

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:
OEP/DG2E/Gas 4
WBI Energy Transmission, Inc.
Wahpeton Expansion Project
Docket No. PF21-4-000

November 9, 2021

VIA FERC Service

Lori Myerchin
Director, Regulatory Affairs and Transportation Services
WBI Energy Transmission, Inc.
1250 West Century Avenue
P.O. Box 5601
Bismarck, ND 58506-56

Re: Selection of Third Party Contractor

Dear Ms. Myerchin,

Commission staff has reviewed the third-party contractor proposals provided on October 27, 2021, for WBI Energy Transmission, Inc. (WBI Energy) planned Wahpeton Expansion Project filed under Docket No. PF21-4-000 to assist us in preparing the National Environmental Policy Act (NEPA) document. We have selected Cardno, Inc. (Cardno) as the third-party contractor to work solely under the direction of the Commission staff. Factors considered in this selection included technical approach, personnel qualifications, past work history, and clearance of any organizational conflict of interest. I request that you proceed with executing a contract with Cardno. We have prepared the attached Memorandum of Understanding (MOU) between the Federal Energy Regulatory Commission, WBI Energy, and Cardno in accordance with the Commission's *Handbook for Using Third-Party Contractors to Prepare Environmental Documents* (Third Party Handbook). The MOU describes the duties and responsibilities of each signatory of the agreement. Please coordinate the remaining signatures between WBI Energy and Cardno and then file the MOU on eLibrary under the project's docket number.

As specified in the MOU, Commission staff must have complete control over the scope, content, and quality of the contractor's work; sole ownership of all documents (other than those related to financial aspects) produced under the contract; and complete control over the schedule for completion of the third-party contractor's work.

Commission staff will independently evaluate the results of the third-party contractor's work and the Commission, through its staff, will bear ultimate responsibility for full compliance with the requirements of NEPA.

If you have any questions, please contact David Hanobic, Environmental Project Manager, at (202) 502-8312.

Sincerely,

Dave Swearingen
Chief, Gas Branch 4
Division of Gas – Environment
and Engineering

ATTACHMENT

MEMORANDUM OF UNDERSTANDING

Between the

Federal Energy Regulatory Commission,

WBI Energy Transmission, Inc., and Cardno, Inc.

a. Background.

The Energy Policy Act of 1992¹ and related regulations provide for the use of third-party contracts to assist agencies in satisfying the requirements of the National Environmental Policy Act (NEPA).² In its “Forty Questions” issued in the Federal Register on 23 March 1981, the Council on Environmental Quality indicated the term “third-party contract” referred to contractors paid by the applicant but selected by the agency. 40 CFR 1506.5(b)(4) further stipulates that the contractor must execute a disclosure statement prepared by the agency to avoid any conflict of interest. If the NEPA document is prepared with third-party contract assistance, the responsible agency must participate in the preparation and shall independently evaluate the NEPA document prior to its approval. The agency must also take full responsibility for the scope and contents of the NEPA document.

On September 27, 2021, the Federal Energy Regulatory Commission (FERC) staff approved WBI Energy Transmission, Inc. (WBI Energy)’s request to use the pre-filing review process for the planned Wahpeton Expansion Project in Docket No. PF21-4-000, and acknowledged WBI Energy’s intent to fund a third-party contractor and that FERC would select a third-party contractor once all the information had been filed. On November 9, 2021, the FERC staff selected Cardno, Inc. (Cardno).

This Memorandum of Understanding (MOU) defines the roles and obligations of the FERC as the federal agency responsible for the NEPA review; WBI Energy as the private entity with a planned or pending application before the FERC (referred to as Applicant); and Cardno as the independent contractor chosen by FERC staff (referred to as Contractor). The contract between the Applicant and the Contractor will be executed pursuant to the third-party contracting procedures set forth in 40 CFR 1506.5(b)(4) and as described in the FERC *Handbook for using Third-Party Contractors to Prepare Environmental Documents* (August 2016).

¹ 16 U.S.C. 797d.

² 42 U.S.C. §§ 4321-4370h (2012).

