included in, and shall be a part of, all solicitations for bids on all Federal and federally assisted construction contracts or subcontracts of \$10,000.00 or more.

As used in these provisions, "Engineer" means the State Highway Engineer of the State of North Carolina acting either directly or through his authorized representatives.

Section 140 of Title 23, United States Code, EQUAL EMPLOYMENT OPPORTUNITY, as in effect on May 1, 1982, is incorporated by this reference and made a part of these specifications.

**NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246).**

1. The Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" set forth herein.
2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate work force in each trade on all construction work in the covered area, are as follows:

COVERED AREA

Goals for Women Apply Statewide

GOALS AND TIMETABLES

<u>Timetable</u>	<u>Goals</u> <u>(Percent)</u>
------------------	----------------------------------

The Contractor's compliance with the Executive Order and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the Contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director within 10 working days of award of any construction subcontract in excess of \$10,000.00 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the contract resulting from this solicitation, the "covered area" is the State of North Carolina and the county or counties listed in the special provisions.

#### **EQUAL OPPORTUNITY CLAUSE**

The equal opportunity clause (II Equal Opportunity Form PR 1273) is required to be included in, and is part of, all nonexempt Federal and federally assisted construction contracts and subcontracts in excess of \$10,000.00.

#### **STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)**

1. As used in these specifications:

a. "Covered area" means the geographical area, described in the solicitation from which this contract resulted;

b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

d. "Minority" includes:

i. Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

ii. Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

iii. Asian American and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

iv. American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000.00 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitation from which this contract resulted.

3. The Contractor shall implement the specific affirmative action standards provided in paragraphs 6a through 6p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minorities and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is performed. The Contractor is expected to make substantially uniform progress toward its goals in each craft during the period specified.

4. Neither the provisions of any collective bargaining agreement nor the failure by a union with whom the Contractor has a collective bargaining agreement to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

5. In order for the non-working training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the

Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

6. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minorities and female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off the street applicant and minority or female referral from a union, a recruitment source, or a community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.



d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on the job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 6b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with on site supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media,

and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60 3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female employees for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations are being carried out.

n. Ensure that all facilities and company activities are non-segregated except that separate or single user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

7. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (6a through 6p). The efforts of a contractor association, joint contractor union, contractor community; or other similar group of which the Contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 6a through 6p of these Specifications provided that the Contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female work force participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

8. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

9. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex or national origin.

10. The Contractor shall not enter into any subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

11. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

12. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 6 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60 4.8.

13. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned. social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Contractors shall not be required to maintain separate records.

14. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

## **ADDITIONAL PROVISIONS**

### WRITTEN NOTIFICATION

In addition to the notification required in Item 3 on page a 2, the Contractor shall provide written notification to the Engineer within 10 working days of award of any construction subcontract in excess of \$10,000.00 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

In addition to the notification required in Item 6d on page a 4, the Contractor shall provide immediate written notification to the Engineer when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor minorities or women sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

### REPORTS

The Contractor and each Subcontractor (\$10,000.00 or more) shall submit to the Engineer the following reports:

1. Monthly, an "Employment Utilization Report" (Form 731-0394).
2. Annually, a "Federal Aid Highway Construction Contractor's EEO Report" (Form PR 1391).

## COMPLIANCE

If the Contractor meets all the craft goals set forth in the applicable "Covered Area" of these Special Provisions, or can demonstrate good faith efforts to meet these goals (as specified in paragraphs 6a through 6p on pages a 4 through a 6), the Contractor shall be considered to be in compliance with these Special Provisions.

## SHOW CAUSE NOTICE

If an investigation or review reveals that a construction Contractor or Subcontractor has not complied with these Special Provisions, the Engineer shall issue a show cause notice to initiate efforts to bring the Contractor or Subcontractor into compliance. This written notice shall state the deficiencies found during the review, and shall advise the Contractor or Subcontractor to show cause within 30 days why the Engineer shall not impose administrative sanctions. Within 30 days the Contractor or Subcontractor must show good cause or must provide an acceptable agreement for corrective action including, where appropriate, goals and timetables for affected class members.

If the Contractor or Subcontractor does not provide this information by the end of the 30 days, the Engineer shall withhold all project progress payments in process as of the date the show cause notice was issued and will continue to withhold project progress payments until the Contractor or Subcontractor responds in an acceptable manner. If the Contractor or Subcontractor fails to meet the conditions of the corrective action agreement, no further show cause notice is required; the Engineer shall immediately initiate enforcement proceedings.

If a Contractor's prequalification certification is revoked and/or disqualified because the Contractor has been found on at least two occasions to be in breach of the EEO provisions of Federal Aid highway construction contracts, the Contractor must be determined to be in compliance with contract EEO provisions prior to the Contractor's prequalification certificate being reinstated.

Information relating to compliance with these Special Provisions may be obtained from the Civil Rights Section, North Carolina Department of Transportation, Salem, OR 97310, telephone: 986-4351.

**EXHIBIT 4 TO APPENDIX G**

Davis-Bacon Wage Determinations for Highway Construction Contracts

[TO COME]



## EXHIBIT 5 TO APPENDIX G

[PLACEHOLDER – REFERENCE ONLY – WAGE SHEET USED IN TRIANGLE PROJECT]

### Required Prevailing Wage Requirement Provisions

GENERAL DECISION NC20070011 NC11

Date: February 9, 2007

General Decision Number NC20070011

Superseded General Decision No. NC20030011

State: North Carolina

Construction Type: HIGHWAY

#### COUNTIES:

Alamance	Durham	Orange
Alexander	Forsyth	Randolph
Buncombe	Franklin	Rowan
Burke	Gaston	Stokes
Cabarrus	Guilford	Union
Catawba	Lincoln	Wake
Cumberland	Mecklenburg	Yadkin
Davidson	New Hanover	
Davie	Onslow	

HIGHWAY CONSTRUCTION PROJECTS (does not include tunnels, building structures in rest area projects, railroad construction, and, bascule, suspension and spandrel arch bridges, bridges designed for commercial navigation, and bridges involving marine construction, and other major bridges).

