Central 70

DATE: March 3, 2017
TO: Board of Directors of the Colorado Bridge Enterprise ("BE")
Board of Directors of the High Performance Transportation Enterprise ("HPTE")
FROM: Tony DeVito, Central 70 Project Director
David Spector, HPTE Director
SUBJECT: Central 70 Final Request for Proposals

Purpose
Issuance of the Final Request for Proposals ("Final RFP") for the Central 70 Project ("Project") is scheduled for March 6, 2017, in order to meet certain deadlines established by the Federal Highway Administration ("FHWA") for the Local Labor Hiring Pilot Program in which the Project is participating. Prior to approving issuance of the Final RFP, the Boards are being given an opportunity to review, in their entirety, the Instructions to Proposers ("ITP"), the Project Agreement ("PA") and the financial, commercial and technical schedules to the PA, which together comprise the Final RFP. This memorandum provides a summary of the Project and key provisions of the Final RFP.

Action
Staff requests that the BE and HPTE Boards of Directors (the "Boards") authorize issuance of the Final RFP for the Project.

Background
The Final RFP is being issued to the four Proposer teams that were shortlisted in July 2015 following a thorough evaluation of their financial and technical capabilities. Each of the shortlisted teams is required to maintain equivalent qualification standards throughout the procurement process, and all changes in Proposer team structures are subject to review and approval by the Procuring Authorities.

This Final RFP constitutes the Sixth Addendum to the original RFP, which was first issued in two parts on September 19 and 25, 2015. Each prior version of the RFP has been made available to the public in its entirety on the public procurement website, and with each release Staff has notified interested parties, including state elected officials, that the procurement documents are available on the Project website.

The Record of Decision ("ROD") approving the Project, also referred to as Phase 1 of the Partial Cover Lowered Alternative, was issued by the FHWA on January 19, 2017. Exhibit 14 to the ROD contains a number of commitments to the local community and other Project mitigation measures, many of which identified the Project Developer as the responsible party. The PA and the ITP (in particular, Schedule 17 to the PA, further described below) requires the Developer to complete all of the mitigations identified in the ROD that are not otherwise being undertaken by CDOT directly.

Final RFP Executive Summary
At the direction of the State's Transportation Commission, and acting in collaboration with CDOT, the Colorado Bridge Enterprise and the Colorado High Performance Transportation Enterprise (each individually an "Enterprise" and, together, the "Enterprises" or "Procuring Authorities") are procuring the design, construction, financing, operation and maintenance of a 9.4-mile portion of the I-70 East Corridor in Greater Denver (such portion, the "Project") as a public-private partnership with a private sector partner (the "Developer").

There are two main components of the RFP: the Instructions to Proposers ("ITP") and the Project Agreement ("PA"). The ITP sets out the structure and rules of the procurement, the instructions (and forms to be submitted) for proposals, the evaluation criteria for proposals, and the process for reaching Commercial Close. The ITP governs the procurement up until Commercial Close, at which point the PA is signed and becomes effective. The PA is the contract that the Developer will sign with the Procuring Authorities that establishes the Developer's scope of work in delivering the Project, and sets forth each party's (the Developer's and Enterprises') rights and obligations (including risk allocation) over the term of the contract.

While the Developer, a special purpose entity formed by a consortium of equity partners, will be the party executing the Project Agreement with the Enterprises, it will actually be part of a broader team in delivering the Project. The Developer will contract with a lead contractor to perform the design and construction work for the Project and, in some instances, a lead operator to perform the operations and maintenance work during the operating period (alternatively, some Developers with operations and maintenance capabilities will employ a self-perform strategy).

Instructions to Proposers

The ITP governs the procurement process for Proposers (i.e. teams that are bidding for the Project) up until the Preferred Proposer (i.e. winning bidder) reaches Commercial Close (signs the PA). In terms of the ITP, this memorandum focuses on 1) the sources of funds available to finance the Project, 2) proposal requirements and 3) the evaluation and selection process for the Preferred Proposer.

Sources of Funds

The Project will be financed by a combination of milestone payments from the Enterprises, third-party debt, and equity from the Developer. BE has obtained a $725 million PABs allocation from the USDOT, and the Procuring Authorities are currently negotiating with the Build America Bureau for a TIFIA loan, the amount of which will be dependent on the Preferred Proposers' financing needs.

Interest Rate and Credit Spread Protection

Base Rates – The Procuring Authorities will bear 100% of the movement in base interest rates from 10 days prior to the date of the Financial Proposal submittal until financial close for bank, TIFIA, and bond financings.

