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May 3, 2016

**VIA E-MAIL (kramsey@townofmiddlebury.org &
cenglish@townofmiddlebury.org) & U.S. MAIL**

Town of Middlebury
Local Management Team
Town of Middlebury Selectboard
Middlebury Town Offices
77 Main Street
Middlebury, VT 05753

Re: Downtown Railroad Bridge Replacement Project

Dear Local Project Management Team and Selectboard:

We appreciate the efforts taken by the Town of Middlebury (the "Town") to acquire clarifying documents from the State of Vermont (the "State") about the Downtown Railroad Bridge Replacement Project (the "Project"). Our response today is:

1. Intended for use by the Town in its continued engagement with the State, and;
2. To highlight several issues that arise from the recent Local Project Management Team ("LPMT") and Select Board ("SB") meetings.

With respect to the Town and State's response to my letter of April 10th, 2016 (the "Letter"), the issues are addressed by item in the attached memo.

In summary, the Project representatives have visited places of business and announced that blasting will commence in the fall of 2016, engineering and design will be completed 3-9 months thereafter and the permit work is not yet advanced to the point where baseline studies are fully scoped, much less initiated or complete. This schedule is irregular and appears to be an irresponsible plan of action. We note that each of the questions were met with responses varying between "not yet completed", "in planning", or "we will follow the applicable rules and standards". We share the Town's concern that none of the State's responses rise to a level of

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professional clarity. We are concerned that we will not receive any comprehensive or detailed data from the State or the Town, and as a result our offer to assist with professional third party oversight will go unused.

At the most recent LPMT and SB hearings regarding the project, we are left with a lack of clarity on the most basic of issues. The Project is represented as an endeavor of the Town with the town being the client. The engagement of engineering firms and contractors is completely at the discretion of the State, as is the appointment of the Town's Local Project Manager ("LPM"). It is not apparent who is actually in charge, who is making decisions, or what the organizational hierarchy of the Project is.

We understand the Town's costs to date exceed \$2.5M and will certainly continue to rise to a level well in excess of \$5M when VHB, Mott Macdonald, Patrick Engineering, Kubricky, and other vendors complete their work. We ask the Town to provide their contract with the vendors so we may review the scope, terms, conditions, and liabilities.

There are a number of distressing elements to the Grant Agreement (the "Grant") between the Town and the State:

- The Town is currently operating under an amended Grant from August 14, 2014 that caps reimbursement from the State at \$17.5M. The State, the Town, and VHB all appear to agree that the Project will cost in excess of \$40M, yet the Town has not cancelled the Grant nor has the State confirmed in writing that it will continue to reimburse the Project costs incurred by the Town.
- To our knowledge the Town is responsible for all costs and the State is obliged only to reimburse those costs which qualify in turn for Federal reimbursement. The Town bears the risk of compliance with Federal reimbursement requirements and is responsible for repaying all Project costs to the State if the Project fails to proceed (Attachment B: Payment Provisions, Section 4).
- In the amended Project Agreement, the Town agrees to indemnify the State against all claims and suits arising from any act or omission. Amongst many other distressing elements of the Project Agreement, this is of particular concern.

We implore the LPMT and SB to cease all expenditure and notice the State with suspension of the Grant until it can be updated with a new amendment to reflect the new cost and a balance of risk that is more protective of the Town's interests.

If the Town is not the responsible party for the Project then we would like to understand who is. This is more than an academic question as any error, loss of life, damage to private property, or other damages will need to be recovered from the responsible party. We ask the Town to produce documentation that clearly demonstrates the State's commitment to reimburse all costs to the Town, no matter when or if the Project moves forward, and to indemnify the Town against losses.

May 3, 2016

Page 3

We continue to welcome the open cooperation demonstrated by the Town and will make every effort to assist you in gathering the information required to protect the Town and successfully execute a replacement of the aged bridges in our downtown.

In the spirit of cooperation, the response date of April 29th provided in the Letter is extended to May 16, 2016 with the expectation that the State will use this added time to provide meaningful and detailed responses to these important questions.

Sincerely yours,



Peter F. Langrock

plangrock@langrock.com

PFL:kkw

Attachment

c: CEO, Bank of Middlebury
Interim CEO, Porter Medical Center
President, Middlebury College
Senior Warden, St. Stephen's Episcopal Church
CEO, Town Hall Theater

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Attachment 1

Q1. Firm EPC contract with the proposed Contractors. a. What is the fixed cost? b. What is the guaranteed time for completion? What are the incentives/penalties (i.e., liquidated damages) to mitigate the risk of a late completion?