Modification Number  
0

Publication Date  
02/09/2007

SUNC1990-014 02/12/1990

	Rates	Fringes
CARPENTER	7.63	
CONCRETE FINISHER	7.52	
ELECTRICIAN	10.26	
IRONWORKERS (reinforcing)	9.76	
LABORER		
Common	5.33	
Asphalt Lay Down Man	5.60	
Asphalt Raker	6.14	
Form Setter (road)	8.57	
Mason (brick, block, stone)	7.44	
Pipe Layer	6.23	
Power Tool Operator	8.28	

POWER EQUIPMENT OPERATORS		
Asphalt Distributor	6.78	
Asphalt Paver	7.47	
Bulldozer	7.33	
Bulldozer (utility)	6.72	
Concrete Curb Machine	7.09	
Concrete Finishing Machine	7.85	
Concrete Paver	6.90	
Crane, Backhoe, Shovel & Dragline (over 1 yd)	8.16	
Crane, Backhoe, Shovel & Dragline(1 yd and under)	6.95	
Drill Operator	7.34	
Grade Checker	5.45	
Gradeall	8.38	
Grease man	6.49	

Loader	7.09	
Mechanic	8.47	
Motor Grader (Fine Grade)	8.04	
Motor Grader(Rough Grade)	7.68	
Oiler	5.88	
Roller (Finisher)	6.70	
Roller (Rough)	5.65	
Scraper	6.63	
Screed Asphalt	7.09	
Stone Spreader	6.02	
Stripping Machine Operator	6.00	
Subgrade Machine	7.13	
Sweeper	5.80	
Tractor (Utility)	5.47	

TRUCK DRIVERS		
Trucks – Single Rear Axle	5.42	
Trucks – Multi Rear Axle	6.08	
Trucks – Heavy Duty	9.47	

WELDERS – Receive rate prescribed for craft performing operation to which welding is incidental.

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR 5.5(a)(1)(ii)).

In the listing above, the "SU" designation means that rates listed under that identifier do not reflect collectively bargained wage and fringe benefit rates. Other designations indicate unions whose rates have been determined to be prevailing.

## WAGE DETERMINATION APPEALS PROCESS

1. Has there been an initial decision in the matter? This can be:

- \* an existing published wage determination

- \* a survey underlying a wage determination

- \* a Wage and Hour Division letter setting forth a position on a wage determination matter

- \* a conformance (additional classification and rate) ruling

On survey related matters, initial contact, including requests for summaries of surveys, should be with the Wage and Hour Regional Office for the area in which the survey was conducted because those Regional Offices have responsibility for the Davis-Bacon survey program. If the response from this initial contact is not satisfactory, then the process described in 2.) and 3.) should be followed.

With regard to any other matter not yet ripe for the formal process described here, initial contact should be with the Branch of Construction Wage Determinations. Write to:

Branch of Construction Wage Determinations  
Wage and Hour Division  
U. S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

2. If the answer to the question in 1.) is yes, then an interested party (those affected by the action) can request review and reconsideration from the Wage and Hour Administrator

(See 29 CFR Part 1.8 and 29 CFR Part 7). Write to:

Wage and Hour Administrator  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

The request should be accompanied by a full statement of the interested party's position and by any information (wage payment data, project description, area practice material, etc.) that the requestor considers relevant to the issue.

3. If the decision of the Administrator is not favorable, an interested party may appeal directly to the Administrative Review Board (formerly the Wage Appeals Board).

Write to:

Administrative Review Board  
U. S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

4. All decisions by the Administrative Review Board are final.

END OF GENERAL DECISION

## EXHIBIT 6 TO APPENDIX G

### Disadvantaged Business Enterprise (DBE) Supplemental Required Contract Provisions

For purposes of this Exhibit 6, all references to “work” mean “Services.”

#### 01.00 - DBE Policy and Authorities

(a) DBE Policy, Obligation, and Applicability

As required by 49 CFR Part 26, NCTA and the Consultant agree to abide by and take all necessary and reasonable steps to comply with the policy set out below:

DBE POLICY. It is the policy of the United States Department of Transportation (USDOT) to practice nondiscrimination on the basis of race, color, sex and/or national origin in the award and administration of USDOT assisted contracts. Consequently, the DBE requirements of 49 CFR 26 apply to each Federal Aid Contract.

DBE OBLIGATION. The North Carolina Department of Transportation (NCTA) and Consultant agree to ensure that disadvantaged business enterprises as defined in 49 CFR 26 have the opportunity to participate in the performance of Federal Aid Contracts and subFederal Aid Contracts financed in whole or in part with federal funds provided by Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) under each Federal Aid Contract. NCTA and Consultant shall take all necessary and reasonable steps in accordance with 49 CFR 26 to ensure that disadvantaged business enterprises have the opportunity to compete for and perform contracts. Neither NCTA nor Consultant shall discriminate on the basis of race, color, sex and/or national origin in the award and performance of Federal-Aid contracts.

DBE APPLICABILITY. This applies to all personal services, trade services, and public improvement projects financed in whole or in part with federal funds

received from Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) through the North Carolina Department of Transportation. NCTA and Consultant shall conform to all applicable civil rights laws, orders, and regulations. NCTA and Consultant shall not discriminate on the basis of race, age, sex, color, religion, national origin, mental or physical disability, political affiliation, or marital status in the award and performance of NCTA contracts.

