

MEMORANDUM

TO: City Council and Central Staff (Ben Noble, Norm Schwab, and Dan Eder)

FROM: City Attorney's Office

SUBJECT: Summary of City-WSDOT Memoranda of Agreement

DATE: January 31, 2011

This summary of the January 28, 2011 Memoranda of Agreement (MoA) updates our July 16, 2010 memorandum describing the July 2, 2010 Memoranda of Agreement. In August 2010 the City Council approved MoA that the Seattle Department of Transportation, Seattle Public Utilities, and Seattle City Light negotiated and wrote under the direction of the Mayor's Office, while the City Attorney's Office played a supporting role, offering legal advice and drafting assistance. Since then, the City and State have agreed to a few more changes. Those changes are highlighted in this summary. The City Attorney's Office AWV Memoranda of Agreement (MoA) team includes:

Jean Boler – Civil Division Chief
Darby DuComb – Chief of Staff
Rodney Eng – Contracts
John Groh – Contracts
Kathy Gerla – Environment Protection
Gary Keese – Government Affairs
Judy Nevins – Land Use
John Schochet – Government Affairs
Jeff Slayton – Government Affairs
Suzanne Smith – Utilities
Theresa Wagner – Environmental Protection
Sandy Watson – Land Use
Roger Wynne – Land Use

Stanton Beck – Lane Powell PC

SDOT-WSDOT MoA AND SHARED PROVISIONS

Background, Purpose & Project Scope

1. The project is still undergoing environmental review. These MoA address a proposed PROJECT should the bored tunnel alternative be selected through the environmental review process. The MoA permit preliminary design work to proceed now, and if the preferred alternative is selected by the STATE, the City Council and WSDOT will determine whether to give a notice to proceed following the Final Environmental Impact Statement and Record of Decision. SDOT MoA Section 2.3.
2. There are three MoA with the STATE: SDOT-WSDOT, SPU-WSDOT and SCL-WSDOT. These MoA are similar in format and content to the agreements authorized by City Council for Early Electrical Relocation, Holgate to King Stage 1, and Holgate to King Stage 2. The key differences being that SPU and SCL are paying for final utility relocations, the Design Build contract changes the manner in which the CITY will review and approve CITY Infrastructure work, there will a right-of-way agreement detailing the content and process for future real estate transactions, and large portions of the project will be designated a Limited Access Facility.
3. Program elements included in the PROJECT:
 - a. A four-lane tunnel from a south portal in the vicinity of South Dearborn Street and Alaskan Way South to a north portal in the vicinity of 6th Avenue North and Harrison Street.
 - b. North and south tunnel portal structures, including tunnel operation buildings at each portal.
 - c. New SR99 surface roadways connecting the proposed bored tunnel to the existing SR99-Aurora Avenue in the north, and to the soon to be constructed SR99 improvements between South Holgate Street and South King Street.
 - d. Reconnect Aurora Avenue to the City street grid at Denny Way.
 - e. Improvements to existing City street rights-of-way, including new lanes, curbs, sidewalks, traffic signals, intelligent transportation systems and signage, landscaping, and street lighting.
 - f. New cross-corridor connections of John, Thomas, Harrison, and Dearborn Streets.
 - g. New bicycle and pedestrian paths and pedestrian plazas.
 - h. Relocation of utilities that are in conflict with or that intersect with the proposed PROJECT.
 - i. Protection of utilities that may be adversely subjected to tunnel settlement.
 - j. Remediation of hazardous substances.
4. Program elements not included in the PROJECT:
 - a. The STATE'S Moving Forward Projects
 - b. Viaduct demolition
 - c. Battery Street Tunnel decommissioning
 - d. Reconfiguration of Alaskan Way