Credit Spreads – The Procuring Authorities will bear 85% of the movement in credit spreads (the margin between base interests rates and actual rates paid to investors) from 10 days prior to the date of the Financial Proposal submittal until financial close for bond financings (tax-exempt and taxable bonds). Credit spread protection is not provided for bank financings, except in a circumstance where the Procuring Authorities extend the Proposal Validity Period. The Procuring Authorities' Proposal Validity Period Extension Rights are described in more detail below.

Proposal Requirements[1]

Proposers are required to submit an Administrative and Technical Proposal and a Financial Proposal, currently due May 18, 2017 and July 11, 2017, respectively. The ITP requires that Administrative and Technical Proposals include plans, drawings, reports, and Alternative Technical Concepts (i.e. Proposers' pre-approved modifications to the Enterprises' technical solution), that explain and articulate Proposers' technical solutions. Financial Proposals are required to include plans for financing the Project, a financial model (which contains the Base Performance Payment each Proposer is 'bidding' for the Project), financing documents, Proposers' Proposal Securities ($10,000,000), and a form that requires Proposers to specify their BE-eligible eligible costs and non-BE-eligible costs using the criteria set forth in BE Resolution #15-8-2.

Proposal Validity Period

Both the Administrative and Technical Proposal and Financial Proposal are to remain valid (meaning their terms and pricing) for a period of 180 days after the Financial Proposal Deadline (July 11, 2017) – this period is known as the "Proposal Validity Period." Proposers' Proposal Securities are required to be outstanding during the Proposal Validity Period or, in the case of the Preferred Proposer, until Commercial Close, at which time it is required to post the Financial Close Security ($20,000,000).

[1] Note this is a summary of proposal requirements. The full requirements can be found in the ITP.

Procuring Authorities' Proposal Validity Period Extension Right

The Enterprises have a unilateral right to extend the Proposal Validity Period following Commercial Close by up to 180 days, subject to compensating the Developer for such extension. Compensation to the Developer is to include: 1) escalation on their construction price during the extension period, 2) reimbursement of external costs incurred in connection with the extension (subject to a $1.5 million cap), and 3) 100% credit spread protection for *bank* and *bond* financings for the period beyond the original Proposal Validity Period.

Preferred Proposer Reimbursement of Costs

The Preferred Proposer will be required to make a $25 million payment to the Procuring Authorities to reimburse the Procuring Authorities and/or CDOT for costs incurred in connection with the procurement process. The Developer will also reimburse the Procuring Authorities and/or CDOT for previously incurred PABs and TIFIA financing fees.

Explanation of Certain ITP Forms

As part of the Financial Proposal requirements, Proposers are required to complete certain forms related to their schedule, financing solution, and costs. Select forms are discussed below.

Form D-3: Financing Plan Dates requires Proposers to specify when they anticipate achieving each milestone, substantial completion, and final acceptance. As discussed further below, Proposers will be evaluated (in part) on the length of their construction period.

Form D-4: Equity, Debt and Termination Compensation Information requires Proposers to provide information on the key equity and debt metrics of their financing solution, including the amount of debt and equity they are raising for the Project, equity returns, and debt service coverage ratios. This information will also be contained in the financial models that Proposers are required to submit.

Form D-7: Sources and Uses of Funds requires Proposers to provide information on their sources of funds (e.g. milestone payments, debt, and equity) that they will utilize to finance the Project, and the uses of these funds for their costs (e.g. construction costs, interest expense during construction, insurance costs, reserve funding, etc.). This information will also be contained in the financial models that Proposers are required to submit.

Form D-8: Cost Data for Major Components of the Construction Work requires Proposers to breakdown their construction costs into certain elements prescribed by the Procuring Authorities. This form is for informational purposes only.

Evaluation and Selection Process

The evaluation process will be conducted in two phases by the Procuring Authorities, who may utilize various committees comprised of individuals with certain skillsets and knowledge bases to aid in the review process. The Procuring Authorities will also have the ability to request clarifications and conduct interviews with Proposers. Both the Administrative and Technical Proposal and Financial Proposal will be subject to pass/fail criteria.

Administrative and Technical Proposals that satisfy the pass/fail criteria – which includes a rigorous initial technical evaluation requiring a minimum passing score in four separate technical categories, as well as an overall passing score - will be progressed to the substantive evaluation phase. In the substantive evaluation phase the Procuring Authorities will score proposals across the following six elements: 1) project management, 2) quality management, 3) maintenance of traffic, 4) environmental management, strategic communications, community development programs, small and disadvantaged business participation and workforce development, 5) operations and maintenance management, and 6) technical approach and solutions. Cumulatively, for the six categories, Proposers can receive up to 30 evaluation points (out of 100 total) for their "Technical Score." Proposers must have a passing pass/fail score for the Administrative and Technical Proposal or their Financial Proposals will not be evaluated.

