

TOLLING EQUIPMENT FINANCING AGREEMENT

This TOLLING EQUIPMENT FINANCING AGREEMENT (the “Agreement”) is made this ___ day of _____, 2019 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 completing 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. Consistent with their respective missions and statutory powers, CDOT and HPTE are cooperating to construct, operate and maintain several surface transportation infrastructure projects across the State of Colorado, including construction of the westbound Mountain Express Lane (the “MEXL”) from Empire Junction to the Twin Tunnels on I-70, and other, future corridors that will promote and contribute to the integrated transportation system in the State of Colorado (referred herein, collectively, as the “Express Lanes Projects” and each an “Express Lane Project”).

E. In particular, the westbound MEXL Project received twenty-five million dollars (\$25,000,000.00) in funding from an Infrastructure for Rebuilding America (“INFRA”) grant, thus completing the nearly eighty million (\$80,000,000.00) in funding needed to construct the Project.

F. In addition to the construction costs associated with the westbound MEXL Project, HPTE estimates that the capital costs of hardware and software equipment (the “Tolling Equipment”) needed to implement user-fee systems – including installation, integration and testing periods prior to June 2019 – for the westbound MEXL Project will be funded using an existing allocation previously authorized for this purpose by the Transportation Commission.

G. As a government-owned business within CDOT, HPTE is required to own and operate all Tolling Equipment on its Express Lanes Projects.

H. 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.

I. In order for HPTE to finance the capital costs of the Tolling Equipment needed to implement user-fee systems for some of, but not all, of HPTE's past Express Lane Projects, including: (1) North I-25 between US 36 and Wagon Wheel Park-and-Ride (the "Segment 2"); (2) North I-25 between Wagon Wheel Park-and-Ride and E-470 (the "Segment 3"); (3) eastbound MEXL; and (4) C-470 from I-25 to Kipling (the "C-470 Express Lanes Project"), the Parties entered into that certain Master Installment Purchase Agreement (the "MIPA") on November 10, 2014, wherein CDOT agreed to make available five million dollars (\$5,000,000.00) to finance the capital costs of Tolling Equipment.

J. Following the execution of the MIPA, HPTE utilized funds under the MIPA to purchase Tolling Equipment for Segment 2 (at a cost of \$1,616,606.50) and for the C-470 Express Lanes Project (at a cost of \$433,371.74) only, leaving a balance of \$2,950,021.76 of the \$5,000,000.00 originally authorized by CDOT under the MIPA.

K. HPTE exercised its Early Purchase Option under the MIPA for the repayment of the capital costs incurred, including interest, for Tolling Equipment for Segment 2 and the C-470 Express Lanes Project, with payments to CDOT dated January 4, 2017 and February 13, 2018, respectively, thereby satisfying its debt obligations to CDOT under the MIPA.

L. As HPTE becomes a more sophisticated enterprise with more mature business practices, both CDOT and HPTE have recognized that the terms and processes outlined by the MIPA were created as a temporary stopgap that would eventually not align with current accounting or budget best practices, thereby making the MIPA terms and processes burdensome for staff to manage.

M. Furthermore, because of internal discussions between HPTE, CDOT and the Federal Highway Administration (the "FHWA") regarding the purchase and installation of Tolling Equipment, and as several Express Lanes Projects across the State of Colorado have become fully operational, the Parties agree and acknowledge that the MIPA no longer serves a business purpose to both HPTE and CDOT, and should be replaced, highlighted by the fact that HPTE has repaid all of capital costs incurred for Tolling Equipment under the MIPA.

N. Now, in furtherance of the successful implementation of the westbound MEXL Project and any other Express Lane Project to be identified in the future, HPTE intends to implement a user-fee system on each Express Lane Project and has requested that CDOT enter

into an equipment finance agreement with HPTE to finance the capital costs of the Tolling Equipment needed to implement user-fee systems on each Express Lane Project, which effectively replaces the MIPA, and CDOT has agreed to enter into the equipment financing agreement with HPTE for this purpose.

O. Under the Agreement, HPTE agrees to grant CDOT a continuing security interest in the Tolling Equipment described in **Exhibit A**, attached hereto and incorporated herein, to secure payment and performance of HPTE's debt obligations under this Agreement, with such security interest expiring upon HPTE's repayment of its debt obligations as specified in Exhibit A.