General Responsibilities

1. The STATE is responsible for designing and constructing the proposed PROJECT and mitigating, minimizing, and remedying damage. The STATE will reimburse the CITY for any PROJECT services. SDOT MoA Sections 2.9, 10 and 19; SPU and SCL MoA Sections 2.9 and 4.
2. The STATE and the CITY will manage risk, produce design and conduct construction in a manner that maximizes cumulative public benefits and minimizes cumulative public costs. SDOT MoA Section 2.1; SPU and SCL MoA Section 2.1.
3. The STATE and the CITY will work collaboratively to resolve issues in a manner that endeavors to open the proposed SR 99 bored tunnel to the public on schedule. SDOT MoA Section 2.4; SPU and SCL MoA Section 2.11.
4. The design and construction of CITY Infrastructure, including infrastructure repair, shall comply with City of Seattle codes, rules, regulations, and standards. SDOT MoA Section 2.5; SPU and SCL MoA Section 2.5.
5. The STATE is responsible for taking measures to minimize, limit, and mitigate damage to private property and CITY Infrastructure during PROJECT construction, including damage that may result from tunnel-induced ground settlement. "The STATE is responsible for remedying such damage should it occur." SDOT MoA Section 2.8; SPU and SCL MoA Section 2.8.
6. Each PARTY may perform work on behalf of another PARTY. The Task Order process is a prerequisite to payment for specific work. SDOT MoA Section 2.9, Section 4 and Exhibits B (Section 7) and C.
7. The CITY and STATE agree the PROGRAM is not complete until the elements in Exhibit D are completed, and each shall mutually agree to any change in responsibilities for certain elements of the PROGRAM. The STATE must update the CITY quarterly on the PROJECT and PROGRAM budget. SDOT MoA Section 2.11 and Exhibit D.
8. The PARTIES establish an Advisory Committee on Tolling & Traffic Management. SDOT MoA Section 2.12 and Exhibit E.

Monitoring and Deformation Mitigation

1. The STATE agrees to assess and estimate susceptibility and vulnerability of CITY Facilities to Deformation, and the CITY will comment thereupon. SDOT MoA Sections 12.1 and 12.2; SPU and SCL MoA Section 4.
2. The STATE agrees to develop a deformation mitigation plan and to monitor tunneling pre- and post-construction. SDOT MoA Section 12.4; SPU and SCL MoA Section 4.

3. A monitoring Task Force will plan, implement, review, and rapidly respond to monitoring data. SDOT MoA Section 12.5; SPU and SCL MoA Section 4.

Environmental Remediation

1. The STATE will remediate hazardous substances the STATE knows of or discovers during the course of construction within the limits of the PROJECT, on property in which the CITY has or will have an interest or right. SDOT MoA Section 5; SPU and SCL MoA Section 15.

Property Acquisition and Transfer

1. The STATE will acquire Project Property necessary to implement the PROJECT at its expense. SDOT MoA 3.1.1.
2. Prior to the start of construction, the STATE and the CITY will agree to the terms of, and enter into, an agreement for the transfer of Program Transfer Property to the CITY. The agreement will describe the property to be transferred, will require transfer by deed and will include environmental liability indemnification by the STATE. SDOT MoA Section 3.2.1.
3. Transfer and acceptance of property rights procedures, including environmental indemnification. SDOT MoA Section 3.2; SPU and SCL MoA Section 14.
4. The STATE will initiate disposal of Surplus Property within two years of PROJECT completion. SDOT MoA Section 3.3.

City Review, Approvals and Permits

1. Each PARTY will obtain all required permits and approvals for work that PARTY is designing and constructing. SDOT MoA Sections 5.10 and 6.1; SPU and SCL MoA Section 2.15.
2. The STATE agrees to additional SDOT review and permitting of all activity through the issuance of Street Use Permits. SDOT MoA Section 6.2 through 6.5.
3. Urban design requirements and procedures, including Seattle Design Commission review and recommendations. SDOT MoA Section 8; SPU and SCL MoA Section 5. SDOT is responsible for requiring compliance with Seattle Design Commission recommendations. SDOT MoA Section 8.7.
4. SDOT, SCL, and SPU plan review and permit issuance process for CITY Infrastructure. SDOT MoA Section 7 and Exhibit B; SPU and SCL MoA Section 5.
5. Procedures for CITY evaluation and approval of revisions or additions to the scope of work. SDOT MoA Section 7; SPU and SCL MoA Section 5.