(b) Authorities

These Disadvantaged Business Enterprise (DBE) Supplemental Required Contract Provisions are authorized by the following laws, rules, regulations and guidelines, which, in conjunction with any pertinent policy memoranda or procedures issued by the FHWA, all of which are incorporated by reference into the provisions, govern NCTA's administration of the DBE Program:

The US DOT Regulations (49 CFR Part 26) published in the Federal Register, effective March 4, 1999, established a requirement that all recipients of U.S. DOT funds establish a Disadvantaged Business Enterprise Program. The regulations are applicable both to NCTA's Federal-aid construction and to its non-construction activities.

The US DOT's legal authority for its DBE regulations includes Executive Order 11625 (October 13, 1971), which required that federal executive agencies develop comprehensive plans and programs to encourage minority business participation. US DOT requires NCTA to establish a DBE Program as a condition for receiving US DOT federal funds.

Title VI, Civil Rights Act of 1964. This Act concerns non-discrimination in federally assisted programs or activities on the grounds of race, color, sex or national origin.

The Program is also subject to the following laws: Section 30 of the Airport and Airway Development Act of 1970 and Section 520 of the Airport and Airway

Improvement Act of 1982, as amended by the Airport and Airway Safety Capacity Expansion Act of 1987; Section 905 of the Railroad Act of 1978 (45 USC 903); and Section 19 of the Urban Mass Transportation Act of 1964, as amended (Public Law 95-599).

The Consultant agrees that these Disadvantaged Business Enterprise (DBE) Supplemental Required Contract Provisions (including references therein) shall be incorporated into all subcontracts (regardless of tier) describing the work to be performed by DBEs under each Federal Aid Contract.

## **02.00 - Definitions**

Definitions of words and phrases used in connection with the Disadvantaged Business Enterprise (DBE) Program are as follows:

**Broker** - A business firm that provides a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for the performance of the contract.

**Certified Disadvantaged Business Enterprise** - A business firm certified by the State of North Carolina OMWESB, indicating that it: (a) meets the criteria outlined in 49 CFR 26 regarding certification as a DBE; and (b) possesses the required resources and expertise to perform designated types of work.

**Commercially Useful Function** - Commercially useful function is defined as follows:

49 CFR 26.55(c) defines commercial useful function as: a DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a DBE is performing a commercially useful function, Consultant shall



evaluate the amount of work subcontracted, industry practices, and other relevant factors.

**Commodity Codes** - Code(s) assigned by the OMWESB to indicate the standard type(s) of work the DBE provides.

**Consultant's DBE Liaison Officer** - The individual designated by the Consultant to assist the Consultant in meeting the Consultant's responsibility of compliance with the legal requirements of the DBE program and with the contractual obligations imposed by these supplementary provisions including but not limited to assuring that the DBE subcontractors under each Federal Aid Contract perform a commercially useful function.

**Consultant/Subcontractor** - A licensed business participating in a contract, subcontract, or other agreement which NCTA has awarded or to which NCTA has consented.

**DBE Directory of Certified Firms** - A publication (available through Internet) listing all Disadvantaged Business Enterprises which are currently certified by the OMWESB. The Directory is provided to the Consultant for use in identifying DBEs whose participation on a contract may be counted toward achievement of the assigned DBE participation goal. [www.cbs.state.or.us/omwesb](http://www.cbs.state.or.us/omwesb)

**DBE Eligibility** - A firm is eligible to participate as a Disadvantaged Business if it meets the criteria as established by regulation and enforced by the certifying agency. A firm will no longer be able to participate as a DBE on current or future contracts when it receives notification of decertification, denial of recertification, or notice of graduation by the certifying agency.

**Equipment** - All machinery, tools, and apparatus needed to complete the contract.

**FAA** - Federal Aviation Administration.

**Federal-Aid Contract** - Any contract including consultant agreements or modifications of a contract between NCTA and Consultant which is paid for in whole or in part with USDOT financial assistance from FHWA, FTA or FAA.

**FHWA** - Federal Highway Administration.

**FTA** - Federal Transit Administration.

**Goal** - An assigned numerical percentage value of the total dollar amount of a contract award which must be allocated for DBE participation.

**Good Faith Efforts** - Efforts required to obtain and support DBE participation that could reasonably be expected to produce and maintain a level of DBE participation sufficient to meet the contract goal. Good faith efforts are required before proposal opening, upon contract award, and continue throughout the performance of the contract to maximize DBE participation.

**Joint Venture (DBE)** - An NCTA certified enterprise consisting of two or more businesses formed to jointly carry out a single highway construction project, one or more of which is a certified DBE (see Section 8.00 of these Supplemental Provisions).

**Managerial Control** - Consistent with normal industry practice, managerial control shall include scheduling work operations, ordering equipment and materials (if materials are part of the contract), preparing and submitting payrolls and all other required reports and forms, and hiring and firing employees, including supervisory employees.

**Manufacturer** - A firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Consultant.

**NCTA** - North Carolina Turnpike Authority.

**OMWESB** - The Office of Minority, Women and Emerging Small Business, which is authorized to certify Disadvantaged Business Enterprises in accordance with federal regulations.

**Operational Control** - Consistent with normal industry practice, the DBE must supervise the daily operations of the work contracted. There are only two acceptable ways for the DBE to supervise the daily operations. The DBE owner may act as superintendent and directly supervise the work or a skilled and knowledgeable superintendent employed by and paid wages by the DBE must directly supervise the work. If the latter is used, the DBE owner must be actively involved in making the operational and managerial decisions of the firm.

**Regular Dealer** - A DBE firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of a contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the DBE firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as regular dealers within the meaning of this definition.

