

Resolution – HPTE #283

Approving the Second Amendment to the Central 70 Project Agreement

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, the General Assembly created the Colorado Bridge Enterprise (“BE”) pursuant to Section 43-4-805, C.R.S., as a government-owned business within CDOT to accelerate the repair and reconstruction of deficient bridges further defined as structures that are “poor”; and

WHEREAS, the HPTE Board of Directors (the “HPTE 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, the BE Board of Directors (the “BE Board”) is similarly empowered, pursuant to Section 43-4-805(5)(h)(II), C.R.S., to enter into agreements pursuant to which a private entity designs, develops, constructs, reconstructs, repairs, operates, or maintains all or any portion of a designated bridge project on behalf of BE; and

WHEREAS, HPTE and BE (together, the “Enterprises”) are, at the direction of the Colorado Transportation Commission and in collaboration with CDOT, jointly procuring the design, construction, financing, operations, and maintenance of the reconstruction of the 9.4-mile portion of the I-70 East Corridor in the Denver area (the “Central 70 Project” or the “Project”) as a public-private partnership; and

WHEREAS, the HPTE Board and BE Board have each reviewed multiple drafts of the Project Agreement and related agreements over the course of the procurement and, on March 3, 2017, the HPTE Board and BE Board each received and reviewed a final draft form of the Project Agreement, which were subsequently released to four shortlisted proposer teams as the Final Request for Proposals (“Final RFP”); and

WHEREAS, on June 1, 2017, and August 1, 2017, the Enterprises received, respectively, technical and financial proposals in response to the Final RFP from each of the four shortlisted proposer teams; and

WHEREAS, the Enterprises, in collaboration with CDOT, conducted a robust evaluation of the four proposals and, on August 24, 2017, issued a notice identifying Kiewit Meridiam Partners (“KMP”) as the preferred proposer; and

WHEREAS, the equity partners of the Developer, Meridiam I-70 East CO, LLC (as holder of a 60% direct membership interest) and Kiewit C70 Investors, LLC (as holder of a 40%

direct membership interest) formed a special purpose vehicle, Kiewit Meridiam Partners, LLC (the “Developer”) for purposes of completing the Project; and

WHEREAS, on November 15, 2017, the HPTE Board and the BE Board approved a final Project Agreement for the Central 70 Project (the “Project Agreement”) incorporating a main body and twenty-nine schedules, sets forth the rights and obligations of the Enterprises and the Developer with respect to the design, construction, operations, maintenance, renewal and replacement of the Project, during both the construction period and 30-year operating period, including, *inter alia*, provisions related to the design and construction requirements for the Project, milestone payments to the Developer during construction, performance payments to the Developer during operations, financial close procedures, risk allocation between the Enterprises and the Developer, change procedures, insurance and indemnity requirements, defaults, and termination provisions; and

WHEREAS, an amendment to the Project Agreement (“First Amendment to the Project Agreement”), which was contemplated in the form of the Project Agreement approved by the HPTE Board and BE Board on November 15, 2017, updated the Project Agreement Milestone Completion and Substantial Completion Dates to account for the actual date of Financial Close that occurred on December 21, 2017; and

WHEREAS, the Enterprises and the Developer now desire to effectuate a second amendment to the Project Agreement (“Second Amendment to the Project Agreement”), which is needed to account for an amended Project timeline, added Milestones, and additional details thereunder; and

WHEREAS, the HPTE Board has reviewed the Second Amendment to the Project Agreement for the Central 70 Project and now desires to approve and authorize execution of the same as part of the changes to the Project.

NOW THEREFORE BE IT RESOLVED, the HPTE Board hereby approves the Second Amendment to the Project Agreement for the Central 70 Project in substantially the form presented to the HPTE Board prior to the meeting 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 Second Amendment to the Project Agreement for the Central 70 Project 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.

