



Date: January 19, 2022
To: HIGH-PERFORMANCE TRANSPORTATION ENTERPRISE BOARD
From: NICK FARBER, DIRECTOR, HPTE
Subject: THIRD AMENDMENT TO HPTE / E-470 TOLLING SERVICES AGREEMENT

Purpose

The purpose of this memo is to describe the Third Amendment to HPTE / E-470 Tolling Services Agreement (TSA).

Action

The HPTE Board is asked to adopt a resolution #376 that supports the staff recommendation to approve the Third Amendment to the TSA.

Background:

As HPTE and E470 were negotiating an increase to E-470's General Reimbursable Costs and a new Discovery Services Task Order, the State Controller noticed that HPTE was conducting business under old State Fiscal Rules, which is currently impermissible. From 2015 until late last year, HPTE was operating under a Fiscal Rules Waiver that allowed HPTE to pay E-470 for processing toll transactions, switchable transponder, and HOV3+ related expenses (amounts to about \$400,000 per month) without encumbering estimates for those expenses upfront. In the summer of 2018, the State Fiscal Rules were amended to eliminate the State Controller's ability to issue those waivers; however, CDOT nor HPTE was made aware of that change until late last year. Since HPTE is now unable to pay E-470 for those expenses currently, we have been working diligently with E-470 staff, their general counsel, the Attorney General's Office, and the State Controller to amend the TSA to accommodate the updated State Fiscal Rules. Attachment A is the result of those efforts.

The Third Amendment to the TSA:

- Allows HPTE to issue Option Letters (with E-470's prior written consent) to increase a Task Order's amount or extend the term of the Task Order. Option Letters are unilaterally approved by the HPTE and not by either E-470 or the State Controller.
- Says E-470 will only provide tolling services through Task Orders and will not work without one.
- Specifies HPTE must provide E-470 fully formed and complete operational requirements for our new or existing tolling facilities. If E-470 can perform the work, it will put those requirements into a functional requirements document, which will serve as the basis for a Task Order under the TSA.
- Says HPTE recognizes the significant effort and expense of our tolling services on E-470 and agrees to take the steps necessary to ensure that all Task Orders are adequately funded through Option Letters.
- Says if HPTE does not take the necessary steps to fund Task Orders adequately, E-470 is entitled to stop performing tolling services within ten days of notification.
- Says if HPTE fails to add funds to a Task Order, which impedes E-470 from performing its obligations under the TSA, there is no cure period, and E-470 has the right to stop performing services for HPTE.

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2829 W. Howard Place, Denver, Colorado 80204 | 303.757.9249 | FAX: 303.757.9179 |



- Allows E-470 to object to HPTE issuing an Option Letter if it would impair their separate contractual obligations (such as HPTE unilaterally extending the term of a Task Order). If E-470 objects, then HPTE would start the Task Order Amendment process.

The Third Amendment will bring HPTE and E-470 in line with current state practices and will not change HPTE's business processes or our cost of doing business with E-470. Once this Amendment is approved, HPTE and E-470 will start discussions on a three-year extension of the TSA.

Options / Decision Matrix

1. **Staff Recommendation:** Approve Resolution #376 for the approval of the Third Amendment to the HPTE / E-470 TSA.
2. Review but do not approve the Amendment. Provide instructions on the next steps.

Attachments

Attachment A: THIRD AMENDMENT TO MANAGED LANES TOLLING SERVICES AGREEMENT BY AND BETWEEN HIGH-PERFORMANCE TRANSPORTATION ENTERPRISE AND E-470 PUBLIC HIGHWAY AUTHORITY

Attachment B: Resolution #376 Approving Third Amendment to the Master Tolling Services Agreement between HPTE and E-470 Public Highway Authority covering HPTE Tolling Facilities

**THIRD AMENDMENT TO
MANAGED LANES TOLLING SERVICES AGREEMENT
BY AND BETWEEN
HIGH PERFORMANCE TRANSPORTATION ENTERPRISE
AND
E-470 PUBLIC HIGHWAY AUTHORITY**

Dated _____, 202__

THIRD AMENDMENT TO
TOLLING SERVICES AGREEMENT

THIS THIRD AMENDMENT TO TOLLING SERVICES AGREEMENT (“Third Amendment”) is made and entered into this ____ day of _____, 202__ by and among the **E-470 PUBLIC HIGHWAY AUTHORITY**, a political subdivision of the State of Colorado and a body corporate (the “**Authority**”) and **HIGH PERFORMANCE TRANSPORTATION ENTERPRISE** of the State of Colorado Department of Transportation (“**HPTE**”) (singularly a “**Party**” and collectively the “**Parties**”).

