

Resolution #TC17-6-17

Approving the Intra-Agency Agreement between the Colorado Department of Transportation, the Colorado High Performance Transportation Enterprise and the Colorado Bridge Enterprise for the Central 70 Project.

Approved by the Transportation Commission on June 15, 2017.

WHEREAS, pursuant to Section 43-1-106(8), C.R.S, the Transportation Commission is responsible for formulating the general policy with respect to the management, construction, and maintenance of public highways and other transportation systems in the state; and

WHEREAS, the Transportation Commission promulgates and adopts all budgets for the Colorado Department of Transportation (“CDOT”) and state transportation programs; and

WHEREAS, the passage of FASTER legislation in 2009 established both the Colorado High Performance Transportation Enterprise (“HPTE”) and the Colorado Bridge Enterprise (CBE); and

WHEREAS, the General Assembly created HPTE, pursuant to Section 43-4-806, C.R.S., as a government-owned business within CDOT to pursue innovative means of more efficiently financing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system; and

WHEREAS, HPTE is authorized, pursuant to Section 43-4-806(2)(c)(I), C.R.S., to impose user fees on the travelling public for the privilege of using surface transportation infrastructure, and is further authorized pursuant to Section 43-4-806(2)(c)(III), C.R.S. to contract with any governmental or non-governmental source of funding for loans to be used in support of HPTE’s functions; and

WHEREAS, the General Assembly created CBE, pursuant to Section 43-4-805, C.R.S., as a government-owned business within CDOT to accelerate the repair and reconstruction of deficient bridges further defined as structures that are “poor”; and

WHEREAS, using the criteria outlined in the FASTER legislation, 128 bridges were originally determined to be eligible for the CBE program and the elevated portion of I-70 East corridor on a bridge, known as the Viaduct, was included on that list; and

WHEREAS, on February 19, 2016 the Transportation Commission approved a governance structure between CDOT, CBE and HPTE in which CBE is the managing partner of Central 70 Project (“Project”) and CBE and HPTE will enter into an anticipated agreement (“Project Agreement”) with a private partner (“Developer”); and

WHEREAS, the Transportation Commission, in Resolution #TC-15-2-5, and the CBE Board of Directors, in Resolution #BE-15-2-3, the CBE Board of Directors, directed staff to pursue delivery of the Project using a Design Build Finance Operate Maintain procurement process because the ability of this model to transfer more risk to the private sector and to offer a more predictable long term cost schedule through the structure of availability payments, minimizing future contingency and cost overrun exposure to CDOT; and

WHEREAS, CDOT and CBE have requested HPTE's involvement in the Project for a variety of benefits that CDOT will receive from implementing tolling on the Project, including, but not limited to, allowing CDOT to better manage congestion over the long term on I-70 and providing the traveling public with the choice of a new travel lane with more reliable and efficient travel times; and

WHEREAS, the Transportation Commission supports the Project and recognizes the benefits that CDOT and the State will receive from replacing the Viaduct and implementing tolling on the Project; and

WHEREAS, the Transportation Commission, the HPTE Board of Directors and the CBE Board of Directors all reviewed and approved the issuance of the Final Request for Proposals on the Central 70 Project during its March 2017 board meetings; and

WHEREAS, CDOT, HPTE, and CBE now desire to enter into a Central 70 Intra-Agency Agreement ("Central 70 IAA" or "IAA") to further define their roles and responsibilities with respect to funding the construction of the Project, management of the Project and cooperation on the operation and maintenance of the Project and financial obligations to each party with respect to the Project; and

WHEREAS, specifically with regard to CDOT, the Central 70 IAA outlines that CDOT will be contributing \$171 million to the Project for pre-development costs and \$58 million for Milestone Payments to the Developer during Project construction, these payments will be made using a combination of federal Congestion Mitigation and Air Quality Improvement funds from the Denver Regional Council of Governments as well as SB-09-228 funds; and

WHEREAS, contemplating that other unanticipated costs may arise during the construction period for items like change orders or supervening events, the Central 70 IAA includes provisions to allocate these incremental costs amount CDOT and CBE; and

WHEREAS, under the Central 70 IAA, CDOT will be primarily responsible for administering the Project Agreement with the Developer during the construction period and these responsibilities are more fully explained in the IAA; and

WHEREAS, the Central 70 IAA outlines the operations period of the Project and describes the costs that will be incurred by CDOT, HPTE, and CBE during the operating period and the responsibility among CDOT, HPTE and CBE for these costs and the IAA further describes each party's responsibilities in terms of administering the Project Agreement during the operating period; and

WHEREAS, the Central 70 IAA allocates responsibility for funding various termination amounts between CDOT, HPTE and CBE, both prior to and after financial close, depending on the situation that gives rise to a termination; and

WHEREAS, lastly, the Central 70 IAA allows for either HPTE or CBE, in the case of a shortfall in funds, to seek a backup loan from CDOT to defray expenses and satisfy its obligations under the Project Agreement; and

WHEREAS, any loan from CDOT to either HPTE or CBE will be subject to approval and allocation from the Transportation Commission and will follow the form loan agreement included in the IAA and repayment terms for any backup loan will be determined at the time a backup loan is actually made; and

WHEREAS, pursuant to Sections 43-4-805(4) and 43-4-806(4), C.R.S., the Transportation Commission may authorize the transfer of money from the state highway fund to CBE or HPTE to defray expenses of HPTE; and

WHEREAS, any loan that CDOT provides HPTE or CBE under the IAA shall, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, constitute a loan from the Transportation Commission to HPTE or CBE and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution; and

WHEREAS, in consideration of the various terms, covenants, and conditions set forth herein, including the benefits that CDOT will receive as a result of the financing and the Project, CDOT, HPTE, and CBE have agreed to enter into the Central 70 IAA pursuant to which HPTE or CBE can request financial support from the Transportation Commission in the form of a CDOT Backup Loan to assist HPTE or CBE in fulfilling any obligations under the Project Agreement in the event revenues, together with any available reserves, are insufficient, or projected to be insufficient, to satisfy such obligations; and

WHEREAS, the Transportation Commission recognizes and respects the legal principle that it cannot bind future Transportation Commissions with respect to budgetary and policy decisions, recognizes it cannot agree, in advance, to allocate and transfer state highway funds for a loan to HPTE or CBE, and agrees that any decision as to whether or not to allocate and transfer such funds for such purposes shall be made by the Transportation Commission, in its sole discretion, in the year in which the HPTE or CBE request occurs.

NOW THEREFORE BE IT RESOLVED, the Transportation Commission hereby approves and authorizes CDOT to enter into the Central 70 Intra-Agency Agreement with HPTE and CBE in substantially the form presented to the Transportation Commission and authorizes the CDOT Executive Director or his delegee to execute the Central 70 IAA with such changes therein and additions thereto, not inconsistent with this Resolution, as are approved by the CDOT Executive Director or his delegee (whose signature thereon shall constitute conclusive evidence of such approval).

Herman F. Stockinger

Herman Stockinger, Secretary
Transportation Commission of Colorado

6-15-17

Date