

Resolution – HPTE #175

Approving and Authorizing the Execution of a Four-Party Settlement Agreement in Relation to the Late Handover of the US 36 Phase 1 Managed Lanes

WHEREAS pursuant to Section 43-4-806, C.R.S., the General Assembly of the State of Colorado (the “State”) created the Colorado High Performance Transportation Enterprise (“HPTE”) as a government-owned business within the Colorado Department of Transportation (“CDOT”) to pursue innovative means of more efficiently financing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system; and

WHEREAS 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 has entered into a Concession Agreement with Plenary Roads Denver LLC (the “Concessionaire”) dated June 27, 2013, as amended and restated on February 25, 2014, and on December 17, 2014 (as amended, the “Concession Agreement”), which sets forth the terms and conditions for the operation and maintenance of the U.S. 36 Phase 1 Project; and

WHEREAS CDOT has entered into that certain US 36 Express Lanes Design/Build Contract (the “Phase 1 DB Contract”) with the Ames/Granite Joint Venture (the “Contractor”) related to the construction of the U.S. 36 Phase 1 Project; and

WHEREAS due to unforeseeable weather conditions, CDOT previously granted the Contractor an extension of the completion deadline under the Phase 1 DB Contract from December 31, 2014, to April, 29, 2015; and

WHEREAS the Contractor was nevertheless unable to complete work on the U.S. 36 Phase 1 Project prior to April 29, 2015, resulting in the failure to achieve acceptance of the Phase 1 Managed Lanes by June 30, 2015 (the “Phase 1 Services Commencement Compensation Date”), and a delay in the commencement of operations for the Phase 1 Managed Lanes, including tolling operations, until July 22, 2015; and

WHEREAS the delay in Phase 1 Services Commencement Date (as defined in the Concession Agreement) for the Phase 1 Managed Lanes constitutes a Compensation Event under the Concession Agreement, which would obligate HPTE to compensate the Concessionaire for lost toll revenues in an estimated amount of \$3,386.48 per day; and

WHEREAS CDOT is separately entitled to assess liquidated damages against the Contractor under the terms of the Phase 1 DB Contract for delays in the completion of work on the U.S. 36 Phase 1 Project; and

Exhibit A to HPTE Resolution #175

**(Approved Term Sheet for the Four-Party Settlement Agreement in
Relation to the Late Handover of the US 36 Phase 1 Managed Lanes)**



Date: July 15, 2015
To: High Performance Transportation Enterprise Board
From: Nicholas Farber, HPTE Operations Manager
Subject: Four Party Settlement Agreement re Late Handover of the US 36 Phase 1 Managed Lanes

Purpose

The purpose of this memo is to summarize the Four Party Settlement Agreement between CDOT, the Ames/Granite Joint Venture (Contractor), HPTE, and Plenary Roads Denver (PRD), and to recommend its approval.

Action

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

Background

The historic September 2013 floods caused serious delays to the US 36 Project Phase 1 Project. Because of the damage done to the Project, Contractor asked for, and was granted, a contract deadline extension from December 31, 2014 to April 29, 2015. Contractor missed the extended deadline and completed the work of opening the Project to its final traffic configuration on May 18th, thereby delaying Phase 1 Tolling Services commencement from July 1st to July 22nd. Under the Concession Agreement, a delay of the Phase 1 Tolling Services Commencement past July 1st triggered a Compensation Event, where HPTE would owe PRD for lost toll revenue. When it became clear that Contractor would not make the April 29th deadline, PRD advised that their lost toll revenue would amount to \$3,386.48 per day. To avoid being assessed liquidated damages under the Phase 1 Design-Build contract, which they would have to disclose on future project applications, Contractor offered to pay HPTE's Compensation Event. The Four Party Settlement Agreement is a result of the offer.

HPTE, CDOT and the Attorney General's office has spoken directly to the State Controller and he is agreeable to the Settlement Agreement's terms.

Details

The Settlement Agreement provides that CDOT agrees to waive all claims against Contractor for liquidated damages under the Phase 1 Design-Build contract for not completing all work associated with the full operation of the Managed Lanes by April 29th and delaying until May 18th; and Contractor is waiving all claims against CDOT that they are entitled to claim an extension of time, or any financial compensation relating to the delay.

HPTE and PRD agree that they accept the terms of the Settlement Agreement in full and final settlement of any claims PRD has under the Concession Agreement.

Contractor agrees to pay \$74,502.56 (\$3,386.48 x 22 days) to PRD in addition to any Consumer Price Index offsets with five days of execution of the Settlement Agreement.