Private Utility Relocation

1. The CITY and STATE will be jointly responsible for ordering private utility relocation. SDOT MoA Section 6.7.

Risk Allocation & Insurance

1. Limits of liability
 - a. No CITY liability for its assistance with the PROJECT. SDOT MoA Section 19.1; SPU and SCL MoA Section 16.
 - b. No CITY liability for delay. SDOT MoA Section 19.1.2; SPU and SCL MoA Section 16.
 - c. No CITY liability for third party claims of diminution in value of private property. SDOT MoA Section 19.1.3; SPU and SCL MoA Section 16.
2. Mutual indemnification to the extent of a PARTY'S negligence. SDOT MoA Section 19.2; SPU and SCL MoA Section 16.
3. Environmental indemnification, except for within real property in which the CITY already has a real property interest. SDOT MoA Sections 5.16 and 19.2; SPU and SCL MoA Section 15.
4. The STATE shall require its Contractors to provide performance bonds, and the STATE shall use the bonds, or other means, if a Design Builder defaults. SDOT MoA Section 19.1.4. The MoAs do not establish a minimum amount for the performance bonds, although the WSDOT design-build contract does.
5. The STATE shall make the CITY a third party beneficiary of the indemnification and insurance requirements of their construction contracts. SDOT MoA Section 21; SPU and SCL MoA Section 18.
6. The STATE shall require its contractors to include "The City of Seattle" as an additional insured for primary and non-contributory limits of liability for:
 - a. Commercial General Liability
 - b. Commercial Automobile Liability
 - c. Contractor's Pollution Liability (if required)
 - d. Products and Completed Operations CoverageThe minimum limits of liability and terms and conditions shall be mutually agreed upon. SDOT MoA Section 20; SPU and SCL MoA Section 17.
7. Cost Overruns. The MoA establish that the STATE is responsible for designing and constructing the Proposed PROJECT and that "[e]ach PARTY shall provide the funding and resources necessary to fulfill the responsibility of that PARTY as established by this Agreement." SDOT MoA Sections 2.6, 2.9, and 10; SPU and SCL MoA Section 9. As such, WSDOT is responsible for any cost overruns on the PROJECT. The MoA do not address the situation in which the STATE'S cost for the PROGRAM exceeds \$2.8 billion. "By entering

into the MoA, the CITY is not waiving its position that the CITY and/or its citizens and property owners cannot be held responsible for any or all cost overruns related to the portions of the PROJECT for which the STATE is responsible.” SDOT MoA Section 10.2.

Project Delivery Expectations & Procedures

1. The MoA establish a Task Order process allowing one PARTY to hire another to perform work on its behalf. Work performed under these Task Orders is subject to the provisions of the MoA, unless specific terms are modified by the Task Order, including expectations regarding invoicing and payment for services. SDOT MoA Section 4 and Exhibits B (Section 7) and C: SPU and SCL MoA Section 2.11.
2. SDOT, SCL, and SPU plan review and permit issuance process for CITY Infrastructure. SDOT MoA Section 7 and Exhibit B; SPU and SCL MoA Section 5.
3. Access to CITY Facilities. SDOT MoA Exhibit B, Section 5.10: SPU and SCL MoA Sections 11.2, 11.3 and 11.4.
4. Procedures for CITY evaluation and approval of revisions or additions to the scope of work. SDOT MoA Section 7.3; SPU and SCL MoA Section 5.
5. Procedures and expectations for STATE remediation of hazardous substances. SDOT MoA Section 5; SPU and SCL MoA Section 15.
6. Construction management and inspection requirements. SDOT MoA Section 14 and Exhibit B, Section 3; SPU and SCL MoA Sections 6 and 11.
7. Maintenance of traffic. SDOT MoA Section 13.
8. Public outreach. SDOT MoA Section 18.
9. Process for putting in service and transferring ownership of CITY Infrastructure built by THE STATE to the CITY. SDOT MoA Section 15 and Exhibit B, Section 5; SPU and SCL MoA Sections 12.1 and 12.2.
10. Preparation and quality control of as-built information and record drawings. SDOT MoA Section 16 and Exhibit B, Section 6.
11. One-year warranty on CITY Infrastructure. SDOT MoA Section 17; SPU and SCL MoA Section 13.
12. Confidentiality of sensitive CITY Infrastructure records. SDOT MoA Section 29; SPU Section 22; and SCL MoA Section 22 and Exhibit C.
13. Participation by Disadvantaged Business Enterprises. SDOT MoA Section 11.

