



DATE: September 10, 2014
TO: HPTE Board of Directors
FROM: Michael Cheroutes, Director of High Performance Transportation Enterprise
SUBJECT: Amendment No. 1 to the Amended and Restated Concession Agreement for the US 36 and the I-25 Managed Lanes

Purpose

The High Performance Transportation Enterprise (“HPTE”) and Plenary Roads Denver LLC (“PRD”) would like to amend the Amended and Restated Concession Agreement for US 36 and the I-25 Managed Lanes (“Concession Agreement”) to accomplish the items described below. These amendments, which are memorialized in Amendment No. 1 to the Concession Agreement (“Amendment”), are intended to either clarify existing language within the Concession Agreement or revise it to more accurately reflect the intentions of the parties.

Action

Staff is requesting that the HPTE Board approve the Amendment between HPTE and PRD that will address the below matters. The resolution approving the Amendment also ratifies and affirms the Concession Agreement.

Background

HPTE and PRD previously entered into the Concession Agreement for US 36 and the I-25 Managed Lanes on June 27, 2013, and subsequently amended and restated the Concession Agreement pursuant to the Amended and Restated Concession Agreement for US 36 and the I-25 Managed Lanes dated February 25, 2014.

Details

The Amendment accomplishes the following:

1. *Acceptance Timing of Phase 1*

HPTE and CDOT are working together with the Phase 1 Design Builder to complete US 36 Phase 1 (“Phase 1”), and the Concession Agreement contemplates that Phase 1 will be transferred to PRD to be operated and maintained upon completion. Presently, the Concession Agreement uses “Final Acceptance” under the Phase 1 Design/Build Contract (“Phase 1 DB Contract”) as the milestone that triggers when this transfer process commences. HPTE and PRD have agreed that this milestone is not what was intended because Final Acceptance can occur months after a project is considered operational. As a result of this, the parties would like to modify the Concession Agreement to clarify that PRD will accept Phase 1 upon the occurrence of “Project Completion.” Project Completion, as that term is used in the Phase 1 DB Contract, is a concept more closely aligned with the commonly accepted view of when a project is substantially complete and operational.

2. *Timing of Payments for HPTE Requested Lane Closures*

Under the Concession Agreement, HPTE can request that PRD close the managed lanes, which could happen if, for example, CDOT or HPTE needed to complete work adjacent to the managed lanes that required lane closures. In such an instance, HPTE would be required to make a payment to PRD for lost toll revenue as compensation for the closure. In certain circumstances, the calculation in determining lost toll revenue is based on averages of actual toll revenues collected before and after the closure. HPTE and PRD want to clarify in the Amendment how and when these payments need to be made—the Concession Agreement currently requires payment within three (3) business day after a closure. The Amendment modifies this to provide for (i) a period when HPTE and PRD work together to determine the amount of the averaging; and (ii) after determining this, HPTE being required to make a payment within five (5) business days. Please note that this change does not affect the situations when the lanes are closed because of weather or because of an accident. Those closures are handled in a separate provision and do not require a payment from HPTE.

Options and Recommendations

1. Staff Recommendation - Approve Amendment No. 1 to the Amended and Restated Concession Agreement and ratify and affirm the Amended and Restated Concession Agreement
2. Delay approval of Amendment No. 1 pending approval confirmation from PRD.



3. Deny approval for Amendment No. 1 to the Amended and Restated Concession Agreement, which will result in the Concession Agreement not accurately reflecting the timeline under the Phase 1 DB Contract

Resolution – HPTE # 141

Approving Amendment No. 1 to the Amended and Restated Concession Agreement for US 36 and the I-25 Managed Lanes and Affirming and Ratifying the Amended and Restated Concession Agreement

WHEREAS pursuant to Section 43-4-806, C.R.S., the General Assembly of the State of Colorado created the Colorado High Performance Transportation Enterprise (“HPTE”) as a government-owned business within the Colorado Department of Transportation (“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 such innovative means of financing projects include, but are not limited to, public-private partnerships, operating concession agreements, user fee-based project financing, and availability payment and design-build contracting; and

