

MEMORANDUM OF AGREEMENT BETWEEN PORT OF SEATTLE AND CITY OF SEATTLE

This Memorandum of Agreement (the "Agreement") is made and entered into by the Port of Seattle, a municipal corporation of the State of Washington, hereinafter called the "Port", and City of Seattle, a municipal corporation of the State of Washington, hereinafter called the "City". As used in this Agreement, "Project" means the construction of S Lander St Grade Separation Project, a four-lane bridge spanning the BNSF railroad tracks between 1st and 4th Avenues South. The Port and the City are also referred to in this Agreement collectively as "the Parties", and individually as a "Party."

RECITALS

WHEREAS, S. Lander St is a major east-west corridor within the Duwamish industrial area where general purpose, transit, and freight traffic cross the mainline and industrial spur railroad tracks; and

WHEREAS, the Port, City of Seattle, State of Washington, private sector partners, and other agencies within Puget Sound and the state have developed and signed funding agreements for freight infrastructure improvements, including SR 519, the Spokane St Viaduct, the E Marginal Way Grade Separation, Duwamish Intelligent Transportation Systems, the Galer St Flyover, and other FAST Corridor projects, all of which provide freight mobility benefits for the region; and

WHEREAS, both S Lander St, and other at-grade crossings in SODO, are routes for freight passing through Port facilities, especially those operated as container terminals by the Northwest Seaport Alliance and local distribution facilities; and

WHEREAS, S Holgate St fulfills an important function that is not intended to be replaced by the new S Lander Grade Separation Project; and

WHEREAS, the proposed Lander Overpass will provide a benefit to the Port and the industrial areas of the Duwamish Manufacturing-Industrial Center (as designated by the Puget Sound Regional Council) by reducing traffic congestion in and around Port facilities; and

WHEREAS, the City has explored alternative design options for the Lander Overpass over several years and is working to achieve a design and funding strategy for construction in 2018; and

WHEREAS, train crossings of S Lander St currently close the street to through traffic over 4.5 hours per day, and those closures are forecast to increase as rail travel is projected to increase significantly; and

WHEREAS, the Project will improve overall traffic congestion, including for adjacent east-west connectors on the Spokane St Viaduct and SR519/Atlantic St; and

WHEREAS, the Project will improve safety for drivers, bicyclists, and pedestrians by separating them from the grade crossing; and

WHEREAS, the Project will decrease air emissions due to idling, and improve trucking efficiencies to reduce operating costs; and

WHEREAS, the Project will support both existing and new jobs in the Duwamish Manufacturing-Industrial Center and will create 125 new jobs during construction; and

WHEREAS, the City is seeking and has been awarded grant funding from a broad group of partners; and

WHEREAS, the Port supported the City's application for a Fostering Advancements In Shipping And Transportation For The Long-Term Achievement Of National Efficiencies (FASTLANE) grant and for which a \$45,000,000 award is currently proposed, \$8,000,000 Freight Mobility Strategic Investment Board (FMSIB) grant, and various grants from the Puget Sound Regional Council;

NOW, THEREFORE, the Parties agree as follows:

1. SCOPE OF WORK

- 1.1. Project Title: The S Lander St Grade Separation Project (CIP Project TC366150).
- 1.2. Description: The Project will construct a bridge on S Lander St between 1st Ave S and 4th Ave S spanning the BNSF mainline railroad tracks, including a separated multi-use path (or equivalent separated facility), and four, 11-foot travel lanes for vehicles. Intersections at 1st and 4th Avenues provide for separated left-turning movements with sufficient capacity for trucks to clear the intersection. The grade will not exceed 7.5% and signalization will be implemented such that trucks are not predicted to need to stop on the uphill grade based on the 2016 Transportation Discipline Report (DRAFT dated June 30, 2016). The construction phase cost of the Project is currently estimated to be One Hundred and Twenty-Five Million Dollars (\$125,000,000) by the City.
- 1.3. Schedule: The Project is anticipated to begin construction in 2018 and open to traffic in late 2019, with Final Acceptance expected in 2020.

