

Resolution – HPTE #251

Approving the First Amendment to the Loan Agreement with the with the United States Department of Transportation (TIFIA) for the C-470 Express Lanes Project

WHEREAS, pursuant to Part 8 of Article 4 of Title 43, Colorado Revised Statutes, as amended (“FASTER”), and particularly Section 43-4-806, C.R.S., the General Assembly of the State of Colorado (the “State”) 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, HPTE, in partnership with CDOT, is currently undertaking the first phase of the C-470 Express Lanes Project which generally consists of the completion of one to two new tolled express lanes in each direction on State Highway 470 (“C-470”) from approximately Wadsworth Boulevard to the C-470/Interstate 25 interchange (the “Project”); and

WHEREAS, HPTE is authorized by FASTER to (a) to impose user fees, the proceeds of which, together with other revenues received by HPTE, are required by FASTER to be deposited into the Transportation Enterprise Special Fund; (b) to issue bonds and incur other secured obligations payable from the Transportation Enterprise Special Fund for purposes of financing a portion of the costs of the Project; (c) to pledge all or a portion of the Transportation Enterprise Special Fund for the payment of bonds and other secured obligations; and (d) to enter into contracts or agreements that are necessary or incidental to the exercise of its powers and performance of its duties; and

WHEREAS, on February 15, 2017, by Resolution #223, the HPTE Board of Directors (the “Board”), approved the form of Loan Agreement (the “TIFIA Loan Agreement”) with the United States Department of Transportation, acting by and through the Build America Bureau (“TIFIA”) and authorized HPTE to borrow a principal amount not to exceed \$108,000,000 (the “TIFIA Loan”); and

WHEREAS, on June 7, 2017, HPTE executed the TIFIA Loan Agreement and closed on the TIFIA Loan in the principal amount of \$106.95 million, comprising a portion of HPTE’s overall financing contributions to the Project; and

WHEREAS, the TIFIA Loan Agreement contains certain reporting requirements including, *inter alia*, the requirement to provide TIFIA, on a quarterly basis, with HPTE’s unaudited income statement and balance sheet, and to provide TIFIA with HPTE’s audited income statement and balance sheet of the Borrower within 120 days of the end of each fiscal year; and

WHEREAS, HPTE now desires, and TIFIA has agreed, to modify the frequency and timeframes required for such financial reporting.

NOW THEREFORE BE IT RESOLVED, the Board hereby approves the First Amendment to the TIFIA Loan Agreement with the United States Department of Transportation for the C-470 Express Lanes Project and authorizes the HPTE Director or his designee to execute the Amendment on behalf of HPTE, with such revisions or modifications, not inconsistent with this Resolution, and at such time, as the HPTE Director may determine to be necessary or appropriate.

Signed as of November 15, 2017

Kari V. Grant
Secretary, HPTE Board



Date: November 15, 2017
To: High Performance Transportation Enterprise Board
From: Nicholas Farber, HPTE Operations Manager; Brent Butzin, HPTE General Counsel
Subject: Resolution; First Amendment to the C-470 TIFIA Loan Agreement

Purpose

The purpose of this memo is to summarize the First Amendment to the C470 TIFIA Loan Agreement (TLA) to recommend adoption of the Resolution and approval of the form of this document.

Action

The Board is asked to adopt a resolution that supports the staff recommendation to approve the amendment to the C470 TLA.

Background

In June of this year, HPTE successfully closed on an approximately \$107 million TIFIA loan for the C470 Express Lane Project. During negotiations with the USDOT Build America Bureau (BAB) on the TLA, HPTE stated that we could not comply with their standard provisions of providing quarterly unaudited financial statements 60 days after the end of each quarter, and audited financial statements 120 days after the end of our fiscal year.

HPTE cannot do this because:

- Quarterly unaudited financial statements: the state does not produce quarterly financial statements, staff workload, and the Office of the State Auditor does not post financial transaction until past the current deadline in the TLA.
- Audited financial statements: state statute prohibits the release of audited financial statements until approved by General Assembly's Legislative Audit Committee. This usually takes place in February, which is past the requirement in the TLA.

