

Kevin V. Schieffer
President & Chief Executive Officer

1 March 2004

Vicki Rutson
1925 K Street, NW
Suite 500
Washington, DC 20423



Dear Vicki:

Enclosed please find three signed original MOU's, accompanied by three initial work plans. I would suggest after signing them to forward them on to Burns & McDonnell who could then send one original back to each of us.

Should you have any questions, do not hesitate to call.

Sincerely,


Kevin V. Schieffer
President & Chief Executive Officer

C: Steve Thornhill

Enclosures: MOU (3 copies)
Exhibit A to MOU (Work Plan) (3 copies)



**MEMORANDUM OF UNDERSTANDING
AMONG
SURFACE TRANSPORTATION BOARD,
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND
BURNS & McDONNELL
RE: Finance Docket No. 33407**

I. Introduction and Purpose

The 8th Circuit United States Court of Appeals recently entered an order (8th Circuit Case No. 02-1359, etc., dated October 2, 2003; and an Order Denying Rehearings, dated January 30, 2004; hereinafter “Court Order”) reversing and remanding the Surface Transportation Board (“Board”) Decision issued in the above referenced case due to certain deficiencies in the Environmental Impact Statement (“EIS”). Said EIS and Board Decision relate to the application of the Dakota, Minnesota & Eastern Railroad Corporation (hereinafter, the “Railroad”) to construct and operate a new line of railroad extending from the Railroad’s existing line to coal mines in the Powder River Basin area of Wyoming (the “Project”). In conducting the environmental review relating to the Project, SEA has also considered the impacts of operating coal trains on approximately 600 miles of DM&E’s existing rail line in Minnesota and South Dakota. In response to the Court Order, it is anticipated that the Board will prepare a Supplemental EIS (“SEIS”) addressing the environmental issues identified by the Court Order. Then, after consideration of the SEIS, the Board will issue another decision addressing the issues raised in the Court Order and the SEIS.

Pursuant to 40 CFR § 1506.5(c) and 49 CFR § 1105.4(j) and 1105.10(d), the Railroad has agreed to engage, at the Railroad’s expense, Burns & McDonnell (“Contractor”) as the Independent Third Party Contractor for the Project. The Contractor shall assist SEA in preparing the SEIS and providing reasonable additional support and assistance that the Board requests, and shall work directly for SEA under SEA’s sole direction, control, and supervision. The purpose of this Memorandum of Understanding (“Memorandum”) is to summarize the relationship among the Contractor, the Railroad, and SEA, as set forth in applicable regulations and Board policy, regarding the conditions and procedures each party must follow in preparing all further environmental documentation. The Memorandum does not supersede or amend, and is made expressly subject to, the requirements of the National Environmental Policy Act (“NEPA”), and, to the extent applicable, related environmental laws, and 49 CFR Part 1105 and 40 CFR Part 1500.

II. Document Process

- A. SEA will, with the assistance of the Contractor, prepare on behalf of the Board, the draft SEIS for agency and public review, and will provide a period of time for receiving comments on the SEIS.

- B. SEA will, with the assistance of the Contractor, prepare on behalf of the Board, a final SEIS, responding to substantive comments received on the draft SEIS.

III. Agreement between the Railroad and Contractor

- A. Any contract between the Railroad and the Contractor, and any subcontracts (which must be approved by the parties hereto), shall be consistent with the provisions of this Memorandum.
- B. The terms of this Memorandum shall override any contradictory or conflicting terms regarding the scope of any work to be performed under any contract entered into between the Railroad and the Contractor; provided, however, that the foregoing shall not limit the rights of the Railroad and Contractor to contract on terms which require that the work be performed cost-effectively.
- C. The contract between the Contractor and the Railroad shall specifically provide, and the Contractor shall represent, that (1) the Contractor and any subcontractors do not and shall not have any financial or economic interest in the Railroad or this Project, except for payment for services rendered in connection with the preparation of the SEIS, and except for services rendered pursuant to any other agreements that may be entered into subject to SEA's authorization, and (2) there is no agreement between the Railroad and the Contractor regarding future employment that is contingent upon the Contractor's performance under this contract. The Contractor shall concurrently execute a disclosure statement as mandated by the regulations of the Council on Environmental Quality ("CEQ") (40 CFR § 1506.5 (c)) and submit it to both SEA and the Railroad, before beginning any work under SEA's direction, control, and supervision.
- D. Any SEIS work that Contractor cannot efficiently perform may be contracted to another party, subject to the approval of the Board and Railroad, which approval will not be unreasonably withheld.
- E. Restrictions on other work
 - (1) No employee of either the Contractor or any subcontractor, who works on the Project for SEA or Railroad ("Core Team Member"), shall engage in (a) other work for the Railroad during the SEIS process, or (b) any work for any party other than SEA or Railroad relating to the Project or Application.
 - (2) During the SEIS process for the Project, no employee of the Contractor or employee of any subcontractor who is not a Core Team Member, shall, unless SEA is provided prior notice of and approves such work, engage in other work for the Railroad.