WHEREAS in connection with Phase 2 of the U.S. 36 Managed Lanes Project (“Phase 2 Project”), HPTE issued a Request for Proposals on February 12, 2013, pursuant to which Plenary Roads Denver LLC (“Concessionaire”) submitted a final proposal to HPTE and HPTE and the Concessionaire entered into that certain Concession Agreement for US 36 and the I-25 Managed Lanes dated June 27, 2013, as amended by Amendment No. 1 to the Concession Agreement dated October 4, 2013, and Amendment No. 2 to the Concession Agreement dated December 27, 2013, and Amendment No. 3 to the Concession Agreement dated January 29, 2014, and Amendment No. 4 to the Concession Agreement dated February 21, 2014 (“Concession Agreement”), in order to implement the Phase 2 Project and the operation and maintenance of U.S. 36 Phase 1 Project and the I-25 Managed Lanes; and

WHEREAS financial close under the Concession Agreement occurred in February 2014 (“Financial Close”) and, at Financial Close, HPTE and the Concessionaire entered into an Amended and Restated Concession Agreement dated February 25, 2014 (“Amended and Restated Concession Agreement”), amending and restating the Concession Agreement; and

WHEREAS HPTE and the Concessionaire wish to amend the Amended and Restated Concession Agreement and have negotiated an Amendment No. 1 to the Amended and Restated Concession Agreement for US 36 and the I-25 Managed Lanes (“Amendment No. 1”); and

WHEREAS pursuant to Sections 43-4-806(6)(a) and (h), C.R.S., the HPTE Board of Directors has the power and duty to supervise the HPTE Director and to make and enter into contracts or agreements.

NOW THEREFORE BE IT RESOLVED, the HPTE Board of Directors hereby affirms and ratifies the Amended and Restated Concession Agreement and hereby approves

and authorizes HPTE to enter into Amendment No. 1 amending the Amended and Restated Concession Agreement in substantially the form presented to the HPTE Board of Directors and authorizes HPTE's Director to execute the Amendment No. 1 on behalf of HPTE, in such form and with such revisions or modification as the HPTE Director may determine to be necessary or appropriate.

Signed as of September 17, 2014

Tim Gagen
Chair, HPTE Board of Directors

**AMENDMENT NO. 1 TO
THE AMENDED AND RESTATED A&R CONCESSION AGREEMENT FOR US 36 AND THE I-25
MANAGED LANES**

THIS AMENDMENT NO. 1 TO THE AMENDED AND RESTATED A&R CONCESSION AGREEMENT FOR US 36 AND THE I-25 MANAGED LANES (this "Amendment") is made as of September [], 2014.

BETWEEN:

COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE,
a government owned business and a division of the Colorado Department of
Transportation

("HPTE")

AND:

PLENARY ROADS DENVER LLC, a Colorado limited liability company

(the "**Concessionaire**", and collectively with HPTE, the "**Parties**").

WHEREAS:

On February 25, 2014, HPTE and the Concessionaire executed the Amended and Restated A&R Concession Agreement for US 36 and the I-25 Managed Lanes (the "**A&R Concession Agreement**"); and

As contemplated by Section 70 of the A&R Concession Agreement, the Parties desire to amend the A&R Concession Agreement by written agreement.

NOW THEREFORE for good and valuable consideration, the sufficiency of which is acknowledged and agreed, HPTE and the Concessionaire agree to further amend the A&R Concession Agreement in accordance with terms of this Amendment.

Terms of this Amendment

- (a) Capitalized terms used and not defined herein have the meaning ascribed to such terms in the A&R Concession Agreement.
- (b) A new defined term is added to Schedule 1 of the A&R Concession Agreement as follows:

"Phase 1 DB Project Completion" means Project Completion under the Phase 1 DB Contract, being the date when CDOT finds that all prerequisites to Project Completion have been met in accordance with Section 20.1.2 of the Phase 1 DB Contract."