RECITALS

WHEREAS, the Parties entered into that Tolling Services Agreement, dated May 7, 2015, which was subsequently amended by the First Amendment to Tolling Services Agreement, dated effective December 14, 2017 and the Second Amendment dated effective August 14, 2018 (collectively the “**TSA**”); and

WHEREAS, the Parties now wish to amend the TSA in order to provide that all Tolling Services (even ongoing routine services) shall be performed only by Task Orders and related Option Letters and adding certain terms to ensure the Authority is reimbursed for Tolling Services requested by HPTE in accord with the intent of the TSA, including but not limited to stop work provisions for HPTE’s failure to make payments for service rendered due to internal HPTE issues with rules promulgated by the Colorado State Controller; and

WHEREAS, Section 30(f) provides that the TSA may be amended only if in writing executed by HPTE and the Authority; and

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the Parties agree as follows:

TERMS AND CONDITIONS

1. **Recitals.** The Recitals set forth above are hereby incorporated into the covenants and agreements set forth below.
2. **Defined Terms and Attachment 1 Amendment.** All defined terms utilized but not defined herein shall have the meanings ascribed to them in the TSA. The following defined terms are hereby added to Attachment 1, or amended from the original Attachment 1:

“Stop Work Right” shall have the meaning ascribed to that term in Section 14(f) of the Agreement.

“HPTE Encumbrance Obligation” shall have the meaning ascribed to that term in Section 14(e) of the Agreement.

“Operational Requirements” shall mean a detailed, comprehensive, and discrete set of written requirements specifying the various functionality scenarios desired by HPTE for additions to,

commencement of, or changes to, tolling operations relative to HPTE Projects which shall be of sufficient detail to enable the Authority to produce FRDs per the terms of the relevant Task Order.

“Option Letter” shall mean the letters issued by HPTE in the form attached hereto as Exhibit A, pursuant to the Colorado State Controller’s fiscal rules which shall be used only where there are no changes to the Task Order scope of work for the limited purposes of (a) increasing the not-to-exceed amounts for any previously issued Task Order and/or (b) extending the termination date of any previously issued Task Order.

3. **Section 3** is hereby amended in its entirety to read as follows:

a. The Authority will only provide Tolling Services through individual Task Orders and the Authority shall have no legal obligation to provide any Tolling Services of any type until a Task Order has been signed by HPTE and the Authority and validly funded by HPTE. For the avoidance of doubt, the Authority shall not be obligated to provide Tolling Services of any type unless:

i. A valid Task Order has been signed by the Colorado State Controller with adequate funds encumbered to allow continued performance of Tolling Services; or

ii. A valid Task Order amendment has been agreed by the parties and signed by the Colorado State Controller for changes in the Task Order’s scope of work;

b. HPTE may issue an Option Letter to:

i. Extend the term of the Task Order, exclusive of changes to scope of work for the Task Order which shall be done only by Task Order amendment, by providing written notice to the Authority by issuing an Option Letter in a form substantially equivalent to Exhibit A.

ii. Increase the encumbered not to exceed funds on a Task Order, for reasons other than increases in scope of work for the Task Order which shall be done only by Task Order amendment, by providing written notice to the Authority by issuing an Option Letter in a form substantially equivalent to Exhibit A.

c. The Authority's obligation to commence Tolling Services for any specific HPTE Tolling Facility is hereby expressly conditioned upon: (i) HPTE’s strict compliance with Section 3(a), 3(b), and (ii) HPTE fulfilling each of its obligations contained in Section 6 of this Agreement, which are necessary to allow the Authority to design, program and test all applicable software to ensure it has the specified operational capabilities needed for each specific HPTE Tolling Facility, and (iii) Authority resource availability in light of HPTE’s desired timing and project complexities for new HPTE Projects

4. **Section 6.** Section 6(a) is hereby amended as follows:

a. HPTE shall provide the Authority with complete and fully formed Operational Requirements for all HPTE desired capabilities for new or existing Tolling Facilities. Provided the Authority is provided with complete and fully formed Operational Requirements, the Authority

will thereafter create functional requirements documents ("FRDs"), all of which shall be approved and signed by HPTE and appended to the relevant Task Order.

