

**Resolution – HPTE #187**

**Approving a Second Amendment to the HPTE US36 Concession Project Intra-Agency Agreement with CDOT.**

**WHEREAS**, pursuant to Section 43-4-806, *et seq.*, C.R.S., the General Assembly created the Colorado High Performance Transportation Enterprise (“HPTE”) as a government-owned business within the Colorado Department of Transportation (“CDOT”) to pursue public private partnerships and other innovative and efficient means of completing surface transportation infrastructure projects; and

**WHEREAS**, the Board of Directors of the HPTE (the “Board”) is empowered, pursuant to Section 43-4-806(6)(g), C.R.S., to enter into contracts or agreements with any private or public entity to facilitate a public-private partnership; and

**WHEREAS**, HPTE into an Amended and Restated Concession Agreement (the “Concession Agreement”) dated February 25, 2014, with Plenary Roads Denver LLC (the “Concessionaire”), for the design, construction, financing, operation and maintenance of the US 36 and I-25 Managed Lanes (the “Project”); and

**WHEREAS**, the Colorado Office of the State Auditor undertook a performance audit of the Concession Agreement and issued its audit report to members of the Colorado Legislative Audit Committee on March 11, 2015; and

**WHEREAS**, in its audit report, the State Auditor recommended, in part, that the HPTE should work with CDOT to develop a comprehensive monitoring framework and systematic mechanisms for managing and monitoring the Concessionaire during the 50-year operations phase of the Concession Agreement, and recommended that HPTE execute a project-specific agreement for specifying in detail HPTE’s, CDOT’s, and their contractors’ respective roles and responsibilities for monitoring the Concession Agreement operations phase; and

**WHEREAS**, HPTE previously approved that certain HPTE US36 Concession Project Intra-Agency Agreement with CDOT, dated June 27, 2013, which agreement was subsequently amended on October 17, 2013 (as amended, the “HPTE-CDOT Agreement”), which sets forth many of the tasks required to be performed by HPTE and CDOT with respect to the operations phase of the Project; and

**WHEREAS**, in order to implement the recommendations of the State Auditor, HPTE and CDOT now desire to enter into a Second Amendment to the HPTE US36 Concession Project Intra-Agency Agreement (the “Second Amendment”), which outlines and memorializes HPTE’s and CDOT’s respective obligations to manage and monitor the operations phase of the of the Concession Agreement; and

**WHEREAS**, in accordance with the requirements of the Concession Agreement, the Concessionaire has given its written approval to the proposed Second Amendment.

**NOW THEREFORE BE IT RESOLVED**, the Board of the HPTE hereby approves the Second Amendment to the HPTE US36 Concession Project Intra-Agency Agreement between HPTE and CDOT and authorizes the HPTE Director to execute the Second Amendment on behalf of HPTE, with such revisions or modifications, not inconsistent with this Resolution, as the HPTE Director may determine to be necessary or appropriate.

Signed as of October 14, 2015

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Kari V. Grant  
Interim Secretary, HPTE Board



Date: October 14, 2015  
To: High Performance Transportation Enterprise Board  
From: Nicholas Farber, HPTE Operations Manager  
Subject: Second Amendment to the HPTE US36 Concession Project IAA

#### Purpose

The purpose of this memorandum is to summarize HPTE's recommendation regarding the Second Amendment to the CDOT / HPTE US 36 Concession Agreement Intra-Agency Agreement (IAA).

#### Action

The Board is asked to consider a resolution that supports the staff recommendation.

#### Background

The March 30, 2015 HPTE Legislative Audit cited that HPTE and CDOT had not executed a project-specific agreement outlining their respective roles and responsibilities for monitoring operations and maintenance for the US-36 P3 Project as required by the September 2013 Memorandum of Understanding that created OMPD. The Project Specific Agreement must "outline detailed responsibilities, and identify the responsible organizational units and key personnel required to perform those responsibilities, so that each agency's monitoring responsibilities are clear."

#### Details

The Second Amendment to the June 27, 2013 CDOT HPTE IAA puts HPTE in charge of the contract administration for the current HDR Engineering Contract with respect to O&M Oversight Activities and any future consultant contracts, requires HPTE to coordinate monthly meetings between the Concessionaire, CDOT staff and consultants; requires HPTE to develop a Monitoring Management Plan to ensure timely coordination between the HPTE, CDOT, and the concessionaire during the operating period of the Project; requires HPTE to develop Processes for managing changes and claims related to operations and maintenance; and requires HPTE staff to review all invoices from McGladrey LLP, HDR Engineering or LS Gallegos & Associates to confirm accuracy.

CDOT staff, through OMPD, work with HPTE and consultants to participate in necessary meetings, adhere to its roles and responsibilities set forth in the Monitoring Management Plan, and review documents in order to facilitate Concessionaire's maintenance and operations activities on the US 36 Concession Project.

The IAA also adds a provision that any payment CDOT makes to Plenary of any amounts payable under the Concession Agreement be a discharge of HPTE's obligation to make the relevant payment. This was added to facilitate the US 36 General Purpose Routine Maintenance, Snow and Ice and Courtesy Patrol payments due on a monthly basis.