- (3) No employee of the Contractor or employee of any subcontractor who is not a Core Team Member shall, unless SEA and Railroad are provided prior notice of and approve such work, engage in any work relating to the SEIS or Project for any party other than SEA or Railroad.
- F. The reasonable costs incurred by the Contractor, and by any subcontractor approved by Railroad and SEA, in preparing the SEIS under the direction, control, and supervision of SEA, shall be borne by Railroad. The railroad agrees to hold harmless and indemnify the United States of America and the Board with respect to any and all claims, demands, causes of action and the like which may arise in performing the work under the contract between the Contractor and the Railroad.
- G. Any contract between the Contractor and the Railroad shall specifically limit any remedies available to the Contractor or subcontractors upon termination of the contract to affirmatively relieve the United States of America, the Board, and any officer, agent, or employee, from any liability from terminating the contract.

IV. Contractor Responsibilities

- A. All work performed by the Contractor or any subcontractors shall be under the sole direction, control, supervision, and final approval of SEA. The Contractor and subcontractors, if any, will act as the agent(s) of the Board, not the Railroad, in performing its/their duties.
- B. The Contractor shall provide:
 - i. Appropriate expertise in the areas of environmental concern identified in the Court Order.
 - ii. A good working knowledge of NEPA and related environmental laws, Board environmental regulations, CEQ regulations and guidelines, other applicable federal laws and regulations, state laws and regulations, and applicable local ordinances and regulations.
 - iii. The capability to perform environmental impact analyses and prepare environmental documentation.
 - iv. Thorough, readable, technically sound, and informative environmental documents, as well as related charts, maps, diagrams, etc.

- v. Representatives to attend and/or facilitate meetings or hearings with federal, state, regional, and local agencies, other interested parties, and the Railroad for the purpose of exchanging and obtaining information, explaining the Project and related environmental concerns and impacts, and receiving comments in preparing the required environmental documentation.
- vi. Expertise in data management.

C. The Contractor shall maintain and provide to SEA upon request:

- i. Adequate record keeping and reporting systems to assure preservation of all data gathered, including surveys, studies, etc.
- ii. Logs summarizing all telephone calls, meetings, document reviews, and other substantive communications with SEA, the Railroad, local governments, governmental agencies, citizens' groups, shippers, and any other interested parties.
- iii. Lists of all agencies, railroads, citizens' groups, organizations, shippers, and individuals (including their respective addresses and telephone numbers) contacted in preparing the environmental documentation.

D. The Contractor shall perform the work in a timely, responsive, satisfactory, and cost-effective manner, pursuant to a work schedule developed with SEA in coordination with the Railroad and approved by SEA.

E. The Contractor shall assist SEA in coordinating the efforts and exchange of all relevant environmental information among SEA staff, the Railroad's staff and representatives, the Contractor, and any subcontractors, related to the Project and necessary in preparing the draft and final SEIS.

F. The Contractor shall submit directly to SEA any and all work the Contractor performs in preparing all required environmental documentation, studies, surveys, etc. The Contractor, and any subcontractors, shall not disclose the results of their work nor release any of the underlying work papers, drafts, or other materials prepared under this Memorandum to anyone, including the Railroad, without SEA's express authorization. In no case will the Railroad be provided the opportunity to modify or edit the Contractor's work prior to submission to SEA, without SEA's express authorization.

G. The Contractor shall follow the directions and instructions of SEA, and incorporate them into the environmental document(s), as needed, in a timely and

responsive manner. The Contractor shall submit preliminary and final drafts of any documents to SEA for final review and approval.