Form D to the ITP sets a Base MPP Upset Limit of $41,403,000, which is the highest Base MPP "bid" (i.e. the annual availability payment the Enterprises will make to the Developer during operations) that a Proposer can submit and still receive a "pass" on its Financial Proposal. Proposers' Financial Proposals satisfying the financial pass/fail criteria will be progressed to the Financial Proposal scoring stage. Proposers will receive up to 65 evaluation points for submitting the lowest Base MPP, calculated as follows:

$$\text{Financial Score} = \frac{Lowest\ Base\ MPP}{Proposer's\ Base\ MPP} \text{ x } 65$$

Proposers will also be evaluated on the length of their construction schedules with shorter construction periods receiving higher scoring. There are up to 5 evaluation points available for submitting the shortest construction schedule. Schedule scoring will be determined as follows:

$$\text{Schedule Score} = \frac{Shortest\ Scored\ Construction\ Period}{Eligible\ Proposer's\ Scored\ Construction\ Period} \text{ x } 5$$

The Preferred Proposer will be the Proposer that has the highest “Best Value Score”, with the highest possible score being 100 points.

Best Value Score = Technical Score + Schedule Score + Financial Score

After determining the Preferred Proposer, the Procuring Authorities will provide a notice of award to the Preferred Proposer. The Procuring Authorities and the Preferred Proposer will then finalize all documents and execute the Project Agreement.

Stipend

If the procurement is cancelled after the issuance of the final RFP but prior to the Technical Proposal deadline (May 18, 2017), a $1.25 million stipend will be due to Proposers. If the Procuring Authorities cancel the procurement after the Technical Proposal deadline or after award of the Project to another proposer, Proposers (excluding the Preferred Proposer) will receive a stipend in the amount of $2.5 million. The stipend is compensation for the intellectual property that Proposers provide to the Procuring Authorities in their proposals, including the right to use any ATCs submitted by such Proposer.

CORA

In the interest of maintaining a fair and transparent procurement, and in accordance with HPTE’s Transparency Policy, the Procuring Authorities have undertaken in the ITP to disclose all materials permitted to be disclosed under CORA regarding the process and Proposers’ proposals. Proposers are required to submit a CORA Protocol to the Procuring Authorities that is intended to streamline determinations regarding confidential commercial and financial documents that are prohibited from disclosure under CORA. Proposers will also be required to submit public release versions of the Proposals, with CORA exempt materials redacted, to facilitate timely disclosure to the public.

Project Agreement

This summary of the Project Agreement is sectionalized as follows: 1) Project Agreement term 2) construction period overview, 3) operating period overview, 4) payments to the Developer, 5) supervening events, 6) change procedure, 7) insurance and indemnity, 8) financing, 9) defaults, 10) termination, 11) enterprise assignment rights, 12) general provisions, and 13) explanation of schedules to the Project Agreement.

Project Agreement Term

The Project will commence when the PA is signed and continue until thirty (30) years after the substantial completion date, unless the PA is terminated earlier.

Construction Period Overview

During the construction period, the Developer will be responsible for the design and construction of the Project, including working with railroad and utility owners. The Developer will also be responsible for certain O&M work, including snow and ice removal, during the construction period. The Developer’s contractor will provide a fixed-price, date-certain construction contract. Any cost overruns or schedule delays will be the responsibility of the contractor and, ultimately, the

Developer, except where relief is provided in certain circumstances in the PA, as further discussed below. The longstop period, which is the period of time by which the Developer can be delayed in achieving substantial completion prior to being in default under the PA, is 540 days (approximately 18 months).

Schedule 10: Design and Construction Requirements of the PA sets out all of the Developer's design and construction requirements for the Project. Further, *Schedule 29: Reference Documents* includes the "Reference Design" which is the preliminary technical blueprint and description of essential elements for the Project. Given that some elements of the construction scope will be transferred to the City of Denver and Denver Public Schools after they are constructed, the PA requires that the Developer provide warranties to the City of Denver and Denver Public Schools for these elements. In addition to technical requirements for design and construction, the Developer will be required to maintain payment and performance security in an amount equal to 50% of the value of the work to be performed during construction.

