

Resolution – HPTE #210

Approving the C-470 Express Lanes Project Intra-Agency Agreement between HPTE and the Colorado Department of Transportation

WHEREAS, the General Assembly created the Colorado High Performance Transportation Enterprise (“HPTE”), pursuant to Section 43-4-806, C.R.S., 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 is authorized, pursuant to Section 43-4-806(2)(c)(I), C.R.S., to impose user fees on the travelling public for the privilege of using surface transportation infrastructure, and is further authorized pursuant to Section 43-4-806(2)(c)(III), C.R.S. to contract with any governmental or non-governmental source of funding for loans to be used in support of HPTE’s functions; and

WHEREAS, HPTE, in partnership with CDOT, is 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, the HPTE Board of Directors (the “Board”) supports the Project and recognizes the benefits it provides to the State, which include, but are not limited to, allowing CDOT to better manage congestion over the long term on C-470 and providing the traveling public with the choice of a new travel lane with more reliable and efficient travel times; and

WHEREAS, in an effort to assist CDOT with financing the Project, HPTE intends to enter into certain financing agreements, pursuant to which HPTE will pledge all amounts received by HPTE from tolls, rates and other user fees imposed by HPTE for the privilege of traveling on the Project; and

WHEREAS, HPTE currently anticipates that the financing for HPTE’s share of the Project costs will include the issuance of senior toll revenue bonds under a master trust indenture (the “Senior Bonds”), as well as a loan of additional funds under a loan agreement with the U.S. Department of Transportation, by and through its Transportation Infrastructure Finance and Innovation Act (“TIFIA”) Joint Program Office (the “TIFIA Loan”, which together with the Senior Bonds constitutes the “Financing”), which Financing, to consist of one or more closings, will fund the payment of certain costs and expenses of the planning, design, engineering, acquisition, installation or construction of the Project, and other lawful expenses and costs related thereto; and

WHEREAS, CDOT has entered into a contract for the Project with a design-build contractor for the design, engineering and construction of the Project which establishes, *inter alia*, minimum insurances to be provided by the design-build contractor during the

construction period, certain required parent guarantees and payment and performance bonds, and sets forth liquidated damages to be assessed by CDOT in the event the Project is not completed within the timeframe set forth in the design-build contract; and

WHEREAS, HPTE has entered into a Managed Lanes Tolling Services Agreement, dated May 7, 2015 (the "TSA") with the E-470 Public Highway Authority ("E-470") pursuant to which E-470 provides Tolling Services for HPTE Tolling Facilities, including, but not limited to, Toll Collection and Adjudication Services, conditioned upon payment by HPTE to E-470 of E-470's Expenses, including Transaction Costs, Reimbursable Costs, and/or costs per dollar of Gross Toll Revenue, all in accordance with the TSA; and

WHEREAS, pursuant to Section 43-4-806(4), C.R.S., the Transportation Commission may authorize the transfer of money from the state highway fund to HPTE to defray expenses of HPTE; and

WHEREAS, any loan that CDOT provides HPTE shall, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, constitute a loan from the Transportation Commission to HPTE and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution; and

WHEREAS, CDOT and HPTE have agreed to enter into the C-470 Express Lanes (Phase 1) Project Intra-Agency Agreement (the "C-470 Intra-Agency Agreement"), pursuant to which HPTE can request financial support from the Transportation Commission in the form of a CDOT Backup Loan to assist HPTE in fulfilling any operations and maintenance obligations, including amounts payable to E-470, in the event revenues, together with any available reserves, are insufficient, or projected to be insufficient, to satisfy HPTE's obligations; and

WHEREAS, HPTE acknowledges that the Transportation Commission is not required by the C-470 Intra-Agency Agreement to make any such loan, and that any determination by the Transportation Commission to make, and allocate funds for, any such loan shall be in the sole discretion of the Transportation Commission; and

WHEREAS, CDOT and HPTE further desire to enter into this C-470 Intra-Agency Agreement to define their respective roles and responsibilities with respect to construction funding and timely prosecution of the Project, cooperation on the operation and maintenance of the completed Project, and to allocate the costs related thereto.

NOW THEREFORE BE IT RESOLVED, the Board hereby approves the Segment 2 Intra-Agency Agreement with CDOT in the form presented and authorizes the HPTE Director to execute the Segment 2 Intra-Agency Agreement with such revisions or modifications, not inconsistent with this Resolution, as the HPTE Director may determine to be necessary or appropriate.

BE IT FURTHER RESOLVED, the Board acknowledges that the Financing agreements are not yet available and are not approved for execution by this Resolution, and that a subsequent amendment to the C-470 Intra-Agency Agreement will be required on or before closing on the earlier to occur of the TIFIA Loan or the Senior Bonds, which amendment shall, among other things, set forth HPTE's final contribution amount toward the construction of the Project.

Signed as of September 21, 2016

Kari V. Grant
Secretary, HPTE Board



Date: September 15, 2016

To: Colorado Transportation Commission / High Performance Transportation Enterprise Board

From: Nicholas Farber, HPTE Operations Manager; Brent Butzin, HPTE General Counsel

Subject: Intra-Agency Agreement between CDOT and HPTE regarding the C-470 Express Lanes Project

Purpose

The purpose of this memo is to summarize the Intra-Agency Agreement (IAA) between CDOT and HPTE regarding the financing of the C-470 Express Lanes Project (Project) and to recommend its approval.

Action

The Board and TC are asked to adopt a resolution that supports the staff recommendation to approve the IAA.

