



Date: November 14, 2018

To: High Performance Transportation Enterprise Board / Colorado Transportation Commission

From: Nicholas Farber, HPTE Head of Innovative Project Delivery; Andrew Gomez, HPTE General Counsel

Subject: Amendment to Intra-Agency Agreement Between HPTE and CDOT regarding I-25 North Segment 3 Project

#### Purpose

The purpose of this memo is to describe the First Amendment to the Intra-Agency Agreement (IAA) between the Colorado Department of Transportation (CDOT) and the High-Performance Transportation Enterprise (HPTE) regarding delays in the project.

#### Action

The HPTE Board and Transportation Commission are asked to adopt a resolution that supports the staff recommendation to approve the amendment to the I-25 North Segment 3 IAA to adjust it to match the terms of the C470 IAA in regards to project delays.

#### Background

The remainder of the I-25 North Segment 3 Project went out to bid on October 25, 2018, and construction is anticipated to be completed in late December of 2019, with toll commencement in April of 2020. Unlike the IAA HPTE and CDOT entered into on the C470 Project, the current Segment 3 IAA does not contemplate what happens in case of any project delays. Since the C470 IAA was entered into subsequent to the Segment 3 IAA, HPTE's lender, Bank of America, suggested amending it to cover any affects due to project related delays.

#### Overview of the IAA

The First Amendment to the IAA adds a section that enumerates CDOT's responsibilities to the HPTE if there are delays associated with the project. Specifically, CDOT shall be liable to the HPTE for any costs incurred by the HPTE under the Bank Loan that are the result of a project delay (except if the delay is caused by the HPTE). CDOT further agrees to: 1) take all actions to enforce the provisions of the Design-Bid-Build contract; 2) cause the contractor to seek recovery in any delay in startup builders risk insurance policies; 3) take all reasonable actions to recover under any surety or parent company guarantees provided to CDOT; and 4) enforce all liquidated damages against the contractor and remit them to the HPTE to assist in covering costs under the Bank Loan. On or around November 1st of each year, HPTE must submit an invoice to CDOT describing any costs owed in relation to the Bank Loan. CDOT then has 30 days to remit payment.

#### Options / Decision Matrix

1. **Staff Recommendation:** Approve the Amended Segment 3 IAA between CDOT and HPTE.
2. Review but do not approve the IAA. Provide instructions on changes or revisions.

#### Attachment

First Amendment to I-25 North Express Lanes Project Intra-Agency Agreement

**FIRST AMENDMENT TO  
I-25 NORTH EXPRESS LANES PROJECT (SEGMENT 3)  
INTRA-AGENCY AGREEMENT**

THIS FIRST AMENDMENT (the “Amendment”) to the I-25 NORTH EXPRESS LANES PROJECT (SEGMENT 3) INTRA-AGENCY AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 2018 by and between the COLORADO DEPARTMENT OF TRANSPORTATION (“CDOT”), an executive agency of the State of Colorado (“State”) and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT (“HPTE”). CDOT and HPTE are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

**RECITALS**

A. The Parties entered into that certain *I-25 North Express Lanes Project (Segment 3) Intra-Agency Agreement* dated February 24, 2016 (the “IAA”), pursuant to which the Parties agreed, *inter alia*, to undertake the I-25 North Express Lanes Project (Segment 3) (the “Segment 3 Project”) to complete, implement and operate one new tolled express lane in each direction between approximately 120<sup>th</sup> Avenue and E-470.

B. CDOT has entered into that certain contract for the I-25 North Segment 3 Tolled Express Lanes Design-Bid-Build Project dated April 26, 2016 with Hamon Infrastructure, Inc. (the “Contractor”) for the construction of the Segment 3 Project (the “Contract”) which establishes, *inter alia*, minimum insurances to be provided by the Contractor during the construction period, certain required parent guarantees and payment and performance bonds, and sets forth liquidated damages to be assessed by CDOT in the event the Segment 3 Project is not completed within the timeframe set forth in the Contract.

C. HPTE has entered into that certain Managed Lanes Tolling Services Agreement, dated May 7, 2015 (such agreement, or any successor or replacement agreement, the “TSA”) with the E-470 Public Highway Authority (“E-470”), or any successor counterparty, pursuant to which E-470 provides tolling related services for HPTE’s tolling facilities, including, but not limited to, toll collection and adjudication services, conditioned upon payment by HPTE to E-470 of E-470’s Expenses, including Transaction Costs, Reimbursable Costs, and/or costs per dollar of Gross Toll Revenue (each as defined in the TSA), all in accordance with the TSA.

D. In recognition of anticipated delays to the Segment 3 Project, the Parties desire to amend Section I of the IAA to make explicit certain financial obligations between the Parties for the Segment 3 Project, specifically related to costs incurred under the Bank Loan Agreement.