- H. The Contractor shall provide SEA access to and the right to review all procedures and underlying data used in the Contractor's development and preparation of any and all environmental documents. This includes, but is not limited to, field reports/surveys, technical studies and analyses, subcontractor reports, and interviews with concerned private and public parties, whether or not such information may be reflected in draft, supplemental, or final environmental documents submitted to SEA.
- I. The Contractor will (i) assist SEA in reviewing comments received during the SEIS development process, (ii) draft a summary of such comments, and (iii) coordinate analysis of the comments with SEA in preparing the required SEIS.
- J. Contractor shall be available to attend all meetings, briefings, and consultations, as SEA reasonably deems necessary, including teleconferences with cooperating and consulting agencies, if relevant. The Project Director and Project Manager shall devote and direct as much time to this Project as is necessary to assure Contractor's performance of its responsibilities under this Agreement, particularly with respect to the Appendix B schedule. This work commitment will extend for the entire time necessary to complete the SEIS.
- K. Except as specifically authorized by SEA, the Contractor and its approved subcontractors, if any, shall refer all media/press inquiries directly to SEA.
- L. Contractor shall be available to assist SEA in drafting and reviewing environmental documentation and environmental analysis for the Board.
- M. Contractor shall be available to assist in preparing environmental arguments as part of any litigation that may be brought against the Board's NEPA process regarding the Project.

V. Railroad Responsibilities

- A. The Railroad shall retain the Contractor to assist SEA in preparing all reasonably required environmental documentation and analysis to comply with the Court Order.
- B. The Railroad, including its staff and representatives, shall provide to SEA and the Contractor any reasonably requested supportive expertise, resources, data, and technical capabilities necessary to undertake the supplemental environmental analysis, subject to the right of the Railroad to advise SEA of any request received from SEA or the Contractor that the Railroad believes is not germane to matters appropriately reviewed in the SEIS process, is contrary to the Court Order, would

impose an extraordinary burden on the Railroad, or is subject to the right of the Railroad to maintain confidentiality as to proprietary or privileged information or other information which is not otherwise subject to disclosure. In the event that the Railroad so advises SEA, SEA shall determine whether the request is appropriate and shall so advise the Railroad and the Contractor of its determination. SEA shall, to the extent possible, maintain the confidentiality of any information provided in preparation of the SEIS.

- C. The Railroad shall cooperate fully with SEA in all respects relating to fulfillment of the requirements of the Court Order.
- D. With respect to all reports, analyses, and documents, including drafts, supplements, and final copies of the environmental documents, Applicant shall be responsible for Contractor's administrative and clerical costs, as well as the costs of graphics, maps, layout, mailing, and printing, as those costs are defined by a contract to be negotiated and executed by Applicant and Contractor. However, Applicant shall have the option of directing that the printing of the environmental documentation be performed by a private entity, rather than SEA. Applicant shall be solely responsible for the cost of preparing and providing to SEA the appropriate number of copies of all required environmental documentation.
- E. Applicant shall provide complete, accurate, relevant, and timely responses to all reasonable requests for information pertaining to the Project to the Board, and the environmental aspects consistent with the Court Order.
- F. In the event of any litigation resulting from the further environmental analysis in this proceeding Applicant shall provide for Contractor's support and assistance in connection with any litigation, if requested by the Board.

VI. Board/SEA Responsibilities

- A. The Board is responsible for ensuring compliance with the requirements of the Court Order by preparing appropriate environmental documentation in accordance with the Court Order and issuance of a further decision addressing the remaining environmental issues.
- B. SEA shall:
 - (1) Direct, review, and approve all phases of preparing all required supplemental environmental documentation.
 - (2) Designate appropriate staff to review and approve all work as it is developed and completed.
 - (3) Ensure that its representatives attend meetings, as needed, with federal, state, regional, and local agencies, and other

interested parties, as well as any public hearings or meetings, to exchange information, explain the Court Order requirements, obtain technical input, and receive comments in preparing all required supplemental environmental documentation.

- (4) Ensure coordination of effort and the exchange of necessary supplemental information among any planning, design, or construction engineers or technical staff employed by the Railroad and the Contractor.
- C. SEA will periodically review the work of the Contractor to ensure that the Board's responsibilities under the Court Order, NEPA, and related environmental laws and regulations are satisfied. As each portion of the draft or final SEIS is completed, SEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.
- D. In all instances involving questions concerning the content or relevance of any material (including all data, analyses, charts, and conclusions) prepared by the Contractor, SEA shall make the final determination on including, deleting, or revising any such material in the SEIS.
- E. To coordinate the preparation of all required environmental documentation, and to verify Project-related data, SEA may hold joint meetings with the Railroad and the Contractor. As necessary, SEA may exclude the Railroad from participation. SEA, with the assistance of the Contractor, may also consult directly with appropriate federal, state, and local officials and other interested parties.
- F. SEA, with the assistance of the Contractor, shall organize and conduct any public hearing or meetings that may be necessary during the environmental review process.
- G. SEA, with the assistance of Contractor, will receive all relevant comments submitted during the environmental review process and comment period. At the close of any public review and comment period, SEA, in consultation with Contractor, shall identify the issues and comments that will require a response from the Board. SEA may direct these comments to Applicant and to Contractor, as appropriate, to be included in the final SEIS. SEA may modify these responses as appropriate.
- H. SEA will periodically review the work of Contractor to ensure that the Board's responsibilities under NEPA and related environmental laws and regulations are being satisfied. As each portion of the draft or final SEIS is completed, SEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.