Project Background

The C-470 Express Lanes Project (the Project) is located along 12.5 miles of C-470, between Interstate 25 (I-25) and Wadsworth Boulevard. The Project includes reconstructing existing pavement, adding auxiliary lanes, improving on and off ramps as well as the construction of new express lanes both westbound and eastbound. The total cost of the Project is \$276 million with funding coming from CDOT, local stakeholders and HPTE who will borrow the remainder of the Project cost through a TIFIA loan and toll revenue backed bonds.

C-470 Intra-Agency Agreement Details

IAAs between CDOT and HPTE document the substantive terms of how CDOT and HPTE work together and allocate rights and responsibilities on shared projects. This IAA for C-470 will address traditional provisions normally contained in all CDOT/HPTE IAAs on other corridors, e.g. operations and maintenance responsibilities, and the CDOT Backup loan, (see MEXL and I-25N Segment 2 IAAs). However, because of the financing required to complete construction the C-470 Express Lanes Project IAA must have provisions regarding the HPTE TIFIA loan and the toll backed revenue bonds.

Provisions Unique to this IAA

Below is a summary of the key substantive provisions that are unique to this IAA. The IAA is attached as (Attachment A) and resolution is attached as (Attachment B):

- *HPTE Contribution & Project Cost Overruns*: Describes that HPTE will contribute the TIFIA loan proceeds and toll revenue backed bond proceeds to the Project, and that CDOT will remain responsible for any Project contingency and cost overruns (IAA §§ I(1), II(7), III(1)).
 - Exact numbers will not be in this version of the IAA because those amounts will not be finalized until prior to Financial Close.
 - Staff will come back to the Commission and the HPTE Board prior to Financial Close to amend the IAA by inserting final amounts.
- *Flow of Funds*: Describes how HPTE's contribution flows to CDOT for construction related expenses (IAA § III(1)).
- *Scope of CDOT Backup Loan*: In addition to being able to request a backup loan for O&M costs, HPTE may request a backup loan for toll processing costs (IAA §§ II(7), III(2), III(3)).
 - Required due to the gross revenue pledge for the Project financing.
 - Includes ability to request that potential loan amounts be set aside if a shortfall will occur.
- *Flow of certain funds to the bond trustee*: Describes how Project completion security funds (payment and performance bonds, parent company guarantee, Delay in Start Up insurance coverage, and liquidated damages all sized to cover HPTE debt service in the event of construction delays) flow to the trustee (IAA § I(1)(a)).
- *CDOT covenants*: Because CDOT is not a counterparty to the TIFIA loan, CDOT's covenants with respect to Project completion, O&M responsibilities, and environmental approvals are contained in this IAA instead.

Key Benefits

- IAA Provides TIFIA and bond holders with certainty regarding HPTE and CDOT's roles and responsibilities.
- Documents the necessary contractual obligations between CDOT and HPTE.
- Approval of the IAA will reinforce the mutually beneficial partnership between CDOT and HPTE on corridors where there are managed and general purpose lanes.

Commission Options/Decision Matrix

- 1) **Staff Recommendation:** Approve the IAA. CDOT and HPTE will execute the IAA, and construction will begin around October 1st.
- 2) Review but do not approve the IAA. Provide instructions on changes or revisions. Project financing would be delayed by at least one month.

Next Steps

If approved, the IAA will be executed by CDOT and HPTE. Financial close will be in late November early December. HPTE will come back around that time to seek an amendment with final numbers to the IAA and any changes required by lenders.

Recommendations

The staff recommends that the Board approve a resolution authorizing the execution of this agreement.

Attachments

Attachment A: C-470 Express Lanes Project Intra-Agency Agreement

Attachment B: Resolution Approving the Intra-Agency Agreement between the Colorado Department of Transportation and the High Performance Transportation Enterprise for the C-470 Express Lanes Project

C-470 EXPRESS LANES (PHASE 1) PROJECT

INTRA-AGENCY AGREEMENT

THIS INTRA-AGENCY AGREEMENT (this “Agreement”) is made this ___ day of _____, 2016 by and between the STATE OF COLORADO for the use and benefit of the COLORADO DEPARTMENT OF TRANSPORTATION (“CDOT”) and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT (“HPTE”). CDOT and HPTE are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

RECITALS

A. CDOT is an agency of the State of Colorado authorized pursuant to Section 43-1-105, C.R.S. to plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies.

B. The Transportation Commission of Colorado (the “Transportation Commission”) is the budgetary and policy making body for CDOT with all powers and duties granted by the Colorado General Assembly pursuant to Section 43-1-106, C.R.S.

C. HPTE was created pursuant to Section 43-4-806(2), C.R.S. as a government-owned business within CDOT to pursue innovative means of financing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system, can feasibly be commenced in a reasonable amount of time, and will allow more efficient movement of people, goods, and information throughout Colorado.

D. On November 20, 2015, the Federal Highway Administration issued and approved the *C-470 Corridor Finding of No Significant Impact (FONSI), Kipling Parkway to I-25, November 25* (the “FONSI”), in accordance with 42 U.S.C. § 4321, *et seq.*

E. CDOT and HPTE are currently working in cooperation on the planning, financing, construction, implementation and operation of the first phase of the approved project, generally consisting 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”).

F. CDOT has requested HPTE’s involvement in the Project for the variety of benefits CDOT will receive from implementing tolling on the Project, including, but not limited to, allowing CDOT to better manage congestion over the long term on C-470 and providing the traveling public with the choice of a new travel lane with more reliable and efficient travel times.