The BAB agreed to our requested changes, however, they never made it into the final document. HPTE noticed this earlier in the fall and have been working with them since then to amend the TLA.

Analysis

The First Amendment to the C470 TLA amends the financial statements reporting requirement to: unaudited financial statements 90 days after the end of each *semi-annual* period, and the audited financial statement 180 days after the end of our fiscal year. These changes will allow the HPTE to fully comply with the financial statements reporting requirements.

Options/Decision Matrix

- 1) **Staff Recommendation:** Approve the First Amendment to the C470 TLA.
- 2) Review but do not approve the document. Provide instructions on changes or revisions.

Attachments

Attachment A: First Amendment to C470 TLA.

November 8, 2017

FIRST AMENDMENT TO TIFIA LOAN AGREEMENT

This **FIRST AMENDMENT TO TIFIA LOAN AGREEMENT** (this “**Amendment**”), dated as of [●], 2017, is entered into by and between **COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE**, a government-owned business within the Colorado Department of Transportation created by the Funding Advancements for Surface Transportation and Economic Recovery Act of 2009, title 43, article 4, part 8, Colorado Revised Statutes, as amended (“**FASTER**”), for the purpose of financing Surface Transportation Infrastructure Projects, with an address of 4201 E. Arkansas Avenue, Denver, Colorado 80222 (the “**Borrower**”), and the **UNITED STATES DEPARTMENT OF TRANSPORTATION**, an agency of the United States of America, acting by and through the Executive Director of the Build America Bureau (the “**Executive Director**”), with an address of 1200 New Jersey Avenue, S.E., Washington, D.C. 20590 (the “**TIFIA Lender**”).

RECITALS

WHEREAS, the Borrower and the TIFIA Lender have entered into that certain TIFIA Loan Agreement, dated as of June 7, 2017 (the “**Original Loan Agreement**” and as amended and supplemented by this Amendment, the “**TIFIA Loan Agreement**”); and

WHEREAS, the Borrower and the TIFIA Lender desire to amend the Original Loan Agreement to modify certain provisions relating to the frequency of the Borrower’s delivery of its unaudited financial statements.

NOW, THEREFORE, the premises being as stated above, and for good and valuable consideration, the receipt and sufficiency of which are acknowledged to be adequate, and intending to be legally bound hereby, it is hereby mutually agreed by and between the Borrower and the TIFIA Lender as follows:

AGREEMENT

Section 1. Definitions. Capitalized terms used, and not otherwise defined, in this Amendment shall have the meanings assigned to such terms in the Original Loan Agreement.

Section 2. Authority for Amendment. This Amendment amends and supplements the Original Loan Agreement and is entered into in accordance with Section [30] of the Original Loan Agreement.

Section 3. Amendments to the Original Loan Agreement.

(a) Section 22(c)(i)(A) (*Financial Statements*) is hereby amended and restated as follows:

“as soon as available, but no later than ninety (90) days after the end of each semi-annual period of each Borrower Fiscal Year, an unaudited income statement and balance sheet of the Borrower as of the end of such period and the related unaudited statements of operations

and of cash flow of the Borrower for such period and for the portion of the fiscal year through the end of such period, setting forth in each case in comparative form the figures for the previous period, certified by the chief executive officer or chief financial officer of the Borrower or any Borrower's Authorized Representative fairly stating in all material respects the financial condition of the Borrower as at the end of such period and the results of its operations and its cash flows for such period (subject to normal year-end audit adjustments); and"; and

- (b) Section 22(c)(i)(B) (*Financial Statements*) is hereby amended and restated as follows:

"as soon as available, but no later than one hundred eighty (180) days after the end of each Borrower Fiscal Year, a copy of the audited income statement and balance sheet of the Borrower as of the end of such fiscal year and the related audited statements of operations and of cash flow of the Borrower for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, certified without a "going concern" or like qualification or exception, or qualification as to the scope of the audit, by an independent public accounting firm selected by the Borrower and which is reasonably acceptable to the TIFIA Lender."; and