2. TERMS AND CONDITIONS

- 2.1. Implementing Agency: As the implementing agency the City shall ensure Project compliance with the State Environmental Policy Act (SEPA) and the National Environmental Policy Act (NEPA), and shall be responsible for obtaining all necessary permits and/or agreements. The City shall be responsible for accomplishing all aspects of the Project scope.
- 2.2. Contact Persons: The Parties to this Agreement shall designate person(s) to act as liaison for the Project. The contact persons shall meet on a mutually agreed upon, scheduled basis at a frequency appropriate to the phase and status of the Project.
- 2.3. Scope: The Project's defined scope as it relates to freight benefits shall be based on input from the funding partners. Any changes during design or construction to the functionality of the Project and benefits to the Port, as described in Section 1.2, and further illustrated by the description of Project benefits, and the Project plan as provided in Exhibits B and C, shall require the Port's review to maintain the Port's funding obligation. (See Exhibit B and Exhibit C) The Port's funding is contingent upon the commitments outlined in Section 1.2.
- 2.4. System Mobility: The City recognizes that other east-west corridors in the Duwamish provide significant utility to the Port. The City shall not reduce capacity on other east-west corridors in the Duwamish when the Project is completed without providing notice to and opportunity for input from the Port. Specifically, S Holgate St provides connections from 1st Ave S to 6th Ave S over the mainline railroad crossing with 4 lanes of capacity, as well as connections from there to Airport Way and on an elevated bridge to Beacon Hill. The improvements at S Lander St should add to the mobility in the neighborhood, and are not intended to be offset by other lane reductions. The City will work with the Port and others to maintain efficient freight mobility throughout the Duwamish Manufacturing/Industrial Center (MIC). Should there be a specific proposal to close S Holgate St, or if safety issues arise on S Holgate St or other critical freight routes, or should the City be required by outside entities to perform mandated actions that

require changes, the City will include the Port in discussions regarding the resolution of the issue, and specifically discuss how mobility is maintained.

- 2.5. Industrial Lands Protection: The City will support efforts to protect, preserve, and enhance industrial lands and highlight the critical connection to freight mobility and other maritime issues.
- 2.6. Progress Report: The City shall provide the Port with a report that includes a copy of the WSDOT/FHWA approved Project schedule (or analogous format), and final engineer's estimate with contract bid items or summary of values. At the time of making application for each payment under Section 3, the City shall provide to the Port a progress report. The progress report will include a narrative describing the Project progress since the last report, an updated Project construction schedule showing the current progress and percent completion of the major work elements, and a tabulation of the construction progress payments made such that percent completion can be determined.
- 2.7. Inspections: The City shall provide opportunities for Project inspection by issuance of Notices of Final Inspection and/or Interim Final Inspections by Project Phase to the Port and other funding partners. The Port shall participate in inspections of the Project within the specified timeframe to inform punch-list requirements for Project Completion and to confirm its satisfaction that Project improvements, as defined in Section 1.2 and 2.3, are in place and fully operational. Prior to issuance of Notice of Physical Completion (to the Contractor), the City will provide the Port the opportunity for verification of Final Inspection work. Project conditions existing at the time of the Project's Final Inspection, but not identified by the Port until the request for final payment is made under 3.6, shall not be grounds for payment to be withheld.
- 2.8. Public Involvement: The City shall be responsible for the continued public involvement and/or community outreach process for the Project. The City shall develop a Public Involvement Plan for the Project with input from the Port and shall be specific with requests should it desire engagement from the Port.