G. HPTE is authorized pursuant to Section 43-4-806(2)(c)(I), C.R.S. to impose user fees on the traveling public for the privilege of using surface transportation infrastructure, and is further authorized pursuant to Section 43-4-806(2)(c)(III), C.R.S. to contract with any governmental or non-governmental source of funding for loans to be used in support of HPTE's functions.

H. Consistent with HPTE's statutory purpose as a government-owned business and enterprise for purposes of Article X, Section 20 of the State Constitution, and in order to support CDOT's efforts to finance the Project, HPTE intends to enter into certain financing agreements pursuant to which HPTE will pledge all amounts received by HPTE from tolls, rates and other user fees imposed by HPTE pursuant to Section 43-4-806(2)(C)(I), C.R.S., for the privilege of traveling on the Project (the "Gross Revenues").

I. HPTE currently anticipates that the financing for HPTE's share of the Project costs will include the issuance of senior lien toll revenue bonds under a master trust indenture (the "Senior Bonds"), as well as a loan of additional funds under a loan agreement with the U.S. Department of Transportation, by and through its Transportation Infrastructure Finance and Innovation Act ("TIFIA") Joint Program Office (the "TIFIA Loan," which together with the Senior Bonds constitutes the "Financing"), which Financing, to consist of one or more closings, will fund the payment of certain costs and expenses of the planning, design, engineering, acquisition, installation or construction of the Project, and other lawful expenses and costs related thereto.

J. CDOT has entered into that certain contract for the C-470 Tolled Express Lanes Segment 1 Design-Build Project dated [] with [Flatiron] (the "Design-Builder") for the design, engineering and construction of the Project (the "D-B Contract") which establishes, *inter alia*, minimum insurances to be provided by the Design Builder during the construction period, certain required parent guarantees and payment and performance bonds, and sets forth liquidated damages to be assessed by CDOT in the event the Project is not completed within the timeframe set forth in the D-B Contract.

K. HPTE has entered into that certain Managed Lanes Tolling Services Agreement, dated May 7, 2015 (the "TSA") with the E-470 Public Highway Authority ("E-470") pursuant to which E-470 provides Tolling Services for HPTE Tolling Facilities, including, but not limited to, Toll Collection and Adjudication Services, conditioned upon payment by HPTE to E-470 of E-470's Expenses, including Transaction Costs, Reimbursable Costs, and/or costs per dollar of Gross Toll Revenue, all in accordance with the TSA.

L. Pursuant to Section 43-4-806(4), C.R.S., the Transportation Commission may authorize the transfer of money from the state highway fund to HPTE to defray expenses of HPTE and, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, such a transfer shall constitute a loan from the Transportation Commission to HPTE and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution.

M. In consideration of the various terms, covenants, and conditions set forth herein, including the benefits that CDOT will receive as a result of the Financing and the Project, CDOT and HPTE have agreed to enter into this Agreement pursuant to which HPTE can request financial support from the Transportation Commission to assist HPTE in fulfilling its obligations with respect to HPTE O&M Obligations (as such term is hereinafter defined) in the event revenues, together with any available reserves, are insufficient, or projected to be insufficient, to satisfy HPTE's obligations.

N. HPTE recognizes and acknowledges that any such financial support shall be in the form of a CDOT Backup Loan (as defined and further described in Section III below) from the Transportation Commission to HPTE pursuant to Section 43-4-806(4), C.R.S. The Transportation Commission may, in its sole and absolute discretion, but is not obligated to, make a CDOT Backup Loan. If the Transportation Commission elects not to make a CDOT Backup Loan, such an election shall not, by itself, result in a default of HPTE under any of HPTE's Financing documents.

O. CDOT and HPTE further desire to enter into this Agreement to define their respective roles and responsibilities with respect to funding the construction of the Project and cooperation on the operation and maintenance of the Project and adjacent general purpose lanes, and to allocate the costs related thereto.

P. This Agreement is executed by HPTE under the authority of Sections 29-1-203 and 43-4-806(6)(h), C.R.S., and by CDOT under the authority of Sections 43-1-110 and 43-1-116, C.R.S.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, AND THE VARIOUS TERMS, COVENANTS, AND CONDITIONS SET FORTH HEREIN, AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:

TERMS AND CONDITIONS

I. CONSTRUCTION OF THE PROJECT

1. Project Budget. CDOT is primarily responsible for the capital costs of the Project. Notwithstanding the foregoing, in consideration of the various benefits HPTE receives by implementing a user fee system on the Project, HPTE has agreed to contribute a portion of the proceeds of the Financing toward the design, acquisition and construction of the Project. The specific amounts of HPTE's contribution toward the design, acquisition and construction of the Project shall be set forth in an amendment to this Agreement that the Parties agree shall be approved on or before closing on the earlier to occur of the TIFIA Loan or the Senior Bonds.

The manner in which both CDOT's and HPTE's respective contributions will be requisitioned for the payment of costs of the Project shall be set forth in the Financing agreements. HPTE's contribution amount, once finally established, shall be in full satisfaction of any obligations HPTE might have with respect to financing the design, acquisition and the construction of the Project. CDOT represents that such contribution is expected to be sufficient to complete the Project; provided, however, that if costs to complete the Project exceed the funding available, CDOT, and not HPTE, shall be solely responsible for identifying additional funding sources to cover any shortfalls.