E. The Parties acknowledge they are each vested with the legal power to satisfy their respective obligations under this Amendment.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, AND THE VARIOUS TERMS, COVENANTS, AND CONDITIONS SET FORTH HEREIN, AND

OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES TO THIS AMENDMENT HEREBY AGREE AS FOLLOWS:

### TERMS AND CONDITIONS

1. Section I.1 of the IAA shall be replaced with the following language in its entirety:

1. Project Budget. CDOT is primarily responsible for the capital costs of the Segment 3 Project. Notwithstanding the foregoing, in consideration of the various benefits HPTE receives by implementing a user fee system on the I-25 North Express Lanes Project (Segment 3), HPTE has agreed to contribute a portion of the amounts deposited into the I-25 North Express Lanes Project Account (Segment 3) under the Bank Loan Agreement toward the construction of the Segment 3 Project, in full satisfaction of any obligations HPTE might have with respect to such construction. CDOT represents that such contribution, equal to the loan proceeds initially deposited into the I-25 North Express Lanes Project Account (Segment 3) under the Bank Loan Agreement, less working capital fees and other reasonable costs and expenses of HPTE, together with available CDOT moneys, is sufficient to complete the I-25 North Express Lanes Project (Segment 3) on or before December 31, 2019. HPTE's contributions to the Segment 3 Project may be applied to any lawful cost or expense related to the implementation of the Segment 3 Project, including reimbursement to HPTE for overhead and administration costs incurred in conjunction with the implementation of the Segment 3 Project.

2. The following section shall be added as new Section I.4 of the IAA:

4. Delays in Project Completion. CDOT acknowledges that time is of the essence in the completion of the Segment 3 Project; that HPTE intends to pledge future user fee revenues toward the repayment of the Bank Loan Agreement; and that HPTE may incur costs in the event tolling does not commence within the timeframes contemplated in the Contract. Notwithstanding Section III of this Agreement which contemplates use of the CDOT Backup Loan during the operations and maintenance period of the Segment 3 Project, CDOT shall be liable to HPTE for any costs incurred by HPTE under the Bank Loan Agreement that arise as a result of construction delays, except to the extent any delay in tolling commencement is caused by HPTE or E-470, or any successor counterparty to the TSA, and is not attributable to the actions of CDOT or the Contractor. CDOT agrees and covenants that it shall: (i) undertake all actions necessary to enforce the provisions of the Contract; (ii) cause the Contractor to seek recovery under any available delay in start-up or builders risk insurance policies; (iii) take all reasonable actions to recover amounts payable under the provisions of any surety or parent company guarantees provided to CDOT by the Contractor; and (iv) in the event of delayed construction completion, enforce all liquidated damages provisions against the Contractor and remit liquidated damages amounts received, notwithstanding any costs of liabilities of CDOT, first to HPTE in such amount as is necessary to cover any costs or liabilities of HPTE incurred under the Bank Loan Agreement.

a. HPTE shall, in cooperation with CDOT, determine any liquidated damages provisions against the Contractor and notify the CDOT Chief Financial Officer in writing of the same.

i. Any such liquidated damages provisions against the Contractor shall be calculated within the timeframes contemplated in the Contract.

b. HPTE shall, in cooperation with CDOT, determine any amounts as is necessary to cover any costs or liability of HPTE incurred under the Bank Loan Agreement and notify the CDOT Chief Financial Officer in writing of the same.

i. On or before November 1 of each year, HPTE shall submit to CDOT an invoice describing any costs incurred under the Bank Loan Agreement, including any such terms as specifically defined in the Bank Loan Agreement. CDOT shall (to the extent consistent with, and subject to, the Bank Loan Agreement) cause such amounts to be remitted with 30 days of receipt of HPTE's invoice.

ii. In the event any such costs incurred under the Bank Loan Agreement exceed the liquidated damages amount actually received by CDOT from the Contractor, CDOT agrees and covenants that it shall, without limitation, cover any costs or liabilities of HPTE incurred under the Bank Loan Agreement.

c. The provisions of this Section I.2 shall be made retroactive to January 21, 2016 and be construed as if the provision of Section I.2 had been made a part thereof on such date.

3. The following section shall be added as new Section I.2.j of the IAA:

j. CDOT will assist HPTE in complying with all reporting requirements under the Bank Loan Agreement and related documents.

4. The following section shall be added as new Section I.3.c of the IAA:

c. HPTE will be responsible for complying with all reporting requirements under the Bank Loan Agreement and related documents.

5. Section V.4 of the IAA shall be replaced with the following language in its entirety:

4. Notices. All communications relating to the day-to-day activities for the work shall be exchanged between representatives of CDOT and HPTE. All communications, notices, and correspondence with respect to the performance of this

Agreement shall be addressed to the individuals identified below. Either Party from time to time, may designate in writing new or substitute representatives.

