

Procurement of Wetland Mitigation Credits from Third-Party Sources (March 2010)

This document provides direction regarding the procurement of wetland mitigation credits from entrepreneurial wetland mitigation banks for the purposes of compensating for unavoidable impacts to wetlands. The use of third-party sources for mitigation may reduce permit times and provide WSDOT with more cost-effective mitigation options for projects impacting aquatic resources. This guidance was originally developed as Directional Memo ESO-2010-01. For more information, please contact Doug Swanson, Wetlands Program Manager, WSDOT Environmental Services Office (360) 705-7405.

Background

In 2008, the Environmental Protection Agency and the U.S. Army Corps of Engineers issued a final rule on compensatory mitigation for losses of aquatic resources (Dept. of Army, Corps of Engineers 33 CFR Parts 325 and 332 and EPA 40 CFR Part 230). This rule established equivalent and effective standards for all three compensatory mitigation mechanisms: mitigation banks, in-lieu fee mitigation, and permittee-responsible mitigation. The value of a mitigation bank is defined in “compensatory mitigation credits”. Credits are awarded to a bank based on the sponsor’s ability to restore, enhance and/or preserve ecological functions. A bank’s instrument and ledger identify the number of credits available for sale and require certification that those credits provide the required ecological functions. The Department of Ecology oversees the banking program for Washington State and issued a new rule on Mitigation Banking in 2009 (WAC 173-700). Subject to regulatory approval, a permit holder may satisfy wetland mitigation requirements by purchasing suitable credits from a mitigation bank sponsor (e.g., private wetland bank).

The purchase of mitigation bank credits is a viable option for the Department of Transportation (WSDOT) to mitigate for wetland impacts. In some cases bank credits may also be used to mitigate for stream and buffer impacts. Generally, the mitigation bank must provide environmental benefit at a level equal to or greater than the resource impacted and have a service area that includes the site of project impacts. Mitigation sponsors must satisfy performance standards set forth by the Corps and assume responsibility for the success of the wetland mitigation action. Thus, the purchase of wetland mitigation credits from an entrepreneurial mitigation bank may reduce permit times and save costs associated with the evaluation of other alternatives, property acquisition and mitigation site design. It also has the benefit of relieving WSDOT of any future liability for mitigation success and long-term stewardship.

Key Terms

credit - A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank; the measure of function is typically indexed to the number of wetland acres restored, created, enhanced or preserved.

entrepreneurial mitigation bank - A private mitigation bank whereby the project proponent organizes, operates, and assumes the risk for the business venture.

ledger - Document to be used in the accounting of credits and debits. Ledger will be maintained by the bank sponsor

service area - The service area of a mitigation bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources.

Procurement of Wetland Bank Credits

Where feasible opportunities for on-site mitigation of impacts to aquatic resources are lacking or less desirable, WSDOT may choose to purchase third-party mitigation bank credits either as advanced or concurrent mitigation. Regulatory approval of the use of third-party mitigation credits is required, and is obtained during the permitting process. Thus, it is essential to insure early coordination with resource agencies and to receive input regarding the potential suitability of using mitigation bank credits to offset anticipated project impacts. In addition, local governments may have requirements regarding the location of mitigation sites in their regulations and may require mitigation as close to the impact area as practicable.

Mitigation credits must be acquired using a competitive bid process. The following are recommendations for developing and evaluating competitive bids for purposes of acquiring wetland mitigation credits.

Vendor Registry and Bid Notification

Effective November 1, 2008, all state agencies must use a common approach to register and notify vendors of business opportunities with the state of Washington. This common approach has been identified as Washington's Electronic Business Solution, or [WEBS](#); a free internet vendor registration and bid notification system. A key benefit of using WEBS is that it offers a single online portal where vendors can register to automatically receive electronic notification of bid opportunities for commodities of their choosing, and government purchasers can expand their reach by posting solicitations¹. Any posting to WEBS should recognize the importance of providing sufficient time for vendors to prepare a response. At least three weeks is the recommended minimum for responses.

Bid Development

Bid specifications must be developed to promote full and unrestricted competition by clearly stating the actual minimum requirements necessary to produce a successful bid. This is accomplished by developing a clear and concise statement of project needs or

¹ For more information or to register to receive notifications, go to <http://www.ga.wa.gov/webs>

scope of work (SOW). The SOW should identify the specific details needed from vendors to allow them to evaluate their eligibility and ability to provide project mitigation needs in terms of service area location, acreage and the ecological functions and habitat(s) being lost or impacted. Bid specifications also should clearly indicate the cutoff date for bid submittals. An example scope of work is provided below.

Bid “Scope of Work” Example Language

WSDOT is seeking to purchase three (3.0) wetland credits from a wetland mitigation bank located in WRIA 7 within the Snohomish River watershed basin. The anticipated permitting date for the project is 15 April, 2010.

The following specific requirements also must be met for your bid to receive consideration:

1. The mitigation bank must be certified by the Washington Department of Ecology to sell wetland credits for project impacts occurring in WRIA 7, within the Snohomish River watershed.
2. The mitigation bank must be certified by the Washington Department of Ecology to sell wetland credits for project impacts to Category II and Category III fresh water wetlands.
3. The mitigation bank must have easements recorded and financial assurances in place as required by the Washington Department of Ecology.