2. Delays in Project Completion. CDOT acknowledges that time is of the essence in the completion of the Project; that HPTE intends to pledge future user fee revenues toward the repayment of the TIFIA Loan and Senior Bonds; and that HPTE may incur costs in the event tolling does not commence within the timeframes contemplated in the D-B Contract. CDOT shall be liable to HPTE for any costs incurred by HPTE under the Financing agreements that arise as a result of construction delays, except to the extent any delay in tolling commencement is caused by HPTE or E-470 and is not attributable to the actions of CDOT or the Design Builder. CDOT agrees and covenants that it shall: (i) undertake all actions necessary to enforce the provisions of the D-B Contract; (ii) cause the Design Builder to seek recovery under any available delay in start up or builders risk insurance policies; (iii) take all reasonable actions to recover amounts payable under the provisions of any surety or parent company guarantees provided to CDOT by the Design Builder; and (iv) in the event of delayed construction completion, enforce all liquidated damages provisions against the Design Builder and remit any liquidated damages amounts received first to HPTE to cover any liabilities it incurs under the Financing agreements.

3. CDOT Responsibilities. Except as otherwise specifically identified as a responsibility of HPTE in Paragraph 3 of this Section, CDOT shall be responsible for the design, acquisition and construction of the Project, including, but not limited to, the following:

a. CDOT will provide reasonable cooperation to HPTE with regard to the Financing and any continuing disclosure or other ongoing obligations related thereto.

b. CDOT will provide design and construction management for the Project and will oversee the Design Builder who shall perform the construction in accordance with the approved design plans and/or administer the construction, all in accordance with the D-B Contract. Such administration shall include, but not be limited to, inspection and testing; approving sources of materials; performing required plant and shop inspections; documentation of contract payments; preparing and approving pay estimates; preparing, approving and securing the funding for contract modification orders and minor contract revisions; processing contractor claims; construction supervision; and meeting requirements of applicable federal and state laws and regulations.

c. CDOT will be responsible for acquiring all rights of way, if any, necessary for the Project and for compliance with the Uniform Federal Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601, *et seq.*) requirements.

d. If necessary, CDOT will be responsible for obtaining the proper clearance or approval from any public or private utility company that may become involved in the Project.

e. CDOT shall ensure that any and all work in connection with the Project is undertaken in accordance with the requirements of the current federal and state environmental regulations including the National Environmental Policy Act of 1969 (42 U.S.C. § 4321, *et seq.*), as applicable, and the FONSI.

f. CDOT will be responsible for ensuring compliance with Federal Disadvantaged Business Enterprise requirements for the Project.

g. In the event the Project involves modifications of a railroad company's facilities whereby the related work is to be accomplished by railroad company forces, CDOT shall make timely application to the Public Utilities Commission requesting its order providing for the installation of the proposed improvements and not proceed with that work without compliance. CDOT shall also establish contact with the railroad company involved for the purposes of complying with applicable provisions of 23 CFR 646, subpart B, concerning federal aid projects involving railroad facilities.

h. CDOT will maintain all documents related to the construction of the Project and make them available for inspection and review by HPTE and all federal agencies with an interest in the Project for a period of not less than three years after the completion of the work.

i. CDOT may be responsible for all other items in the Memorandum of Understanding by and between CDOT and HPTE, dated September 30, 2013, as may be amended from time to time (the "MOU") identified as the responsibility of CDOT's Office of Major Project Development.

4. HPTE Responsibilities. HPTE shall be specifically responsible for the following with respect to the construction of the Project:

a. HPTE will be responsible for the contracting necessary to implement a user fee system, including paying for the costs of all tolling equipment, software and related installation, including, but not limited to, any obligations to E-470 under the TSA.

b. HPTE may be responsible for other items identified in the MOU as a responsibility of HPTE.

II. OPERATIONS AND MAINTENANCE OF THE PROJECT

1. Overview and Costs. The Project is being constructed adjacent to the C-470 general purpose lanes (within the Project area, referred to herein as the “General Purpose Lanes”), and the Parties recognize the need to cooperate in carrying out the related operations and maintenance for the Project and adjacent General Purpose Lanes. To that end, the Parties agree to cooperate in ensuring that the operations and maintenance are performed and agree to the division of costs as set forth in this Agreement. As a general matter, HPTE shall be responsible for operating and maintaining the Project (including contracting for tolling services and tolling enforcement), and CDOT shall be responsible for operating and maintaining the General Purpose Lanes. It is the intent of the Parties that, except as specifically provided otherwise herein, CDOT shall perform such operations and maintenance of both the Project and the General Purpose Lanes, subject to reimbursement from HPTE for HPTE’s proportionate share of the overall operations and maintenance expenses of the Project, as further described herein.

2. HPTE License. In consideration of the various benefits CDOT will receive as a result of the Project, CDOT hereby provides to HPTE a perpetual, non-exclusive, non-terminable license over, under, upon and in the site of the Project (the “License”) for HPTE to operate and maintain the Project. CDOT acknowledges and agrees that HPTE may sublicense the License as needed to fulfill its obligations hereunder. Subject to the License, CDOT reserves the right of use, occupancy and ownership over, under, upon and in the lands comprised of the Project, which right shall be exercised consistent with a mutually agreed upon and approved Concept of Operations for the Project and in a manner that does not unreasonably interfere with the collection of tolls by HPTE on the Project.

