

**FISCAL YEAR 2017-18
FEE FOR SERVICE
INTRA-AGENCY AGREEMENT**

THIS AGREEMENT (the “**Agreement**”) is made this ____ day of _____, 2017 by and between the STATE OF COLORADO for the use and benefit of the COLORADO DEPARTMENT OF TRANSPORTATION, hereinafter referred to as the “**Department**” or “**CDOT**,” and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT, hereinafter referred to as the “**Enterprise**” or “**HPTE**.” CDOT and HPTE are referred to herein individually each as a “**Party**” and collectively as the “**Parties**.”

RECITALS

A. CDOT is an agency of the State of Colorado authorized pursuant to § 43-1-105, C.R.S. to plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies.

B. Pursuant to § 43-1-110, C.R.S., the executive director of CDOT is authorized to execute certain agreements on behalf of CDOT.

C. HPTE was created pursuant to § 43-4-806(2), C.R.S. and operates as a government-owned business within CDOT.

D. Pursuant to § 43-4-806(6)(g), C.R.S., HPTE is empowered to enter into contracts or agreements with any public entity to facilitate a public-private partnership, including, but not limited to, an agreement in which the Enterprise, on behalf of CDOT, provides services in connection with a surface transportation infrastructure project.

E. HPTE is further empowered, pursuant to § 43-4-806(6)(h), C.R.S., to make and enter into all other contracts and agreements, including intergovernmental agreements under § 29-1-103, C.R.S., that are necessary or incidental to the exercise of its powers and performance of its duties.

F. The business purpose of HPTE, as provided for in § 43-4-806(2)(c), C.R.S. is to pursue public-private partnerships and other innovative and efficient means of completing surface transportation infrastructure projects, which HPTE may agree to complete for CDOT under agreements entered into with the Department in accordance with § 43-4-806(6)(f), C.R.S.

G. On September 30, 2013, CDOT and HPTE entered into a Memorandum of Understanding, which set forth each Party’s operating roles and responsibilities as they relate to their respective missions and provided, in relevant part, that HPTE is to be reimbursed by CDOT for personal goods or services procured by HPTE.

H. CDOT acknowledges that HPTE possesses expertise and legal powers unavailable to CDOT, which enable it to accelerate the development and delivery of critical surface transportation infrastructure projects; and

I. CDOT and HPTE previously entered into Fee for Service Intra-Agency Agreements, dated September 9, 2015, (the “**FY 2015-16 Agreement**”), and October 14, 2016, as subsequently amended on January 12, 2017 (the “**FY 2016-17 Agreement**”), in which CDOT agreed to compensate HPTE for the fair market value of certain services to be provided to CDOT during those fiscal years.

J. The Parties agree and acknowledge that the Services to be provided by HPTE to CDOT (for purposes of this recital, as such term was defined in the FY 2016-17 Agreement and subsequently modified by mutual agreement of the Parties over the course of the fiscal year) are anticipated to be provided in their entirety prior to the conclusion of the fiscal year, with such satisfactory completion to be documented in the final progress report to be submitted no later than July 15, 2017.

K. HPTE has prepared a new scope of work describing the services CDOT has requested HPTE to provide CDOT during the 2017-18 fiscal year (the “**Services**”), which is attached hereto and incorporated herein as **Exhibit A** (the “**Scope of Work**”).

L. In order to further the efficient completion of surface transportation infrastructure projects necessary to CDOT’s development of an integrated transportation system, CDOT desires that HPTE utilize its expertise and legal powers to provide the Services, in exchange for which CDOT agrees to compensate HPTE in the amounts set forth in the Scope of Work.

M. HPTE shall continue to be an enterprise for purposes of Section 20 of Article X of the Colorado Constitution (“**TABOR**”), so long as it receives less than ten percent (10%) of its total revenues in grants from all Colorado state and local governments combined.

N. Pursuant to §§ 24-77-102(7)(b) and 43-4-803(13)(b), C.R.S., grants do not include revenues or income derived from any authorized rate, fee, assessment, or other charge imposed by an enterprise for the provision of goods or services by such enterprise.