Recommendations

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

Attachments

Outline Term Sheet of the Four Party Settlement Agreement [will replace with actual agreement if drafted in time]

**OUTLINE TERM SHEET FOR FOUR-PARTY SETTLEMENT AGREEMENT IN RELATION TO LATE HANDOVER
OF US 36 PHASE 1 MANAGED LANES**

For Settlement Purposes – Subject to Rule 408, Colorado Rules of Evidence

	Subject	Summary of agreement terms
1.	Parties	<p>1. The Colorado Department of Transportation (CDOT) as party to the US 36 Express Lanes Design/Build Contract by and between CDOT and the Phase 1 DB Contractor, Contract Routing No. 12HA6642252, PO No 261000985, Project No NH 0361-093 (Phase 1 DB Contract)</p> <p>2. The Ames/Granite Joint Venture as the "Contractor" under the Phase 1 DB Contract (Phase 1 DB Contractor)</p> <p>3. The Colorado High Performance Transportation Enterprise (HPTE) as party to the amended and restated concession agreement (ARCA) dated February 25, 2014</p> <p>4. Plenary Roads Denver (Concessionaire) as the Concessionaire under the ARCA.</p>
2.	Conditions Precedent to Settlement Agreement coming into effect	<p>2.1 The Settlement Agreement is subject to and conditional on the approval by the Controller</p> <p>2.2 The Settlement Agreement will not come into effect until the Phase 1 DB Contractor makes the cash payment required by section 5.1.</p>
3.	Settlement of delay claims under the Phase 1 DB Contract	<p>CDOT and the Phase 1 DB Contractor agree that they accept the terms of the Settlement Agreement in full and final settlement of:</p> <p>3.1 all claims by CDOT against the Phase 1 DB Contractor for liquidated damages under section 17.1.1.1(5) of the Phase 1 DB Contract in respect of the failure to complete all Work associated with full operation of the Managed Lane by April 29, 2015, and then failing to complete that Work until May 18, 2015;</p> <p>3.2 all claims by the Phase 1 DB Contractor against CDOT that the Phase 1 DB Contractor is entitled to claim an extension of time, or any financial compensation of any sort whatsoever (whether under the Phase 1 DB Contract or otherwise) in respect of any fact or matter which caused the failure of the Phase 1 DB Contractor to complete all Work associated with full operation of the Managed Lane by April 29, 2015, and completion of that Work being delayed until May 18, 2015.</p>
4.	Settlement of Compensation Event	<p>HPTE and the Concessionaire agree that they accept the terms of the Settlement Agreement in full and final settlement of all claims by the Concessionaire under Section 23.5 of the ARCA or on any other basis whatsoever</p>

	Subject	Summary of agreement terms
	claim under the Concession Agreement	arising out of or connected with the failure to achieve acceptance of the Phase 1 Managed Lanes or the Phase 1 ETCS after the Phase 1 Services Commencement Compensation Date in relation to the period between the Phase 1 Services Commencement Compensation Date and July 22, 2015.
5.	Phase 1 DB Contractor to make payments to the Concessionaire.	<p>5.1 The Phase 1 DB Contractor shall be liable to pay the Concessionaire \$74,502.56, calculated as the \$3,386.48 for a period of 22 days as adjusted in accordance with the ARCA Financial Model as a consequence of the change in CPI to be published on [date in July]. <i>[Machinery to manage CPI adjustment to be added]</i></p> <p>5.2 The Phase 1 DB Contractor shall discharge its liability to make this payment:</p> <p>(a) By a lump sum payment of \$74,502.56 paid on or about the date of this Settlement Agreement; and</p> <p>(b) By the payment of any further sum due when the impact of CPI is calculated within 5 business days after the Concessionaire gives notice to the Phase 1 DB Contractor of the result of the CPI calculation.</p> <p>The Phase 1 DB Contractor agrees that the Concessionaire may recover payment under 5.2(b) by set-off against any amount due to the Phase 1 DB Contractor in its capacity as the Concessionaire's subcontractor in respect of the ARCA.</p>
6.	All other rights of the parties under the Phase 1 DB Contract and the ARCA remain unaffected by this Settlement Agreement	The Settlement Agreement only settles the specific matters mentioned in Sections 3 and 4, and is without prejudice to all of the other rights and obligations of CDOT and the Phase 1 DB Contractor under the Phase 1 DB Contract and HPTE and the Concessionaire under the Concession Agreement.

Draft: June 15, 2015

Hogan Lovells US LLP

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