3. Cost Allocation. Except as otherwise provided herein, the Parties agree to allocate costs based on a proportion of the total number of vehicles using all lanes on the portion of C-470 that includes the Project, with HPTE’s portion being calculated to include all vehicles obligated to pay a user fee within the Project, whether or not such user fee is actually collected, and CDOT’s portion being calculated to include all other vehicles (the “Pro-Rata O&M Cost Calculation”). For illustrative purposes only, if the total cost of operating and maintaining the portion of C-470 that includes the Project is \$100,000 per month, and 20% of the total vehicle count consisted of vehicles obligated to pay a user fee, HPTE would be responsible for \$20,000 of such operations and maintenance costs. The Pro-Rata O&M Cost Calculation shall apply to CDOT’s costs incurred with respect to: (i) snow and ice removal services; (ii) courtesy patrol; (iii) pavement resurfacing, life-cycle and capital maintenance, to the extent such activities reasonably include both the Project and the General Purpose Lanes; (iv) lane striping and lane sweeping/cleaning; and (v) any other operations and maintenance expense CDOT and HPTE agree in good faith is most fairly allocated utilizing the Pro-Rata O&M Cost Calculation method.

4. CDOT O&M Obligations. The Pro-Rata O&M Cost Calculation shall not apply to those operations and maintenance costs existing and regularly funded by CDOT prior to the implementation of the Project, and for which the addition of the Project results in a *de minimus*

impact on overall operations and maintenance expenses on C-470: Such costs include, but are not limited to, CDOT's costs incurred with respect to: (i) repair and replacement of guardrail; (ii) repair and replacement of lighting fixtures; (iii) contracts with the State Patrol for safety enforcement within the corridor (but exclusive of additional enforcement contracted by HPTE for toll evasion enforcement); and (iv) pavement maintenance on the General Purpose Lanes.

5. HPTE O&M Obligations. HPTE shall be solely responsible for costs incurred with respect to: (i) toll processing and collection, including, for certainty, all costs payable to E-470 under the TSA; (ii) Level I and Level II maintenance of toll equipment, as defined in the TSA; (iii) contracts for toll evasion enforcement with the State Patrol or other law enforcement entity; (iv) pavement maintenance on the Project; and (v) HPTE overhead and administrative costs related to the operations and maintenance of the Project. Such costs, together with those costs attributable to HPTE under the Pro-Rata O&M Cost Calculation, shall constitute the "HPTE O&M Obligations."

6. Invoicing. To the extent either Party provides services to the other (either through a third party or directly) that results in one Party covering the costs that is agreed to be the responsibility of the other, the Party covering such costs will invoice the other and such invoice shall include a reasonably detailed breakdown of the costs for which the invoicing Party is seeking reimbursement.

7. Reconciliation; O&M Shortfall; Performance. CDOT shall submit to HPTE on or before January 15 and July 15 of each year an invoice describing the HPTE O&M Obligations due to CDOT with respect to the Project for the prior six month period. HPTE will then cause such amounts to be remitted within 45 days of receipt of CDOT's invoice. To the extent the Gross Revenues, less amounts first required to be paid in accordance with the security and priority of payments set forth in the Financing agreements, including, but not limited to, the payment of: (i) pay debt service on the Senior Bonds; (ii) pay debt service on the TIFIA Loan; (iii) pay debt service on any future junior lien toll revenue bonds; (iv) make required deposits to the debt service reserve funds relating to the Senior Bonds and TIFIA Loan; and (v) pay fees and expenses relating to the Financing (so reduced, the "Net Revenues"), are inadequate in any fiscal year to cover the HPTE O&M Obligations, including, for certainty, amounts payable to either CDOT or E-470, HPTE may request a CDOT Backup Loan to fund such shortfall. Notwithstanding such shortfall in the availability of Net Revenues to cover the HPTE O&M Obligations or the a failure by HPTE to make any principal or interest payment due under any CDOT Backup Loan agreement, CDOT agrees that it shall continue to perform operations and maintenance of both the Project and the General Purpose Lanes.

III. CDOT BACKUP LOAN OBLIGATIONS

1. HPTE Financing Obligations. The Financing agreements under which HPTE anticipates issuing the Senior Bonds and receiving the TIFIA Loan are expected to require that HPTE first apply the Net Revenues toward the payment of the HPTE O&M Obligations in priority ahead of repayment obligations on any CDOT Backup Loan (as hereinafter defined).

Prior to entering into the Financing agreements and executing the contemplated amendment that will finally set forth HPTE's contribution toward the construction of the Project, CDOT and the Transportation Commission will be given an opportunity to review the Financing agreements, and CDOT will acknowledge its awareness of HPTE's obligations under the Financing agreements.

2. CDOT Backup Loan Set Aside. On or before September 15 of the immediately preceding fiscal year, HPTE shall estimate whether and in what maximum amount it may be necessary for HPTE to request that CDOT provide financial support to fulfill an HPTE O&M Obligation in any fiscal year due to an insufficiency of Net Revenues to pay all or any portion of the HPTE O&M Obligation, it being understood that any such financial support shall be in the form of a loan from CDOT to HPTE pursuant to Section 43-4-806(4), C.R.S. (a "CDOT Backup Loan"). HPTE shall notify the Executive Director in writing as to the estimated maximum amount, if any, that is expected to be payable in the succeeding fiscal year to satisfy the HPTE O&M Obligations in excess of the amount of Net Revenues anticipated to be generated by the Project and available for the payment of HPTE O&M Obligations in such fiscal year, and such maximum amount (the "CDOT Backup Loan Set Aside") shall be included in the budget request to the Transportation Commission for an allocation of moneys in the state highway fund for such purpose.