A1. Currently, the Town of Middlebury has a pre-construction personal services contract with Kubricky to serve as Construction Manager as discussed in Background above. The current Project Schedule calls for the construction contract, which will be held by VTrans, to be finalized in late January 2017. The fixed cost of the project has not yet been set. Current estimate of total project cost is \$40 million. A completion date will be set at the Contract Plans stage (January 2017). The completion date will be based on estimates provided by the CM, an Independent Cost Estimator, and VHB. Final decision on a completion date will be made collaboratively by VTrans and the Town. The Town's hoped-for completion date is November 2018. At minimum, the standard Liquidated Damages specified by VTrans' Standard Specifications for Construction will apply to the construction contract.

Response1: The Grant Agreement does not reflect the current estimate. There is no contract with time and schedule in place. The referenced Standard Specifications for Construction are not included for review.

Q2. What are the dates and duration of street closures?

A2. The current design plan calls for replacing the Merchants Row rail overpass starting in Spring 2017, followed by the Main Street rail overpass, with traffic flow returning to normal patterns by the end of 2017. Specific dates and duration of the closures will be firmed up once the General Contractor is awarded the contract.

Response2: There is no firm date for street closures and the Public cannot make plans, schedule events, or make decisions that impact their personal or professional health or finances at this date.

Q3. What are the dates and durations of the anticipated pedestrian passage closures?

A3. Final project design and the traffic control plan submitted by the Contractor will address any anticipated closures to provide a temporary pedestrian access route(s) in accordance with Americans with Disabilities Act Public Rights-of-Way Accessibility Guidelines and the Manual on Uniform Traffic Control Devices. Currently, a temporary pedestrian walkway connecting Merchants Row to Main Street passing along the eastern side of St. Stephen's is under discussion.

Q4. Where will the construction laydown areas be?

A4. The laydown area designated for construction equipment and supplies has not yet been determined. The VTrans Environmental Section needs to obtain environmental permits and approvals for natural and cultural resources, as well as for construction-related stormwater runoff. No construction activity will take place on the Village Green. Triangle Park will be disassembled and the fountain moved off-site to allow construction access to this location.

Response3: The referenced ADA Guidelines and the UTCD Manual are not provided for review. All plans are "under discussion" based on "estimates" of closures, durations, etc. There is nothing the public can plan around.

Response4: It is not yet determined, so no plans can be made to mitigate its impact. Laydown areas are supposed to be considered during the EIS before a project approval is granted by State and Federal authorities.

Q5. What insurance do each of the contractors carry?

A5. *Insurance requirements are specified in Section 103.04 of VTrans' Standard Specifications.*

Response5: They did not provide the VTrans Standard Specifications. This should be an easy thing to provide.

Q6. To what extent is business interruption insurance a part of the confirmed agreement?

A6. *Business interruption insurance is a type of insurance that covers the loss of income that a business suffers after a fire, tornado, or some other disaster. VTrans' Standard Specifications require contractors to purchase liability insurance, not business interruption insurance. VTrans' Standard Specifications make contractors legally responsible for claims resulting from any act, omission, neglect or misconduct of the Contractor during performance of the work. If a property owner brought a claim for business loss because of negligence or misconduct by the contractor during construction, the contractor would be responsible to investigate and, if appropriate, adjust the claim. The Standard Specifications also require the contractor to take proper precautions during construction to protect public and private utilities and to be responsible for damages to utilities, as described in Section 107.13.*

Response6: The question was not really answered. VTrans has tried to explain how they won't put in more direct and protective insurance measures for local business owners into a construction contract they have yet to create for a project they have yet to finish engineering on. It seems presumptuous to assume there can be no protection or clear path to protection for property owners.

A7. *VTrans' contractors routinely work in and around active railroad track on a daily basis, as occurred during the late 1980s when VTrans replaced the Elm Street Bridge overpass in Middlebury. The following response has been provided by Vermont Rail Systems General Counsel.*

"We are not aware of any efforts [to date] on VRS' part in reviewing this or having a third party review it. Of course, when this happens, the railroad will supervise the contractor who performs the work. Both the contractor and the railroad will have a job briefing regarding the replacement of the rail before the work is done. So, in this instance, both parties can address any concerns. After the work is done, the railroad will inspect the track, and the railroad has the final say as to whether the track is safe for a train to go over. Given the hazmat traversing these rails, the track must meet class 1 standards as set forth in the CFR Part 213. These standards address gauge tolerances, cross-level tolerances, etc. for a train to go over the track safely at a maximum speed of 10 MPH.