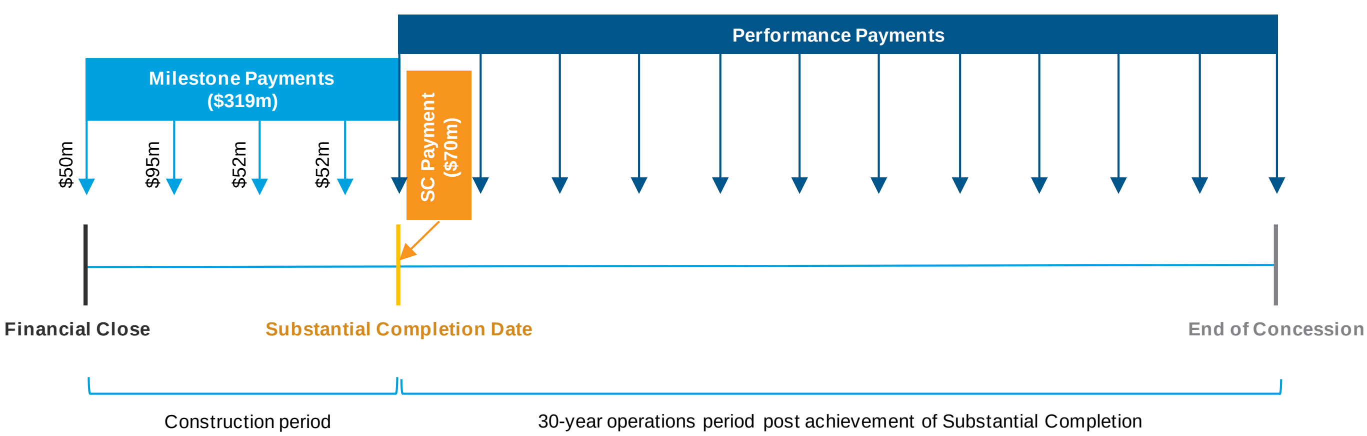
Operating Period Overview

During the operating period the Developer will be obligated to perform all operations, maintenance, renewal work, and handback work in accordance with the terms and performance standards set out in the PA. The Developer will be required to submit to the Enterprises an "Operations Management Plan" that sets out how it will comply with its operations obligations. For handback, the Developer is required to fund a reserve three years prior to the end of the term in an amount equal to the handback work required to turn the Project over to the Procuring Authorities in the condition specified in the PA. The Enterprises will have the handback reserve as security in the event the Developer fails to satisfy its handback obligations, ensuring that the Procuring Authorities can complete any work the Developer fails to have completed to bring the Project back up to the specified condition at the end of the term. *Schedule 11: Operations and Maintenance Requirements* and *Schedule 12: Handback Requirements* specify the Developer's exact operations maintenance and handback obligations, and are discussed further below.

In addition to maintaining the Project in accordance with the operations and maintenance standards of the PA, the Developer will be required to maintain payment and performance security in an amount equal to 100% of the annual value of the O&M work to be performed each year during operations.

Payments to the Developer

In consideration for its work, the Developer will receive a combination of milestone payments during the construction period and monthly performance payments (availability payments) during the operating period. An illustrative example of when milestone payments and performance payments will be paid is provided in the figure below, with further detail following (actual timing of the milestone payments in the graphic below will depend on the Developer's schedule).



Milestone Payments: there are five milestone events, each defined by a specific scope of work, for which the Developer is entitled to compensation upon completion. Each Proposer will determine its own milestone schedule based on when they anticipate completing the relevant work pursuant to their construction schedule. *Schedule 5: Milestone Payments* includes a table that specifies the timing for when funding is available for the milestones. The milestone events for the Project are as set forth below. Note that the amounts to be paid for each milestone represent less than the estimated cost of the work to complete each milestone.

Event	Milestone Payment
Milestone 1 - Sand Creek Bridge to Chambers Road	$50,000,000
Milestone 2 - Dahlia Street to Sand Creek Bridge	$95,000,000
Milestone 3 - WB I-70 Brighton Boulevard to Dahlia Street	$52,000,000
Milestone 4 - EB I-70 Brighton Boulevard to Dahlia Street	$52,000,000
Milestone 5 - Substantial Completion	$70,000,000
TOTAL	**$319,000,000**

Performance Payments: Performance payments are monthly availability payments to the Developer. Performance payments will have two main components: 1) an operations, maintenance, and renewal portion (the "OMRP"), which will amount to 20% of the total performance payment, and 2) a capital payment that compensates the Developer for the debt and equity it raised during construction to fund the Project (the "CPP"), which will amount to 80% of the total performance payment. The OMRP will escalate at CPI per annum and the CPP will escalate at 2% per annum.

Toll revenues will be retained by HPTE and, together with annual payments to be made by the City and County of Denver pursuant to the Intergovernmental Agreement entered into effective September 14, 2015, will be available to contribute toward payment of the OMRP. Unlike on the US36 Managed Lanes Project, where the Concessionaire bears the toll revenue risk, HPTE and CDOT will be responsible for payment of the OMRP irrespective of toll revenue collections, in accordance with an Intra-agency Agreement to be entered into prior to execution of the PA.

Performance-based Payment Deductions: The Substantial Completion Milestone Payment and all performance payments will be subject to monetary deductions for the Developer's failure to meet: 1) quality or service requirements ("Noncompliance Events"), and 2) unexcused lane closures ("Closures"). In addition to monetary penalties, the Enterprises have a default right against the Developer for incurrence of these events above the levels established in the PA. The Enterprises also have a default right for "Persistent Breach" of the PA by the Developer for obligations that fall outside of Noncompliance Events and Closures.