5. **Section 8.** Section 8's introductory paragraph is hereby amended in its entirety as follows:

8. Authority's General Responsibility for Tolling Services. Provided HPTE has issued appropriate Task Orders and kept them fully funded through Task Order Amendments or Option Letters, the Authority shall continue to process Tolls on the HPTE Projects for both ExpressToll® and LicensePlateToll® Account holders for HPTE during the Term and pursuant to the terms and conditions set forth herein. The Authority's general responsibilities shall include:

6. **Section 14(e).** Section 14 is hereby amended by the addition of a new subsection 14(e) which shall read as follows:

e. HPTE Encumbrance Obligations. HPTE acknowledges that significant effort and expense are involved in the Authority's provision of the Tolling Services and that, notwithstanding Section 29(d), cost estimates are often simply order of magnitude estimates due to myriad operational variables which often become apparent to the Parties only during FRD development, including but not limited to HPTE directed functionality changes mid-development. These operational variables prevent costs from being known with precise certainty when Task Orders are issued. Therefore, HPTE hereby agrees to take all steps necessary to ensure each Task Order is adequately funded for the Task Order's term, including processing Task Order amendments, or issuing Option Letters as needed and as applicable to provide funding such that the Authority does not exercise its Stop-Work Rights ("HPTE Encumbrance Obligations").

7. **Section 14(f).** Section 14 is hereby amended by the addition of a new subsection 14(f) which shall read as follows:

(f) Authority Stop-Work Right. In the event of an HPTE Default under Section 20(b), the Authority shall be entitled to stop performance of Tolling Services within ten (10) Business Days of the date the Authority provides Notice to HPTE of its intent to exercise its right to cease performance of Tolling Services (the "Stop-Work Right").

8. **Section 20(b).** Section 20(b) is hereby amended in its entirety to read as follows:

b. In the case of monetary obligation of HPTE in which the applicable payment is not made (including payment for the Default Rate if required by this Agreement), within forty-five (45) Business Days of the Invoice Due Date, then, in addition to the requirement to pay interest at the Default Rate, in addition to the Authority's ability to exercise its Stop-Work Right, such failure to pay shall be an HPTE Default. Further, in the case of a monetary obligation of HPTE in which HPTE fails to meet its HPTE Encumbrance Obligations by midnight on the fifth Business Day from the date of the Authority's Notice of HPTE Encumbrance Obligation Default, then in addition to the Authority's ability to Stop-Work, and the requirement to pay interest at the Default Rates; such failure to pay shall be an HPTE Default; or

9. **Section 20(i).** Section 20(i) is hereby amended in its entirety to read as follows:

- i. HPTE takes any action, or refuses to act, expressly including but not limited to an HPTE failure to perform the HPTE Encumbrance Obligations, the result of which materially impedes the Authority's ability to perform its obligations under this Agreement in which case there shall be no cure period.
10. **Section 23(b)(iv).** Section 23(b)(iv) is hereby amended in its entirety to read as follows:
 - iv. During the Term, HPTE shall not contract in any manner with any other tolling services provider to provide the Tolling Services contemplated herein, including but not limited to providing alternative tolling vendors or technologies in respect of such Tolling Services, except as may be strictly necessary to either: (a) allow HPTE to fulfill its obligation to provide Operational requirements to the Authority under Section (6)(a), or (b) allow HPTE to seek services for new HPTE Tolling Facilities not yet operational which, for the avoidance of doubt, shall mean planned future HPTE Tolling Facilities for which routine Tolling Services are not already being provided by the Authority under Sections 8(a) through 8(d) of the TSA).
11. **Section 29(a).** Section 29(a) is hereby amended as follows:
 - a. General.
12. **Section 29(b).** Section 29(b) is hereby amended as follows:
 - b. Process for Issuance of Task Orders, Amendments to Task Orders, and Allowance for use of Option Letters.
 - i. Process General. Task Orders issued hereunder shall be processed according to this Section 29(b). First, HPTE shall specify desired services and any HPTE Tolling Facility specific requirements. The Authority shall propose a price using the Cost Model. The proposal shall be in a form acceptable to HPTE and include all pertinent information such as a Statement of Work, proposed time of performance, estimated number of hours, and material costs. Once the Parties agree regarding the foregoing, they shall prepare and execute a Task Order in a form similar to that attached as Attachment 11.
 - ii. Task Order Amendments. Task Orders issued hereunder may be amended in writing via Task Order amendments, which shall be processed in the manner provided in Section 29(b)(i)
 - iii. Option Letters. Option letters may not be used to amend Task Orders except for the purposes described in Section 3 (b)
13. **Section 29(f).** Section 29(f) is hereby amended in its entirety as follows:

Neither Task Orders nor Options Letters shall be used to amend the terms of this Agreement.