#### Recommendations

The staff recommends that the HPTE Board approve a resolution authorizing HPTE to execute the Second Amendment to the June 27, 2013 IAA with CDOT to clarify each other's roles and responsibilities as it applies to the oversight of the Concessionaire's operations and maintenance work on US 36.

#### Next Steps

A resolution approving the CDOT's execution of the Second Amendment will be presented to the Transportation Commission at their October 15, 2015 meeting for approval.

#### Attachments

Second Amendment to the HPTE US 36 Concession Project IAA; US 36 P3 Audit relative recommendation; McGladrey High Level Compliance Monitoring Approach and Detailed Compliance and Performance Requirements

**SECOND AMENDMENT TO  
HPTE US36 CONCESSION PROJECT  
INTRA-AGENCY AGREEMENT**

THIS SECOND AMENDMENT (“Amendment”) is made this \_\_\_\_\_ day of \_\_\_\_\_, 2015 by and between the STATE OF COLORADO for the use and benefit of THE COLORADO DEPARTMENT OF TRANSPORTATION, hereinafter referred to as “CDOT”, and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT, hereinafter referred to as the “Enterprise” or “HPTE.”

***FACTUAL RECITALS***

A. CDOT and HPTE entered into that certain HPTE US36 Concession Project Intra-Agency Agreement dated June 27, 2013 (“Original Agreement”), and entered into the First Amendment to the Original Agreement on October 17, 2013 (“First Amendment”) pursuant to which CDOT agreed (among other things) to perform the CDOT Service Funding Obligations, provide for a CDOT Backup Loan to HPTE, and fulfill the CDOT Performance Obligations, all relating to the Concession Agreement and the US 36 Concession Project. All capitalized terms used in this Amendment but not otherwise defined in this Amendment shall have the meaning for such terms as set forth in the Original Agreement.

B. The Enterprise entered into a Concession Agreement, dated June 27, 2013, with Plenary Roads Denver (“Concessionaire”), which agreement was subsequently amended and restated in that certain Amended and Restated Concession Agreement, dated February 25, 2014 (the “Concession Agreement”), obligating the parties thereto to perform certain tasks, many of which were outlined in the Original Agreement. Specifically, Concessionaire is required to perform snow and ice removal services and routine maintenance services for the general purpose lanes in the US 36 Corridor, for which the Concessionaire is to be compensated by the Enterprise which will in turn be reimbursed for those expenses related to the general purpose lanes by CDOT. Concessionaire is also required to operate and maintain the US 36 and I-25 managed lanes.

C. The Colorado Office of the State Auditor undertook a performance audit of the US-36 Public-Private Partnership and issued its audit report to members of the Colorado Legislative Audit Committee on March 11, 2015. In its audit report, the State Auditor recommended, in part, that the Enterprise should work with CDOT to develop a comprehensive monitoring framework and systematic mechanisms for managing and monitoring the Concessionaire during the 50-year operations phase of the Concession Agreement. Specifically, the audit recommended that the Enterprise execute a project-specific agreement for the US-36 P3 Project specifying in detail HPTE’s, CDOT’s, and their contractors’ respective roles and responsibilities for operations and maintenance monitoring.

D. To perform its responsibilities under the Concession Agreement and as advised by the State Auditor’s audit report, HPTE retained McGladrey LLP to develop a detailed compliance monitoring plan to monitor and verify Concessionaire’s compliance and performance under the Concession Agreement. McGladrey delivered its report to the Enterprise on July 15, 2015 and in its report, McGladrey outlined a compliance monitoring approach and compliance performance requirements in order to monitor and

measure Concessionaire's performance under the Concession Agreement, including maintenance and operations activities.

E. On May 29, 2014, CDOT entered into a long-term contract with HDR Engineering, Inc. to perform a variety of tasks for the US 36 Concession Project including providing for comprehensive oversight services for Concessionaire's maintenance and operations activities for the entire Concession Project ("O&M Oversight"). This contract was amended on March 25, 2015, to add the Enterprise as a party. HDR Engineering, Inc. has subcontracted all O&M Oversight activities under its contract with CDOT and HPTE to LS Gallegos & Associates.

F. Using the framework established in the McGladrey report, HDR Engineering and its subcontractor LS Gallegos & Associates will provide comprehensive O&M Oversight services to both the Enterprise and CDOT for the US 36 Concession Project.

G. The purpose of this Amendment is to create the recommended US 36 Project-specific agreement to outline and memorialize HPTE's, CDOT's and any current or future contractors' respective roles for operations and maintenance monitoring during the Concession Agreement's 50-year term.