3. COST REIMBURSEMENT AND FUNDING

The Port Commission authorizes the execution of the Agreement and agrees to contribute an amount of Five-Million Dollars (\$5,000,000) for the Project subject to the following conditions:

- 3.1. All environmental review and permitting will be completed in accordance with Federal, State, and local requirements;
- 3.2. The Port and City continue to work together to ensure that the Project development and implementation during design and construction meet the needs of both Parties ;
- 3.3. The Project is constructed as described in Section 1.2 or modified consistent with Section 2.3;
- 3.4. The Port's total contribution shall not exceed Five Million Dollars (\$5,000,000) as a cash payment, but pay be reduced as provided in Sections 3.5 and 3.7.
- 3.5. Total construction cost is currently estimated to be One-Hundred Twenty-Five Million Dollars (\$125,000,000). (See Exhibit D, Summary Estimates of Cost and Funding Shares, attached.)
The Port shall make three payments as follows:
 - a. The first payment of Two Million (\$2,000,000) shall occur after the City has made progress payments to the Contractor totaling at least 50% of the construction Contract value. (This is expected in 2018).
 - b. The second payment of Two Million Dollars (\$2,000,000) shall occur upon Substantial Completion (as defined in the construction contract) of the Project, as issued by the City to the Contractor.
 - c. The final payment of One Million Dollars (\$1,000,000) shall occur upon Final Acceptance (as defined in the construction contract), subject to the requirements of Section 2.7 and Section 3.6, and the Port's receipt of a progress report and a letter from the City Project

Manager attaching the Certificate of Final Acceptance. This is expected in 2020. The final payment may be subject to a reduction based on Section 3.7 of this Agreement.

- 3.6. Prior to application for the final payment, the City shall provide opportunity for the Port to inspect and verify that the requirements of Physical Completion have been met in accordance with Section 2.7. The City shall issue a letter to the Port requesting final payment upon Final Acceptance.
- 3.7. In the event the total construction contract value at the time of the Project's Final Acceptance ("Final Cost") is less than the Project estimate at the time of bid ("Bid Estimate"), the Port's total funding contribution shall be adjusted by a percentage that represents the proportional share of \$5,000,000 to the Bid Estimate.

4. AMENDMENT

Either Party may request changes to the provisions contained in this Agreement. Any change to this Agreement must be mutually agreed to by both Parties, in writing and executed with the same formalities as the original Agreement.

5. NOTIFICATION

Any notice required or permitted to be given pursuant to this Agreement shall be in writing, and shall be sent postage prepaid by U.S. Mail, return receipt requested, to the following addresses unless otherwise indicated by the Parties to this Agreement:

To the City: Jessica Murphy, Project Manager
700 Fifth Ave, Suite 3700
PO Box 4996
Seattle, WA 98124-4996

To the Port: Geraldine Poor, Regional Transportation Manager
Port of Seattle
2711 Alaskan Way
Seattle, WA 98121

6. RECORDS RETENTION AND AUDIT

During the progress of the work on the Project and for a period not less than three (3) years from the date of final payment by the Port to the City, the records and accounts pertaining to the Project and accounting thereof are to be kept available for inspection and audit by the Port and the City shall provide the Port with copies of all records, accounts, documents, or other data pertaining to the Project upon the Port's request. If any litigation, claim, or audit is commenced, the records and accounts along with supporting documentation shall be retained until all litigation, claims, or audit findings have been resolved, even though such litigation, claim, or audit continues past the typical three year retention period. This provision is not intended to alter or amend records retention requirements established by applicable state and federal laws.

7. DISPUTES

The designated representatives under section 5.0, NOTIFICATION, shall use their best efforts to resolve disputes between the Parties. If the designated representatives are unable to resolve a dispute, then the responsible Project directors for each Party shall review the matter and attempt to resolve it. If the Project directors are unable to resolve the dispute, the matter shall be reviewed by the department director or chief executive officer of each Party or his or her designee. The Parties agree to exhaust each of these

procedural steps before seeking to resolve disputes in a court of law or any other forum.

8. EFFECTIVENESS AND DURATION

This Agreement is effective upon the last date of execution by both Parties and will remain in effect until Project completion, unless otherwise stated herein or unless amended or terminated.

9. TERMINATION

Either Party may terminate this Agreement at any time upon thirty (30) days written notice to the other Party, but said written notice of termination shall not occur sooner than sixty (60) days from the execution of this Agreement. If either Party decides to terminate this Agreement, the Port shall reimburse the City its proportionate share of all costs payable under this Agreement at the time of notice of termination, including those obligations that the City has contractually undertaken prior to the notice of termination, but in no case shall the Port be obligated to reimburse the City any amounts in excess of the Port's Five Million Dollars (\$5,000,000) contribution set forth in Section 3 of this Agreement.