14. Informal dispute resolution process using escalation of issues through the PARTIES' leadership. SDOT MoA Section 23; SPU and SCL MoA Section 19.
15. The PARTIES maintain all remedies available at law or equity, including specific performance. SDOT MoA Section 24; SPU and SCL MoA Section 20.
16. The MoA may be terminated if an alternative other than the proposed bored tunnel is selected during the environmental review process or for other cause. SDOT MoA Sections 2.3 and 28; SPU and SCL MoA Section 21.1.

SPU-WSDOT AND SCL-WSDOT MEMORANDA OF AGREEMENT

Cost Responsibility for Relocations

1. The CITY is responsible for relocating "Conflicting Facilities." **Conflicting Facilities does not include certain Moving Forward facilities that were recently located.** SPU and SCL MoA Sections 1.13.
2. SCL's and SPU's funding responsibility is limited to the final relocation of each Conflicting Facility "unless otherwise agreed." SPU and SCL MoA Section 2.10.
3. The STATE will prepare a detailed "Conceptual Relocation Plan" for each Conflicting Facility. SPU and SCL MoA Sections 3.1 and 3.3. The PARTIES will use the Conceptual Relocation Plan to agree in writing on the scope of the Relocation Work and each PARTY'S responsibilities. SPU's and SCL's funding responsibility begins when such agreement is reached. SPU and SCL MoA Sections 3.4.
4. **The STATE is responsible for identifying all Conflicting Facilities. SPU and SCL MoA Sections 3.1 and 3.2.**

Deformation Mitigation

1. The STATE is required to monitor for Deformation (settlement), including certain inspection surveys where excessive Deformation is anticipated or where there is a risk to services. SCL and SPU MoA Section 4.7.
2. The STATE will perform specified Deformation Mitigation Work on watermains when certain "displacement criteria" are met. SPU MoA, Sections 4.8, 4.9, and 4.10.
3. The STATE's responsibility for remedying damage to SPU watermains due to Deformation is limited to a maximum of two (2) years after substantial completion of the Design Build Contract. SPU and SCL MoA Section 4.6. This two-year limitation only applies to watermains.

4. The SPU and SCL MoA allow but do not require the CITY to remedy STATE work that is Defective, not authorized, or does not conform to CITY Standards, at STATE expense. SPU and SCL MoA Sections 10.
5. Protection of existing CITY Infrastructure and services. SPU and SCL MoA Sections 11.1 and 11.3.

Property Acquisition and Transfer

1. SCL and SPU are responsible, at their expense, for acquiring property rights needed for Relocation Work. SPU and SCL MoA Section 14.1.
2. The STATE is responsible, at its expense, for acquiring property rights needed to perform the Deformation Mitigation Work. SPU and SCL MoA Section 14.2. Unless the property is designated a Limited Access Facility, the STATE will grant easements to the CITY. SPU and SCL MoA Section 14.4 and Exhibit A.
3. If an SPU or SCL Facility exists, or needs to be relocated, to an area the STATE designates as a Limited Access Facility, the STATE will issue the CITY a utility permit. SPU and SCL MoA Section 14.6.5 and Exhibit B.

Dispute Resolution Process

1. Separate provisions for informal dispute resolution, using an informal dispute resolution process of escalation of issues through the agency's leadership. SPU and SCL MoA Section 19.