P. HPTE further agrees to repay CDOT the "Estimated Draw Amount", as amended and restated, shown in Exhibit A, together with interest in the number of periodic installments.

Q. The Parties acknowledge that, based on the westbound MEXL Project scope, the current early estimate for Tolling Equipment will be paid for with the \$2,950,021.76 unused balance which has already been authorized for this purpose by CDOT under the prior MIPA.

R. As westbound MEXL and other Express Lanes Projects are identified, implemented and constructed, HPTE will work with the CDOT Division of Accounting and Finance (the "DAF") to bring funding requests before the Transportation Commission for approval through existing budget processes to procure funds needed for Tolling Equipment, if any, pursuant to Section 1.a. of this Agreement.

S. 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

1. Security Interest. HPTE grants CDOT a continuing security interest in the property described in Exhibit A as amended and restated. Such security interest is granted to secure performance by HPTE of its obligations hereunder and under any other present or future agreement with CDOT and will expire upon HPTE's repayment of its debt obligations as specified in Exhibit A.

a. The Parties acknowledge that for the westbound MEXL Project, and any other future Express Lanes Project, corresponding Tolling Equipment will be needed for the Express Lane Project based on specific construction, testing and installation timelines. The Parties shall add, expand and/or supplement Exhibit A, which shall be memorialized in a written notice from HPTE to CDOT during CDOT's annual budget approval process. When Tolling Equipment for the next Express Lane Project is to be purchased, Exhibit A will be supplemented with an Exhibit A-1, then with Exhibit A-2 for the following Express Lane Project, and so on (the "Exhibit Adding Process").

b. Subject to the terms and conditions of this Agreement and upon HPTE's purchase of the Tolling Equipment for each Express Lane Project, CDOT will be deemed to have established its security interest described in Exhibit A pursuant to the Parties' Exhibit Adding Process.

2. Tolling Equipment. The Parties understand and agree that any obligation on the part of CDOT in any given future State Fiscal Year constitutes a then-current year expense of CDOT, payable exclusively from CDOT's then-current annual allocation by the Transportation Commission of the State of Colorado. The act of allocating by the Transportation Commission is an act solely within the discretion of the Transportation Commission and no provision of this Agreement shall be construed or interpreted as creating a general obligation or other indebtedness of CDOT, within the meaning of any constitutional or statutory debt limitation.

a. The Parties agree to coordinate as necessary to purchase the appropriate Tolling Equipment for the westbound MEXL Project, and any other future Express Lane Project, once Tolling Equipment expenses are finalized (the "Draw Amount"), which shall be memorialized in a written notice from HPTE to CDOT specifying exact costs, including all necessary line items. It is contemplated by the Parties that the Estimated Draw Amounts set forth on Exhibit A are subject to change based on each Express Lane Projects' installation, construction and testing timeline, provided that each Party shall have obtained the necessary approvals from the HPTE Director and the CDOT CFO prior to doing so.

b. The Parties shall expand and/or supplement Exhibit A, which shall be memorialized in a written notice from HPTE to CDOT and pursuant to the Exhibit Adding Process.

3. Payments. HPTE shall repay CDOT the Monthly Payment Amount indicated in Exhibit A, as amended and restated, with interest thereon until paid in full at the per annum rate set by the State Infrastructure Bank at the time of draw, which amounts shall accrue from the date of funding with respect to each draw. The initial payment shall be deemed due as of the date indicated on Exhibit A and subsequent installment payments shall be due on the same day of each month thereafter until paid. HPTE warrants that it shall stagger each draw for any other future Express Lanes Projects between Fiscal Year 2019 through Fiscal Year 2022.

4. No Prepayment Penalty. HPTE shall have the right to prepay any amounts accrued under this Agreement in full or in part at any time without the imposition of any prepayment fee or penalty.

5. Term. This Agreement as it applies to each draw will commence on the date HPTE accepts funding for the Tolling Equipment and shall continue until all Monthly Payment Amounts related to that draw have been made (the "Term"), unless earlier terminated pursuant to Section 4 of this Agreement. The Term for each Express Lane Project shall not exceed ten (10) years from the date funding is received by HPTE.