Supervening Events

While the PA allocates cost, performance, and schedule risk to the Developer during both the construction and operating periods, there are certain risks that are not completely transferred to the Developer – either because they are out of the control of the Developer, uninsurable, or prohibitively expensive for the Developer to price. These risks are referred to as "Supervening Events" in the PA. Generally speaking, the basic risk allocation principles of the PA are as follows:

Compensation Events: Risks that are within the control of the Enterprises, or where it is a better value proposition for the public sector to take the risk, are retained by the Enterprises and the Developer is entitled to full compensation – e.g. schedule relief, performance relief, financing costs, and additional costs incurred by the Developer as a result of these events.

Delay Relief Events: Risks for which neither party has control but where a better value proposition arises from the Enterprises assuming some portion of the risk (and which are otherwise uninsurable) give rise to schedule relief, performance relief, and financing costs incurred by the Developer as a result of these events.

Relief Events: Risks for which neither party has control, for example force majeure events, but that are insurable give rise to schedule and performance relief.

Before the Developer is entitled to relief, it is required to bear certain risk sharing allowances. In the construction period, the Developer is subject to a $20,000 per event claim threshold ($10,000 during operations) for an event to be compensable. Further, the Developer must bear the first $500,000 of aggregate compensable claims during construction

($100,000 during operations) before it is entitled to compensation for Supervening Events where compensation is provided for (certain hazardous substances and utility related events are outside of this regime and are discussed separately below).

The chart below summarizes the Supervening Event treatment for some of the Project's key risks – please note this summary is not exhaustive.

Supervening Events[2]
Compensation Events (schedule relief, performance relief, financing costs, and additional costs)
Breach of the PA by the Enterprises Enterprises' failure to provide Developer with timely possession of ROW Parcel Provision by the Enterprises of possession of a ROW Parcel subject to unanticipated restrictions Physical damage, delay or disruption caused by installation, testing or maintenance of ETC or ITS Elements Physical damage, delay or disruption caused by Other Department Projects, or other Enterprise and/or CDOT projects/facilities Enterprise Release of Hazardous Substances (note: excludes releases into groundwater) Issuance of Safety Compliance Order Issuance of TRO, injunction or other interlocutory relief Discriminatory Change in Law Qualifying Change in Law Unexpected Geological Conditions Unexpected Historically Significant Remains Unexpected Endangered Species Unexcused Utility Owner Delays CCD breach of Denver IGA re. waiver of fees or quantum of fill dirt
Delay Relief Events (schedule relief, performance relief, and financing costs)
Unexcused Railroad Delay Unexpected Governmental Approval Delay Breach by CCD of Denver IGA resulting in reduced duration of street occupancy permit Breach by CCD of Denver IGA resulting in CCD unreasonably withholding or delaying any required permit
Relief Events (schedule relief and performance relief)
Force Majeure Event (i.e., war/conflict, terrorism/sabotage, construction, blockage/embargo, or labor dispute) Fire or explosion Geomagnetic storm Earthquake Riot or illegal civil commotion Change in Law (excl. Discriminatory Change in Law and Qualifying Change in Law) Third party release of hazardous substances during the construction period Accidental loss or damage to ROW, Additional ROW or Permit Areas Delay of or disruption caused to the Developer by a failure by the Cove Maintainer to perform its obligations Delay or disruption to the Work caused by operation or maintenance of Limited O&M Work Segments

Unexpected Utility Conditions

Unexpected Utility Condition Events are Supervening Events for utilities that were not identified or incorrectly shown in available utility information. For these events, the Developer and the Enterprises share equally in the first $5,000,000 of costs (financing costs and additional costs) that result from the event. The Enterprises compensate the Developer 100% for costs above $5,000,000.

[2] The treatment described in this table is a summary of PA and is not meant to be exhaustive. In certain instances, some of the events described are not subject to the sharing of schedule float with the Enterprises, not subject to the $20k per event claim threshold ($10k during operations), and not subject to the $500k aggregate claims threshold during construction ($100k during operations).

Hazardous Substances

For hazardous substances, the PA divides the Project's footprint in two categories of parcels: 1) parcels where the risk of contamination is higher, but for which significant diligence exists for the Developer to estimate the risk of contamination (these parcels are known as "Appendix B Parcels" and represent approximately 10% of the area of the Project's footprint); and 2) parcels where boring diligence has not revealed any contamination (these parcels are known as "Non-Appendix B Parcels" and represent approximately 90% of the area of the Project's footprint).