Signed as of November 14, 2018

Simon Logan
Secretary, HPTE Board

Resolution – HPTE #284

Approving and Authorizing the Execution of the Memorandum of Settlement in Relation to the Supervening Event Submissions of the Central 70 Project

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, the General Assembly created the Colorado Bridge Enterprise (“BE”) pursuant to Section 43-4-805, C.R.S., as a government-owned business within CDOT to accelerate the repair and reconstruction of deficient bridges further defined as structures that are “poor”; 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, the BE Board of Directors (the “BE Board”) is similarly empowered, pursuant to Section 43-4-805(5)(i), 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, HPTE and BE (together, the “Enterprises”) are, at the direction of the Colorado Transportation Commission and in collaboration with CDOT, jointly procuring the design, construction, financing, operations, and maintenance of the reconstruction of the 9.4-mile portion of the I-70 East Corridor in the Denver area (the “Central 70 Project” or the “Project”) as a public-private partnership; and

WHEREAS, the Project Agreement for the Central 70 Project (the “Project Agreement”) sets forth the rights and obligations of the Enterprises and the Developer with respect to the design, construction, operations, maintenance, renewal and replacement of the Project, during both the construction period and 30-year operating period, including, inter alia, provisions related to the design and construction requirements for the Project, milestone payments to the Developer during construction, performance payments to the Developer during operations, financial close procedures, risk allocation between the Enterprises and the Developer, change procedures, insurance and indemnity requirements, defaults, and termination provisions; and

WHEREAS, on November 21, 2017, the Enterprises and Kiewit Meridiam Partners LLC (the “Developer”), executed and delivered the Central 70 Project Agreement; and

WHEREAS, the Enterprises received from Developer three Supervening Event Submissions (the “Submissions”) that could have affected, and possibly delayed, the Project timeline; and

WHEREAS, in order to settle the Supervening Event Submissions at the lowest possible cost to the Project and to be proactive in minimizing any potential impacts to the Project, the Enterprises and Developer began working toward a resolution of the three Submissions; and

WHEREAS, in consideration of releasing all claims related to the Submissions, the Enterprises and Developer have agreed in principle to the attached Memorandum of Settlement.

NOW THEREFORE BE IT RESOLVED, the HPTE Board hereby approves the Memorandum of Settlement for the Central 70 Project in substantially the form presented to the HPTE Board prior to the meeting 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 Memorandum of Settlement for the Central 70 Project 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, any amendments thereto added by the Colorado Office of the State Controller.

Signed as of November 14, 2018

Simon Logan
Secretary, HPTE Board



DATE: November 14, 2018

TO: Board of Directors of the Colorado Bridge Enterprise (“BE”)
Board of Directors of the High Performance Transportation Enterprise (“HPTE”)

FROM: Keith Stefanik, Central 70 Project Director
David Spector, HPTE Director

SUBJECT: Central 70 Project Agreement - Second Amendment to the Project Agreement, Memorandum of Settlement, and First Amendment to Issuer’s Loan Agreement

Purpose

The purpose of this memo is to summarize the changes to the Central 70 Project Agreement (the “PA Second Amendment”) and the accompanying Memorandum of Settlement. Additionally, in conjunction with the PA Second Amendment, the Boards are asked to review and approve the First Amendment to the Issuer’s Loan Agreement (the “LA First Amendment”). The PA Second Amendment and the Memorandum of Settlement are attached for review, while the complete draft of the LA First Amendment is available for review on the CDOT website (due to size).

Action

Staff requests that the BE and HPTE Boards of Directors (“Boards”) authorize execution of the PA Second Amendment for the Project and the Memorandum of Settlement, as well as the execution of the CC Second Amendment and the LA First Amendment, in which corresponding changes are necessary to line up with the PA Second Amendment.

Background

On June 22, 2018, the Enterprises received Supervening Event Submission 1.4 (the “S.E. #1”). Shortly thereafter on July 5, 2018, the Enterprises received Supervening Event Submission 2.2 (the “S.E. #2”). Then, on August 6, 2018, the Enterprises received Supervening Event Submission 4.4 (the “S.E. #4”) (together, the “KMP Submissions”). S.E. #1 related to the timely execution of the Union Pacific Railroad Agreement (the “UPRR RA”), while S.E. #2 related to incomplete yard expansion work (the “Phase 0 Work”). S.E. #4 related to the increases in steel and aluminum prices enacted by the Trump administration. In response to the KMP Submissions, the Enterprises and KMP (the “Parties”) began working toward a resolution of the claims.

In order to settle the KMP Submissions at the lowest possible cost to the Project and to be proactive in minimizing any potential impacts to the Project, the Parties agreed to amend the PA. By doing so, KMP agreed to waive any potential claims related to the KMP Submissions, thereby minimizing any future risks.