**Subcontract** - A subcontracting arrangement is generally considered to exist when a person or firm assumes an obligation to perform a part of the contract work and the following conditions are present:

- (a) Compensation for performance of work is on a unit price or lump sum basis.
- (b) The subcontractor exercises full control and authority over the subcontracted work, including the furnishing of labor and equipment and choice of work methods, with only general supervision being exercised by the prime Consultant.

- (c) Personnel involved in the operation are under the direct supervision of the subcontractor and are included on the subcontractor's payroll.
- (d) NCTA has provided written consent to the subcontract arrangement, regardless of tier.

All conditions involved should be considered and no one condition alone will normally determine whether a subcontract actually exists.

**Type of Work** - Specific descriptions of work which the DBE is certified in the DBE Directory as having the expertise and resources necessary to perform.

**USDOT** - United States Department of Transportation

### **03.00 - Assigned DBE Participation Goal**

In order to increase DBE participation on NCTA contracts, the project is assigned a DBE participation goal. The Consultant is required to select a portion of work available on the project for DBE participation. The Consultant may use DBE subcontractors, suppliers, manufacturers or professional service providers to fulfill the goal. The goal on the project remains in effect throughout the life of the contract. Should a DBE subcontractor lose its certification, the Consultant may be required to substitute with another certified DBE. Dollar values of participation shall be credited toward meeting the goal based on DBE gross earnings.

In determining whether a DBE prime Consultant has met a contract goal, only the work the DBE has committed with its own forces as well as the work that it has committed to be performed by DBE subcontractors or suppliers will be counted.

### **04.00 - Subcontracting Limitations**

(a) All DBE subcontractors committed to perform a function or service as a condition of contract award, or for replacing the performance of a committed DBE, must perform a commercially useful function as defined in Section 08.00. If it is determined by NCTA that the DBE subcontractor will not be able to perform a commercially useful function

(CUF), NCTA will notify the Consultant prior to subcontract approval. The Consultant must either provide evidence that the DBE subcontractor is able to perform a commercially useful function, or replace the DBE subcontractor with another DBE who has been certified to perform the proposal item subcontracted as outlined in section 09.00 (c).

If the Consultant cannot provide sufficient evidence the DBE subcontractor has the ability to perform a CUF, and/or refuses to replace the DBE, the Consultant may be declared in default and the contract could be terminated according to the termination provisions under this contract relating to breach and default.

(b) Second tier DBE subcontracts may be counted toward the Consultant's DBE goal provided it was listed in the original DBE commitment prior to proposal award.

#### **05.00 - DBE Subcontract and Sub-Subcontract Documents**

All work committed to DBE firms toward meeting the assigned participation goal and as a condition of contract award, including work to be performed by DBE firms substituting for DBE firms committed as a condition of contract award, as outlined in Section 9.00, shall be performed under a written subcontract, regardless of the description of work to be performed by either the committed or substituting DBE firm. The subcontract must fully describe any partial proposal item work committed to be performed by DBE firms.

For DBE subcontractor substitution, the Consultant must submit written request for consent from NCTA to subcontract any portion of the work at any tier. Written consent must be received from NCTA before the subcontractor is allowed to commence any work on the project.

#### **06.00 - Good Faith Efforts Requirements**

The Consultant is required to exercise good faith efforts during the entire life of the contract to meet the assigned goal with DBE participation and performance on the contract. Good faith efforts must be made to secure DBE participation sufficient to meet the assigned goal. The Consultant must also make every reasonable effort during the

course of the project to enable DBEs to perform those portions of the contract work for which they have been committed.

The Consultant must make good faith efforts to replace with another DBE, a DBE who is unable, unwilling or has lost its certified status for any reason, including change in ownership and/or control. Section 09.00 discusses the procedures that must be followed to terminate a committed DBE and replace the firm with a substitute.

The Contract Administrator may request the Consultant to submit evidence of Good Faith Efforts at any time during the course of the contract and the Consultant shall promptly submit such evidence.

### **07.00 - Consultant Reporting Requirements**

The Consultant shall deliver the following information to the Contract Administrator within ten (10) calendar days after execution of the contract:

- (a) The name of the DBE liaison officer who will administer the Consultant's DBE program.
- (b) Consultant's project schedule showing the estimated work commencement date and estimated completion date for each DBE that will perform work on the project.

### **08.00 - Commercially Useful Function**

The Consultant is responsible for ensuring that DBEs working on the project perform a commercially useful function (CUF). The Consultant shall receive credit toward meeting the assigned DBE goal and payment for DBE CUF performed work only.

An on-site review will be used to ascertain whether the DBE is actively performing, managing, and supervising the work. It must employ a labor force which is separate and apart from that employed by Consultant, and which is independently recruited by the DBE in accordance with standard industry practice. The DBE must supervise and manage the work or independently hire a supervisor, who may not be a supervisor employed by the prime or any other subcontractor on the project.

With regard to the Federal-aid share, if an investigation reveals that there has been a violation of the CUF provisions, that portion of the work found to be in violation would not be counted toward goal achievement for either the Consultant or NCTA.

When a DBE is presumed not to be performing a CUF as described in this section, the DBE may present evidence through the Consultant to NCTA to rebut that presumption.

(a) The DBE (and Not Some Other Business Entity) Must Actually Perform the Subcontract

The DBE's utilization of labor, supervisory personnel, equipment and material in the performance of the subcontract must be consistent with industry standards and must demonstrate that the DBE and not some other business entity is actually performing the subcontract. For example, if a DBE associates itself too closely with another business entity or entities, in acquiring a labor force, supervisors, equipment or materials to an extent inconsistent with industry standards, the DBE can no longer be said to be actually performing the subcontract - rather a partnership or joint venture of which the DBE is a member is the actual performer of the subcontract.