- (c) Section 22(d) (*Officer's Certificate*) is hereby amended and restated as follows:

"Officer's Certificate. The Borrower shall furnish to the TIFIA Lender, together with each delivery of annual audited or interim unaudited financial statements of the Borrower pursuant to Section 22(c) (Financial Statements), a certificate signed by the chief executive officer or chief financial officer of the Borrower or any Borrower's Authorized Representative, stating whether or not, to the Borrower's knowledge, during the semi-annual or annual period (as the case may be) covered by such financial statements, there occurred any Event of Default or event that, with the giving of notice or the passage of time or both, would become an Event of Default, and, if any such Event of Default or other event shall have occurred during such period, the nature of such Event of Default or other event and the actions that the Borrower has taken or intends to take in respect thereof."

Section 4. Representations and Warranties of the Borrower. The Borrower hereby represents and warrants that, as of the date of this Amendment, the Borrower has full legal right, power and authority to execute and deliver this Amendment. This Amendment has been duly authorized, executed and delivered by the Borrower, and the officer of the Borrower executing this Amendment is fully authorized to do so. This Amendment constitutes, and the TIFIA Loan Agreement will constitute, the legal, valid and binding obligation of the Borrower enforceable in accordance with its terms, except as such enforceability (i) may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the rights of creditors generally and (ii) is subject to general principles of equity (regardless of whether enforceability is considered in equity or at law).

Section 5. Miscellaneous.

- (a) *Integration.* This Amendment and all its terms, conditions and provisions shall be deemed to be part of the Original Loan Agreement. Except as specifically amended and

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supplemented by this Amendment, all other terms, conditions, and provisions of the Original Loan Agreement (i) are unchanged, (ii) shall remain in full force and effect and are hereby ratified and confirmed by each party hereto, as amended hereby and (iii) shall apply to this Amendment, *mutatis mutandis*, as if this Amendment was originally part of the Original Loan Agreement. No provision of this Amendment shall be deemed to prejudice any rights or remedies which the TIFIA Lender may have now or in the future under or in connection with the TIFIA Loan Agreement or any other TIFIA Loan Document. In the event of any conflict or inconsistency between this Amendment and the Original Loan Agreement, the terms and provisions of this Amendment shall govern and prevail to the extent necessary to resolve such conflict or inconsistency. The Original Loan Agreement, as modified by this Amendment, constitutes the entire contract between the parties relating to the subject matter hereof and supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter hereof.

- (b) *Governing Law.* This Amendment shall be governed by the federal laws of the United States of America if and to the extent such federal laws are applicable and the internal laws of the State, if and to the extent such federal laws are not applicable.
- (c) *Severability.* In case any provision in or obligation under this Amendment shall be invalid, illegal, or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.
- (d) *Counterparts.* This Amendment may be executed in any number of counterparts and by the different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed an original, but all such counterparts together shall constitute one and the same instrument; signature pages may be detached from multiple separate counterparts and attached to a single counterpart so that all signature pages are physically attached to the same document. Electronic delivery of an executed counterpart of a signature page of this Amendment shall be effective as delivery of an original executed counterpart of this Amendment.
- (e) *Effectiveness.* This Amendment shall be effective as of the date first written above.

[Signature pages follow]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered by their respective officers that have been duly authorized to do so as of the date of their respective signatures below.

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____

Name: David I. Spector

Title: Director

Date:

APPROVED:

CYNTHIA H. COFFMAN
Attorney General

By: _____

Name: Brent E. Butzin

Title: Assistant Attorney General

*[Signature page to the First Amendment to the TIFIA Loan Agreement
for the C-470 Express Lanes Project]*

UNITED STATES DEPARTMENT OF
TRANSPORTATION,
acting by and through the Executive Director of the Build
America Bureau

By: _____

Name: Duane Callender

Title: Director, Credit Office, Build America Bureau

Date:

*[Signature page to the First Amendment to the TIFIA Loan Agreement
for the C-470 Express Lanes Project]*

