

Memorandum of Settlement

This **Memorandum of Settlement** (this "Memorandum") is made and entered into as of the date it is approved and signed by the Colorado State Controller or its designee below among:

- (1) Colorado High Performance Transportation Enterprise ("HPTE"), a government-owned business within and a division of the Colorado Department of Transportation ("CDOT");
- (2) Colorado Bridge Enterprise, a government-owned business within CDOT ("BE" and, together with HPTE, each individually an "Enterprise" and, together, the "Enterprises");
- (3) Kiewit Meridiam Partners LLC, a limited liability company formed under the laws of the State of Delaware ("Developer"); and
- (4) Kiewit Infrastructure Co., a corporation formed under the laws of the State of Delaware ("Construction Contractor").

The Enterprises, Developer and Construction Contractor are hereinafter referred to collectively as the "Parties", and "Party" means either the Enterprises (taken together), Developer or Construction Contractor.

RECITALS

Whereas:

- (A) The Enterprises and Developer entered into the Project Agreement for the Central 70 Project, dated as of November 21, 2017 (as amended from time to time in accordance with the terms thereof, including by the First Amendment to the Project Agreement, dated December 21, 2017, the Second Amendment to the Project Agreement, dated May 9, 2019, and the Third Amendment to the Project Agreement, dated December 11, 2019, the "Project Agreement"), in connection with the design, construction, financing, operation and maintenance of a portion of the I-70 East corridor in Greater Denver, Colorado as more fully described in the Project Agreement.
- (B) Developer and Construction Contractor entered into the Design and Construction Contract for the Central 70 Project, dated as of November 21, 2017 (as amended from time to time in accordance with the terms thereof, including by the First Amendment to the Design and Construction Contract, dated December 21, 2017, the Second Amendment to the Design and Construction Contract, dated May 9, 2019, and the Third Amendment to the Design and Construction Contract, dated December 11, 2019, the "Construction Contract"), in connection with the design, construction, and operation and maintenance during construction of a portion of the I-70 East corridor in Greater Denver, Colorado as more fully described in the Construction Contract.
- (C) During the Construction Period, Construction Contractor provided notice to Developer that certain Supervening Events under the Construction Contract (the "CC SE Notices") occurred.
- (D) Following the receipt of the CC SE Notices, Developer provided notice to the Enterprises that certain Supervening Events under the Project Agreement (the "PA SE Notices") occurred.
- (E) Following the receipt of the PA SE Notices, the Enterprises provided responses to Developer in accordance with the Project Agreement (the "PA SE Notice Responses").
- (F) Following receipt of the PA SE Notices and in accordance with the PA SE Notice Responses, and in regards to any claimed Supervening Event, the Enterprises make no admission regarding the existence or validity of any Supervening Event described in the PA SE Notices, and the Enterprises and Developer have referred Developer's claims regarding the existence and validity of the

Supervening Events described in the PA SE Notices for resolution pursuant to the Dispute Resolution Procedure (the "Subject Event Dispute Resolution Proceedings").

- (G) The Enterprises and the Developer have previously agreed to suspend the Subject Event Dispute Resolution Proceedings pending the achievement of the Settlement Date (as defined below).
- (H) Pursuant to Section 15.3 of the Project Agreement, the Enterprises and Developer have engaged in discussions in an effort to determine any extension of time, relief and compensation to which Developer is entitled in respect of PA SE Notices.
- (I) Pursuant to Section 15.3 of Part 2 of the Construction Contract, Developer and Construction Contractor have engaged in discussions in an effort to determine any extension of time, relief and compensation to which Construction Contractor is entitled in respect of the CC SE Notices.
- (J) Developer intends to raise additional funds to be used for, among other things, the payment of Project costs by undertaking the Debt Restructuring (as defined below).
- (K) In accordance with Section 15.3.2 of the Project Agreement, the Enterprises and Developer have agreed to resolve such PA SE Notices and wish to set forth the details of such agreement in this Memorandum.
- (L) In accordance with Section 15.3.2 of Part 2 of the Construction Contract, Developer and Construction Contractor have agreed to resolve such CC SE Notices and wish to set forth the details of such agreement in this Memorandum.

Now, therefore, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties undertake and agree as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1. Capitalized terms used but not defined herein shall have the respective meanings ascribed to such terms in the Project Agreement. As used herein, the following terms shall have the following meaning:
 - 1.1.1. "A&R IAA" means that certain Amended and Restated Central 70 Project Intra-Agency Agreement substantially in the form attached hereto as Exhibit D.
 - 1.1.2. "BE" has the meaning set forth in the preamble.
 - 1.1.3. "CC Amendment" has the meaning set forth in Section 4.3.
 - 1.1.4. "CC Incentive Payment" has the meaning set forth in Section 4.8.2.1.
 - 1.1.5. "CC SE Notices" has the meaning set forth in the recitals.
 - 1.1.6. "CDOT" has the meaning set forth in the preamble.
 - 1.1.7. "Construction Contract" has the meaning set forth in the recitals.
 - 1.1.8. "Construction Contractor" has the meaning set forth in the preamble.
 - 1.1.9. "Debt Restructuring" means (a) the Refinancing of the TIFIA Loan, (b) the incurrence by Developer of additional Project Debt and (c) an increase in the Committed Investments to Developer, which, taken together result in a Refinancing Amount of (i) not less than the

Refinancing Minimum, or (ii) such lesser amount as the Parties may agree in accordance with Section 6.1.2,.