(b) DBE's Work Force

The DBE must solicit, hire, place on its payroll, direct, and control all workers performing work under the subcontract. The DBE owner or its superintendent must, on a full-time basis, supervise and control the work performed under the subcontract.

The DBE may with the prior written consent of the Contract Administrator augment its work force with personnel of another firm. The Contract Administrator shall approve the request only when:

- (1) specialized skills are required, and
- (2) the use of such personnel is for a limited time period.

(c) DBE Equipment

The DBE is expected to perform the work with equipment that is owned, being purchased, or leased by the DBE under a written lease agreement that has been consented to by the Contract Administrator prior to the DBE starting work.

No credit will be given, nor payment made for the cost of equipment leased or rented and used in the DBE firm's work when payment for those costs is made by a deduction from the Consultant's payment(s) to the DBE firm.

Specialized equipment and operator leased from the Consultant: The DBE may lease specialized equipment, provided a written rental agreement, separate from the subcontract, specifying the terms of the lease arrangement is consented to by NCTA Contract Administrator prior to the DBE starting work.

The Contract Administrator shall consent to the lease agreement only when:

- (1) the equipment is of a specialized nature,
- (2) the equipment is readily available at the job site,
- (3) the operation of the equipment is under the full control of the DBE,
- (4) the lease arrangement is for a short term, and
- (5) the lease arrangement for the specialized equipment in question is a normal industry practice.

The DBE must hire, direct, supervise, control and carry the operator of the equipment on the DBE payroll.

(d) DBE Flagging Firms

DBE flagging firms will be credited at 100% if the DBE furnishes 100% of the equipment (in this case, paddles and radios) to perform the committed work. If the DBE uses employees' equipment for any part of the work, the DBE will be credited as a broker as



defined in 02.00 above. This credit will equal the DBE labor broker's commission for supplying personnel to the job.

#### **09.00 - Termination and Substitution of DBE**

The Consultant shall notify NCTA in writing and must obtain written consent as outlined in Section 5.00 before terminating and/or replacing the DBE that was committed as a condition of contract award or otherwise being used or represented to fulfill DBE contract obligations during the contract performance period. Written consent for terminating the performance of any DBE will be granted only where the Consultant can demonstrate that the DBE is unable, unwilling or ineligible to perform. Such written consent to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE. Termination or replacement of a DBE will not be consented to based solely on a Consultant's ability to negotiate a more advantageous contract with another subcontractor.

##### **(a) Consultant Written Request to Terminate DBE**

All Consultant requests to terminate, substitute or replace a DBE shall be in writing and shall include the following information:

- (1) Date the Consultant determined the DBE to be unwilling, unable or ineligible to perform.
- (2) Projected date Consultant will require substitution or replacement DBE to commence work if consent is granted to the request.
- (3) Brief statement of facts describing and citing specific actions or inaction by the DBE giving rise to the Consultant's assertion that the DBE is unwilling, unable or ineligible to perform.
- (4) Brief statement of the affected DBE's capacity and ability to perform the work as determined by Consultant.

- (5) Brief statement of facts regarding actions taken by Consultant that are believed to constitute good faith efforts toward enabling the DBE to perform.
- (6) To date percentage of work completed on each proposal item by the DBE.
- (7) The total dollar amount paid, per proposal item, to date for work performed by the DBE.
- (8) The total dollar amount, per proposal item, remaining to be paid to the committed DBE for work completed, but for which the DBE has not received payment and with which the Consultant has no dispute.
- (9) The total dollar amount, per proposal item, remaining to be paid to the DBE for work completed, but for which the DBE has not received payment and over which the Consultant and/or the DBE have dispute.
- (10) A written, signed statement from the DBE, provided the DBE concurs with request to terminate, indicating its unwillingness or inability to perform.

(b) Consultant Written Notice to DBE of Pending Request to Terminate and Substitute with Another DBE

The Consultant shall send a copy of the request to terminate and substitute letter to the affected committed DBE firm, in conjunction to submitting the request to the Contract Administrator. The affected DBE firm may submit a response letter to the Contract Administrator within five calendar days of receiving the notice from the Consultant. The affected DBE firm may explain its position concerning performance on the committed work. The Contract Administrator will consider both the Consultant's request and DBE's response and explanation before approving the Consultant's termination and substitution request.

If the Consultant is unsuccessful in notifying the affected DBE firm, after trying its best to deliver a copy of its request letter, NCTA may determine that the affected

(committed) DBE firm is unable or unwilling to continue the contract and a substitution will be immediately approved by the Contract Administrator.

(c) Proposed Substitution of Another Certified DBE

When a DBE substitution shall occur, the Consultant may submit another certified DBE firm to replace the original committed firm in writing. The Consultant shall submit the name of the DBE firm, the proposed work to be performed, and the dollar amount of the work. The Consultant shall give pertinent information including proposal item, item description, proposal quantity & unit, unit price, and total price. The dollar value of work to be performed by the substitute DBE shall be in an amount equal to the dollar value of the terminated DBE, minus the value of work performed to date by the DBE, prior to the request for substitution.