For Appendix B Parcels, the Developer must bear 100% of the first $25,000,000 of costs (financing costs and additional costs (additional costs are limited to a more narrow scope of items for the purpose of satisfying this risk sharing threshold)) associated with hazardous substances on these parcels. The Enterprises compensate the Developer 100% for costs (financing costs and additional costs) above $25,000,000.

For Non-Appendix B Parcels, the Developer must bear 100% of the first $6,000,000 of costs (financing costs and additional costs (additional costs are limited to a more narrow scope of items for the purpose of satisfying this risk sharing threshold)) associated with hazardous substances on these parcels. The Enterprises compensate the Developer 100% for costs (financing costs and additional costs (additional costs are limited to a more narrow scope of items in this scenario)) above $6,000,000.

Extended Events

In certain circumstances, when Supervening Events persist and delay the Project for an extended period of time (depending on the event, anywhere from 180 continuous days for a single event to 730 days in aggregate for multiple events), they become known as "Extended Events." Extended Events give rise to termination rights on behalf of both the Developer and the Enterprises. However, the Enterprises have the right to reject a termination notice from the Developer and to elect to continue the Project. In this circumstance, the Enterprises are required to compensate the Developer for electing to continue. The nature of this compensation is dependent upon the type of Supervening Event that became an Extended Event.

Change Procedure

Both the Enterprises and the Developer will have the right to propose changes. The protocol for negotiating and implementing a change is detailed in *Schedule 24 (Change Procedure),* which details how the components of compensation due pursuant to a change order or directive letter are to be calculated.

Insurance and Indemnity

The PA requires that the Developer maintain certain insurance policies (e.g. property, commercial general liability, workers' compensation, pollution liability, automobile liability, etc.) at minimum coverage limits and deductibles. The insurance requirements are bifurcated for the construction and operating periods. The PA also includes a risk-sharing regime during the operating period whereby significant increases or decreases in premiums due to market factors are shared by the Enterprises and the Developer.

Further, the Developer is required to indemnify the Enterprises, CDOT, and the State of Colorado against any claims that are a consequence of the Developer's actions. The Developer's indemnity obligations are excused for situations where claims arise due to the fault, fraud, willful misconduct, criminal conduct, recklessness, bad faith, negligence, violation of law, or violation of the Project Agreement on behalf of the Enterprises, CDOT, or the State of Colorado, as applicable. Neither the Enterprises, nor CDOT, have any obligation to indemnify the Developer.

Financing

Equity: The Developer will be required to maintain at least 10% equity (calculated based on long-term debt) in the Project through substantial completion. Equity transfers during the term of the Project will generally require the consent of the Enterprises, outside of a few limited circumstances where control of the Developer remains unaffected as a result of such transfer.

Debt: The Developer is permitted to grant security interests in (or assign its interest in) the PA, its subcontracts, payment and performance security, insurance policies, and the Supplemental Indenture from BE to lenders exclusively for purposes of securing debt for the Project.

Defaults

The PA includes "Developer Defaults" – events that occur on behalf of the Developer that make it noncompliant with the PA – and "Enterprise Defaults" – events that occur on behalf of the Enterprises that make them noncompliant with the PA. Most defaults have a "Cure Period" (i.e. a time period to rectify a default by the offending party) before it gives the other party a right to terminate the PA; however, some severe Developer Defaults do not. Illustrative examples of Developer Defaults and Enterprise Defaults are provided below (note this list has been abridged and is not exhaustive).

Developer Defaults	Enterprise Defaults
Insolvency Events (e.g. bankruptcy) of the Developer or its principal subcontractors (e.g. construction contractor or O&M contractor), or their guarantors Termination of a principal subcontract Failure to achieve substantial completion by the longstop date Noncompliance with project and operating standards Persistent breach Illegal acts (fraud, bribes, corruption, noncompliance with law) Debarment from contracting with state or federal agencies Unpermitted equity transfers Failure to maintain insurance, payment, or performance security Failure to comply with handback requirements Abandonment of the Project Failure to make a payment to the Enterprises	Failure of the Enterprises to maintain enterprise status Failure to make a payment to the Developer Condemnation of the Project Failure of the Enterprises to enforce certain rights of theirs under the IAA Prohibited assignment or transfer by the Enterprises of their interests in the PA Persistent breaches by the Enterprises that prohibit the developer from performing its obligations under the PA

Enterprise Assignment Rights

The Enterprises have assignment and transfer rights that allow either Enterprise to transfer its interest in the Project to the other Enterprise and/or CDOT or another Person, if certain conditions are met. Either Enterprise can transfer its interest in the Project to the other Enterprise and/or CDOT, if allowed by law and collectively the new counterparties have equivalent legal authority and financial capacity to carry out the Project as the original counterparties. The Enterprises can transfer to any other person with the consent of the Developer.