- 1.1.10. "Debt Restructuring Model" has the meaning set forth in Section 2.1.2.
- 1.1.11. "Developer" has the meaning set forth in the preamble.
- 1.1.12. "Enterprises" has the meaning set forth in the preamble.
- 1.1.13. "Event 1" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on December 14, 2018 (SE Tracking No. 8.0) and on June 13, 2019 (SE Tracking No. 24.0), in each case, as further supplemented, and (b) the notice provided by Developer to the Enterprises on December 17, 2018 (SE Tracking No. 8.0) and on June 14, 2019 (SE Tracking No. 24.0), in each case, as further supplemented.
- 1.1.14. "Event 2" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on February 22, 2019 (SE Tracking No. 10.0) and on June 14, 2019 (SE Tracking No. 25.0), in each case, as further supplemented, and (b) the notice provided by Developer to the Enterprises on February 22, 2019 (SE Tracking No. 10.0) and on June 19, 2019 (SE Tracking No. 25.0), in each case, as further supplemented.
- 1.1.15. "Event 3" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on February 22, 2019 (SE Tracking No. 11.0) and on June 20, 2019 (SE Tracking No. 26.0), in each case, as further supplemented, and (b) the notice provided by Developer to the Enterprises on February 22, 2019 (SE Tracking No. 11.0) and on June 28, 2019 (SE Tracking No. 26.0), in each case, as further supplemented.
- 1.1.16. "Event 4" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on February 22, 2019 (SE Tracking No. 14.0) and on June 20, 2019 (SE Tracking No. 29.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on February 22, 2019 (SE Tracking No. 14.0) and on June 28, 2019 (SE Tracking No. 29.0), in each case, as further supplemented.
- 1.1.17. "Event 5" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on February 22, 2019 (SE Tracking No. 15.0) and on June 25, 2019 (SE Tracking No. 30.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on February 22, 2019 (SE Tracking No. 15.0) and on June 28, 2019 (SE Tracking No. 30.0), in each case, as further supplemented.
- 1.1.18. "Event 6" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on March 28, 2019 (SE Tracking No. 17.0) and on March 28, 2019 (SE Tracking No. 18.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on March 28, 2019 (SE Tracking No. 17.0) and on March 28, 2019 (SE Tracking No. 18.0), in each case, as further supplemented.
- 1.1.19. "Event 7" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on April 30, 2019 (SE Tracking No. 21.0) and on April 30, 2019 (SE Tracking No. 22.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on

May 2, 2019 (SE Tracking No. 21.0) and on May 2, 2019 (SE Tracking No. 22.0), in each case, as further supplemented.

- 1.1.20. "Event 8" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on August 19, 2019 (SE Tracking No. 31.0) and on August 19, 2019 (SE Tracking No. 32.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on August 22, 2019 (SE Tracking No. 31.0) and on August 22, 2019 (SE Tracking No. 32.0), in each case, as further supplemented.
- 1.1.21. "Event 9" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on August 20, 2019 (SE Tracking No. 33.0) and on August 20, 2019 (SE Tracking No. 34.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on August 22, 2019 (SE Tracking No. 33.0) and on August 22, 2019 (SE Tracking No. 34.0), in each case, as further supplemented.
- 1.1.22. "Event 10" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on December 20, 2019 (SE Tracking No. 35.0) and on December 20, 2019 (SE Tracking No. 36.0), in each case, as further supplemented and (b) the notice provided by Developer to the Enterprises on December 26, 2019 (SE Tracking No. 35.0) and on December 26, 2019 (SE Tracking No. 36.0), in each case, as further supplemented.
- 1.1.23. "Event 11" means the events and circumstances claimed as Supervening Event(s) and described in (a) the notice provided to Developer by Construction Contractor on April 10, 2020 (SE Tracking No. 38.0), as further supplemented and (b) the notice provided by Developer to the Enterprises on April 14, 2020 (SE Tracking No. 38.0), as further supplemented.
- 1.1.24. "First Memorandum of Settlement" means that certain Memorandum of Settlement, entered into as of May 9, 2019, among the Enterprises, Developer and Construction Contractor, which provided for the resolution of certain other events and circumstances claimed as Supervening Events by notices from Construction Contractor to Developer and Developer to the Enterprises.
- 1.1.25. "HPTE" has the meaning set forth in the preamble.
- 1.1.26. "Memorandum" has the meaning set forth in the preamble.
- 1.1.27. "O&M Amendment" has the meaning set forth in Section 4.4.
- 1.1.28. "O&M Contractor" means Roy Jorgensen Associates, Inc.
- 1.1.29. "PA Amendment" has the meaning set forth in Section 4.2.
- 1.1.30. "PA SE Notices" has the meaning set forth in the recitals.
- 1.1.31. "Project Agreement" has the meaning set forth in the recitals.
- 1.1.32. "Refinancing Amount" means the amount of additional funding (net of any expenses of Developer) actually obtained by Developer as a result of the Debt Restructuring.
- 1.1.33. "Refinancing Minimum" means \$37,500,000.

- 1.1.34. "SC Incentive Date" means January 1, 2023, as such date may be extended from time to time in accordance with Section 7.1.
- 1.1.35. "SC Incentive Payment" has the meaning set forth in Section 4.8.1.1.
- 1.1.36. "Second CC Settlement Payment" has the meaning set forth in Section 4.8.2.1.
- 1.1.37. "Second PA Settlement Payment" has the meaning set forth in Section 4.8.1.1.
- 1.1.38. "Settlement Date" has the meaning set forth in Section 3.1.
- 1.1.39. "Subject Event Dispute Resolution Proceedings" has the meaning set forth in the recitals.
- 1.1.40. "Subject Events" means, collectively, Event 1, Event 2, Event 3, Event 4, Event 5, Event 6, Event 7, Event 8, Event 9, Event 10, and Event 11.
- 1.1.41. "Term Sheet Effective Date" means October 21, 2020.
- 1.1.42. "TIFIA Refinance Event" means:

