



MEMORANDUM

TO: TRANSPORTATION COMMISSION
FROM: MARIA SOBOTA, CHIEF FINANCIAL OFFICER
CC: DAVID SPECTOR, DIRECTOR OF HIGH PERFORMANCE TRANSPORTATION ENTERPRISE
DATE: FEBRUARY 18, 2016
SUBJECT: AMENDMENT TO THE INTRA-AGENCY AGREEMENT BETWEEN CDOT AND HPTE

Purpose

To present details regarding changes being made to the existing I-70 Peak Period Shoulder Lane Project Intra-Agency Agreement (IAA) between Colorado Department of Transportation (CDOT) and the High Performance Transportation Enterprise (HPTE).

Action

Staff is seeking TC approval of the resolution authorizing the proposed changes to the I-70 Peak Period Shoulder Lane (PPSL) Project IAA.

Background

In December 2014, HPTE borrowed \$25 million from Banc of America to help complete the I-70 PPSL Project. In order to assist HPTE in securing more favorable loan terms needed for this critical project, CDOT entered into an IAA in order to provide credit support to HPTE. Since that time, the need has arisen to modify specific items in the Loan Agreement itself as well as clarify how obligations between CDOT and HPTE will be determined.

Amendment Details

The IAA amendment conforms to two specific changes being made to the Loan Agreement between Banc of America and HPTE. The two changes to the Loan Agreement that are reflected in the IAA amendment are as follows:

1. The original Loan Agreement had a reporting requirement that specified that HPTE provide unaudited financial statements 30 days after July 1 and January 1 of each fiscal year. In practice, this is impossible due to the state's accounting system (CORE) and how long it takes to reconcile financial information. HPTE and Banc of America agreed that moving from 30 to 90 days after July 1 and January 1 was reasonable in order to accommodate these existing constraints.
2. It clarifies the definition on when our interest payment date occurs.



In addition to the changes that flow from the amendments to the loan agreement, the changes to the IAA more clearly define how obligations between CDOT and HPTE will be determined. The changes to the IAA are as follows:

1. It defines which Operations and Maintenance (O&M) costs are subject to the "pro-rata share." In the original IAA, a broad pro-rata split is all that was contemplated, but since that time, staff has gotten more specific about how that split will be determined. This IAA amendment will use essentially the same criteria that HPTE and CDOT have used in the recently approved I-25N Segment 3 IAA. Specifically, many items (such as snow and ice) will be treated on a pro-rata basis; whereas costs related only to the tolling and toll lane maintenance will be an HPTE-only expense and pre-existing costs unaffected by the managed lane (such as lighting) will be a CDOT-only expense.
2. It includes CDOT invoicing and HPTE payment processes of O&M obligations that were not addressed in the original IAA.

All necessary parties have agreed to the changes to the original Loan Agreement. Those are currently being integrated into the first amendment to HPTE's PPSL Loan with Banc of America. This amendment is being presented to the HPTE Board of Directors this month for authorizing and execution.

Key Benefits

Approval of the changes to the existing I-70 PPSL IAA will mirror the revisions being made to the existing Loan Agreement, ensuring consistency across all agreements related to this project. It will also reinforce the mutually beneficial partnership between CDOT and HPTE by clearly defining roles and responsibilities.

Options and Recommendations

1. Approve the amended IAA between CDOT and HPTE (STAFF RECOMMENDATION).
2. Do not approve the amended IAA and request additional information.
3. Reject the amended IAA.

Next Steps

If approved, execute amended IAA.

Attachments

Attachment A: First Amendment to HPTE I-70 PPSL Project Intra-Agency Agreement

Attachment B: Resolution Approving the First Amendment to the Intra-Agency Agreement between CDOT and HPTE for the I-70 Peak Period Lane (Mountain Express Lane) Project



**FIRST AMENDMENT TO
HPTE I-70 PPSL PROJECT
INTRA-AGENCY AGREEMENT**

THIS FIRST AMENDMENT (the “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 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. CDOT and HPTE previously entered into that certain *HPTE I-70 PPSL Project Intra-Agency Agreement*, dated December 19, 2014 (the “Agreement”), regarding the financing, construction, and operations and maintenance of the I-70 Mountain Express Lane Project, formerly known as the I-70 Peak Period Shoulder Lane Project (the “Project”).

E. CDOT and HPTE also previously entered into a Letter Agreement, dated March 5, 2015, concerning the invoicing and reimbursement of certain costs paid by CDOT for the construction of the Project, the terms of which are to be incorporated into this Amendment.

F. CDOT and HPTE now desire to amend the Agreement to clarify certain terms and conditions related to the operations and maintenance of the Project.