Summary of Changes to the PA

1) Milestones

Among other amendments to the PA, the Parties agreed to redefine Milestone 3 and 4, and create new Milestone 5 and 6. Specifically, the amendment revises the Milestone Completion Conditions for Milestone 3 and 4 while holding the original PA Milestone Payment dates. Thus, payment amounts for Milestone 3 and 4 remain unchanged.

Additionally, Milestone 5 and 6 will be added to the PA. First, Milestone 5 will be defined as completion of all Construction Work (excluding SMA pavement within the Lowered Section, Cover Top and ITS and Tolling). Milestone 5 now becomes the original Substantial Completion Date (March 25, 2022). The Substantial Completion amount originally due upon completion (\$70 million) will be reduced and be applied thereafter to Milestone 5 and 6 and Substantial Completion. For Milestone 5,

\$53.4 million will be made upon completion. Importantly, full Availability Payments will begin upon completion of Milestone 5 while the Construction Period continues. And, while the Availability Payment for Milestone 5 will occur on the original timeline, the Enterprises will not make payment for performance, as the value of that portion of the payment will be withheld and be paid upon completion of Milestone 6 and Substantial Completion.

Second, Milestone 6 will be defined as completion of all Construction Work for the Cover Top and SMA pavement. A new Milestone Payment of \$3 million will be made upon completion, with a Target Date of August 20, 2022.

Finally, Substantial Completion will be revised to have a completion date of September 21, 2022. Upon Substantial Completion, toll lanes will be operational and the Operating Period will commence. Because of the PA amendment, the Operating Period will be reduced to 29½ years (previously 30 years) to make up for the six-month delay. The new Milestone Payment of \$13.6 million will be made upon completion. As was the case with the original PA, the sum of \$319 million for Milestone Payments remains the same.

2) Timeline of Project

As a result of the PA Second Amendment, Project completion will be moved from March 25, 2022 to September 21, 2022 -- a six-month difference. And, as stated previously, the Operating Period will be shortened to 29½ years. Otherwise, no major timelines are implicated with the PA amendment. Importantly, the Project will still be on target for completion in calendar year 2022.

Summary of Memorandum of Settlement

In consideration of releasing all claims related to the KMP Submissions, the Parties have agreed to the Memorandum of Settlement. As a result, the Enterprises agree to make a payment in the amount of \$7,316,693 at Substantial Completion. This amount is separate and apart from the \$319 million Milestone Payments and funding will be appropriated from the previously approved project contingency. For ease of reference, a visual summary of the PA Second Amendment and the Memorandum of Settlement begins on the following page.

First Amendment to the Issuer's Loan Agreement

The LA First Amendment will be separately approved by the BE Board and is an agreement whereby BE agrees to lend KMP (and KMP agrees to borrow) the proceeds of the Bonds. Because the LA First Amendment includes repayment schedule and prepayment terms, an amendment is necessary to include the added Milestones and amended definitions surrounding Substantial Completion.

Board Options/Decision Matrix

- 1) Staff Recommendation: Approve the PA Second Amendment, Memorandum of Settlement and LA First Amendment.
- 2) Review, but do not approve the PA Second Amendment and other agreements. Provide feedback on desired changes. Staff will work with Developer to negotiate any such changes and will report back to the Boards. Selecting this alternative would likely have an adverse effect on the timing of the Project.

Recommendation

Staff recommends approval of the PA Second Amendment 70 Project Agreement, Memorandum of Settlement, and LA First Amendment.

Next Steps

If the Boards approve the PA Second Amendment and associated agreements, the Construction Period will move forward in a timely fashion and on par with all Project timelines.

Attachments

Visual Summary of PA Second Amendment and Memorandum of Settlement (attached, beginning on following page)

Attachment A - Second Amendment to the Central 70 Project Agreement - PDF #1

Attachment B - Memorandum of Settlement - PDF #2

Attachment C - First Amendment to the Issuer's Loan Agreement - PDF #3

THIS MEMORANDUM IS INTENDED TO BE A SUMMARY FOR BOARD CONSIDERATION ONLY, AND NEITHER DEVELOPER NOR OTHER THIRD PARTIES ARE ENTITLED TO RELY ON THIS MEMORANDUM.