Our track inspectors just completed a FRA 213 course provided by a third party on March 25th. The FRA was in attendance.

Also please note, the project specs will document the plan for rail removal/replacement. This will be subject to review by the engineering consultants."

Response7: OK. The project specifications were not provided for review.

Q8. Who will be responsible for the rail positioning (contractor or Vermont Railway)?

A8. *Assuming that rail positioning means alignment, alignment is determined by the design engineer (VHB) in accordance with Federal Railroad Administration standards and agreed to by Vermont Railway and VTrans Rail Section. Alignment will remain within the right of way of the rail corridor.*

Response8: Who will reinstall the rail and bear the insurance responsibility for a derailment? We understand the FRA Certified VRS inspector will look at the rail before traffic crosses, but who will actually be on the hook in the event of a derailment?

Q9. Is the insurance coverage assigned to the Town, VTrans, or a combination of the two, and how do those funds find their way to the damaged party?

A9. *The General Contractor is required to obtain and keep in effect insurance covering project-related claims that might be asserted against the contractor, the Town, VTrans, or the railroad. The contractor will refer claims to its insurance carrier for investigation and possible adjustment. If a claim cannot be settled through negotiation, the claimants have recourse to the judicial system.*

Q10. Emergency Response Plans for a derailment of Gasoline, Diesel, LPG, Ammonia, Chlorine, and other STB-defined Hazardous Materials. a. In the event of a derailment and potentially extreme damages, who will coordinate the Emergency Response? b. How will the Public be informed and educated about the risks and appropriate response in the event of emergency? c. What requests of our Clients, the Town, Middlebury College, Porter Medical Center, or the Addison County Supervisory Union will be made for emergency services or assembly space?

A10. *Middlebury Fire Chief David Shaw confirms that the Middlebury Fire Department has an Emergency Response Protocol in place to respond to the derailment scenarios described above. The following response has been provided by Vermont Rail Systems General Counsel.*

To Q10a: *"Normally (regardless of the commodity involved), the initial notification of a derailment will go to the VRS Dispatcher. We have a contact flow chart that the Dispatcher will follow. The first phone calls will be made to emergency responders, and then to appropriate railroad officials. We also have a responsibility to notify the FRA and the National Response Center (NRC). The NRC will then make notifications to appropriate federal agencies.*

Our Timetable has procedures that railroad employees are required to follow in a hazmat derailment. Generally speaking, employees should evacuate to a safe distance away from the incident scene, make appropriate notifications, with the Dispatcher being the first notification, and report conditions at the scene (how many cars involved, type of hazmat, weather, etc.).

Once the emergency responders arrive on the scene, they coordinate the emergency response. The responding Fire Chief is initially the incident commander, and then he may be relieved by the State Hazmat Team chief."

To Q10b/c: "The framework is well published in the State adopted Response Plans with two pertinent SSF Binders. The actual procedures that are responsive to b and c will most likely involve the local fire marshal (or his designee) who will make those decisions at the time dependent upon the circumstances. We don't believe that a definitive answer can be given for all circumstances. Generally speaking, those decisions will be made by the incident commander or his designee. It would be a good idea for the Middlebury Fire Department to make a pre-plan that would include public notification and assembly spaces. VRS can participate in a pre-plan development if that is deemed appropriate."

Reponse10: Is the local Emergency Responder resourced appropriately or does he need additional resources during the course of construction that will be a cost burden on the Town?

Q11. In the event of a derailment and potentially extreme damages, how will the responsible party be determined, and the related insurance of the contractor and Vermont Railway disbursed to the injured parties?

A11. *VTrans' construction contracts contain numerous provisions for the protection of persons and property along and adjacent to the work, including but not limited to the following:*

- a. Contractors are required to take necessary precautions to prevent damage or injury;*
- b. Contractors are required to promptly investigate and, where appropriate, make reasonable efforts to adjust legitimate claims;*
- c. Contractors are required to maintain commercial general liability insurance and to require similar insurance from all their subcontractors;*
- d. Contractors working in and around railroad facilities are required to obtain special "railroad protective liability insurance"; and*
- e. Contractors are required to secure performance bonds,*

In the event of an incident causing widespread damage, the contractor's insurance company probably will set up a temporary claims office near the project site and attempt to quickly adjust small claims. For larger, more complex claims, the insurance adjusters may offer interim settlements, which provide some immediate assistance to the injured party. In some instances, there may be disputes about liability and/or the proper measure of damages. If the parties cannot close the gap through negotiation, the claimant can file a lawsuit.