H. This Amendment is executed under the authority of Section 29-1-203, C.R.S., as amended.

**NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING FACTUAL RECITALS, IT IS HEREBY AGREED AS FOLLOWS:**

1. HPTE Responsibilities. With regard to HPTE's respective role and responsibility for operations and maintenance monitoring, HPTE shall manage and oversee present and future CDOT and HPTE consultants who have been tasked with Concessionaire and Concession Project oversight activities. This management shall include, but not be limited to, the following:

- a. HPTE staff shall act as Contract Administrator for the current HDR Engineering Contract with respect to O&M Oversight Activities and any future consultant contracts;
- b. HPTE staff shall coordinate monthly meetings between Concessionaire, CDOT staff, HPTE staff, and consultants to report on Concession Project maintenance and operations activities and concerns;
- c. HPTE staff and consultants shall develop:
  - i. A Monitoring Management Plan to ensure timely coordination between the HPTE, CDOT, and the concessionaire during the operating period of the Project and,
  - ii. Processes for managing changes and claims related to operations and maintenance
- d. HPTE staff shall review all invoices from McGladrey LLP, HDR Engineering or LS Gallegos & Associates to confirm accuracy.

2. CDOT Responsibilities. CDOT obligations with respect to the Original Agreement and the First Amendment shall remain unchanged. With regard to CDOT's respective role and responsibility for

operations and maintenance monitoring, CDOT staff shall work with HPTE and consultants to participate in necessary meetings, adhere to its roles and responsibilities set forth in the Monitoring Management Plan, and review documents in order to facilitate Concessionaire's maintenance and operations activities on the US 36 Concession Project. The organizational unit that shall direct CDOT staff shall be the Office of Major Project Development.

3. Payments by CDOT. To the extent that CDOT makes payments to the Concessionaire of any amounts payable under the Concession Agreement, such payment shall, to the extent of the amount paid by CDOT, be deemed to have discharged the obligation of HPTE to make the relevant payment under the Concession Agreement.

4. General Provisions. With the exception of those terms and conditions specifically modified and amended herein, the Original Contract shall remain in full force and effect in accordance with all of its terms and provisions. In the event of any conflict between the terms and provisions of the Original Agreement and the term and provisions of this Amendment, the terms and provisions of this Amendment shall supersede and control. This Amendment may be executed in any number of counterparts, each of which shall be deemed an original, and all of such counterparts shall constitute one agreement.

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

STATE OF COLORADO  
JOHN HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE  
TRANSPORTATION ENTERPRISE

By \_\_\_\_\_  
SHAIEN BHATT  
Executive Director  
DEPARTMENT OF TRANSPORTATION

By \_\_\_\_\_  
DAVID SPECTOR  
HPTE Director

APPROVED:  
CYNTHIA H. COFFMAN  
Attorney General

By \_\_\_\_\_  
First Assistant Attorney General

## WHY DID THE PROBLEMS OCCUR?

HPTE and CDOT have not established a comprehensive monitoring framework for monitoring the concessionaire during the operations phase of the concession agreement. Specifically:

- **HPTE AND CDOT HAVE NOT EXECUTED A PROJECT-SPECIFIC AGREEMENT** outlining their respective roles and responsibilities for monitoring operations and maintenance for the US-36 P3 Project as required by the MOU. The project-specific agreement should outline detailed responsibilities, and identify the responsible organizational units and key personnel required to perform those responsibilities, so that each agency's monitoring responsibilities are clear. The project-specific agreement is a necessary first step in establishing a monitoring framework.
- **HPTE HAS NOT ESTABLISHED MECHANISMS TO ENSURE ADEQUATE TECHNICAL REVIEW** of the concessionaire's monitoring plans and reports. HPTE contracted with an external accounting firm to monitor the concessionaire's compliance with requirements to provide monitoring plans and reports as outlined in the concession agreement. Additionally, CDOT's Office of Major Project Development (OMPD) hired an engineering firm to assist in supporting OMPD and HPTE with technical reviews on a task order basis. Although these contracted services are available to provide monitoring support, HPTE and CDOT will need to identify the respective roles and responsibilities of HPTE, CDOT, and the contractors with respect to monitoring the technical requirements outlined in the concessionaire's plans and reports over the 50-year term of the agreement. Further, since the contracted engineering firm that is providing OMPD with technical monitoring support is a member of the concessionaire consortium and is responsible for engineering design for the US-36 P3 Project, HPTE and CDOT will need to ensure that appropriate firewalls and other contractual controls are in place to ensure that the engineering firm is not monitoring its own work.

Both HPTE and CDOT lack experience with complex P3 projects and the long-term obligations that are present during the operations phases. To form a basis for a monitoring framework and address the knowledge and experience gap, HPTE and CDOT could hold a series of workshops with experienced CDOT operations and maintenance personnel to train them on contract requirements, work through sample scenarios, and identify ways these scenarios should be monitored. A "scenario workshop," would allow participants to see how the contract mechanisms work and help identify the elements that need to be included in the monitoring management plan and framework. Prioritizing issues identified through the scenario workshop would also help with determining timelines for addressing issues in the monitoring management plan. HPTE and CDOT could also use the scenario workshops to develop processes for claims review and to identify any HPTE or CDOT obligations that were overlooked when developing the Project Management Plan for the Federal Highway Administration or the MOU for the concession agreement.