



# Public Service Commission State of North Dakota

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## COMMISSIONERS

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May 7, 2015

Katie Schmidt, Project Manager  
E3 Environmental, LLC  
871 Jefferson Avenue  
St. Paul, MN 55102

RE: **Case No. PU-14-852**  
**Basin Electric Power Cooperative**  
**Lonesome Creek Station Phase III Project**  
**Siting Application**

Dear Ms. Schmidt:

At its regular meeting on April 29, 2015, the North Dakota Public Service Commission passed a motion to execute a contract with E3 Environmental, LLC for construction inspection services. A copy of the motion and contract are enclosed.

Sincerely,

A handwritten signature in cursive script that reads "Patrick Fahn".

Patrick Fahn, Director  
Compliance and Competitive Markets

Enclosures

**APPROVED**

DATE: 4-29-15

[Signature]

**MOTION**

**April 29, 2015**

**Basin Electric Power Cooperative  
Lonesome Creek Station Phase III Project  
Siting Application**

**Case No. PU-14-852**

I move the Commission execute a contract with E3 Environmental, LLC. for construction inspection services in Basin Electric Power Cooperative, Lonesome Creek Station Phase III Project, Siting Application, Case No. PU-14-852.

VFS

## PURCHASE OF SERVICE CONTRACT

The parties to this Contract are the State of North Dakota, acting through its North Dakota Public Service Commission, Compliance and Competitive Markets Division (STATE), and *E3 Environmental, LLC, 871 Jefferson Avenue, St. Paul, MN 55102* (CONTRACTOR).

### 1. SCOPE OF SERVICE

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, agrees to provide the services enumerated below. CONTRACTOR must be registered with the North Dakota Secretary of State and the North Dakota State Procurement Office prior to Contract execution.

#### **Background Information**

The North Dakota Energy Conversion and Transmission Facility Act (North Dakota Century Code Chapter 49-22) authorizes the STATE to determine that the location, construction, and operation of jurisdictional energy conversion and transmission facilities will produce minimal adverse effects on the environment and the welfare of the citizens of North Dakota. STATE construction inspections ensure that projects are constructed in compliance with the siting laws (North Dakota Century Code chapter 49-22), siting rules (North Dakota Administrative Code article 69-06) and applicable Commission Orders. The STATE is currently contracting for site inspection services regarding the following case:

*PU-14-852  
Basin Electric Power Cooperative  
Lonesome Creek Station Phase III Project  
Siting Application*

#### **Scope of Work**

CONTRACTOR agrees to perform construction inspections applying engineering and science principles for the purpose of ensuring that energy conversion and transmission facilities authorized by the STATE are constructed in compliance with the siting laws and applicable Commission Orders. CONTRACTOR'S Project Manager assigned to the project shall be capable of reading and interpreting relevant laws, rules, Orders, and Commission precedent for proper execution of the project.

Upon execution of Contract, CONTRACTOR shall participate in all preconstruction conferences for energy conversion and transmission facilities listed within the Contract and held after the effective date of the Contract. If construction is already underway or complete upon Contract execution, CONTRACTOR shall immediately begin providing construction inspection services. Contractor shall perform a post-construction inspection after construction is complete and at least one growing season after initial reclamation of the entire project area has been completed.

### **Specific, Results-Oriented Tasks**

CONTRACTOR shall provide the STATE with a copy of legible field inspection notes within 7 days after each field inspection. CONTRACTOR shall report to the STATE, within 5 business days, any suspected non-compliance conditions.

CONTRACTOR shall also provide to the STATE, within 30 days after completion of all inspection related services, a written Construction Inspection Report (Report). The Report must contain specific supporting documentation and photographs regarding issues to resolve, recommendations for resolution of issues, and conclusions about whether, in the opinion of CONTRACTOR, the transmission facility has been constructed in compliance with the siting laws, siting rules, and applicable Commission Orders. The Report must also contain a statement by Contractor indicating whether the area affected by construction activities has been restored as near as practicable to the condition as it existed prior to the beginning of construction, including the reestablishment of desired plant species where applicable. Immediately following the cover and table of contents of the Report must be an executive summary of the inspection findings concerning construction compliance and issues to be resolved. The Report must be approved and signed by the lead Project Manager responsible for this project:

*Katie Schmidt, Project Manager  
E3 Environmental, LLC  
871 Jefferson Avenue  
St. Paul, MN 55102*

The negotiated cost proposal provided by CONTRACTOR is attached to and incorporated into this agreement.