To receive consideration bids must be received no later than the close of business on 15 January 2010.

Competitive Bid

A competitive bid process should be used to ensure that all eligible vendors have the opportunity to submit a bid.

Verifying Vendor Eligibility

Vendor eligibility should be evaluated based on bank certification, the location of the bank’s service area in relation to project impacts, and the availability of suitable bank credits needed to compensate for your project’s impacts. Information about potential vendors may be obtained by accessing the Washington Department of Ecology’s mitigation banking web page via the internet. Information about mitigation banks statewide is maintained under the “*Wetlands Program*” and the link can be found under on the sub-heading “*Wetlands Mitigation Banking*”. The current link to this website is: <http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking/map.html>

It is recommended that you contact potential mitigation sponsors and the Department of Ecology’s Wetlands Program directly to confirm the status of potential vendors.

Purchasing an Option from Sole-Source Vendors

If there is only one eligible vendor certified to sell credits in your impact area, it may be possible to negotiate with that vendor an “Option to Purchase Credits” that will allow you to establish a price to purchase credits to meet project needs in the future. WSDOT may choose this approach to increase the certainty that mitigation credits will be available when projects need them. However, if additional vendors become certified prior to the actual project bid date, a competitive bid process is required.

Pre-Bid Conference and Site Visit

Because project mitigation needs can be complex, it is strongly recommended that WSDOT hold a pre-bid conference and site visit with all prospective vendors. This conference provides the opportunity for dialogue between WSDOT and vendors, and can help clarify specific bid requirements and mitigation needs. Pre-bid conferences can reduce the likelihood of bidder misunderstanding and ensure that the vendor’s mitigation bank provides the appropriate habitat, acreage, and/or function needs of your project. Information shared with prospective vendors should be provided with consistency between vendors.

Bid Disclosure

Vendors submitting bids should be reminded that the state of Washington requires public disclosure of bids. Public disclosure of bids reduces the possibility for collusion and favoritism, and fosters public confidence in the procurement system (See WAC 236-48-111). However, the language of the statutes and rules require that only pertinent information be read at the bid opening. Complete and full disclosure is performed after the award is made. Information on pricing is not required at bid opening. Bids, and all documents and information about the evaluation of bids and bidders, are confidential until after contract award (WAC 236-48-123).

Compliance with Bid Criteria

All bids received must be evaluated relative to their compliance with the stated bid criteria in order to determine which bid represents the lowest responsive and responsible bidder. Any criteria, other than price, to be used in evaluating solicitations should be clear and exact and stated in the bid document. When requesting bids, criteria must be stated with sufficient clarity and exactness, using vernacular common to the industry, to inform each bidder of the factors that will be used in evaluating a bid.

Evaluation of Bids

Factors to consider when evaluating a bid include price, technical evaluation, certification, and evidence of responsibility.

- **Price** – The cost of purchasing credits from the bank.

- **Technical Evaluation** - Bids require a technical evaluation to determine which quotes meet the technical requirements of your project (i.e., the bid is meeting the specific mitigation needs). It is essential that this technical review be adequate to satisfy both WSDOT and regulatory agencies. The pre-bid conference and site visit with vendors should assist in providing this certainty.
- **Certification** - A determination must be made to verify that the vendor has the required mitigation bank certifications and regulatory approvals, record of financial assurances, and that all required conservation easements in place and recorded. Documentation of certification should be required from the vendor and the Washington Department of Ecology's Wetlands Program should be contacted for verification.
- **Evidence of Responsibility** - A vendor should have a satisfactory record of performance and compliance with regulatory agencies. They may be determined "non-responsible" based on any recent unsatisfactory performance in the same related area of work.

Bid Award

Upon award, all participating bidders will be provided with bid results concurrent with the issuing of an offer and submission of document being sent to the successful bidder. Notification to bidders may be by facsimile, e-mail or U.S. Postal Service. Regardless of notification method used, timely (same day) action must be taken to notify all bidders of the award decision such that the state's liability is minimized in the event a protest is filed. Evidence of notification of all bidders shall be maintained in the purchase file.

Buy/Sell Agreement

In order to best protect WSDOT, the following language should be included in any Buy/Sell agreement prepared for purchasing credits from a mitigation bank:

"The department shall have the right to transfer purchased credits back to the vendor, sell credits at the purchase price, or assign the credits to an additional WSDOT project."

[Note: be cautioned that the process for transferring credits has not been established, and any transfer of credit will require regulatory approval].

The following points should be clear in the agreement:

- The vendor shall provide the department, in an expedient manner, any correspondence from a regulatory agency relating to non-performance issues at the bank.
- The vendor shall provide a copy of the current ledger until all bank credits have been sold or until the bank enters into the Long-Term Management phase.
- The vendor will provide the department with any updates to the ledger.
- The vendor shall provide the department with copies of the legal recording with the county auditor for credits transferred to the department.

- When purchasing credits for more than one project the Buy/Sell Agreement should clearly identify the Project Identification Number (PIN) and Work Item Number (WIN) (if assigned) for each project, and the agreement state how many credits each project has purchased.
- The number of credits assigned to a given project should be specified individually for wetland, buffer, and stream credits.

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