

MEMORANDUM

TO: COLORADO TRANSPORTATION INVESTMENT OFFICE BOARD OF DIRECTORS
FROM: NICK FARBER, CTIO DIRECTOR
SUBJECT: FIFTH AMENDMENT TO THE HPTE/E-470 TOLLING SERVICES AGREEMENT
DATE: MAY 18, 2022

Purpose

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

Action

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

Background

The Fifth Amendment to the TSA clarifies E-470's intellectual property rights and makes CTIO responsible for the direct cost of E-470's work on behalf of the CTIO.

Options / Decision Matrix

1. **Staff Recommendation:** Approve Resolution #390 for the approval of the Fifth Amendment to the HPTE / E-470 TSA.
2. Review but do not approve the Amendment. Provide instructions on the next steps.

Attachments

- Attachment A: Fifth Amendment to the Managed Lanes Tolling Services Agreement by and between the High-Performance Transportation Enterprise and E-470 Public Highway Authority
- Attachment B: Resolution #390 Approving Fifth Amendment to the Master Tolling Services Agreement

OLA #:311002203
Amendment Routing #: 22-HAA-XA-00006-M0004
Original Contract Routing #:15-HAA-ZA-00140
Additional PO Reference: 401000438, 431002786, 431002793, 431003538, 431003579
CMS #79258

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

Dated _____, 2022

FIFTH AMENDMENT TO
TOLLING SERVICES AGREEMENT

THIS FIFTH AMENDMENT TO TOLLING SERVICES AGREEMENT (“Fifth Amendment”) is made and entered into effective this _____ day of _____, 2022 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, the Second Amendment dated effective August 14, 2018, the Third Amendment dated effective January 28, 2022, and the Fourth Amendment dated effective March 9, 2022 (collectively the “**TSA**”); and

WHEREAS, the Parties now wish to amend the TSA to address certain intellectual property and development considerations; 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. **Section 6.** Section 6(d) of the TSA is hereby deleted in its entirety and restated as follows:

d. Authority Intellectual Property Retained. HPTE agrees that all information, developments, work product and materials generated, conceived, created, made, developed, authored or reduced to practice (“**Developed**”) by or on behalf of the Authority, solely or jointly with others, in connection with the performance of Tolling Services hereunder or otherwise in connection with this Agreement, including, but not limited to, all algorithms, analyses, data, designs, documentation, formulae, inventions, know-how, processes, reports, software code (including object code and source code), specifications, systems, and techniques, and any derivative works or other modifications to any of the foregoing Developed by or on behalf of the Authority pursuant to this Agreement (including any Task Order issued hereunder), together with all associated copyright, trade secret and other intellectual property or proprietary rights (“**IP Rights**”) and all copies and tangible embodiments thereof or materials related thereto (all of the foregoing collectively referred to herein as the “**Work Product**”), shall be the sole and exclusive property of the Authority, whether or not the Work Product is completed, and shall not in any event constitute

a “works made for hire” under the U.S. Copyright Act of 1976, as applicable. In the event that HPTE is deemed through the dispute resolution provisions set forth in the TSA or by a court of competent jurisdiction to own any right, title or interest in any Work Product, HPTE hereby exclusively and irrevocably assigns to the Authority all right, title, and interest in and to such Work Product, together with all associated IP Rights. Upon the Authority’s request, HPTE shall execute and deliver to the Authority all instruments and other documents and shall take such other actions as the Authority may reasonably request, so that the Authority may protect and defend its rights in and to such Work Product, including all associated IP Rights. Nothing in this TSA entitles HPTE to a copy of any source code that forms part of the Toll Collection System or that constitutes Work Product of the Authority under this TSA. In addition to the foregoing, and for the avoidance of doubt, as between the Parties, the Authority owns and shall retain all right, title and interest in and to the Authority’s modifications to its TCS, and nothing in this Agreement or any Task Order shall be construed to provide any claim of ownership to HPTE related to any of the modifications to the Authority’s TCS made by or on behalf of the Authority to provide the Work. The Authority hereby provides HPTE a non-exclusive, non-transferrable, non-sublicensable license to use the Work Product solely to the extent necessary to receive Tolling Services from the Authority as set forth in this Agreement (and any applicable Task Order hereunder) until (a) the expiration of this Agreement in accordance with its terms; or (b) any earlier termination of this Agreement for any reason. HPTE shall not, shall not attempt to, and shall not assist any third party to, disassemble, reverse engineer or decompile the Work Product or any portion thereof. Except for any Work Product contemplated by a Task Order to be provided to HPTE, the FRD and the executed test plan shall be the only items which will be provided to HPTE during or after the Agreement's Term as part of the development process established in this Section 6.