O. On March 11, 1997, in Opinion No. 97-01, the Colorado Attorney General also concluded, *inter alia*, that a designated enterprise may continue to qualify as an enterprise under TABOR, even though it receives a direct appropriation of monies, so long as the appropriation constitutes revenues resulting from the provision of goods or services pursuant to § 24-77-102(7)(b)(II), C.R.S.

P. Citing *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995), the Colorado Attorney General further noted that the very concept of an enterprise under TABOR envisions an entity that is owned by a government institution, but is financially distinct from it, and also, that the financial affairs of the enterprise must be those of a self-supporting business-like activity that provides goods and services for a fee.

Q. On February 29, 2016, in Opinion 16-01, the Colorado Attorney General also concluded, *inter alia*, that an enterprise must charge a fee in exchange for a government service, and a fee for service arrangement – broadly construed – is nearly synonymous with enterprise status.

R. HPTE engaged Stifel, Nicolaus & Company, Incorporated to prepare an analysis of the market value of the services HPTE could provide to CDOT, based on a review of costs incurred by comparable agencies for similar services (the “**Stifel Report**”).

S. The November 2016 Stifel Report concluded that HPTE provides the necessary benefit to CDOT for CDOT to support compensation for the Services as contemplated in this Agreement.

T. Based on the findings of the Stifel Report and their own examinations of the benefit CDOT receives for HPTE’s services, the Parties find and agree that the amounts CDOT intends to compensate HPTE for fiscal year 2018, as set forth in the Scope of Work, are reasonable and represent the fair market value of the specific Services to be provided.

U. CDOT and HPTE each hereby affirm that, consistent with Colorado law, moneys paid by CDOT to HPTE under this Agreement are not grants of money from CDOT to HPTE, but rather, payment for the Services to be provided by HPTE to CDOT as more particularly set forth in the Scope of Work.

V. Both CDOT and HPTE are authorized under law to execute this Agreement.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:

1. Scope of Work and Responsibilities.

a. HPTE shall provide the Services set forth in Exhibit A over a one year period, commencing on July 1, 2017, and ending on June 30, 2018, which comprises the 2018 fiscal year.

b. No later than January 15th and July 15th of the fiscal year, HPTE shall submit to CDOT a progress report. The progress report is to include a narrative summary of HPTE’s activities during the previous six months, as well as a detailed report on the progress being made in the performance of the Services. The submissions of the semi-annual reports will be used by HPTE and CDOT to recognize revenue and expenses, respectively, and are to be tied to the specific tasks, and categories of work within each task, described in the Scope of Work.

c. The Parties may agree to modify the specific tasks set forth in the Scope of Work to be undertaken by HPTE during the term of this Agreement, provided that such modifications do not result in an increase or decrease in the overall estimated value of the Services to be provided under this Agreement. Any such modifications shall be

specifically identified, and their estimated values reconciled, in the progress report submitted by HPTE on July 15th following the close of the prior fiscal year. Any modifications to the Scope of Work resulting in an increase or decrease in the overall estimated value of the Services shall not be undertaken unless agreed to in writing by the Parties in an amendment to this Agreement.

2. Payment Amount and Procedures.

a. The Parties agree that on July 1, 2017, CDOT shall provide payment in the amount of Four Million Seven Hundred Seventy Four Thousand Five Hundred Dollars (\$4,774,500) to HPTE for the provision of the Services in fiscal year 2018 under this Agreement (the “**Payment Amount**”).