29. **Amendment.** This Agreement may be amended only by written amendment approved by the governing bodies of the Authority and HPTE and executed by HPTE, the Colorado State Controller, and the Authority. This Agreement may not be amended by Task Order or Option Letter.

14. **Effective Date.** This Third Amendment shall not be effective or enforceable until it is approved and signed by the Colorado State Controller or designee (the date of which approval shall be the “**Effective Date**”).

15. **Full force and Effect.** Except as expressly modified by this Third Amendment, all provisions of the Agreement shall remain in full force and effect.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK, SIGNATURE BLOCKS TO FOLLOW]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Third Amendment as of the date first written above.

E-470 PUBLIC HIGHWAY AUTHORITY

By: Tim Stewart
Its: Executive Director

APPROVED AS TO FORM:

ICENOGLE SEAVER POGUE
A Professional Corporation

General Counsel

Director of Finance

DATE APPROVED BY THE BOARD OF DIRECTORS: _____

[Signature page 1 of 2 to the Third Amendment to the Tolling Services Agreement]

HIGH PERFORMANCE TRANSPORTATION
ENTERPRISE

By: Nicholas J. Farber

Its: Director

ALL AGREEMENTS REQUIRE APPROVAL BY THE STATE CONTROLLER

Section 24-30-202, C.R.S. requires that the State Controller to approve all agreements. This Agreement is not valid until the State Controller, or such assistant as he may delegate, has signed it.

**STATE CONTROLLER
Robert Jaros, CPA, MBA, JD**

By: _____

Date: _____

[Signature page 2 of 2 to the Third Amendment to the Tolling Services Agreement]

EXHIBIT A, SAMPLE TASK ORDER ___ OPTION LETTER

State Agency High Performance Transportation Enterprise "HPTE"	Option Letter Number Insert the Option Number (e.g. "1" for the first option)
Contractor E470 Public Highway Authority "E470"	Master Contract Routing Number 15-HAA-ZA-00140
Current Task Order Maximum Amount Initial Term State Fiscal Year 20xx \$0.00 Extension Terms State Fiscal Year 20xx \$0.00 State Fiscal Year 20xx \$0.00 State Fiscal Year 20xx \$0.00 State Fiscal Year 20xx \$0.00 Total for All State Fiscal Years \$0.00	Task Order Contract Routing Number Insert CMS Number or Other Contract Number of this Option Task Order Performance Beginning Date The later of the Effective Date or Month Day, Year Current Task Order Expiration Date Month Day, Year

1. OPTIONS:

- A. Option to modify the Total Cost of the Task Order
- B. Option to modify the Expiration Date of the Task Order.

2. REQUIRED PROVISIONS:

- A. For use with Option 1(A): In accordance with Amendment 3, The Contract Maximum Amount table on the Task Order's Signature and Cover Page is hereby deleted and replaced with the Current Task Order Maximum Amount table shown above.
- B. For use with Option 1(B): In accordance with Amendment 3, the Expiration Date of the Task Order is modified to the Expiration Date stated above.

3. OPTION EFFECTIVE DATE:

- A. The effective date of this Option Letter is upon approval of the State Controller or _____, whichever is later.

<p style="text-align: center;">STATE OF COLORADO Jared S. Polis, Governor Department of Transportation High Performance Transportation Enterprise Nicholas J. Farber, Director</p> <p style="text-align: center;">_____ By: Nicholas J. Farber, Director</p> <p style="text-align: center;">Date: _____</p>	<p style="text-align: center;">In accordance with §24-30-202, C.R.S., this Option Letter is not valid until signed and dated below by the State Controller or an authorized delegate. STATE CONTROLLER Robert Jaros, CPA, MBA, JD</p> <p style="text-align: center;">By: _____ Department of Transportation</p> <p style="text-align: center;">Option Letter Effective Date: _____</p>
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