Reponse11: The Town should ask for more than a "probably" about who will be financially responsible and should have legal counsel review it for completeness.

Q12. Will there be blasting for excavation? How much, and what will the frequency, timing and Blasting Plan recommendations for evacuation be? a. It is customary to have a Blasting Plan that references site-specific geotechnical studies and a pre-blast survey of the surrounding structures for condition and special risks. It also provides recommendations on ground acceleration, blast timing, vibration monitoring, explosive type, matting, and protocol for ensuring restricted entry when explosives are live. b. Please provide the report and recommendations endorsed by a qualified third party or agency detailing the blasting plan and mitigation measures for adjoining buildings and public safety. c. Please provide the pre-construction survey made of all neighboring buildings for condition and risk.

A12. *Some blasting will be necessary to create three pits for the new drainage system and to lower the rail bed. The Blasting Plan will be developed by the Contractor based on specifications provided by the design engineer and approved by VTrans in accordance with VTrans' Standard Specifications and Section 106 requirements. Test drilling for the drainage system has been completed by subcontractor GeoDesign in consultation with VHB. A pre-construction analysis of which buildings are at risk and a thorough survey of those buildings will take place in connection with the Section 106 work plan.*

Reponse12: The blasting plan is not provided, nor are the Standard Specifications. The test drilling results are not provided. The Section 106 is not provided, nor is a SOW for the Section 106.

Q13. Storm Water Pollution Prevention Plan (SWPPP) with drawings and all related environmental approvals, per Federal and State law.

A13. *VTrans will provide a list of relevant permits and documents related to treatments proposed for stormwater runoff during and post-construction once plans and permits have been finalized. Of specific concern is a spill of hazardous material in the rail corridor or on Town streets whose stormwater runs into the new drainage system. VTrans will hold a public meeting in Middlebury to address these concerns in the near future.*

Reponse13: The list of relevant permits still hasn't been provided, much less the plan for review. The public meeting is a good idea. What will the date be?

Q14. Plans showing any drainage discharge point and associated discharge permit from the State of Vermont. a. Maximum daily discharge volume. b. Maximum monthly discharge volume. c. Permit limits for Total Suspended Solids, Heavy Metals, Poly-Aromatic Hydrocarbons, and other substances of concern.

A14. *See response to Q13 above.*

Response14: See response to A13 above. The plans still haven't been provided.

Q15. State of Vermont-issued Permit for drainage, treatment, and disposal of storm water from the completed project.

A15. *See response to Q13 above.*

Response15: See response to A13 above. The plans still haven't been provided.

Q16. Project design documents for professional review by a qualified third-party in cooperation and collaboration with the Town.

A16. Design engineer VHB works under contract to the Town and has its own quality control process. Project design documents are thoroughly reviewed by VTrans Structure, Rail, Construction, Environmental, and GeoTech Sections, among others. The documents are also reviewed by the Independent Cost Estimator. The Federal Highway Administration provides full oversight of the project as well.

Response16: The project design documents are not provided. Does the Town have them or not? Where are the sign-offs from VTrans, FHWA, etc?

Q17. Contaminated materials disposal plan. a. The excavation will generate a substantial volume of spoils from railroad track-bed that's been in service for 120+ years. Abnormally high levels of oils, greases, and heavy metals are typical in poorly draining soils under rail track. Please provide the site-specific geotechnical and soil sampling results characterizing the soils and the appropriate disposal method to comply with State and Federal requirements.

A17. In March, VHB provided a Pre-Construction Soil and Groundwater Sampling Work Plan for review to the Vermont Department of Environmental Conservation, VTrans, and the Town. This work plan provides protocols, at a higher level than is typically done, for a pre-construction characterization of the project area to investigate the condition of soil and groundwater that are expected to be encountered within the project area during project construction. Specifically, the work plan provides a review of the history of the project area with respect to contaminants of concern, and outlines procedures to complete soil and groundwater sampling and analysis of contaminants of concern. The results of this investigation will serve to advise VTrans and the Town of Middlebury of design constraints, allowable soil and groundwater handling practices, and disposal requirements for soils and materials that are encountered during project construction.

Response17: The Pre-Construction Soil and Groundwater Sampling Plan is not provided.

Q18. Evidence of funding commitments and conditions in an amount exceeding the contractually guaranteed Total Included Cost of the Project.

A18. Funding commitments are in place legislatively to cover any cost overruns on the project.

Response18: The legislation showing this is not provided.