



DATE: April 19, 2017
TO: Board of Directors of the Colorado Bridge Enterprise (“BE”)
Board of Directors of the High Performance Transportation Enterprise (“HPTE”)
Colorado Transportation Commission (“TC”)
FROM: Tony DeVito, Central 70 Project Director
David Spector, HPTE Director
SUBJECT: Central 70 Intra-agency Agreement

Purpose

The purpose of this memorandum is to summarize the draft Intra-Agency Agreement (“IAA”) among CDOT, HPTE, and BE for the Central 70 Project.

Action

The Central 70 Project team requests that the BE and HPTE Boards of Directors (together the “Boards”) and TC authorize issuance of the draft IAA for release to Proposers and TIFIA to assist in their credit review of the Project. Formal TC approval of the IAA will be requested in May.

Background

At the direction of the TC, and acting in collaboration with CDOT, BE and HPTE (together, the “Enterprises” or “Procuring Authorities”) are procuring the design, construction, financing, operation and maintenance of a 9.4-mile portion of the I-70 East Corridor in Greater Denver (such portion, the “Project”) as a public-private partnership with a private sector partner (the “Developer”).

BE and HPTE will be the parties entering into the Project Agreement (i.e. the contract) with the Developer to deliver the Project. However, delivery and administration of the Project will ultimately be a collaborative effort among CDOT, BE, and HPTE, and as such, the IAA memorializes each party’s role in the management of the Project, as well as defining the operational and financial obligations of each party with respect to the Project.

HPTE and CDOT enter into IAAs for each project they undertake together. Most IAAs follow a similar format and contain similar substantive provisions, including regarding the backup loan structure. Because of the inclusion of BE as a party in this IAA, and the complexity of the Central 70 Project, this IAA has a number of additional provisions important for the TC and Boards to consider.

Draft Central 70 Intra-Agency Agreement Summary

This summary of the IAA is sectionalized as follows: project management and governance structure, construction period of the Project, operations period of the Project, termination of the Project, funding shortfalls and backup loan arrangements, and defaults.

Project Management and Governance Structure

While the details of this section of the IAA remains under consideration, it will define those matters that require the consent of the Enterprises prior to binding action being taken by the Project Director. It will also set out the committees that will oversee and govern the Project from the public sector (i.e. project management team (PMT), executive oversight committee (EOC), etc.)



Construction Period of the Project

This section of the IAA describes the costs that will be incurred by CDOT and the Enterprises during the construction period of the Project and the responsibility among CDOT and the Enterprises for these costs. Additionally, it describes each party's responsibilities in terms of administering the Project Agreement during the construction period.

Project Costs

The two main cost items of the Project during the construction period will be Pre-Development Costs (the internal costs associated with preliminary design, environmental approvals, acquisition of right of way, and managing the procurement of the Project) and Milestone Payments (payments to the Developer for construction completion of discrete elements of the Project).

It is anticipated that Pre-Development Costs for the Project will total \$313 million, \$171 million of which will be contributed by CDOT (through a combination federal Congestion Mitigation and Air Quality (CMAQ) Improvement funds from the Denver Regional Council of Governments (DRCOG), as well as SB-09-228 Funds). BE will contribute the remaining \$142 million, all of which has already been budgeted by BE to the Project.

The Enterprises will make a total of \$319 million in Milestone Payments to the Developer under the Project Agreement. \$58 million will be contributed by CDOT (through a combination of DRCOG CMAQ and SB-09-228 Funds), and BE will contribute the remaining \$261 million.

Contemplating that other unanticipated costs could arise during the construction period for items like a change order or supervening event (e.g. encountering hazardous materials), the IAA includes provisions to allocate these incremental costs among CDOT and BE. Broadly speaking, these types of costs are split based on the proportionate responsibility between BE and CDOT for the overall construction cost. This allocation will be based on the ratio of 'bridge eligible' costs (as determined by a form in the Preferred Proposers' Financial Proposal) to total costs, with BE bearing responsibility for 'bridge eligible' costs and CDOT bearing the remainder (this allocation is defined in the IAA as the "Pro-Rata Construction Cost Calculation").

Project Responsibilities

Under the IAA, CDOT will be primarily responsible for administering the Project Agreement with the Developer during the construction period (reviewing work, providing approvals, completing NEPA, ensuring compliance with the Project Agreement / applicable law, providing all right-of-way, enforcing railroad agreements and utility relocation agreements, and working with the City and County of Denver ("CCD") in regards to the Cover Maintenance Agreement). HPTE will be responsible for contracting tolling equipment for the Project, and BE will have certain financial budgeting and disclosure obligations.