- (a) Developer notifies the Enterprises that no satisfactory resolution is likely to be reached (as determined in its reasonable discretion) to address the limitation set forth in Section 17(j) of the TIFIA Loan Agreement and any associated required closing mechanics (including, but not limited to, providing bridge financing) that would enable financial close of the Debt Restructuring;
- (b) Developer notifies the Enterprises that no satisfactory resolution is likely to be reached as to, or Build America Bureau or the TIFIA Lender, as applicable, decides not to, or is unable to:
 - (i) provide credit assistance to Developer in an amount at least equal to 33% of "Eligible Project Costs" (as defined in 23 U.S. Code § 601(a)(2)) for the Project; or
 - (ii) provide credit assistance on terms materially consistent with the terms of the TIFIA Loan Agreement, or
- (c) Developer determines, following delivery of the notice contemplated by Section 6.1.1 and the conference contemplated by Section 6.1.2, that the Debt Restructuring is not reasonably anticipated to yield a Refinance Amount of at least the Refinancing Minimum,

provided that such events shall not be deemed to be a TIFIA Refinance Event if Developer has failed to use Reasonable Efforts to achieve financial close of the Debt Restructuring (which Reasonable Efforts shall include negotiating in good faith mutually agreeable terms and conditions with the Build America Bureau or the TIFIA Lender, as applicable, including by making commercially reasonable concessions in connection with concessions by the Build America Bureau or the TIFIA Lender, as applicable, and furnishing all required information and credit ratings in a timely manner); or if such TIFIA Refinance Event arises as a result of any breach of Law, Governmental Approval or this Memorandum, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by Developer.

- 1.2. Sections 2 (excluding only Section 2.1.3.a) and 42.2 of the Project Agreement and Sections 2 (excluding only Section 2.1.3.a) and 42.2 of Part 2 of the Construction Contract are incorporated by reference as if set forth herein.

2. COOPERATION WITH DEBT RESTRUCTURING

- 2.1. As part of the Debt Restructuring process, Developer shall, among other things:
 - 2.1.1. maintain the Key Ratios and other key commercial terms from the Financing Documents in effect on the date hereof and any other structural requirements of the TIFIA Lender and the Rating Agencies, subject to, in all cases, preservation of the Base MPP and Equity IRR, neither of which shall be increased as a result of the Debt Restructuring;
 - 2.1.2. prepare an updated Financial Model (the "Debt Restructuring Model") for review and comment by the Enterprises prior to release of the Debt Restructuring Model to any Lender or Rating Agency;
 - 2.1.3. provide updates to the Debt Restructuring Model to reflect material changes, if any, required over the course of the Debt Restructuring, for review and comment by the Enterprises prior to release of such updated Debt Restructuring Model to any Lender or Rating Agency;
 - 2.1.4. provide a final Debt Restructuring Model if there are material changes, as required over the course of the Debt Restructuring accompanied by a financial model audit (upon which the Enterprises may rely) from an independent model auditor, which final Debt Restructuring Model shall be incorporated as Schedule 26 to the Project Agreement upon financial close of the Debt Restructuring;
 - 2.1.5. communicate regularly with the Enterprises on the status of the Debt Restructuring;
 - 2.1.6. provide the Enterprises opportunities to review significant documents, including without limitation, the TIFIA Loan application, and the Financing Documents, in each case, to be entered into in connection with the Debt Restructuring; and
 - 2.1.7. provide the Enterprises with final (or near-final) Financing Documents with sufficient time to secure required Enterprise approvals; as applicable.
- 2.2. Each of the Enterprises and Construction Contractor shall cooperate with Developer in connection with the Debt Restructuring, including, without limitation, providing such information, certificates and legal opinions as may reasonably be requested or required by Developer in connection with the Debt Restructuring. Without limiting the foregoing, the Parties shall use commercially reasonable efforts to support the timelines and actions set forth in Attachment 1 hereto, including, but not limited to, Lender and Rating Agency approvals.
- 2.3. The Enterprises and Developer acknowledge and agree that Sections 27.2, 27.3 and 27.4 (other than Section 27.4.1) of the Project Agreement apply to the Debt Restructuring.
- 2.4. The Parties agree that the Enterprises shall not be entitled to any portion of the Refinancing Amount. The Enterprises hereby waive any provision of the Project Agreement, including Section 29.3 thereof, that would require Developer to pay any Refinancing Gain in respect of the Debt Restructuring. The Enterprises and Developer agree that Section 29 of the Project Agreement shall not apply to the Debt Restructuring and the Enterprises hereby waive the applicability of any provisions of Section 29 of the Project Agreement to the Debt Restructuring.
- 2.5. The Parties shall participate in executive level check-ins every two weeks (or more frequently, as may be mutually agreed) until the Debt Restructuring is complete or this Memorandum is terminated in accordance with its terms. During such executive check-ins, the Parties will agree upon action items, responsibility and accountability.

- 2.6. The Enterprises shall cause the amendment of (1) the transportation improvement program adopted by the Denver Regional Council of Governments, (2) the State transportation plan and (3) the State transportation improvement program approved by United States Department of Transportation or its designated agency, in each case, to the extent required by 23 U.S.C. §§ 134 and 135 and 23 U.S.C. § 602(a)(3), as applicable, and the financial plan for each such program or plan shall reflect the increase in the amount of federal funds to be used for the Project as sources of funding for the Project after giving effect to the Debt Restructuring. Each of Developer and Construction Contractor shall cooperate with the Enterprises in connection with such amendments, including, without limitation, providing such information reasonably requested or required by the Enterprises in connection therewith.
- 2.7. The Enterprises shall cooperate with Developer and provide reasonable assistance to Developer in connection with the approval by the Build America Bureau, the TIFIA Lender or the FHWA Division Office (as defined in the TIFIA Loan Agreement), as applicable, of an increase in total prior and anticipated "Eligible Project Costs" (as defined in 23 U.S. Code § 601(a)(2)) for the Project. [The Enterprises acknowledge that Developer submitted information to support an increase in "Eligible Project Costs" (as defined in 23 U.S. Code § 601(a)(2)) for the Project that includes \$[114,525,830] in connection with the Subject Events.]¹