Termination

There are three main types of termination: 1) Termination for Convenience or Enterprise Default, 2) Termination for an Uninsurable Risk, Extended Event, or Court Ruling; and 3) Termination for Developer Default. Each of these types of termination has a specific formulation for calculating the compensation payable to the Developer, as detailed below.

Compensation on Termination		
Termination for Convenience or Enterprise Default	Termination for Uninsurable Risk, Extended Event, or Court Ruling	Termination for Developer Default
Proposer has the option to elect, at the time of bid, to receive 1) the fair market value of its projected equity distributions or 2) the present value of its projected equity distributions	All equity amounts contributed into the Developer less dividends and other distributions already paid to equity members; *plus* Debt and hedge costs outstanding;	Prior to substantial completion: The lesser of 1) the construction contract price, less the remaining cost to complete, less any milestone payments previously paid; and 2) debt

discounted at its bid equity IRR; *plus* Debt and hedge costs outstanding; *plus* Subcontractor breakage costs; *plus* Developer breakage costs; *minus* Account balances; *minus* Insurance proceeds available	*plus* Subcontractor breakage costs; *plus* Developer breakage costs; *minus* Account balances; *minus* Insurance proceeds available <u>Note, unlike Termination for Convenience or Enterprise Default, future equity distributions are not paid</u>	and hedge costs outstanding, *minus* account balances, *minus* insurance proceeds available After substantial completion: The lesser of 1) debt and hedge costs outstanding, *minus* maintenance rectification costs, *minus* account balances, *minus* insurance proceeds available; and 2) 80% of debt and hedge costs outstanding, *minus* account balances, *minus* insurance proceeds available

<u>Other General Provisions</u>

Project Information, Reliance, and Diligence
The PA provides for very limited circumstances where the Developer can claim reliance on information provided by the Procuring Authorities, as the Developer is required to conduct its own due diligence prior to bid.

Project License
The Developer is not granted an ownership interest in real property under the PA. Instead, the Developer is granted an exclusive "Project License" that allows it to design, construct, finance, operate and maintain the Project.

Subcontracting Terms and Requirements
The PA includes provisions that require the Developer to pass down certain mandatory subcontract terms to its subcontractors. The Procuring Authorities have included a number of mandatory terms in order to protect the rights and interests of smaller contractors, while attempting to provide an appropriate balance of flexibility in contract terms for larger contractors in order to maximize the benefits of the public-private partnership.

Safety Compliance, Suspension of Work and Public Sector Rights to Intervene
The Enterprises have the right to issue safety compliance orders, suspend the Project because of unsafe conditions, and/or step-in to the Project to remedy emergencies.

Restrictions on Revenue Generating Activities
The PA prohibits the Developer from engaging in any other revenue generating businesses on the site of the Project.

Financial Model
The Developer is required to submit its financial model under the PA so that its assumptions can be verified. Additionally, the financial model will be used for cost calculations in circumstances where the Developer is entitled to compensation under the PA (e.g. for a Supervening Event or change order). The model will also be used to verify financial costs (interest expense, debt balances, equity contributions/dividends, etc.).

Remedies and Liability
The Developer will be required to pursue losses incurred in connection with the Project from its insurers, and any compensation payable by the Enterprises to the Developer will be net of the Developer's insurance proceeds, so as to avoid double recovery.