If to CDOT:

Joshua Laipply, Chief Engineer  
CDOT  
2928 W. Howard Place  
Denver, CO 80204  
Email: joshua.laipply@state.co.us

If to HPTE:

David I. Spector, Director  
HPTE  
2928 W. Howard Place  
Denver, CO 80204  
Email: david.spector@state.co.us

6. General Provisions. All capitalized terms used in this Amendment but not otherwise defined in this Amendment shall have the meaning for such terms as set forth in the IAA. With the exception of those terms and conditions specifically modified and amended herein, the IAA shall remain in full force and effect in accordance with all of its terms and conditions. In the event of any conflict between the terms and provisions of the IAA and the term and provisions of this Amendment, the terms and provisions of this Amendment shall supersede and control. This Amendment may be executed in any number of counterparts, each of which shall be deemed an original, and all of such counterparts shall constitute one agreement.

*[Signature pages follow.]*

**IN WITNESS WHEREOF**, the Parties hereto have executed this Amendment as of the Effective Date.

FOR THE COLORADO DEPARTMENT OF TRANSPORTATION:

STATE OF COLORADO  
JOHN W. HICKENLOOPER, Governor

By: \_\_\_\_\_  
Michael P. Lewis  
Executive Director

FOR THE COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE:

By: \_\_\_\_\_  
David I. Spector  
HPTE Director

FOR THE COLORADO BRIDGE ENTERPRISE:

By: \_\_\_\_\_  
Joshua Laipply, P.E.  
Chief Engineer

APPROVED:

CYNTHIA H. COFFMAN  
Attorney General

By: \_\_\_\_\_

Andrew J. Gomez  
Assistant Attorney General

*[Signature page 1 of 2 to the First Amendment to the Segment 3 Project IAA]*

**ALL AGREEMENTS REQUIRE APPROVAL BY THE STATE CONTROLLER**

Section 24-30-202, C.R.S. requires that the State Controller to approve all agreements. This Agreement is not valid until the State Controller, or such assistant as he may delegate, has signed it.

**STATE CONTROLLER  
Robert Jaros, CPA, MBA, JD**

**By:** \_\_\_\_\_

**Date:** \_\_\_\_\_

*[Signature page 2 of 2 to the First Amendment to the Segment 3 Project IAA]*

**Resolution # TC-18-X**

**Approving a First Amendment to the I-25 North Express Lanes Project (Segment 3) Intra-Agency Agreement between the Colorado Department of Transportation and the Colorado High Performance Transportation Enterprise**

**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 General Assembly created the Colorado High Performance Transportation Enterprise (“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

**WHEREAS**, CDOT, in partnership with HPTE, is undertaking the I-25 North Express Lanes Project (Segment 3) (the “Segment 3 Project”) to complete, implement and operate one new tolled express lane in each direction between approximately 120<sup>th</sup> Avenue and E-470; and

**WHEREAS**, the Transportation Commission supports the Segment 3 Project and recognizes the benefits it provides to the State, which include, but are not limited to, improving travel times, managing congestion in the I-25 North Corridor, and providing travelers with a choice of a new travel lane; and

**WHEREAS**, HPTE entered into a loan agreement with Bank of America, N.A. (the “Segment 3 Loan Agreement”) pursuant to which HPTE will borrow money to fund the payment of the lawful expenses and costs of planning, designing, engineering, acquisition, installation or construction of the Segment 3 Project and other lawful expenses and costs related thereto (“Segment 3 Loan”); and

**WHEREAS**, in connection with the Segment 3 Loan, HPTE will pledge to Bank of America, N.A. the user-fee revenues collected by HPTE from the

Segment 3 Project as further detailed in the Segment 3 Loan Agreement;  
and

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

**WHEREAS**, together with HPTE's approval of the Segment 3 Loan Agreement, HPTE entered into that certain I-25 North Express Lanes Project (Segment 3) Intra-Agency Agreement with HPTE (the "IAA") on January 26, 2016, pursuant to which HPTE can request, and the Transportation Commission will agree to consider making, but is not obligated to make, one or more loans from the state highway fund to satisfy any of HPTE's payment obligations under the Segment 3 Loan Agreement, or to fund HPTE O&M Project Expenses (as such term is defined in the Segment 3 Intra-Agency Agreement), in the event user fee revenues are insufficient, or projected to be insufficient, to satisfy HPTE's obligations; and

**WHEREAS**, the IAA did not enumerate CDOT's responsibilities to HPTE if there were delays associated with the project; and

**WHEREAS**, HPTE and CDOT now desire to enter into a First Amendment to the I-25 North Express Lanes Project IAA (the "First Amendment"), pursuant to which CDOT shall be liable to HPTE for any costs incurred by HPTE under the Segment 3 Bank Loan as a result of project delay that is not attributable to HPTE or its vendors.

**NOW THEREFORE BE IT RESOLVED**, the Transportation Commission hereby approves and authorizes CDOT to enter into the First Amendment to the Segment 3 Intra-Agency Agreement with HPTE in substantially the form presented to the Transportation Commission and authorizes the CDOT Executive Director or his delegee to execute the First Amendment to the Segment 3 Intra-Agency Agreement 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).

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Herman Stockinger, Secretary  
Transportation Commission of Colorado

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Date