3. HPTE may also, at any time during any fiscal year, notify the Executive Director in writing that HPTE desires that CDOT make a CDOT Backup Loan for projected HPTE O&M Obligations in an amount that exceeds any CDOT Backup Loan Set Aside, if any, that the Transportation Commission has previously allocated for such fiscal year. In such event, the Executive Director shall submit a supplemental budget request to the Transportation Commission at its next regularly scheduled meeting for an allocation or supplemental allocation of moneys in the state highway fund for the purpose of making such CDOT Backup Loans to HPTE in such fiscal year in an amount equal to the amount set forth in the notice delivered by HPTE to the Executive Director pursuant to this Section.

4. Moneys allocated by the Transportation Commission to make CDOT Backup Loans shall be transferred to HPTE and shall be used by HPTE to satisfy the HPTE O&M Obligations, as they become due.

5. Notwithstanding any other provision hereof:

a. CDOT and HPTE agree and acknowledge that the Transportation Commission has no obligation to allocate funds to make CDOT Backup Loans in any fiscal year and the decision whether or not to allocate funds, and the amount, if any, of funds allocated, to make CDOT Backup Loans in any fiscal year shall be made at the sole and absolute discretion of the Transportation Commission;

b. CDOT and HPTE further agree and acknowledge that notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be

interpreted to require a contrary conclusion, any CDOT Backup Loan made hereunder shall, in accordance with Section 43-4-806(4), C.R.S., constitute a loan and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution or as defined in Section 24-77-102, C.R.S.;

c. Prior to allocating any funds to make CDOT Backup Loans in any fiscal year, CDOT shall determine that such authority exists in the law and that a sufficient unencumbered balance remains available in Fund 400 for CDOT Backup Loans in an amount equal to the amount of funds so allocated; and

d. If an allocation by the Transportation Commission shall have been made, CDOT Backup Loans shall be made up to the amounts requested by HPTE as set forth above.

e. Repayment of any CDOT Backup Loans shall be payable from Net Revenues after payment of HPTE O&M Obligations in accordance with the terms and conditions of the Financing agreements.

6. Any CDOT Backup Loans made to HPTE in support of HPTE O&M Obligations shall be authorized by and subject to a separate Transportation Commission Resolution and shall be evidenced by one or more loan agreements in substantially the form attached hereto as **Exhibit A** (a "CDOT Backup Loan Agreement"), with terms consistent with the terms contained herein. The Parties agree to cooperate in good faith to determine a reasonable repayment schedule for each CDOT Backup Loan; provided, however, that such repayment terms shall be made consistent with the terms and conditions of the Financing agreements.

IV. DEFAULTS, TERMINATION AND REMEDIES

1. Default; Cure. The failure of either Party to fulfill its obligations to perform in accordance with the terms of this Agreement shall constitute a breach of this Agreement. Subject to the requirements of Section V.1., the non-breaching Party shall thereupon have the right to terminate this Agreement for cause by giving written notice to the other Party of its intent to terminate, and at least thirty (30) days' opportunity to cure the default or show cause why termination is not otherwise appropriate; provided, however that such breaching Party shall not be in default under this Agreement if it has promptly commenced a cure of such nonperformance and is diligently pursuing the same. Any finding of nonperformance and failure to cure under this Paragraph shall be referred for dispute resolution as provided for in Paragraph 3 of this Section IV prior to any termination becoming effective.

2. Default for Non-Payment. If HPTE fails to repay any CDOT Backup Loan in accordance with the applicable CDOT Backup Loan Agreement, and upon notice to HPTE and failure by HPTE to cure within thirty (30) days thereof, CDOT may, at its option: (i) terminate its commitment to consider making future CDOT Backup Loans hereunder; (ii) require HPTE to engage a traffic consultant to review and analyze the operations of the Project and recommend

actions regarding revising toll rates, changing the methods of operations, or any other actions to increase Gross Revenues, and in CDOT's discretion, require HPTE to either implement such recommended actions or undertake such alternative course of action that will ensure HPTE's ability to meet its payment obligations under the applicable CDOT Backup Loan Agreement; or (iii) take any other appropriate action available at law or in equity; provided, however, that no CDOT Backup Loan, or interest thereon, shall be repaid except to the extent Net Revenues are available for such purpose under the terms and conditions of the Financing agreements. Notwithstanding the exercise of any of the remedies above, HPTE shall not be relieved of liability to CDOT for any damages sustained by CDOT by virtue of any breach of this Agreement by HPTE, nor shall CDOT be permitted to cease performance of operations and maintenance of the Project.

3. Dispute Resolution. Any dispute concerning the performance of this Agreement shall be resolved at the lowest staff level possible, and shall first be referred to the Director of the CDOT Office of Major Project Development and the HPTE Operations Manager. Failing resolution by such officers, the escalation process shall be: (i) CDOT Chief Engineer and HPTE Director; (ii) CDOT Executive Director and HPTE Director; and (iii) Transportation Commission and HPTE Board of Directors.

V. GENERAL PROVISIONS

1. Effective Date; Term. This Agreement shall be effective as of the date of the date first written above and shall continue until the earlier of (i) the useful life of the Project; (ii) the date HPTE no longer operates the Project; and (iii) the Parties mutually agree to terminate the Agreement. Notwithstanding any other provision of this Agreement to the contrary, the Parties shall not terminate this Agreement while any amounts remain outstanding on the Senior Bonds or the TIFIA Loan.

2. Modification. This Agreement is subject to such modifications as may be required by changes in federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this Agreement on the effective date of such change as if fully set forth herein. Except as specifically provided otherwise herein, no modification of this Agreement shall be effective unless agreed to in writing by both parties in an amendment to this Agreement that is properly executed and approved in accordance with applicable law.