3. ESTABLISHMENT OF SETTLEMENT DATE

- 3.1. **Settlement Date.** The "Settlement Date" shall be the date on which all of the following conditions precedent have been satisfied:
 - 3.1.1. The Enterprises and Developer shall have duly executed and delivered the PA Amendment.
 - 3.1.2. Developer and Construction Contractor shall have duly executed and delivered the CC Amendment.
 - 3.1.3. Developer and O&M Contractor shall have duly executed and delivered the O&M Amendment.
 - 3.1.4. The Enterprises and CDOT shall have duly executed and delivered the A&R IAA.
 - 3.1.5. The Enterprises shall have caused the amendment of (1) the transportation improvement program adopted by the Denver Regional Council of Governments, (2) the State transportation plan and (3) the State transportation improvement program approved by United States Department of Transportation or its designated agency, in each case, as contemplated by Section 2.6 hereof.
 - 3.1.6. The Enterprises and Developer shall have duly executed and delivered any amendments to the Lenders Direct Agreement necessary in connection with the Debt Restructuring.
 - 3.1.7. Construction Contractor and Developer shall have duly executed and delivered any amendments to the Lenders' CC Direct Agreement (as defined in the Construction Contract) necessary in connection with the Debt Restructuring.
 - 3.1.8. Developer shall have achieved, or simultaneously with the Settlement Date will achieve, financial close of the Debt Restructuring in accordance with this Memorandum.
 - 3.1.9. The Lenders shall have consented to (i) the execution and delivery of the PA Amendment, the CC Amendment, the O&M Amendment, the A&R IAA and any amendments to the

¹ Discussions with the FHWA Division Office are ongoing.

Financing Documents required in connection with the Debt Restructuring, and (ii) the incurrence of additional Project Debt to refinance the TIFIA Loan, in each case, as and to the extent required by the Financing Documents.

3.1.10. O&M Contractor shall have consented to the execution and delivery of the PA Amendment.

3.1.11. The Colorado State Controller or its designee shall have duly executed and delivered the PA Amendment and this Memorandum.

4. TERMS OF SETTLEMENT

4.1. **Releases.** On the Settlement Date, Construction Contractor and Developer shall provide the releases set forth in Section 5 with respect to the Subject Events.

4.2. **Amendment to Project Agreement.** The Enterprises and Developer shall enter into the Fourth Amendment to the Project Agreement in the form attached hereto as Exhibit A (the "PA Amendment").

4.3. **Amendment to Construction Contract.** Developer and Construction Contractor shall enter into the Fourth Amendment to the Construction Contract in the form attached hereto as Exhibit B (the "CC Amendment").

4.4. **Amendment to Maintenance Contract.** Developer and O&M Contractor shall enter into the Second Amendment to the Maintenance Contract in the form attached hereto as Exhibit C (the "O&M Amendment").

4.5. Consents.

4.5.1. Developer hereby requests Construction Contractor to consent to the PA Amendment and pursuant to Section 8.1.5 of Part 2 of the Construction Contract, Construction Contractor hereby consents to the execution and delivery of the PA Amendment and hereby waives any prior notice required by the Construction Contract.

4.5.2. Developer hereby requests the Enterprises to consent to the CC Amendment and pursuant to Section 17.1.3 of the Project Agreement the Enterprises hereby consent to the execution and delivery of the CC Amendment and hereby waive any prior notice required by the Project Agreement. The Enterprises acknowledge and agree that this Memorandum and Exhibit B shall serve as notice of the CC Amendment.

4.5.3. Developer hereby requests the Enterprises to consent to the O&M Amendment and pursuant to Section 17.1.3 of the Project Agreement the Enterprises hereby consent to the execution and delivery of the O&M Amendment and hereby waive any prior notice required by the Project Agreement. The Enterprises acknowledge and agree that this Memorandum and Exhibit C shall serve as notice of the O&M Amendment.

4.5.4. Subject to the satisfaction of the conditions precedent set forth in Section 3, the Enterprises hereby request Developer to consent to the A&R IAA and pursuant to Section 11.2.3 of the Project Agreement the Developer hereby consents to the execution and delivery of the A&R IAA and hereby waives any prior notice required by the Project Agreement. Developer hereby acknowledges and agrees that this Memorandum and Exhibit D shall serve as notice of the A&R IAA.

- 4.6. **Amendments to Financing Documents; Additional Financing Documents; Increased Termination Liabilities.**² On or prior to [●], 2021³, the Enterprises shall deliver to Developer, in form and substance reasonably satisfactory to Developer: (a) a written consent to (i) the refinancing of the TIFIA Loan, (ii) the incurrence of additional Project Debt, (iii) an increase in the Committed Investments to Developer, (iv) the execution and delivery of any additional Financing Document in connection with the Debt Restructuring, and (v) any amendments to the Financing Documents necessary in connection with the Debt Restructuring; and (b) a waiver of the requirements of Section 33.3.a of the Project Agreement with respect to the Debt Restructuring and, in accordance with Section 33.3.b.iii of the Project Agreement, a written consent to a potential increase in the Enterprises' termination liabilities to Developer as a result of the Debt Restructuring.
- 4.7. **Financial Model.** The Enterprises and Developer agree that the Financial Model delivered in digital format and Approved by the Enterprises in connection with financial close of the Debt Restructuring in accordance with Section 28.6 of the Project Agreement shall be the Financial Model for the purposes of the Project Agreement until further amendment pursuant to Section 28 or 29 of the Project Agreement.
- 4.8. **Settlement Payments.**
- 4.8.1. Subject to the satisfaction of the conditions precedent set forth in Section 3:
- 4.8.1.1 Upon Substantial Completion, the Enterprises shall pay to Developer an amount equal to \$12,500,000 (the "Second PA Settlement Payment"). In addition, if the Construction Work required to achieve Substantial Completion is completed by the SC Incentive Date, the Enterprises shall pay to Developer an additional amount equal to \$2,500,000 (the "SC Incentive Payment"). Each of the Second PA Settlement Payment and the SC Incentive Payment (if applicable) shall be reflected, but separately accounted for, in the Payment Request submitted by the Developer in respect of the first Payment Month following the Substantial Completion Date in accordance with Section 2 of Part 2 of Schedule 4 (*Payments*) of the Project Agreement.
- 4.8.1.2 Neither the Second PA Settlement Payment, the SC Incentive Payment, nor the agreement among the Parties set forth in this Memorandum to resolve the Subject Events shall be deemed a Relevant Event for purposes of the Reconciliation process provided for in Section 15.6.2 of the Project Agreement. Nothing in this Memorandum shall be construed to affect the treatment of, or the rights and obligations of the Parties with respect to, any Relevant Event.
- 4.8.1.3 Neither the Second PA Settlement Payment, the SC Incentive Payment, nor any other payment obligation of the Enterprises to the Developer shall be subject to adjustment to reflect costs incurred by the Developer and/or Construction Contractor from delays in payment of the Second PA Settlement Payment or the SC Incentive Payment, nor shall such delay in payment of the Second PA Settlement Payment or the SC Incentive Payment be taken into account for (i) purposes of any Compensable Costs calculation or (ii) for purposes of determining the No Better and No Worse position of the Developer, whether or not such delay in payment of the Second PA Settlement Payment and/or the SC Incentive Payment occurs as a result of the occurrence of any Delay Relief Event or Compensation Event.
- 4.8.1.4 In the event the Substantial Completion Deduction Amount exceeds the amount of the Substantial Completion Milestone Payment, such amount will be reflected as