Should the Consultant be unable to commit the required dollar value to the substitute DBE, the Consultant shall provide written evidence of good faith efforts made to obtain the substitute value requirement. NCTA shall review the quality and intensity of those efforts. Efforts that are merely superficial are not good faith efforts to meet the goal. The Consultant must document the steps taken to obtain participation which demonstrate the good faith efforts outlined below:

- (1) Evidence that the Consultant attended any pre-solicitation or preproposal meetings that were scheduled by NCTA to inform DBEs of contracting and subcontracting or material supply opportunities available on the project;
- (2) Evidence that the Consultant identified and selected specific economically feasible units of the project to be performed by DBEs in order to increase the likelihood of participation by DBEs;
- (3) Evidence that the Consultant advertised in general circulation, trade association, minority and trade oriented, women-focus publications, concerning the subcontracting or supply opportunities;

- (4) Evidence that the Consultant provided written notice to a reasonable number of specific DBEs, identified from the DBE Directory of Certified Firms for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
- (5) Evidence that the Consultant followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested. Provide the following information:
  - (a) The names, addresses, and telephone numbers of DBEs who were contacted, the dates of initial contact and whether initial solicitations of interest were followed up by contacting the DBEs to determine with certainty whether the DBEs were interested;
  - (b) A description of the information provided to the DBEs regarding the plans and specifications and estimated quantities for portions of the work to be performed;
  - (c) Documentation of each DBE contacted, but rejected and the reasons for the rejection.
- (6) Evidence that the Consultant provided interested DBEs with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
- (7) Evidence that the Consultant negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory proposals prepared by any DBE;
- (8) Evidence that the Consultant advised and made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by NCTA or Consultant;

- (9) Evidence that the Consultant's efforts to obtain DBE participation were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of NCTA;
- (10) Evidence that the Consultant used the services of minority community organizations, minority organizations identified by the Advocate for Minority and Women Business that provide assistance in the recruitment and placement of disadvantaged, minority, or women business enterprises; and

### **10.00 - Changes in Work Committed to DBE**

NCTA will consider the impact on DBE participation in instances where NCTA changes, reduces, or deletes work committed to the DBE at the time of contract award. In such instances, the Consultant shall not be required to replace the work but is encouraged to do so.

Consultant represents and warrants to NCTA that the information provided to NCTA on the Committed DBE Breakdown form prior to contract execution is true and correct as of the effective date of the contract and that Consultant shall use the DBE firms indicated on the form for purposes of the contract. If the Consultant proposes any changes that involve a committed DBE, the Consultant shall notify the DBE of the proposed change, reduction, or deletion of any work committed at the time of contract award prior to executing the change order. The Consultant shall enable the affected DBE to participate in the change order request and will make every effort to maintain the committed DBE percentage that was the condition of contract award. Documentation of this effort and a letter from the DBE agreeing to the change shall be included with the request.

### **11.00 - Consultant Payments to Subcontractors**

The Consultant must maintain records of all subcontracts entered into with DBEs and records of materials purchased from DBE suppliers. Such records shall show the name

and business address of each DBE subcontractor or vendor and the total dollar amount actually paid to each DBE subcontractor or vendor.

The Consultant must pay each subcontractor for satisfactory performance under the subcontract no later than 10 (ten) calendar days from receipt of each payment the Consultant receives from NCTA. The Consultant must also return retainage payments to each subcontractor within 10 (ten) calendar days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Contract Administrator. This policy applies to both DBE and non-DBE subcontractors.

The Consultant shall submit a completed, signed original "Subcontractors Paid - Summary Report" form 734-2536, available from the Office of Civil Rights at (503) 986-4350, to the Contract Administrator certifying that payment was made to each subcontractor or supplier. Consultant shall submit the form when a progress or final payment has been made to each subcontractor or supplier and when any held retainage is returned to a subcontractor or supplier. Consultant shall submit the form no later than the fifth day of the month following the date that payment was made to a subcontractor or supplier. At the completion of the project, Consultant shall submit a final form indicating the total amounts paid to all subcontractors and suppliers.

The participation of a DBE subcontractor will not be credited towards the Consultant's DBE achievements, or the overall goal, until the amount being counted toward the goal, and any retainage held by the Consultant has been paid to the DBE.

## **12.00 - Remedies**

In addition to any other remedies provided under the contract, failure of Consultant to meet these Exhibit E DBE Supplemental Required Contract Provisions and program authorities cited in Section 01.00 (b) of these provisions constitutes a breach of contract for which the imposition of the following sanctions could occur:

Temporarily withholding progress payments until the Consultant complies with these contract provisions through future performance.

Permanently withholding payment for work already performed in a manner that constitutes a breach of contract.

Suspension of work for cause as provided under the Standard Specifications for Highway Construction, [Sections 00150.00 and 00180.70].

Any proposer, Consultant or subcontractor on a public contract that violates the provisions of [insert statutory reference, if any] shall have its right to propose on or participate in any public contract suspended for up to 90 days for a first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years, the violation shall no longer be considered in reviewing future violations.

Failure of a proposer, Consultant, or subcontractor to comply with these Exhibit E DBE Supplemental Required Contract Provisions and other authorities cited in Section 01.00 (b) of these provisions wherein there appears to be evidence of criminal conduct shall be referred to the [North Carolina Department of Justice] and/or the FHWA Inspector General for criminal investigation, and if warranted, prosecution.

### **13.00 - Records and Reports**

The Consultant must keep such project records as are necessary to determine compliance with these DBE Supplemental Required Contract Provisions. Such records must include written reports from the DBE Liaison Officer to the Consultant as to the performance of the committed DBE and its performance of a commercially useful function.

### **14.00 - Further Information**

These DBE Supplemental Required Contract Provisions shall be incorporated into and attached to all agreements on projects financed in whole or in part with federal funds and modified only to the extent necessary for incorporation into the agreements.