3. Severability. The terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as a waiver of any other term, or the same term upon subsequent breach.

4. Notices. All communications relating to the day-to-day activities for the work shall be exchanged between representatives of CDOT and HPTE. All communication, notices,

and correspondence with respect to the performance of this Agreement shall be addressed to the individuals identified below. Either Party from time to time, designate in writing new or substitute representatives.

If to CDOT:

Brett J. Johnson, Director
CDOT, OMPD
4201 E. Arkansas Ave. Room 158
Denver, CO 80222
Email: brett.j.johnson@state.co.us

If to HPTE:

David I. Spector, Director
HPTE
4201 E. Arkansas Ave. Room 230
Denver, CO 80222
Email: david.spector@state.co.us

5. Maintenance of Records. Each Party shall maintain all books, documents, papers, accounting records and other evidence pertaining to the Project including, but not limited to, any costs incurred during the construction, operation and maintenance of the Project, and make such materials available to the other Party upon reasonable request.

6. Successors and Assigns. Except as otherwise provided herein, this Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

7. No Third Party Beneficiaries. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein. It is expressly understood and agreed that the enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement, shall be strictly reserved to the Parties hereto, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other third person.

8. Governmental Immunity. Notwithstanding any other provision of this Agreement to the contrary, no term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the Colorado Governmental Immunity Act, Sections 24-10-101, *et seq.*, C.R.S., or the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, as applicable, as now or hereafter amended.

9. Adherence to Laws. At all times during the performance of this Agreement, the Parties shall strictly adhere to all applicable federal and state laws, rules, and regulations that have been or may hereafter be established, including, but not limited to state and federal laws respecting discrimination and unfair employment practices.

10. Availability of Funds. All payments pursuant to this agreement are subject to and contingent upon the continuing availability of funds appropriated for the purposes hereof. If any of said funds become unavailable, as determined by CDOT, either Party may

immediately terminate or seek to amend this agreement, subject to the provisions set forth in Section V.1. hereof.

11. Choice of Law. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision of this Agreement, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this Agreement to the extent that the Agreement is capable of execution.

Remainder of page left intentionally blank. Signature page follows.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

STATE OF COLORADO
JOHN W. HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
Executive Director
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE Director

APPROVED:

CYNTHIA H. COFFMAN
Attorney General

By: _____
ASSISTANT ATTORNEY GENERAL

Signature page to the C-470 Express Lanes (Phase 1) Project Intra-agency Agreement.

EXHIBIT A

Form of CDOT Backup Loan Agreement

THIS LOAN AGREEMENT, made this ___ day of _____, 20__ by and between the State of Colorado for the use and benefit of THE COLORADO DEPARTMENT OF TRANSPORTATION (referred to herein as “CDOT” or the “Lender”) and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (referred to herein as “HPTE” or the “Borrower”) entered into pursuant to the C-470 Express Lanes (Phase 1) Project Intra-Agency Agreement, dated as of January __, 2016, between Lender and Borrower (the “Intra-Agency Agreement”).

RECITALS

A. The Lender, is an agency of the State of Colorado authorized pursuant to Section 43-1-105, C.R.S. to plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies.

B. The Borrower was authorized and created pursuant to Sections 43-4-806(1) and (2), C.R.S. as a government-owned business, a TABOR-exempt enterprise, and a division of CDOT, and is charged with aggressively pursuing innovative means of financing surface transportation projects.

C. The Transportation Commission of Colorado is the budgetary and policy-making body of the Lender and may, pursuant to Section 43-4-806(4), C.R.S. authorize the transfer of money from the state highway fund to the Borrower to defray expenses of the Borrower and, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, such a transfer by the Lender to the Borrower shall, in accordance with Section 43-4-806(4), C.R.S. constitute a loan and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution.

D. In furtherance of HPTE’s efforts to finance the Project and for the benefit of CDOT, HPTE has entered into [Insert descriptions of the Financing Agreements] with [Insert descriptions of lenders] dated as [Insert dates] (the “Financing Agreements”) to finance a portion of the C-470 Express Lanes (Phase 1) Project (the “Project”).

E. The Borrower has requested a loan from the Lender in the amount of \$[Requested Amount] for to satisfy the HPTE O&M Obligations (as defined in the Intra-Agency Agreement)] because [description].

F. The Transportation Commission has approved this loan request and authorized the Lender to make a loan to the Borrower in the amount of \$[Principal Amount], and has allocated funds, in its sole discretion, for such purpose.

G. Authority exists in the law and a sufficient unencumbered balance thereof remains available in [Fund 400] to lend to the Borrower.

H. This Agreement is executed under the authority of Section 43-4-806(4), C.R.S. and by resolution of the HPTE Board of Directors.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, THE PARTIES HEREBY AGREE AS FOLLOWS:

ARTICLE I LOAN AND CLOSING

Section 1.01. Loan and Promissory Note. Pursuant to the terms of the Intra-Agency Agreement and this Agreement, the Lender hereby agrees to loan \$[Principal Amount] (the “Principal Amount”) to the Borrower and the Borrower agrees to pay the Lender the Principal Amount of the loan, plus interest on the terms described herein (collectively, the “Loan”). The Borrower’s obligation to pay the Lender the principal of and interest on the Loan is evidenced by a promissory note (the “Note”) in the form attached hereto as Attachment 1.