6. Loss or Damage; Maintenance. HPTE bears the entire risk of loss, theft, damage or destruction of any Tolling Equipment item in whole or in part from any reason whatsoever (the "Casualty Loss"). No Casualty Loss to any Tolling Equipment item shall relieve HPTE from its responsibility to pay CDOT or from any other obligation under this Agreement. In the event of Casualty Loss to any Tolling Equipment item, HPTE shall immediately notify CDOT of the same and HPTE shall immediately repair the same. All maintenance and repair costs to the Tolling Equipment shall be paid by HPTE and CDOT is hereby relieved from any responsibility to maintain or repair the same, except as set forth in Section 8 of this Agreement. HPTE agrees that it will maintain, preserve, and keep the Tolling Equipment in good repair and working order, in accordance with manufacturer's recommendations.

7. Alterations. Without CDOT's prior written consent, HPTE shall not make any alterations or additions to the Tolling Equipment that detract from the Tolling Equipment's economic or functional utility, or use, operate or maintain the Tolling Equipment improperly, carelessly or in a manner contrary to this Agreement.

8. Vendor Warranties. CDOT hereby irrevocably appoints HPTE its agent and attorney-in-fact during the applicable term, so long as HPTE shall not be in default hereunder, to assert from time to time whatever claims and rights (including, without limitations, warranties) relating to the Tolling Equipment that CDOT may have against the manufacturer or supplier of the Tolling Equipment (the "Vendor"). HPTE's sole remedy for the breach of such warranty, indemnification or representation shall be against Vendor of the Tolling Equipment, and not against CDOT. Any such matter shall not have any impact whatsoever on the obligations of HPTE under this Agreement.

9. Insurance. HPTE shall maintain and provide CDOT evidence satisfactory to CDOT of all risk insurance against loss of or damage to the Tolling Equipment for not less than the full replacement value thereof, and against fire, theft and other risks in such amounts in such forms as CDOT reasonably requires.

10. Assignment. Neither Party shall be entitled to assign this Agreement, or any portion hereof, to any third party without the prior written consent of the other Party.

11. Default for Non-payment. Any of the following events shall constitute a default on the part of HPTE hereunder:

a. Failure of HPTE to make any payment within thirty (30) days after receiving notice from CDOT regarding the same; or

b. Any breach or failure of HPTE to perform any of its material obligation under this Agreement within sixty (60) days after HPTE receives notice from CDOT setting forth in reasonable detail the nature and extent of the failure, or within a longer period of time as may be necessary for such cure so long as HPTE shall promptly commence and diligently prosecute pursuing the breach or failure identified in the notice.

c. Upon default and after the expiration of any cure period, CDOT may take possession of the Tolling Equipment to which the default relates, and hold, sell or otherwise dispose of the Tolling Equipment without affecting the obligations of HPTE as provided in this Agreement. No waiver by CDOT of performance by HPTE shall be considered a continuing waiver or shall preclude CDOT from exercising its rights in the event of a subsequent default. No acceptance by CDOT of a partial payment tendered by HPTE shall be deemed a waiver of the balance of the amount due even if the tender states that acceptance will constitute a payment in full.

12. If HPTE fails to repay any obligations in accordance with this 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 draws hereunder; (ii) declare the entire principal amount of all draws then outstanding immediately due and payable; or (iii) take any other appropriate action available at law or in equity. 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.

13. General Provisions.

a. 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) HPTE prepays its payment obligations pursuant to Section 4 of the Agreement; (ii) HPTE completes its payment obligations in Exhibit A; or (iii) the Parties mutually agree to terminate the Agreement.

b. 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.

c. 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.

d. 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:

Chief Financial Officer
CDOT
2829 W. Howard Pl., 5th floor
Denver, CO 80204

If to HPTE:

David I. Spector, Director
HPTE
2829 W. Howard Pl., 5th floor
Denver, CO 80204
Email: david.spector@state.co.us

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

f. 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.

g. 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.

h. 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.

i. 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.

j. 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 12.b hereof.

k. 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
Jared S. Polis, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHOSHANA LEW
EXECUTIVE DIRECTOR
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE DIRECTOR

APPROVED:

Phillip J. Weiser
ATTORNEY GENERAL

By: _____
ASSISTANT ATTORNEY GENERAL

ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER

§ 24-30-202, C.R.S. requires the State Controller to approve all State Contracts. This Agreement is not valid until signed and dated below by the State Controller or delegate of the State of Colorado.