HPTE intends to record the full Payment Amount as deferred revenue, and recognize revenue on a pro-rata basis as Services are performed during the course of the fiscal year. HPTE will conduct a “true-up” of balances at both mid-year and at the end of the fiscal year, to coincide with the Services actually provided, in conjunction with the preparation and submittal of the progress reports described in Section 1.

b. The Services to be provided, and the Payment Amount therefor, are for the full fiscal year covered by this Agreement, as may be amended from time to time. Milestone deadlines contained in the Scope of Work are for informational and work progress tracking purposes only and are not binding on HPTE. Services provided by HPTE within the fiscal year shall be compensated as part of the Payment Amount provided for herein. No deductions shall be made for Services completed outside the timeframes set forth in the Scope of Work, provided such Services are completed within the current fiscal year.

c. Any Services not completed within the term of this Agreement shall be reflected in the progress report submitted by HPTE on July 15th following the close of the prior fiscal year. In the event the value of the Services actually completed during the fiscal year is less than was estimated in the Scope of Work, HPTE may be required to reimburse CDOT for the value of Services not completed. The value of the uncompleted portion of the Services, if any, shall reflect the fair market value of the same, and shall be mutually agreed upon and set forth in writing by the Parties in an amendment to this Agreement.

3. Term. The term of this Agreement shall be from July 1, 2017, through June 30, 2018, unless the Parties mutually agree in writing to an earlier termination.

4. Amendment; Renewal.

a. It is expressly contemplated that the Parties intend to extend this Agreement for additional one-year terms for services to be provided by HPTE to CDOT in future fiscal years. Such extensions shall be documented by formal written amendment, and shall include an updated scope of the services to be provided in the subsequent fiscal years.

b. HPTE agrees to provide CDOT a proposed draft scope of services for the following fiscal year no later than November 2017.

c. If the scope of services and payment amount for the following fiscal year are deemed acceptable by CDOT, the same shall be set forth in a written amendment executed and approved by the Parties.

d. If during its budget approval process for the following fiscal year, the Transportation Commission allocates funds for HPTE in the full amount included in the proposed scope of services submitted by HPTE, such proposed scope of services shall be deemed approved by CDOT, notwithstanding any failure of the Parties to execute a written amendment prior to the July 1 start of the subsequent fiscal year. The Parties shall thereafter execute a written amendment for such subsequent fiscal year, the terms and conditions of which shall not be inconsistent with the budget action taken by the Transportation Commission.

e. If the scope of services and payment amount to be provided by HPTE are approved by CDOT as provided for in this Section 4, CDOT agrees that it shall pay HPTE the agreed upon payment amount for the following fiscal year on July 1, which date represents the first day of the fiscal year in which the proposed services are anticipated to be provided.

f. If the Parties are unable to agree upon a scope of services and payment amount for the following fiscal year prior to June 30 of any year, this Agreement shall terminate and be of no further force and effect for the subsequent fiscal year.

5. Availability of Funds. Payment pursuant to this agreement is subject to and contingent upon the continuing availability of funds appropriated for the purposes hereof. If any of said funds become unavailable, as determined by CDOT, either Party may immediately terminate or seek to amend this agreement.

6. Record Keeping Requirements. HPTE shall maintain a complete file of all books, records, papers, accounting records, and other documents pertaining to its execution of the Scope of Work under this Agreement, and shall make such materials available to CDOT upon request for a period of three years.

7. Right to Audit. HPTE shall permit CDOT, the State Auditor and/or their designee(s) to inspect all records of HPTE and audit all activities which are or have been undertaken pursuant to this agreement.

8. Consideration; Exchange Transaction. The Parties acknowledge that the mutual promise and covenants contained herein, and other good and valuable consideration, are sufficient and adequate to support this Agreement. The Parties further acknowledge that, for accounting purposes, this Agreement represents an exchange transaction for CDOT's purchase of specific services provided by HPTE at the market value of such services.

9. Dispute Resolution. Any dispute concerning the performance of this Agreement shall be referred to the CDOT Chief Engineer and the HPTE Director. Failing resolution by such officers, the dispute shall be submitted in writing by both parties to the State Controller, whose decision on the dispute shall be final.