² Subject to the Enterprises' review pending finalization of financing solution.

³ To be a date prior to launch of the offering of any additional Project Debt.

an excess in the Payment Request submitted by the Developer in respect of the first Payment Month following the Substantial Completion Date pursuant to Section 2.3(e) of Part 2 of Schedule 4 (*Payments*) of the Project Agreement, and such excess amount shall be subject to set-off by the Enterprises from the Second PA Settlement Payment and the SC Incentive Payment in the manner provided for in Section 5 of Part 3 of Schedule 4 (*Payments*).

4.8.2. Subject to the satisfaction of the conditions precedent set forth in Section 3:

4.8.2.1 Developer shall pay to Construction Contractor an amount equal to the amount of the Second PA Settlement Payment actually received by Developer promptly following receipt of the Second PA Settlement Payment from the Enterprises, but in any event within 30 days thereafter (the "Second CC Settlement Payment"). In addition, Developer shall pay to Construction Contractor an amount equal to the SC Incentive Payment actually received by Developer promptly following receipt of the SC Incentive Payment but in any event within 30 days thereafter (the "CC Incentive Payment").

4.8.2.2 Neither the Second CC Settlement Payment, the CC Incentive Payment, nor any other payment obligation of the Developer to the Construction Contractor shall be subject to adjustment to reflect costs incurred by the Construction Contractor from delays in payment of the Second CC Settlement Payment or the CC Incentive Payment, nor shall such delay in payment of the Second CC Settlement Payment or the CC Incentive Payment be taken into account for purposes of any Compensable Costs calculation, whether or not such delay in payment of the Second CC Settlement Payment and/or the CC Incentive Payment occurs as a result of the occurrence of any Delay Relief Event or Compensation Event.

4.8.2.3 In the event the Substantial Completion Deduction Amount exceeds the amount of the Milestone Payment to be paid upon achieving Substantial Completion, such amount will be reflected as an excess in the CC Monthly Payment Application submitted by the Construction Contractor in respect of such CC Monthly Payment, and such excess amount shall be subject to set-off by the Developer from the Second CC Settlement Payment and the CC Incentive Payment in the manner provided for in Section 5 of Part 3 of Schedule 4 (*Payments*) to the Construction Contract. If the remaining payments due and owing to the Construction Contractor are insufficient to set-off the entirety of such excess amount, the Construction Contractor shall pay to the Developer any amounts that cannot be set-off within 10 Working Days of Developer's demand therefore.

5. RELEASES

Subject to the satisfaction of the conditions precedent set forth in Section 3:

5.1. **Construction Contractor's Release.** Construction Contractor, for the greater assurance of Developer and the Enterprises, and in consideration of the time relief provided, and the amounts to be paid, by Developer to Construction Contractor pursuant to this Memorandum, hereby waives and has remised, released and forever discharged, and by these presents does for itself, its successors and assigns, remise, waive and release and forever discharge Developer, the Enterprises and their respective officers, agents, employees, consultants, successors and assigns of and from all and all manner of action and actions, cause and causes of actions, suits, debts, agreements, promises, variances, trespasses, damages, judgments, claims and demands whatsoever at law or in equity, which Construction Contractor, its successors and assigns ever had, now has or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the Term Sheet Effective Date against Developer, the Enterprises or their respective officers, agents, employees, consultants, successors

and assigns arising out of, by reason of, under or in connection with (a) the Subject Events and Construction Contractor's Supervening Event submissions for the Subject Events, (b) Change Order CO-091, (c) otherwise relating to UPRR and any breach, fault, negligence, non-performance or lack of cooperation by UPRR that Construction Contractor is aware has occurred, that Construction Contractor has determined is likely to occur, or that with reasonable diligence Construction Contractor could have known has occurred or is likely to occur, on or prior to the Term Sheet Effective Date (regardless of whether or not Construction Contractor has submitted a notice pursuant to Section 15.1.2.a of Part 2 of the Construction Contract as of the Term Sheet Effective Date), and (d) any delayed review or improper rejection of any Deliverable, or any delayed issuance of any Permit, by any department, agency, unit or arm of the City of Denver that Construction Contractor is aware has occurred, that Construction Contractor has determined is likely to occur, or that with reasonable diligence Construction Contractor could have known has occurred or is likely to occur, on or prior to the Term Sheet Effective Date (regardless of whether or not Construction Contractor has submitted a notice pursuant to Section 15.1.2.a of Part 2 of the Construction Contract as of the Term Sheet Effective Date), in each case including all claims whether or not they presently are or could by investigation be known (including the ultimate cost or schedule implications of such claims), whether or not they have yet arisen or been asserted or have been the subject of notice to Developer or the Enterprises, and whether or not they are in litigation or are under consideration by Developer or the Enterprises, and including claims arising out of a breach of contract or termination of contract and claims based on claims against Construction Contractor by other contractors or by any other third person or entities; provided, however, in each case, that Construction Contractor does not waive or release, and Construction Contractor hereby reserves all rights relating to the ability to seek relief for events, facts, and conditions for which Construction Contractor first becomes aware have occurred or first makes a determination are likely to occur after the Term Sheet Effective Date, and for which with reasonable diligence Construction Contractor could not have known had occurred or were likely to occur, prior to the Term Sheet Effective Date.