Explanations of Schedules to the Project Agreement

Schedule	Description
Schedule 1: Financial Close	Outlines the mechanics for achieving Financial Close including conditions precedent for both the Enterprises and the Developer to satisfy, interest rate and credit spread risk sharing (Enterprises bear 100% of base rate risk and 85% of credit spread risk), Key Financial Events, and termination rights prior to Financial Close.
Schedule 2: Representations and Warranties	Includes representations and warranties given by the Developer and each Enterprise.
Schedule 3: Commencement and Completion Mechanics	Includes the conditions the Developer is required to meet to progress the Project into operations (e.g. NTP 1 conditions, NTP 2 conditions, Milestone Completion conditions, Substantial Completion conditions, and Final Acceptance conditions).
Schedule 4: Payments	Includes general provisions for payments to the Developer including submission of deductions reports and payment requests from the Developer.
Schedule 5: Milestone Payments	Sets forth the milestone payment amounts for each milestone and the schedule by which funds will be available for payment of milestone payments during the construction period.
Schedule 6: Performance Mechanism	Includes the formulation for calculating performance payments to the Developer, including the calculation of Noncompliance and Closure deductions/points.
Schedule 7: Compensation on Termination	Includes the formulations for calculating termination compensation for the various types of termination (Convenience, Uninsurable Risk, Developer Default, etc.).
Schedule 8: Project Administration	Deliverables the Developer is responsible for in managing and administering its work under the PA, including a Project Management Plan, schedules, progress reports, quality management plans, and safety plans.
Schedule 9: Submittals	Protocol for submittals, including review standards (e.g. acceptance vs. approval) and process for reviews of deliverables.
Schedule 10: Design and Construction Requirements	Includes design and construction requirements for the Project, including applicable standards and specifications and contract drawings. Detailed requirements are further specified for work elements, as follows: maintenance of traffic, ITS and tolling equipment, utilities, survey, roadway pavements, earthwork, drainage, railroads, signing, pavement markings, signalization and lighting, cover MEP system, structures, and landscaping and aesthetics.
Schedule 11: Operations and Maintenance Requirements	Operations and maintenance requirements and scope for the Developer, including the standards the Developer is required to comply with. The O&M scope includes snow and ice removal, incident response, cleaning, drainage, groundwater treatment, traffic signals and lighting, and fencing among other items.
Schedule 12: Handback Requirements	Includes calculation of handback requirements, schedule for handback process, and operation of handback reserve account.
Schedule 13: Required Insurances	Specifies the policy types, limits, and deductibles required to be placed by the Developer for both the construction and operations periods.
Schedule 14: Strategic Communications	Requirements for achieving strategic communication goals, including plans to develop two-way communication with the public about the Project.
Schedule 15: Federal and State Requirements	Includes Federal and State law requirements the Developer must comply with. Covers civil rights, Americans with Disabilities Act, FHWA Buy America requirement, small business and workforce development goals. Specifies monetary penalties to the Developer for failure to achieve these goals.
Schedule 16: Mandatory Terms	Specifies certain mandatory terms for contracts with subcontractors and financing documents.
Schedule 17: Environmental Requirements	Includes environmental management and environmental compliance requirements that the Developer is required to comply with, including responsibility for obtaining

	required environmental permits.
Schedule 18: Right-of-Way	Includes CDOT's schedule for making each right-of-way parcel available to the Developer.
Schedule 19: Forms of Direct Agreements	Forms of direct agreements for lenders and principal subcontractors to be entered into with the Enterprises that provide for step-in and substitution rights.
Schedule 20: Forms of Contractor Bond	Forms for payment and performance bonds required under the PA.
Schedule 21: Forms of Supervening Event Notices and Submissions	Forms of notices to be provided by the Developer as part of the Supervening Events regime.
Schedule 22: Forms of Legal Opinions	Forms of legal opinions for the Enterprises, CDOT, and the Developer.
Schedule 23: Form of Financial Model Escrow Agreement	Escrow agreement for depositing the Developer's financial model with the escrow agent.
Schedule 24: Change Procedure	Details the processes for Enterprise change orders, directive letters and Developer change orders. Includes formulation for how the components of compensation due pursuant to a change order or directive letter are to be calculated.
Schedule 25: Dispute Resolution Procedure	Details each action or step the Developer and Enterprises must take in the event of a dispute.
Schedule 26: Base Financial Model	Microsoft Excel attachment of the Developer's financial model.
Schedule 27: Key Personnel	Submission of Developer's key personnel filling the following positions: project manager, construction manager, design-build manager, design manager, O&M manager, project quality manager, independent design quality manager, construction process manager, independent quality control manager, environmental manager, utilities manager, and project communications manager.
Schedule 28: Proposal Extracts	Extracts from the Preferred Proposer's proposal for items like Alternative Technical Concepts.
Schedule 29: Reference Documents	Documents released to Proposers during the bid phase of the Project. This includes documents related to maintenance of traffic, ITS and tolling equipment, utilities (including utility relocation agreements), survey, roadway pavements, earthwork, drainage, railroads (including railroad agreements), signing, pavement markings, signalization, lighting, cover MEP system, structures, landscaping and aesthetics, operations and maintenance, and right-of-way.

Next Steps

Administrative and Technical Proposals are currently scheduled to be received from Proposers on May 18, 2017. Further addenda and revisions may still be issued to the Proposers as needed in the Procuring Authorities' discretion to accommodate further restructuring and/or in response to further comments received from Proposers following Final RFP. The Boards' approval of the Final RFP in the form presented is not intended to be binding, and the Final RFP remains subject to further modification following approval by the Boards (in accordance with the approving resolution). Staff will relay any substantive changes to the Boards prior to receipt of proposals. This memorandum is intended to be a summary for Board consideration only, and neither Proposers nor other third parties are entitled to rely on this memorandum, nor is this memorandum intended to constitute an addendum or other modification to the Final RFP.

Attachments

Instructions to Proposers and Annexes – PDF #1
Project Agreement (Main Body) – PDF #2
Schedules 1-9 and 11-29 to the Project Agreement – PDF #3
Schedule 10 (Technical Requirements) to the Project Agreement – PDF #4