10. Default; Termination. Any failure of either Party to perform in accordance with the terms of this Agreement shall constitute a breach of the Agreement. CDOT reserves the right to terminate this Agreement upon thirty (30) days written notice to HPTE of its nonperformance of the Services; provided, however that HPTE shall not be in default under this Agreement if it has promptly commenced a cure of such nonperformance and is diligently pursuing the same. Any finding of nonperformance and failure to cure under this Section shall be referred for dispute resolution as provided for in Section 9 prior to any termination becoming effective. In the event of termination, including voluntary termination by the Parties under Section 3, HPTE shall be required to reimburse CDOT for the value of the Services not yet completed as of the date of termination.

11. Delegation. Except as identified or otherwise implied in the Scope of Work, the duties and obligations of HPTE with respect to the provision of the Services under this Agreement shall not be assigned, delegated or subcontracted without the prior consent of CDOT. All subcontractors will be subject to the requirements of this Agreement.

12. Modification. This Agreement is subject to such modifications as may be required by changes in federal or state law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this Agreement on the effective date of such change as if fully set forth herein.

13. Severability. To the extent that this Agreement may be executed and performance of the obligations of the Parties may be accomplished within the intent of the Agreement, the terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

14. Waiver. The waiver of any breach of a term, provision, or requirement of this Agreement shall not be construed or deemed as a waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision or requirement, or the same term, provision or requirement upon subsequent breach.

15. No Third Party Beneficiaries. This agreement shall inure to the benefit of and be binding only upon the Parties hereto and their respective successors and assigns. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein. It is expressly understood and agreed that the enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement, shall be strictly reserved to CDOT and HPTE. Nothing contained in this Agreement shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of CDOT and HPTE that any such person or entity, other than CDOT or HPTE, receiving services or benefits under this Agreement, shall be deemed an incidental beneficiary only.

16. Entire Understanding. This Agreement is intended as the complete integration of all understandings between the Parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever. Except as otherwise provided in this Agreement, no subsequent renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved by the Parties.

17. Governmental Immunity. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, as applicable now or hereafter amended.

18. Adherence to Laws. At all times during the performance of this Agreement, HPTE shall strictly adhere to all applicable federal and state laws, rules, and regulations that have been or may hereafter be established, including, but not limited to state and federal laws respecting discrimination and unfair employment practices.

19. Legal Authority. The Parties each warrant that they possess the legal authority to enter into this Agreement and that each has taken all actions required by its procedures, by-laws, and/or applicable law to exercise that authority, and to lawfully authorize its undersigned signatory to execute this Agreement and to bind CDOT or HPTE, as applicable, to its terms. The persons executing this Agreement on behalf of CDOT and HPTE each warrant that they have full authorization to execute this Agreement.

20. Notices. All communications relating to the day-to-day activities for the work shall be exchanged between representatives of CDOT and HPTE. All communication, notices, and correspondence shall be addressed to the individuals identified below. Either Party may, from time to time, designate in writing new or substitute representatives.

If to CDOT:

Joshua Laipply, Chief Engineer
Colorado Department of Transportation
4201 E. Arkansas Ave.
Denver, CO 80222
Email: joshua.laipply@state.co.us

If to HPTE:

David Spector, Director
HPTE
Colorado Department of Transportation
4201 E. Arkansas Ave.
Denver, CO 80222
Email: david.spector@state.co.us

21. Controller's Approval. This agreement shall not be deemed valid until it has been approved by the State Controller or such assistant as he or she may designate.

[Signature page follows.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

STATE OF COLORADO
John W. Hickenlooper, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
EXECUTIVE DIRECTOR
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE DIRECTOR

APPROVED:

Cynthia H. Coffman
ATTORNEY GENERAL

By: _____
ASSISTANT ATTORNEY GENERAL

ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER

§ 24-30-202, C.R.S. requires the State Controller to approve all State Contracts. This Agreement is not valid until signed and dated below by the State Controller or delegate of the State of Colorado.

<p>STATE CONTROLLER Robert Jaros, CPA, MBA, JD</p> <p>By: _____</p> <p>Date: _____</p>
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EXHIBIT A
HPTE Scope of Work for FY 2017-18

(Attached)