- (c) The definition of **"Phase 1 Services Commencement Date"** as defined in Schedule 1 of the A&R Concession Agreement is deleted and replaced in its entirety with the following definition: "means the later of the date of Phase 1 DB Project Completion and the date upon which HPTE has given notice to the Concessionaire that the Conditions Precedent to the Phase 1 Services Commencement Date have been satisfied or waived."
- (d) A new sentence is added to Section 1.6 of the A&R Concession Agreement as follows: "When in this Contract there is a reference to "accept" or "acceptance" in relation to the Phase 1 DB Contract, such term means the acceptance by CDOT that prerequisites to Project Completion have been met in accordance with Section 20.1.2 of the Phase 1 DB Contract (which, for illustration, applies to all uses of "accept" and "acceptance" as used in the A&R Concession Agreement Sections 23.3, and 23.5, and in Schedule 2, Part 2A, Sections 2.2, 2.3, 7.1(b), and 8 of the A&R Concession Agreement)."
- (e) Section 29.7(d) of the A&R Concession Agreement is deleted and replaced in its entirety with the following:

"In all cases where payments are due to be made to the Concessionaire by HPTE pursuant to this Section 29.7:

- (i) HPTE shall make payment to the Concessionaire in relation to each day during which a closure or suspension was in force within three (3) Business Days after that day; provided, that
 - (1) in the case of any closure or suspension where the second sentence of Section 29.7(c)(iii) applies, the Parties shall have five (5) Business Days following the first two (2) week measurement period to determine the amount of such payment in accordance with Section 29.7(c)(iii) and Section 29.7(d)(ii), and any payment shall be payable to Concessionaire within five (5) Business Days following such determination; and

- (2) in the case of any closure or suspension where Section 29.7(c)(iv) applies, the Parties shall have five (5) Business Days following the first three (3) month measurement period to determine the amount of such payment in accordance with Section 29.7(c)(iv) and Section 29.7(d)(ii), and any payment shall be payable to Concessionaire within five (5) Business Days following such determination.
- (ii) Where calculation of the payment involves using the value of Toll Revenues which will be collected after the date when payment is due, then the calculation shall be made on the basis of Toll Revenues predicted in the Base Case Financial Model and a balancing payment made by HPTE to the Concessionaire or by the Concessionaire to HPTE within ten (10) Business Days after all of the actual data necessary to make the calculation is available.”
- (f) This Amendment shall take effect as of the date first set forth above.

Miscellaneous

- (g) Upon this Amendment taking effect, this Amendment shall be read and construed as part of and subject to the terms of the A&R Concession Agreement in all respects, except as specifically provided for in Sections 1(b) through 1(e), inclusive, of this Amendment. The terms and provisions of the A&R Concession Agreement, as now modified by this Amendment, are hereby affirmed and shall remain in full force and effect. To the extent of any conflict or inconsistency between the terms of this instrument and the A&R Concession Agreement and this Amendment, the terms of this Amendment shall control.
- (h) This Amendment may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each of the parties and the State Controller shall constitute a full and original instrument for all purposes.

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WITNESS WHEREOF the parties have executed this Amendment effective as of the date first set forth above.

HPTE

By: _____
Name: Michael L. Cheroutes
Title: HPTE Director

PLENARY ROADS DENVER LLC

By: _____
Brian Clark
Vice President

By: _____
A. Phillip Dreaver
Vice President

ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER

CRS §24-30-202 requires the State Controller of the State of Colorado approve all State Contracts. This Amendment is not valid until signed and dated below by the State Controller or delegate of the State of Colorado. The Concessionaire is not authorized to begin performance until such time. If the Concessionaire begins performing prior thereto, the State of Colorado is not obligated to pay the Concessionaire for such performance or for any goods or services provided hereunder.

<p>STATE CONTROLLER</p> <p>Robert Jaros, CPA, MBA, JD</p> <p>By: _____</p> <p>Date: _____</p>