3. **Section 14.** Section 14(e) of the TSA is amended to add the following subsection (i) after the last sentence:

i. The Parties acknowledge that HPTE shall be responsible for all direct expenses incurred by the Authority in performance of the work stated in the proposal of each executed Task Order , which may include labor overruns, material overruns, and/or cost overruns related to said work arising from or related to any change in any statute, law, regulation, ordinance, rule, judgment, ruling, order, decree, directive, guideline, policy requirement, or any other binding interpretation or administration of any of the foregoing, whether now or hereafter in effect that limits or restricts movement of people, goods or materials, or imposes health, safety, or workplace requirements, restrictions, or limitations, thereby directly impacting the work that are materially different from those in effect on the Task Order effective date (the “Impact Costs”). To the extent Impact Costs are not adequately funded in the applicable Task Order, HPTE agrees that funding the same is an HPTE Encumbrance Obligation, without which the Authority may proceed with exercising its Stop-Work Rights in accordance with Section 14(f).

4. **Section 18.** Section 18 of the TSA is hereby amended by adding a new subsection (c) as follows:

Section 18(b) is intended solely to govern systems for which the Authority did not Develop any components and that were Developed entirely by either HPTE and/or contractors working for HPTE, but not the Authority. Section 18(b) does not apply to the TCS.

4. **Effective Date.** This Fifth 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**”).

5. **Full force and Effect.** Except as expressly modified by this Fifth 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 Fifth Amendment as of the date first written above.

E-470 PUBLIC HIGHWAY AUTHORITY

By: Beau Memory
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: May 12, 2022

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

Resolution – HPTE #390

Approving the Tolling Operations and Maintenance Intra-Agency Agreement between the High Performance Transportation Enterprise and the Colorado Department of Transportation

WHEREAS, pursuant to C.R.S. § 43-4-806, *et seq.*, the General Assembly of the State of Colorado (“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, pursuant to C.R.S. § 43-4-806(6)(h), HPTE is empowered to make and enter into all other contracts and agreements, including intergovernmental agreements under C.R.S. § 29-1-103, that are necessary or incidental to the exercise of its powers and performance of its duties; and

WHEREAS, HPTE and the E-470 Public Highway Authority (“E-470”) entered into a Tolling Services Agreement, dated May 7, 2015 (“Agreement”), to establish the terms and conditions under which the Authority would provide certain toll collection, violations enforcement, and customer service functions for HPTE; and

WHEREAS, the Agreement has been amended several times to include the First Amendment dated December 14, 2017 (“First Amendment”), the Second Amendment dated August 14, 2018 (“Second Amendment”), Third Amendment dated January 28, 2022 (“Third Amendment”), and the Fourth Amendment dated March 9, 2022 (“Fourth Amendment”); and

WHEREAS, HPTE and E-470 now desire to update the Agreement to clarify E-470’s intellectual property rights and codify HPTE’s responsibility for certain direct costs of E-470’s work commenced on HPTE’s behalf.

WHEREAS, the HPTE Board of Directors (“Board”) has reviewed the Fifth Amendment to the Agreement, and finds the terms and conditions stated therein constitute fair and reasonable compensation for the specific Services to be provided by E-470 to HPTE and clarification of E-470’s intellectual property rights under the Agreement; and

WHEREAS, the HPTE Board has reviewed the Fifth Amendment to the Agreement, and by this Resolution accepts, and confirms the findings and statements contained in the recitals.

NOW THEREFORE BE IT RESOLVED, the HPTE Board hereby approves the Fifth Amendment to the Agreement in substantially the form presented and authorizes the HPTE Director, or his designee, to execute the Agreement with such changes therein and additions thereto, as the HPTE Director or his designee may determine to be necessary or appropriate.

Signed as of May 18, 2022

Simon Logan
Secretary, HPTE Board