The FERC staff of the Office of Energy Projects (OEP) will direct the activities of the contractor in the consultation, reviews, preparation, and processing of the documents within the scope of the contract. **The Applicant will not control or direct the activities of the Contractor, except with respect to the processing of invoices.**

b. Obligations of the Applicant

- I. The Applicant certifies that the selected Contractor, to the best of its knowledge, has no financial or other interest in the outcome of the project. Specifically, the contract or project provides no unfair competitive advantage to the Contractor.
- II. The Applicant certifies that the Applicant and the Contractor have no relationships that could impair the Contractor's objectivity in performing the contract work.
- III. All communications with the Contractor will be restricted to the financial components of its contract. Communications on the merits of the Applicant's project may only be conducted jointly with OEP staff, subject to any disclosure and ex parte requirements.
- IV. The Applicant will be solely responsible for all Contractor and subcontractor fees, costs, and expenses.
- V. The Applicant will retain no rights to the products of the contract.
- VI. The Applicant and Contractor roles and obligations outlined in this MOU will be included as mandatory provisions in the contract between Applicant and Contractor.

c. Obligations of the Contractor (and all subcontractors, as appropriate)

- I. The Contractor certifies that it has no conflict of interest in performing the work required under the contract and certifies that it has no financial or other interest in the outcome of the Commission's review.
- II. The Contractor certifies that its Organizational Conflict of Interest (OCI) Statement provided to FERC for review prior to selection is accurate.
- III. The Contractor has a continuing obligation to identify conflicts of interest that may arise because of changes in corporate identity, affiliation, structure,

or ownership, or changes to the contract throughout the actual performance period of the work. Therefore, the OCI Statement must be refreshed **on an annual basis**, at a minimum, and more frequently if the Contractor's business relationships have changed in a manner that affects the previously submitted OCI Statement.

- IV. In the event an OCI is discovered after award, the Contractor certifies that it will **immediately** notify the OEP Environmental Project Manager and will submit a plan to mitigate the conflict. The mitigation plan will be submitted to FERC's Office of General Counsel – General and Administrative Law for review and written determination as to whether the plan can be implemented **within 30 days** of the identification of an OCI.
- V. The Contractor agrees to only communicate with the Applicant on financial issues related to the executed contract, unless OEP staff is present and subject to any disclosure and ex parte requirements.
- VI. All work performed by the Contractor will be under the direction of and meet any timeframes established by OEP staff. General duties of the contractor are listed in Chapter 2.4 of the *Handbook for Using Third-Party Contractors to Prepare Environmental Documents*. These duties are also listed within the sample Request for Proposals included in Chapter 3 of the Handbook.
- VII. The Contractor shall not replace its Project Manager, assistant Project Manager, or other key employee or subcontractor personnel without the prior consultation of the OEP staff.

d. Obligations of OEP

- I. OEP will select the Contractor, based on its independent review of the technical, managerial, personnel, and OCI aspects of each proposal.
- II. OEP will set the schedule for completion of the NEPA document and all associated documents.
- III. OEP will be responsible for providing technical direction to the Contractor throughout the NEPA review process.
- IV. OEP will identify all information necessary to complete its review and will decide on the inclusion or deletion of all material in the NEPA document.

V. OEP staff has the right, at any time and in their sole discretion, to have any personnel of the Contractor, or the Contractor's subcontractor, either temporarily or permanently dismissed from the project.

e. Expiration

This MOU shall become effective upon signature of all three parties and shall expire following completion of the contracted scope of work as agreed to by the parties to the agreement.

f. Termination

This MOU may be terminated prior to expiration with the written consent of all three parties. Each party may initiate termination upon **30 days** written notice to the other parties. During the intervening 30 days, the parties agree to actively attempt to resolve any outstanding disputes or disagreements.

g. Effective Date

This MOU and any attachments hereto shall become effective upon signature of all three parties.

SIGNATURES OF AGREEMENT

Federal Energy Regulatory Commission

Signature

for Terry Turpin

Typed Name

Director, Office of Energy Projects

Typed Title

November 9, 2021

Date

Applicant – WBI Energy Transmission, LLC

Signature

Typed Name

Typed Title

Date

Contractor – Cardno, Inc.

Signature

Typed Name

Typed Title

Date