- I. SEA, with the assistance of the Contractor, shall prepare the final SEIS and recommendations for the Board.

VII. Work Plan

- A. Contractor, in consultation with SEA and Applicant, shall timely submit an initial Work Plan(s) to SEA for preparing the required environmental documentation. The initial Work Plan shall be submitted no more than thirty (30) days after all parties have signed this Memorandum. It is understood that the initial Work Plan will not contemplate all the work requirements necessary for the STB to reach a final decision in the case. Supplemental Work Plans shall be developed as such work requirements are identified. The Work Plan(s) shall contain at least the following elements:
 - (1) A description of all work to be performed consistent with Court Order;
 - (2) The projected schedule for completing the various tasks described;
 - (3) Identification of information necessary to reasonably quantify the amount of work and time required to accomplish the following milestone events: (a) the time and effort required between execution of this Memorandum and the initial Work Plan, (b) the time and effort required between the initial Work Plan and any subsequent Work Plan(s), (c) the time and effort required between the final Work Plan(s) and the issuance of the draft SEIS, (d) the time and effort required between issuance of a draft SEIS and final SEIS, and (e) the time and effort required between issuance of a final SEIS and a final Board decision.
 - (4) Identification of Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work; and
 - (5) An outline of the environmental analysis.
- B. Following receipt of the Work Plan(s), SEA, in consultation with Contractor and Applicant, shall finalize the Work Plan(s) in a timely manner.
- C. Subsequent to consultation with Contractor and Applicant, SEA will amend the Work Plan(s) from time to time as information is developed and compliance issues are resolved consistent with the Court Order. The parties hereto shall consult at least once every two weeks to confirm that the work is being performed

in the most efficient and cost-effective manner and to consider possible measures to improve the efficiency and cost-effectiveness of performance of the work.

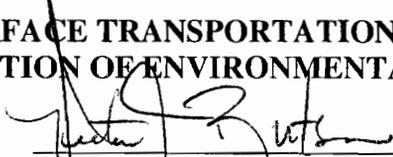
VIII. Nonperformance and Termination

- A. The Railroad or Contractor shall notify SEA of any concerns that either party might have with respect to any party's performance under the contract between the Railroad and the Contractor or under this Memorandum. All parties will attempt to resolve any disputes or disagreements in good faith. Non-performance or breach by any party will be cause for termination by any party to this memorandum or related agreements between any parties.
- B. If SEA determines that the Contractor is not adequately performing its responsibilities and duties in accordance with the Memorandum, SEA will discuss its concerns with the Contractor. If SEA's concerns cannot be satisfactorily resolved, SEA will notify the Railroad that SEA is removing the Contractor for cause. Upon removal of the Contractor and execution of a new Memorandum with a replacement Contractor, SEA shall endeavor to replace the Contractor with another qualified third party Contractor as soon as practicable.
- C. If any party determines that the achievement of any milestone in the Work Plan(s) is not practical given the amount of time or resources required, this Memorandum may be terminated upon notice by any party.
- D. Both Railroad and the Contractor shall immediately notify SEA of any attempt by either party to modify or terminate the contract between the Railroad and Contractor. Material modifications to the Contract shall be subject to SEA's prior approval, after consultation with the Railroad and the Contractor. Upon approving termination of the contract, SEA shall endeavor to replace the Contractor with another qualified third party contractor as soon as practicable. Notwithstanding the foregoing, Railroad may terminate the contract without SEA's approval in the event that it withdraws its Application.

IX. Modification

This Memorandum of Understanding may be modified only by written amendment executed by SEA, the Railroad, and the Contractor.

**SURFACE TRANSPORTATION BOARD
SECTION OF ENVIRONMENTAL ANALYSIS**

By: 

Title: Chief, SEA

Date: March 18, 2004

**DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION**

By: _____

Title: President & Chief Executive Officer

Date: March 1, 2004

BURNS & McDONNELL

By: Dale R. Smith

Title: Associate Vice President

Date: March 24, 2004