Operations Period of the Project

This section of the IAA describes the costs that will be incurred by CDOT and the Enterprises during the operating period of the Project and the responsibility among CDOT and the Enterprises for these costs. Additionally, it describes each party's responsibilities in terms of administering the Project Agreement during the operating period.

Project Costs

Pursuant to the Project Agreement, the Enterprises are required to pay Performance Payments, comprised of a Capital Performance Payment (CPP) and an Operations, Maintenance, and Renewal (OMR) Payment (OMRP), on a monthly basis to the Developer in consideration of work performed by the Developer.

Under the IAA, BE will be 100% responsible for the CPP, which is the payment that repays the Developer for the debt and equity it raised to build the Project. The CPP makes up 80% of the total monthly Performance Payment payable to the Developer (escalated at 2% annually), and would equal \$33 million in the first year (2017 dollars) if the winning bid were to equal the Upset Limit, or the highest possible compliant bid for the Project. The total amount payable by BE, including BE's contribution to Pre-Development Costs, construction period Milestone

Payments, and repayment of the CPP (assuming a maximum compliant bid equal to the Upset Limit), have been sized to comply with the \$850 million (NPV) BE funding commitment to the Project approved by the BE Board of Directors in August 2015. (BE's proportionate responsibility for Supervening Events and other project changes are not intended to be included within the \$850 million constraint. However, there is ample capacity within the other constraint requiring the Project to spend no more than 50% of available BE revenues within the Project Term.)

The OMRP compensates the Developer for the ongoing work it performs during the operating period. The OMRP makes up 20% of the total monthly Performance Payment payable to the Developer (escalated annually at CPI), and would equal \$8 million in the first year (2017 dollars) at the maximum compliant bid. CCD will contribute \$2.6m annually to the OMRP, with CDOT and HPTE contributing the remaining amount. HPTE's portion of the OMRP will be determined using the same methodology used on previous express lane corridors, including the MEXL, I-25 North and C-470. The same methodology will also be used to allocate cost responsibility between CDOT and HPTE to fund unanticipated costs that arise due to a change order or supervening event during the operating period.

Project Responsibilities

Under the IAA, HPTE will be primarily responsible for tolling (including enforcement), as well as administering the Project Agreement with the Developer (outside of a few limited circumstances that are CDOT's responsibility). The IAA contemplates a structure similar to the US 36 transaction, where CDOT will reimburse HPTE for a proportionate share of annual costs to administer the Project Agreement through its Fee for Service Scope of Work or a similar successor arrangement.

Termination of the Project

Given that there are circumstances that could give rise to termination of the Project both prior to and after Financial Close, the IAA allocates responsibility for funding various termination amounts among CDOT and the Enterprises depending on the situation that gives rise to a termination.

Generally speaking, CDOT and BE bear responsibility for termination amounts for a termination during the construction period based on the Pro-Rata Construction Cost Calculation (discussed above). For 'no fault' termination, termination for convenience, or termination for the Enterprises' default during the operating period, CDOT and HPTE bear responsibility for contract breakage costs of the Developer and its subcontractors, and BE bears responsibility for the remaining amount, primarily representing repayment of debt. For a termination for the Developer's default during operations, BE will be responsible for the termination amount since only debt (and not equity) is repayable under such a termination.

Funding Shortfalls and Backup Loan

To the extent either HPTE or BE has a shortfall in the funds they require to satisfy their payment obligations to the Developer under the Project Agreement, either Enterprise can seek a backup loan from CDOT to defray its expenses and satisfy its obligations under the Project Agreement. Any loan will be subject to approval and allocation from TC. A form of backup loan agreement has been included in the IAA for both HPTE and BE. Repayment terms for any backup loans will be determined at the time a backup loan is actually made.

Defaults

The IAA provides for defaults for any party's failure to comply with its obligations under the IAA, subject to a cure period. For failure of either HPTE or BE to repay a backup loan from CDOT, CDOT has the right to suspend or terminate its commitment to consider making future backup loans or undertake procedures to investigate either Enterprises' ability to generate more/future revenues. If CDOT fails to make payment on any of its obligations, it agrees to identify an alternate source of funding to satisfy its obligations, subject to allocation by the TC.