## **2. TERM OF CONTRACT**

This Contract begins on the date the last party has fully executed the Contract, and ends on *December 31, 2017*.

### **No Automatic Renewal**

This Contract will not automatically renew.

### **Renewal Option**

STATE may renew this Contract upon satisfactory completion of the initial Contract term. STATE reserves the right to execute up to two options to renew this Contract under the same terms and conditions for a period of twelve months each.

### **Extension Option**

STATE reserves the right to extend the Contract for an additional period of time, not to exceed 24 months, beyond the current termination date of the Contract.

### **3. COMPENSATION**

#### **Contractual Amount**

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed \$11,150.

The Contractual Amount is firm for the duration of the Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract, unless amended, regardless of this difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

CONTRACTOR agrees to invoice STATE for amounts not to exceed 100% of the Contract amount upon submission of the field inspection notes and the Report.

#### **Payment**

1. Payment made in accordance with this Compensation section shall constitute payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR shall not receive any additional compensation hereunder.
2. STATE will make every attempt to make payment under this Contract within thirty (30) calendar days after receipt of an approved invoice.
3. Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation thereto. CONTRACTOR's invoice will be subject to reduction for amounts included in any invoice or payment made which are determined by STATE, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute allowable costs. At STATE's sole discretion, all payments shall be subject to reduction for amounts equal to prior overpayments to CONTRACTOR.
4. For any amounts that are or will become due and payable to STATE by CONTRACTOR, STATE reserves the right to deduct the amount owed from the payments that are or will become due and payable to CONTRACTOR under this Contract.

#### **Travel**

CONTRACTOR acknowledges travel costs are covered by the Contractual Amount and shall not invoice STATE for travel costs.

#### **Prepayment**

STATE will not make any advance payments before performance by CONTRACTOR under this Contract.

### **Payment of Taxes by STATE**

STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

### **Taxpayer ID**

CONTRACTOR'S federal employer ID number is: 27-0-57466.

### **Purchasing Card**

STATE may make a payment using a government credit card. CONTRACTOR will accept a government credit card without passing the processing fees for the government credit card back to STATE.

## **4. TIME IS OF THE ESSENCE**

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract unless otherwise agreed to in writing by the parties.

## **5. TERMINATION OF CONTRACT**

### **Termination by Mutual Agreement**

This Contract may be terminated by mutual consent of both parties, executed in writing.

### **Termination without Cause**

STATE may terminate this Contract in whole or in part when it has determined that continuing the Contract is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

### **Termination for Lack of Funding or Authority**

STATE by written notice of default to CONTRACTOR, may terminate the whole or any part of this Contract, under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.
- 3) If any license, permit, or certificate required by law or rule, or by the terms of this Contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Contract under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

### **Termination for Cause**

STATE may terminate this Contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services required by this Contract within the time specified or any extension agreed to by STATE; or
- 2) If CONTRACTOR fails to perform any of the other provisions of this Contract, or so fails to pursue the work as to endanger performance of this Contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

### **6. FORCE MAJEURE**

Neither party shall be held responsible for delay or default caused by fire, flood, riot, acts of God or war if the event is beyond CONTRACTOR'S reasonable control and CONTRACTOR gives notice to STATE immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

### **7. INDEMNITY**

CONTRACTOR agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (STATE), from and against claims based on the vicarious liability of the STATE or its agents, but not against claims based on the STATE's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by CONTRACTOR to the STATE under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the STATE is necessary. An attorney appointed to represent the STATE must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under North Dakota Century Code section 54-12-08. CONTRACTOR also agrees to defend, indemnify, and hold the STATE harmless for all costs, expenses, and attorneys' fees incurred if the STATE prevails in an action against CONTRACTOR in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

### **8. INSURANCE**

CONTRACTOR shall secure and keep in force during the term of this agreement and CONTRACTOR shall require from all subContractors, prior to commencement of an agreement between Contractor and the subContractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, Contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this Contract.
- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self-retention is subject to approval by the STATE.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the STATE. The policies shall be in form and terms approved by the STATE.
- 3) The duty to defend, indemnify, and hold harmless the STATE under this agreement shall not be limited by the insurance required in this agreement.
- 4) The State of North Dakota and its agencies, officers, and employees (STATE) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The STATE shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the Contractual indemnity obligations of the Contractor.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
  - a) "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the STATE;
  - b) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the STATE and that any insurance, self-insurance or self-retention maintained by the STATE shall be in excess of the Contractor's insurance and shall not contribute with it;
  - c) cross liability/severability of interest for all policies and endorsements;