Section 1.02. Closing. The Lender shall deliver the principal amount of the Loan to the Borrower, by means of a transfer immediately available funds to Borrower on a date mutually agreed to by the Borrower and the Lender (such date is referred to as the “Closing Date”).

ARTICLE II LOAN OBLIGATIONS

Section 2.01. Principal and Interest Payments. The Borrower shall pay to the Lender the principal amount of the Loan plus accrued interest in accordance with Section 2.07 hereof, or the Borrower may make prepayments in accordance with Section 2.05 hereof (a “Prepayment Date”) only to the extent permitted under the Financing Agreements.

Section 2.02. Lender Invoice and Reports. The Lender shall forward an invoice that includes the amount of principal and interest that shall be due to the Borrower at least thirty days before the next scheduled payment is due.

Section 2.03. Interest. Interest shall accrue on the principal amount of the Loan from the Closing Date through the day preceding the Maturity Date or Prepayment Date at the Interest Rate (defined in Section 2.04 hereof), computed on the basis of a 360-day year of twelve 30-day months.

Section 2.04. Interest Rate. “Interest Rate” means a rate of interest equal to the rate of interest established and adopted by resolution by the Colorado Transportation Commission for loans made by the Colorado state infrastructure bank pursuant to 2 CCR 605-1, Rule V (2), and in effect as of the date hereof.

Section 2.05. Optional Prepayment. The Borrower, at its option, may prepay the Loan in whole by paying the Lender the outstanding principal amount or a portion of the Loan, plus accrued interest to the Prepayment Date as selected by the Borrower.

Section 2.06. Resource Pledge for Repayment. The Borrower’s obligation to pay the principal and interest on the Loan and any other amounts payable by the Borrower hereunder (the “Loan Obligations”) are extraordinary limited obligations of the Borrower payable solely from net revenues generated by the Project in accordance with the terms of the Financing Agreements.

Section 2.07. Repayment Schedule. The Borrower shall make equal installments of \$[Payment Amount] to the Lender each [Payment Period] beginning on [First Payment Due Date]; and continuing each [Payment Period] thereafter for [Number of Payments] consecutive [Payment Periods].

Section 2.08. Remittance. All loan payments shall be made payable to the Colorado Department of Transportation, and sent to the Lender’s accounting branch at 4201 East Arkansas Avenue, Room 212, Denver, CO 80222, or to such other place or person as may be designated by the Lender in writing.

ARTICLE III DEFAULT AND TERMINATION

Section 3.01. Event of Default. Borrower default (“Event of Default”) is governed by Section IV of the Intra-Agency Agreement.

Section 3.02. Remedies. Lender’s remedies against a Borrower Event of Default are governed by Section IV of the Intra-Agency Agreement.

Section 3.03. Remedies Neither Exclusive Nor Waived. No remedy under Section 3.02 hereof is intended to be exclusive, and each such remedy shall be cumulative and in addition to the other remedies. No delay or failure to exercise any remedy shall be construed to be a waiver of an Event of Default.

Section 3.04. Waivers. The Lender may waive any Event of Default and its consequences. No waiver of any Event of Default shall extend to or affect any subsequent or any other then existing Event of Default.

**ARTICLE IV
TERMINATION**

Section 4.01. Subject to the terms of the Intra-Agency Agreement, this Agreement may be terminated as follows:

(a) Termination for Cause. If, through any cause, the Borrower shall fail to fulfill, in a timely and proper manner, its obligations under this Agreement, or if the Borrower shall violate any of the covenants, agreements, or stipulations of this Agreement, the Lender shall thereupon have the right to terminate this Agreement for cause by giving written notice to the Borrower of its intent to terminate and at least thirty (30) days' opportunity to cure the default or show cause why termination is otherwise not appropriate. Notwithstanding above, the Borrower shall not be relieved of liability to the Lender for any damages sustained by the Lender by virtue of any breach of this Agreement by the Borrower.

(b) Termination Due to Loss of Funding. The parties hereto expressly recognize that the Loan is made to the Borrower with State funds which are available to the Lender for the purposes of making a loan for the purposes described herein, and therefore, the Borrower expressly understands and agrees that all its rights, demands and claims to a loan arising under this Agreement are contingent upon availability of such funds to the Lender. In the event that such funds or any part thereof are not available to the Lender, the Lender may immediately terminate or amend this Agreement.

[Signature page follows.]

STATE OF COLORADO
JOHN W. HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
Executive Director
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE Director

APPROVED:

CYNTHIA H. COFFMAN
Attorney General

By: _____
ASSISTANT ATTORNEY GENERAL

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 to CDOT Backup Loan Agreement].

Attachment 1
NOTE

\$ _____

For VALUE RECEIVED, THE COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (the "Maker") subject to and in accordance with a Loan Agreement dated the [Date], promises to pay to the Colorado Department of Transportation (the "Holder") the principal sum of \$[Principal Amount], with interest from date at the rate [Interest Rate]% per annum on the balance from time to time remaining unpaid. The said principal and interest shall be payable in lawful money of the United States of America at 4201 East Arkansas Avenue, Rm. 212, Denver, CO 80222 or at such place as may hereafter be designated by written notice from the Holder to the Maker hereof, on the date and in the manner following:

The Maker shall make equal installments of \$[Payment Amount] to the Lender each [Payment Period] beginning on [First Payment Due Date]; and continuing each [Payment Period] thereafter for [Number of Payments] consecutive [Payment Periods]. [*Or replace by reference to the agreed repayment schedule*].

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____

Its: _____

Attest: _____