10. INDEMNIFICATION AND HOLD HARMLESS

10.1 To the maximum extent permitted by law, each party shall protect, defend, indemnify, and hold harmless the other party, its officers, employees, and agents from any and all costs, claims, judgments, and/or awards of damages, arising out of or in any way resulting from the negligent acts or omissions of said indemnifying party, its officers, employees, and/or agents. Each party agrees that its obligations under this subsection extend to any claim, demand, and/or cause of action brought by or on behalf of any of its employees or agents. Each party, by mutual negotiation, hereby waives, as respects the other party only, any immunity that would otherwise be available to it against such claims under the Industrial Insurance provisions of Title 51 RCW. In the event the indemnified party incurs any judgment, award, and/or cost arising therefrom, including attorney's fees to enforce this provision, all such judgments, awards and costs shall be recoverable from the indemnifying party.

10.2 The indemnification, hold harmless, and/or waiver obligation described in Section 10.1 of this Agreement shall survive the termination of this Agreement.

11. VENUE

This Agreement shall be deemed to be made in the County of King, State of Washington, and the legal rights and obligations of the City and Port shall be determined in accordance with the laws of the State of Washington. All legal actions in connection with this Agreement shall be brought in the County of King, State of Washington.

12. OTHER PROVISIONS

12.1 Severability. A determination by a court of competent jurisdiction that any provision of this Agreement or any part thereof is illegal or unenforceable shall not cancel or invalidate the remainder of such provision of this Agreement, which shall remain in full force and effect.

12.2 Interpretation. The captions of the Sections or Paragraphs of this Agreement are not a part of the terms or provisions of this Agreement. Whenever required by the context of this Agreement, the singular shall include the plural and the plural shall include the singular. The masculine, feminine and neuter genders shall each include the other.

12.3 Construction Contract Terms. The terms Final Inspection, Interim Final Inspections, Project Phase, Project Completion, Physical Completion, Substantial Completion, Final Acceptance shall have the meaning set forth in the City's standard specifications found at <http://www.seattle.gov/util/Engineering/StandardSpecsPlans/index.htm>

12.3 Waivers. All waivers shall be in writing and signed by the waiving Party. Either Party's failure to enforce any provision of this Agreement shall not be a waiver and shall not prevent either Party from enforcing that provision or any other provision of this Agreement in the future.

12.4 Force Majeure. If either Party cannot perform any of its obligations due to events beyond its reasonable control (other than the payment of money), the time provided for performing such obligations shall be extended by a period of time equal to the duration of such events. Events beyond a Party's reasonable control include, but are not limited to, acts of God, war, civil commotion, labor disputes, strikes, fire, flood or other casualty, shortages of labor or materials, government regulations or restrictions and weather conditions.

12.5 Joint Drafting Effort. This Contract shall be considered for all purposes as prepared by the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

12.6 Third Party Beneficiaries. Nothing in this Agreement is intended to, nor shall be construed to give any rights or benefits in the Agreement to anyone other than the Port and the City, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of the Port and the City and not for the benefit of any other party.

12.7 Authority. Each individual executing this Agreement on behalf of the Port or the City represents and warrants that he or she is duly authorized to execute and deliver the Agreement on behalf of the Port or the City.

12.8 Exhibits. This Agreement includes the following exhibits: Exhibit A: Lander Vicinity Map; Exhibit B: Project Benefits; Exhibit C: Project Plan & Profile and Cross Sections; and Exhibit D: Summary Estimate of Cost and Funding Shares which shall be deemed incorporated into this Agreement by this reference.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement which shall be effective upon the date of recording.

PORT OF SEATTLE

CITY OF SEATTLE

Theodore J. Fick, Chief Executive Officer

Scott Kubly, Director
Seattle Department of Transportation

Date: _____

Date: _____