- 5.2. **Developer's Release.** Developer, for the greater assurance of the Enterprises and Construction Contractor, and in consideration of the time relief provided, and the amounts to be paid, by the Enterprises to Developer pursuant to this Memorandum, hereby waives and has remised, released and forever discharged, and by these presents does for itself, its successors and assigns, remise, waive and release and forever discharge the Enterprises, Construction Contractor and their respective officers, agents, employees, consultants, successors and assigns of and from all and all manner of action and actions, cause and causes of actions, suits, debts, agreements, promises, variances, trespasses, damages, judgments, claims and demands whatsoever at law or in equity, which Developer, its successors and assigns ever had, now has or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to Term Sheet Effective Date against the Enterprises, Construction Contractor or their respective officers, agents, employees, consultants, successors and assigns arising out of, by reason of, under or in connection with (a) the Subject Events and Developer's Supervening Event submissions for the Subject Events, (b) Change Order CO-091, (c) otherwise relating to UPRR and any breach, fault, negligence, non-performance or lack of cooperation by UPRR that Developer is aware has occurred, that Developer has determined is likely to occur, or that with reasonable diligence Developer could have known has occurred or is likely to occur, on or prior to the Term Sheet Effective Date (regardless of whether or not Developer has submitted a notice pursuant to Section 15.1.2.a of the Project Agreement as of the Term Sheet Effective Date), and (d) any delayed review or improper rejection of any Deliverable, or any delayed issuance of any Permit, by any department, agency, unit or arm of the City of Denver that Developer is aware has occurred, that Developer has determined is likely to occur, or that with reasonable diligence Developer could have known has occurred or is likely to occur, on or prior to the Term Sheet Effective Date (regardless of whether or not Developer has submitted a notice pursuant to Section 15.1.2.a of the Project Agreement as of the Term Sheet Effective Date), in each case including all claims whether or not they presently are or could by investigation be known (including the ultimate cost or schedule implications of such claims), whether or not they have yet arisen or been asserted or have been the subject of notice to the Enterprises or Construction Contractor, and whether or not they are in

litigation or are under consideration by the Enterprises or Construction Contractor, and including claims arising out of a breach of contract or termination of contract and claims based on claims against Developer by other contractors or by any other third person or entities; provided, however, in each case, that Developer does not waive or release, and Developer hereby reserves all rights relating to the ability to seek relief for events, facts, and conditions for which Developer first becomes aware have occurred or first makes a determination are likely to occur after the Term Sheet Effective Date, and for which with reasonable diligence Developer could not have known had occurred or were likely to occur, prior to the Term Sheet Effective Date.

- 5.3. **The Enterprises' Release.** Except for the Reserved Claims, each of the Enterprises, for the greater assurance of Developer and Construction Contractor, and in consideration of each of Developer's and Construction Contractor's obligations under this Memorandum, hereby waives and has remised, released and forever discharged, and by these presents does for itself, its successors and assigns, remise, waive and release and forever discharge Developer, Construction Contractor and their respective officers, agents, employees, consultants, successors and assigns of and from all and all manner of action and actions, cause and causes of actions, suits, debts, agreements, promises, variances, trespasses, damages, judgments, claims and demands whatsoever at law or in equity, which such Enterprise, its successors and assigns ever had, now have or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the Term Sheet Effective Date against Developer, Construction Contractor or their respective officers, agents, employees, consultants, successors and assigns arising out of, by reason of, under or in connection with, or otherwise relating to the Subject Events, in each case including all claims whether or not they presently are or could by investigation be known, whether or not they have yet arisen or been asserted or have been the subject of notice to the Enterprises, and whether or not they are in litigation or are under consideration by the Enterprises, and including claims arising out of a breach of contract or termination of contract, and claims based on claims against the Enterprises by any third person or entities.

"Reserved Claims" means any Claim or Loss of an Indemnified Party under Section 24 of the Project Agreement in respect of any claims asserted and/or losses suffered by any Subcontractor arising out of, by reason of, under or in connection with, or otherwise relating to the Subject Events.

6. TERMINATION OF MEMORANDUM

6.1. Failure to Consummate Debt Refinancing

6.1.1. If, at any time during the Debt Restructuring process, Developer determines (following consultation with Construction Contractor) in good faith that (a) the required material terms and conditions of the Debt Restructuring cannot be satisfied by Developer using commercially reasonable efforts, or (b) the Debt Restructuring will not result in a Refinancing Amount equal to or in excess of the Refinancing Minimum (in each case, including as a result of the occurrence of a TIFIA Refinance Event), then, in each case, Developer will promptly notify the Enterprises and Construction Contractor.

6.1.2. Within ten (10) Working Days following receipt of notice from Developer in accordance with Section 6.1.1, senior executives of the Enterprises, Developer and Construction Contractor shall confer in order to come to an agreement regarding the Debt Restructuring process.

6.1.3. If the Parties are unable to reach an agreement following the meeting described in Section 6.1.2, then any Party may terminate this Memorandum by delivery of a notice to the other Parties, which termination shall be effective thirty (30) days following the receipt of such notice by the other Parties. Prior to the effectiveness of such termination, the Parties shall continue to engage in good faith discussions in an attempt to achieve a resolution.