<p>STATE CONTROLLER Robert Jaros, CPA, MBA, JD</p> <p>By: _____</p> <p>Date: _____</p>
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[Signature page to Equipment Financing Agreement.]

**EXHIBIT A
TO
EQUIPMENT FINANCING AGREEMENT**

Draw A

WESTBOUND MOUNTAIN EXPRESS LANE

Estimated Draw Amount	\$2,950,021.76
Rate of Interest	2.5% per annum
Estimated Funding Date	
Number of Monthly Payments	
First Monthly Payment Due	
Monthly Payment Amount	

Resolution – HPTE #287

Approving and Authorizing the Execution of the Tolling Equipment Finance Agreement between the Colorado Department of Transportation and the High Performance Transportation Enterprise

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 such innovative means of financing projects include, but are not limited to, public-private partnerships, operating concession agreements, user fee-based project financing, and availability payment and design-build contracting; and

WHEREAS HPTE is specifically authorized, pursuant to Section 43-4-806(c)(I), C.R.S., to impose user fees on the travelling public for the privilege of using surface transportation infrastructure; and

WHEREAS, the HPTE Board of Directors (the “HPTE Board”) is similarly empowered, pursuant to Section 43-4-806(6)(h), C.R.S., to enter into all other contracts or agreements that are necessary or incidental to the exercise of its powers and performance of its duties; and

WHEREAS, consistent with their respective missions and statutory powers, CDOT and HPTE are cooperating to construct, operate and maintain several surface transportation infrastructure projects across the State of Colorado, including construction of the westbound Mountain Express Lane (the “MEXL”) from Empire Junction to the Twin Tunnels on I-70, and other, future corridors that will promote and contribute to the integrated transportation system in the State of Colorado (referred herein, collectively, as the “Express Lanes Projects” and each an “Express Lane Project”); and

WHEREAS HPTE plans to implement a user-fee system on each of the Express Lane Projects and, in furtherance of this effort, HPTE has requested that CDOT enter into an equipment finance agreement with HPTE to finance the capital costs of hardware and software equipment (the “Tolling Equipment”) needed to implement user-fee systems on each Express Lane Project; and

WHEREAS, CDOT and HPTE previously entered into a Master Installment Purchase Agreement (the “MIPA”), which required CDOT to purchase the hardware and software equipment (the “Tolling Equipment”) for each Express Lane Project and then granted HPTE the right to use and operate the Tolling Equipment; and

WHEREAS, both CDOT and HPTE have recognized that the terms and processes outlined in the MIPA were created as a temporary stopgap that would eventually not align with current accounting or budget best practices, thereby making the MIPA terms and processes burdensome for staff to manage, as both parties acknowledge that the MIPA should be replaced; and

WHEREAS, to address the westbound MEXL Project and new Express Lane Projects not contemplated under the MIPA, CDOT and HPTE staff have taken concepts established under the MIPA and created that certain Tolling Equipment Finance Agreement (the "Agreement") which reflects the current business practices of CDOT and HPTE and with which the MIPA no longer reflected; and

WHEREAS this financing arrangement for westbound MEXL and any other Express Lanes Projects has been documented in the Agreement and the HPTE Board has reviewed the terms of the Agreement.

NOW THEREFORE BE IT RESOLVED, the HPTE Board hereby approves the Tolling Equipment Finance Agreement in substantially the form presented to the HPTE Board at which this Resolution is adopted, with such changes thereto, not inconsistent with this Resolution, as may be approved by both the HPTE Director, or his designee, and the office of the Colorado Attorney General.

BE IT FURTHER RESOLVED, the HPTE Board hereby authorizes the HPTE Director or his designee to execute and deliver the Tolling Equipment Finance Agreement and to deliver such other documents and take such other actions as may be necessary or convenient to the accomplishment of the purposes of this Resolution, including, without limitation, accepting the issuance of up to \$2.9 million dollars of the remaining Master Installment Purchase Agreement funds for Tolling Equipment for use on the MEXL Project and any amendments thereto added by the Colorado Office of the State Controller.

Signed as of February 22, 2019

Simon Logan
Secretary, HPTE Board