- d) The legal defense provided to the STATE under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the STATE is necessary;
  - e) The insolvency or bankruptcy of the insured CONTRACTOR shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured CONTRACTOR from meeting the retention limit under the policy.
- 6) The CONTRACTOR shall furnish a certificate of insurance to the undersigned STATE representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
  - 7) Failure to provide insurance as required in this agreement is a material breach of Contract entitling the STATE to terminate this agreement immediately.
  - 8) Contractor shall provide at least 30 day notice of any cancellation or material change to these policies or endorsements.

## **9. WORKS FOR HIRE**

CONTRACTOR acknowledges that all work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

## **10. WORK PRODUCT**

All work product, equipment or materials created or purchased under this Contract belong to STATE and must be delivered to STATE at STATE'S request upon termination of this Contract.

## **11. NOTICE**

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

*Katie Schmidt, Project Manager  
E3 Environmental, LLC  
871 Jefferson Avenue  
St. Paul, MN 55102*

Executive Secretary  
North Dakota Public Service Commission  
600 E Boulevard Ave., Dept 408  
Bismarck, ND 58505-0480

Notice provided under this provision does not meet the notice requirements for monetary claims against the STATE found at North Dakota Century Code section 32-12.2-04.

## **12. CONFIDENTIALITY**

CONTRACTOR shall not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, North Dakota Century Code chapter 44-04. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this Contract.

## **13. COMPLIANCE WITH PUBLIC RECORDS LAW**

CONTRACTOR understands that, except for disclosures prohibited in this Contract, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records that are obtained or generated by CONTRACTOR under this Contract, except for records that are confidential under this Contract, may, under certain circumstances, be open to the public upon request under the North Dakota open records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the open records law and to comply with STATE'S instructions on how to respond to the request.

## **14. INDEPENDENT ENTITY**

CONTRACTOR is an independent entity under this Contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR'S activities and responsibilities under this Contract, except to the extent specified in this Contract.

## **15. ASSIGNMENT AND SUBCONTRACTS**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE'S express written consent. However, CONTRACTOR may enter into subContracts provided that any subContract acknowledges the binding nature of this Contract and incorporates this Contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subContractor. CONTRACTOR does not have authority to Contract for or incur obligations on behalf of STATE.

## **16. SPOILIATION – NOTICE OF POTENTIAL CLAIMS**

CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this Contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

## **17. MERGER AND MODIFICATION**

This Contract, including the following documents, constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this Contract. This Contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. CONTRACTOR's proposal dated *March 20, 2015*
- c. All terms and conditions contained in any end user agreements (e.g. automated click-throughs, shrink wrap, or bonus wrap) are specifically excluded and null and void, and shall not alter the terms of this Contract.

## **18. SEVERABILITY**

If any term of this Contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the Contract did not contain that term.

## **19. APPLICABLE LAW AND VENUE**

This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the State District Court of Burleigh County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or forum non conveniens.

## **20. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

**21. ATTORNEY FEES**

In the event a lawsuit is instituted by STATE to obtain performance due under this Contract, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by North Dakota Century Code section 28-26-04, pay STATE'S reasonable attorney fees and costs in connection with the lawsuit.

**22. NONDISCRIMINATION AND COMPLIANCE WITH LAWS**

CONTRACTOR agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes and unemployment compensation and workers' compensation premiums. CONTRACTOR shall have and keep current at all times during the term of this Contract all licenses and permits required by law.

**23. STATE AUDIT**

All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors. CONTRACTOR shall maintain all such records for at least three years following completion of this Contract and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice.

**24. EFFECTIVENESS OF CONTRACT**

This Contract is not effective until fully executed by both parties.

CONTRACTOR

E3 Environmental, LLC

By: Will F. McJannet

Title: PRESIDENT

Date: 4/15/15

STATE OF NORTH DAKOTA

Acting through its North Dakota Public Service Commission

By: Julie Fedorchak

Title: Julie Fedorchak, Chairman

Date: 4-29-15

By: Randy Christmann

Title: Randy Christmann, Commissioner

Date: 4-29-15

By: 4-29-15

Title: Brian P. Kalk, Commissioner

Date: Brian P. Kalk