- 6.2. **Resumption of DRP Proceedings.** The Parties acknowledge that they have previously agreed to suspend the Subject Event Dispute Resolution Proceedings pending the achievement of the

Settlement Date. If this Memorandum is terminated in accordance with its terms prior to achieving financial close of the Debt Restructuring, the Enterprises, Developer and the Construction Contractor agree that the Subject Event Dispute Resolution Proceedings shall recommence without any prejudice to any of their respective rights to pursue relief in accordance with the Dispute Resolution Procedure. In any such event, the Parties agree that all Dispute Resolution Procedure schedule deadlines shall be extended day-for-day from October 21, 2020 until the date this Memorandum is terminated.

6.3. Termination Payment

6.3.1. Notwithstanding anything to the contrary in this Memorandum, if this Memorandum is terminated by Developer or Construction Contractor:

6.3.1.1 following the Enterprises' failure to obtain required board approvals and/or deliver customary closing documents, then no termination payment shall be due;

6.3.1.2 as a result of the occurrence of a TIFIA Refinance Event, then, in consideration of the Enterprises' efforts in support of the Debt Restructuring, Developer shall pay the Enterprises a termination payment in the amount of:

- (A) \$100,000, if such termination occurs within thirty (30) days following the Term Sheet Effective Date;
- (B) \$250,000, if such termination occurs between thirty-one (31) and sixty (60) days following the Term Sheet Effective Date;
- (C) \$400,000, if such termination occurs between sixty-one (61) and ninety (90) days following the Term Sheet Effective Date;
- (D) \$750,000, if such termination occurs between ninety-one (91) and one hundred twenty (120) days following the Term Sheet Effective Date;
- (E) \$1,500,000, if such termination occurs between one hundred twenty-one (121) and one hundred fifty (150) days following the Term Sheet Effective Date; and
- (F) \$2,500,000, if such termination occurs on or following one hundred fifty-one (151) days following the Term Sheet Effective Date; or

6.3.1.3 for any other reason following the Term Sheet Effective Date, then Developer shall pay the Enterprises a termination payment in the amount of \$2,500,000.

6.3.2. Any termination payment due from Developer to the Enterprises pursuant to Section 6.3.1 hereof shall be due and payable ten (10) Working Days after the effective date of such termination, and shall be payable irrespective of the outcome of any subsequent Dispute Resolution Procedure proceedings. Such termination payment shall be subject to set-off by the Enterprises against any amount owing to Developer in accordance with Section 5 of Part 3 of Schedule 4 to the Project Agreement.

7. ADJUSTMENTS TO THE SC INCENTIVE DATE

7.1. Upon the occurrence of any Compensation Event described in clauses d., e. or l. of the definition thereof that affects or will affect the Critical Path, if such Compensation Event occurred prior to the SC Incentive Date, then the SC Incentive Date shall be extended by the number of Calendar Days

equal to the Milestone Delay Period calculated for such Compensation Event in accordance with Section 15.3.1.c.iii of the Project Agreement.

- 7.2. For the avoidance of doubt, the amount of the SC Incentive Payment shall not be subject to adjustment due to the occurrence of any Supervening Event.

8. GENERAL

- 8.1. This Memorandum strictly constitutes an agreement among the Parties to resolve the Subject Events. Nothing contained herein shall be deemed to constitute an admission of any kind by any party and acceptance by the Parties of this Memorandum is strictly for settlement purposes only. Notwithstanding any other provision of this Memorandum regarding any claimed Supervening Event, the Enterprises makes no admission regarding the existence or validity of any Supervening Event, and this Memorandum shall in no event be used by Developer or Construction Contractor to document or support any future claim that an event constitutes a Supervening Event. This Memorandum, the PA Amendment and the CC Amendment are non-admissible in any proceeding, including the Dispute Resolution Procedures, relating to the Subject Events and shall not be voluntarily disclosed, except as may be required through discovery or other compulsory processes.
- 8.2. Each of the Parties retain all remedies available in law or equity for breach of this Memorandum by any Party, including, without limitation, the right of a non-breaching Party to seek specific performance and injunctive or other equitable relief as a remedy for any such breach.
- 8.3. Except as may be necessary to enforce the terms of this Memorandum, the Parties and any other person who is an intended beneficiary hereunder, agree that she or he shall not commence or proceed with any action, claim, suit, proceeding or litigation against any other Party, directly or indirectly, regarding or relating to the matters described in this Memorandum, or take any action inconsistent with the terms of the Memorandum.
- 8.4. Each Party represents and acknowledges that it has been represented by an attorney with respect to this Memorandum and any and all matters covered by or related to such Memorandum. Each Party further represents and warrants to each other that the execution and delivery of this Memorandum has been duly authorized by each of the Parties after consultation with counsel, that the persons signing this Memorandum on their behalf below have been fully authorized by their respective Parties to do so, and that the undersigned do fully understand the terms of this Memorandum and have the express authority to enter into this Memorandum.
- 8.5. Each Party hereby represents and warrants that (a) it has the full power and authority to execute and deliver this Memorandum and to perform its obligations hereunder, and the execution, delivery and performance of this Memorandum by it has been duly authorized by the necessary action on the part of each such Party, and (b) this Memorandum has been duly executed and delivered by such Party and is the valid and binding obligation of such Party, enforceable against such Party in accordance with its terms.
- 8.6. No officer, agent or employee of any Party shall be charged personally by any other Party with any liability or held liable to such other Party under any term or provision of this Memorandum, or because of its execution or attempted execution or because of any breach thereof.
- 8.7. This Memorandum shall not be valid until it has been approved by the Colorado State Controller or its designee.
- 8.8. This Memorandum, including the exhibits and attachments attached hereto, constitute the entire agreement between the Parties with respect to the subject matter hereof and supersede all prior agreements and understandings relating to the subject matter hereof. For the avoidance of doubt,

this Memorandum shall not supersede the Project Agreement or the First Memorandum of Settlement.

9. CHOICE OF LAW

9.1. This Memorandum shall be governed by and construed in accordance with the laws of the State of Colorado, other than any provision thereof that permits or requires the application of the laws of another jurisdiction, and regardless of any other jurisdiction's choice of law rules. Any provision incorporated herein by reference which purports to negate this provision, in whole or in part, shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Memorandum, to the extent capable of execution.