For further information concerning Disadvantaged Business Enterprise participation, contact:

North Carolina Department of Transportation







**EXHIBIT 7 TO APPENDIX G**  
**Prevailing Wage Rates For Public Works Contracts In North Carolina**

[TO COME]

**EXHIBIT 8 TO APPENDIX G  
FEDERAL ON-THE-JOB TRAINING SPECIAL PROVISIONS  
[TO COME]**

**EXHIBIT 9 TO APPENDIX G [  
TO COME]**

Contract Name

**Appendix H: Form of Opinion of Counsel**

[Letterhead of Independent Law Firm or In-house Counsel – See Section 2.1 for Legal Counsel Requirements]

North Carolina Turnpike Authority

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Pre-Development Agreement (“PDA”) for the Mid-Currituck Bridge Project; North Carolina Turnpike Authority Contract No. \_\_\_\_\_ (“Contract”);  
\_\_\_\_\_ (the “Developer”)

Ladies and Gentlemen:

[Describe relationship to Developer and its joint venture members, general partners, members, as applicable, and any other entities whose approval is required in order to authorize delivery of the proposal and execution of the PDA.] This letter is provided to you pursuant to Section 2.1 of the PDA.

In giving this opinion, we have examined \_\_\_\_\_. We have also considered such questions of law and we have examined such documents and instruments and certificates of public officials and individuals who participated in the procurement process as we have deemed necessary or advisable. [if certificate used/obtained from Developer or Guarantor, such certificate should also run in favor of NCTA and should be attached to opinion]

In giving this opinion, we have assumed that all items submitted to us or reviewed by us are genuine, accurate and complete, and if not originals, are true and correct copies of originals, and that all signatures on such items are genuine.

Subject to the foregoing, we are of the opinion that:

1. [opinion regarding organization/formation and existence of Developer [if partnership/joint venture, add: and each of its joint venture members and general partners] and that Developer has corporate power to own its properties and assets, carry on its business, make the Proposal, enter into the PDA and to perform its obligations under the PDA.]
2. [opinion regarding good standing and qualification to do business in State of North Carolina for Developer]
3. [opinion regarding organization/formation and existence of Guarantor and that Guarantor has corporate power to own its properties and assets, to carry on its business, to enter into the Guaranty and to perform its obligations under the Guaranty].
4. [opinion regarding good standing and qualification to do business in State of North Carolina for Guarantor]
5. [opinion that Proposal, PDA has been duly authorized by all necessary corporate action on the part of Developer and the Proposal and PDA have been duly executed and delivered by Developer.]
6. [opinion that Guaranty has been duly authorized by all necessary corporate action on the part of Guarantor and the Guaranty has been duly executed and delivered by Guarantor.]
7. [opinion that the PDA constitutes a legal, valid and binding obligation of Developer enforceable against Developer in accordance with its terms; if partnership/joint venture, add: and its joint venture members/general partners after the second "Developer"]
8. [opinion that the Guaranty constitutes a legal, valid and binding obligation of the Guarantor enforceable against the Guarantor in accordance with its terms; if partnership/joint venture, add: and its joint venture members/general partners after the second "Guarantor"]

9. [opinion that all required approvals have been obtained with respect to execution, delivery and performance of the Proposal and the PDA; and that neither the Proposal nor the PDA conflict with any agreements to which Developer is a party [if partnership/joint venture, add: and its joint venture members/general partners are a party] or with any orders, judgments or decrees by which Developer is bound [if partnership/joint venture, add: and its joint venture members/general partners are bound].

10. [opinion that all required approvals have been obtained with respect to execution, delivery and performance of the Guaranty; and that the Guaranty does not conflict with any agreements to which Guarantor is a party or with any orders, judgments or decrees by which Guarantor is bound.]

11. [opinion that execution, delivery and performance of all obligations by Developer under the Proposal and the PDA do not conflict with, and are authorized by, the articles of incorporation and bylaws of Developer [if partnership, replace articles of incorporation and bylaws with partnership agreement and (if applicable) certificate of limited partnership); if joint venture, replace articles of incorporation and bylaws with joint venture agreement; if limited liability company, replace articles of incorporation and bylaws with operating agreement and certificate of formation].

12. [opinion that execution, delivery and performance of all obligations by Guarantor under the Guaranty does not conflict with, and is authorized by, the articles of incorporation and bylaws of Guarantor].

13. [opinion that execution and delivery by Developer of the Proposal and the PDA do not, and Developer's performance of its obligations under the Proposal and the PDA will not, violate any current statute, rule or regulation applicable to Developer or to transactions of the type contemplated by the Proposal or the PDA].

14. [opinion that execution and delivery by the Guarantor of the Guaranty do not, and the Guarantor's performance of its obligations under the Guaranty will not, violate

any current statute, rule or regulation applicable to the Guarantor or to transactions of the type contemplated by the Guaranty].



## APPENDIX I IT TERMS AND CONDITIONS

[to be provided]

**APPENDIX J: DBE Program Requirements  
[TO COME]**

## EXHIBIT C – PDA TASK CHART

PDA ACTIVITY	PDA Phase		Concession Agreement Phase	
	NCTA Responsibility	Developer Responsibility	NCTA Responsibility	Developer Responsibility
<b>NEPA</b>	Obtain ROD	Support as Directed by NCTA	Review, Approve and Submit as Necessary	If Required, Develop any Reevaluation Documentation
<b>Environmental Mitigation</b>	Review and Approve	Develop Mitigation Approach to Sufficient Detail so that Fixed Price can be Developed	Review and Approve	Implement Project Mitigation Plan
<b>Regulatory Approvals</b>	Support/Submit	Prepare/Obtain all Required Regulatory Approvals and Permits	Support	Obtain all Required Regulatory Approvals and Permits
<b>Geotechnical</b>	Review and Approve	Conduct Geotechnical Investigations to Sufficient Detail so that Fixed Price can be Developed	Review and Approve Analysis	Complete Analysis as Required to Develop Final Design
<b>Right of Way</b>	Review and Approve	Identify Project Requirements to Sufficient Detail so that Fixed Price can be Developed	Condemnation Authority	Right of Way Acquisition