9.2. Sections 37 and 38 of the Project Agreement are incorporated by reference as if set forth herein.

10. COLORADO OPEN RECORDS ACT

Section 20 of the Project Agreement is incorporated by reference as if set forth herein.

11. GOVERNMENTAL IMMUNITY

No term or condition of this Memorandum 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.

12. AMENDMENTS

Except as specifically provided herein, the Project Agreement and the Construction Contract remain unmodified and in full force and effect. No amendment, modification, termination or waiver of any provision of this Memorandum shall in any event be effective unless the same shall be in writing and signed by each Party hereto.

13. THIRD PARTY BENEFICIARIES

Except for the releases provided in Section 5 of this Memorandum, nothing contained in this Memorandum is intended for the benefit of any third parties or entities.

14. BINDING EFFECT; SUCCESSORS AND ASSIGNS

This Amendment shall be binding upon and inure to the benefit of each Enterprise, Developer and Construction Contractor and each of their respective permitted successors and assigns (including the Lenders in accordance with the terms of the Lenders Direct Agreement).

15. SEVERABILITY

15.1. Notwithstanding Section 2.4.1 of the Project Agreement or Section 2.4.1 of Part 2 of the Construction Contract (each as incorporated herein pursuant to Section 1.2 of this Memorandum), if any provision (or part of any provision) of this Memorandum is ruled invalid (including due to Change in Law) by a court having proper jurisdiction, then the Parties shall:

15.1.1. promptly meet and negotiate a substitute for such provision or part thereof which shall, to the greatest extent legally permissible, effect the original intent of the Parties; and

15.1.2. if necessary or desirable, apply to the court which declared such invalidity for an interpretation of the invalidated provision (or part thereof) to guide the negotiations.

15.2. If any provision (or part of any provision) of this Memorandum shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such provision (or part thereof) shall not affect the validity, legality and enforceability of any other provision of (or the other part of such provision) or any other documents referred to in this Memorandum, and this Memorandum shall be construed as if such invalid, illegal, or unenforceable provision (or part thereof) had never been contained herein.

16. COSTS AND EXPENSES OF THE PARTIES

Except as otherwise expressly provided in the Project Agreement, each Party shall bear its own costs and expenses in connection with the preparation, negotiation, execution and performance of this Memorandum; provided that (i) upon financial close of the Debt Restructuring, the costs and expenses of Developer will be paid from the proceeds of the Debt Restructuring, and (ii) if this Memorandum is terminated, the Construction Contractor shall be responsible for its own costs and expenses and the costs and expenses of Developer in connection with this Memorandum (including, unless otherwise agreed and without prejudice to the Enterprises' rights under Section 6.3.2, the costs of Developer pursuant to Section 6.3.1).

17. FURTHER ASSURANCES

17.1. Each of the Parties covenant to, from time to time, execute and deliver such further documents and instruments and take such other actions as may be reasonably required or appropriate to evidence, effectuate, or carry out the intent and purposes of this Memorandum or to perform its obligations under this Memorandum and the transactions contemplated thereby.

17.2. The Parties agree to reasonably cooperate with one another to effectuate an efficient and equitable implementation of this Memorandum.

18. COUNTERPARTS

This Memorandum 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, to the extent required by Law, the Colorado State Controller or its delegate, shall constitute a full and original instrument for all purposes.

[The remainder of this page left intentionally blank; signature page immediately follows.]

IN WITNESS WHEREOF, the Parties hereto have executed this Memorandum as of the date it is approved and signed by the Colorado State Controller or its designee below.

KIEWIT MERIDIAM PARTNERS LLC

By: _____
Paulo Andre
Project Manager

KIEWIT INFRASTRUCTURE CO.

By: _____
Jason Proskovec
Project Director

COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE

By: _____
Nicholas Farber
Director

COLORADO BRIDGE ENTERPRISE

By: _____
Stephen Harelson, P.E.
Chief Engineer

APPROVED:
Philip J. Weiser, Attorney General

By: _____
Andrew J. Gomez
Assistant Attorney General

ALL AGREEMENTS REQUIRE APPROVAL BY THE STATE CONTROLLER

C.R.S. § 24-30-202 requires the State Controller to approve all State Agreements. This Memorandum is not valid until signed and dated below by the State Controller or its delegate. Developer and Construction Contractor are not authorized to begin performance until such time. If Developer or Construction Contractor begins performing prior thereto, the State of Colorado is not obligated to pay Developer or Construction Contractor, as applicable, for such performance and/or for any goods and/or services provided hereunder.

<p>STATE CONTROLLER Robert Jaros, CPA, MBA, JD</p> <p>By: _____</p> <p>Date: _____, 2021</p>
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Exhibit A

PA Amendment

Exhibit B

CC Amendment

Exhibit C

O&M Amendment

Exhibit D

A&R IAA

Attachment 1⁴
Refinancing Milestones

	Timeline
<u>Target Financial Close</u>	June 17, 2021
<u>Enterprises (Settlement & Board Approvals)</u>	
Circulate Draft Documents for Enterprise Board Approval	April 2, 2021
Circulate Final Documents for Enterprise Board Approval	April 7, 2021
Enterprise Board Approval	April 15, 2021
<u>TIFIA</u>	
CRT 1 Target Date	April 21, 2021
CRT 2 Target Date	May 5, 2021
CCF Target Date	May 19, 2021
Secretary Approval Target Date	June 1, 2021
Existing TIFIA Loan repaid	June 18, 2021
New TIFIA Loan Agreement Executed	June 18, 2021
<u>Senior Lenders</u>	
Consent request launched	May 13, 2021
Finalized Senior Lender documentation	June 17, 2021
Consents received	May 27, 2021
Offering memorandum issued for new debt (if applicable)	June 2, 2021

⁴ _____
 Dates to be updated as needed.