PDA ACTIVITY	PDA Phase		Concession Agreement Phase	
	NCTA Responsibility	Developer Responsibility	NCTA Responsibility	Developer Responsibility
<b>Utility Services</b>	Review and Approve	Identify Relocation Requirements to Sufficient Detail so that Fixed Price can be Developed	Review and Approve	Engineer and Perform Required Utility Relocations
<b>Design and Costing Materials</b>	Review and Approve	Develop to Sufficient Detail so that Fixed Price can be Developed	Review and Approve	Track Project Costs and Provide Periodic Reporting
<b>Construction Plan</b>	Review and Approve	Develop to Sufficient Detail so that Fixed Price can be Developed	Review and Approve	Develop Final Design
<b>Project Management Plan</b>	Review and Approve	Develop PMP and other Deliverables as required by FHWA	Review and Approve	Proactive Management of PMP and Other Plans as Required
<b>Traffic &amp; Revenue</b>	Develop Preliminary T&R Study and Review and Approve Final T&R Study	Develop T&R Study as Required for Project Financing Plan	Review and Approve	Track and Update Periodically as Required by Financing Plan
<b>Toll Strategy and Marketing</b>	Review and Approve	Develop Toll Strategies and Marketing Plan	Review and Approve; Provide Lead Public Interface	Implement Toll Strategies and Marketing Plan
<b>Community Involvement</b>	Perform as Required for the NEPA Process	Support as Directed by NCTA	Review and Approve; Provide Lead Public Interface	Implement Ongoing Community Involvement Plan

PDA ACTIVITY	PDA Phase		Concession Agreement Phase	
	NCTA Responsibility	Developer Responsibility	NCTA Responsibility	Developer Responsibility
<b>Operations &amp; Maintenance</b>	Review and Approve	Develop Operations & Maintenance Plan to Sufficient Detail so that Fixed Price can be Developed	Review and Approve	Implement Operations & Maintenance Plan

Notes:

- PDA Activities included are the major activities anticipated during the PDA phase and not a comprehensive listing of all the activities that will be required in either the PDA Phase or the Concession Agreement Phase.
- The use of “Review and Approve” means to the extent set forth in the PDA or Concession Agreement.

## EXHIBIT D

### MID-CURRITUCK BRIDGE P3 PROCUREMENT RFP FORMS G AND H EXPLANATION

The North Carolina Turnpike Authority (NCTA) has allocated 30% of the Mid-Currituck Bridge Request for Proposals (RFP) selection criteria to Proposer's willingness to assume risk during the Pre-Development Phase. RFP Forms G and H are provided to create a framework for demonstrating what amount of risk that the Proposer is willing to assume during the Pre-Development Phase. The following is intended to provide shortlisted Proposers further explanation of the purpose of Forms G and H to the RFP:

#### FORM G – PDA COST ESTIMATE AND COMPENSATION SCHEDULE

- A. Form G is intended to establish a uniform framework to allow the Proposer to outline the tasks and activities that it proposes be undertaken during the Pre-Development Phase and to establish the maximum price for such activities. These activities should be those that Proposer describes in its submission under Tab 3. NCTA is looking to each Proposer to determine what activities should be undertaken in the Pre-Development Period and as required to reach financial close. The final scope of work and maximum prices will be subject to negotiation following selection of the highest ranked Proposal.
- B. The Pre-Development Agreement (PDA) Activities listed in Form G (Column B) are intended to provide a general schedule of tasks that may be performed under the PDA, although Developer is free to identify additional tasks or subtasks.
- C. NCTA is requesting Proposers complete Form G by filling in maximum PDA costs (\$) per activity (Column C). In Column D, the Proposer is to indicate the percentage (%) these costs, if any, per activity that, if selected, it would seek to be paid by NCTA on progress payment basis during the PDA period , regardless of whether the Developer successfully

negotiates a Concession Agreement with NCTA or the Project reaches financial closing.

- D. With Form G, it is the desire of NCTA to understand the level of effort each Proposer anticipates expending during the PDA development phase and that portion of those activities which would be undertaken “At-Risk”. IT IS NCTA’S EXPECTATION THAT THE DEVELOPER WILL DEFER ALL COSTS UNTIL FINANCIAL CLOSE. (See Exhibit B, Section 5.1.1).
- E. Developer costs incurred during the PDA development phase that are not to be compensated by NCTA on a current basis are described as “At-Risk”. Costs incurred “At-Risk” will be treated in one of two ways:
- i. If the Project advances to a successful financial close, “At-Risk” costs would be reimbursed to the Developer from proceeds of the Project financing.
  - ii. If the Project does not achieve a successful financial close, any recovery of the “At-Risk” costs will be subject to terms and conditions as specified by Form H, Termination Event and Compensation Matrix. The amounts set forth in Column C represent the maximum amount with respect to each task that NCTA would be liable for under any applicable termination event, regardless of whether the Developer in fact incurred costs in excess of such amount, unless otherwise agreed to by the parties in writing.
- F. The NCTA-provided Form G spreadsheet will automatically calculate values in Columns E, F and G from the numbers supplied in Columns C and D. Columns E, F and G should not be filled in by the Proposer.

#### **FORM H – TERMINATION EVENT AND COMPENSATION MATRIX**

- A. Form H identifies various PDA termination scenarios and pertains exclusively to “At-Risk” costs.

- B. NCTA requests Developer complete Form H by filling out the Terms of Developer Compensation (if any) for each of the eight termination scenarios. Developer may list specific percentages (%) of “At-Risk” costs for which it would expect compensation under each scenario, or may provide more narrative explanations of terms of compensation. (E.g., Proposer may request compensation with respect to only certain categories of expenses, rather than a fixed percentage of all At Risk costs.)
  
- C. Developer may offer additional termination events to Form H.