G. Pursuant to Section 6.13 of the Loan Agreement between HPTE and Banc of America Preferred Funding Corporation (the “Bank”), the Bank’s consent to the Amendment is required and, as of the date of this Amendment, such consent has been received.

H. This Amendment 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, THE PARTIES TO THIS AMENDMENT HEREBY AGREE AS FOLLOWS:

1. Amendment to Operations and Maintenance Provisions. Section I (Operation and Maintenance of the Project) of the Agreement is hereby deleted in its entirety and replaced with the following:

I. OPERATIONS AND MAINTENANCE OF THE PROJECT

A. The I-70 PPSL Project is adjacent to a segment of the I-70 general purpose lanes (“I-70 General Purpose Lanes”) and HPTE and CDOT recognize the need to cooperate in carrying out the related operations and maintenance for the I-70 PPSL Project and the I-70 General Purpose Lanes. To that end, HPTE and CDOT agree to cooperate in ensuring that the operations and maintenance is performed and agree to the division of costs as set forth herein. As a general matter, HPTE shall be responsible for operating and maintaining the I-70 PPSL Project, and agree that CDOT shall be responsible for operating and maintaining the I-70 General Purpose Lanes. It is the intent of the parties that, except as specifically provided otherwise herein, CDOT shall perform such operations and maintenance of both the I-70 General Purpose Lanes and the I-70 PPSL Project, subject to reimbursement from HPTE for HPTE’s proportionate share of the overall operations and maintenance expenses, as further described herein.

B. Except as otherwise provided herein, the CDOT and HPTE agree to allocate costs based on a proportion of the total number of vehicles using I-70 within the Project area during the reference month, with HPTE’s portion being calculated to include all vehicles obligated to pay a fee for use of the I-70 PPSL Project, whether or not such user fee is actually collected, and CDOT’s portion being calculated to include all other vehicles (the “Pro-Rata O&M Cost Calculation”). For illustrative purposes only, if the total cost of operating and maintaining the segment of I-70 including the I-70 PPSL Project is \$500,000 per month, and 5% of the total vehicle count consisted of vehicles obligated to pay a user fee, HPTE would be responsible for \$25,000 of such operations and maintenance costs. The Pro-Rata O&M Cost Calculation shall apply to CDOT’s costs incurred with respect to: (i) snow and ice removal services; (ii) courtesy patrol; (iii) pavement resurfacing, life-cycle and capital maintenance, to the extent such activities reasonably include both the I-70 PPSL Project and the I-70 General Purpose Lanes; (iv) lane striping; and (v) any other operations and maintenance expense CDOT and HPTE agree in good faith is most fairly allocated utilizing the Pro-Rata O&M Cost Calculation method.

C. The Pro-Rata O&M Cost Calculation shall not apply to those operations and maintenance costs existing and regularly funded by CDOT prior to the

implementation of the I-70 PPSL Project, and for which the addition of the I-70 PPSL Project results in a *de minimus* impact on overall operations and maintenance expenses for I-70. Such costs include, but are not limited to, CDOT's costs incurred with respect to: (i) repair and replacement of guardrail; (ii) repair and replacement of lighting fixtures; and (iii) contracts with the State Patrol for safety enforcement within the corridor (but exclusive of additional enforcement contracted by HPTE for toll evasion enforcement, if any).

D. HPTE shall be solely responsible for costs incurred with respect to: (i) toll processing and collection; (ii) Level I and Level II maintenance of toll equipment; (iii) contracts for toll evasion enforcement with the State Patrol or other law enforcement entity, if any; (iv) daily lane sweeping/cleaning in preparation for opening the I-70 PPSL Project; and (v) CDOT staff time dedicated to monitoring traffic flows and determining opening/closing times and variable toll rates for the I-70 PPSL Project, in accordance with guidance set forth and approved by HPTE; and (vi) HPTE overhead and administrative costs related to the operations and maintenance of the I-70 PPSL Project. Such costs, together with those costs attributable to HPTE under the Pro-Rata O&M Cost Calculation, shall constitute the "HPTE O&M Project Expenses."

E. To the extent either CDOT or HPTE provides services to the other (either through a third party or directly) that results in one party covering the costs that is agreed to be the responsibility of the other, the party covering such costs will invoice the other and such invoice shall include a reasonably detailed breakdown of the costs for which the invoicing party is seeking reimbursement.

F. CDOT shall submit to HPTE on or before January 15 and July 15 of each year an invoice describing the HPTE O&M Project Expenses due to CDOT with respect to the I-70 PPSL Project for the prior six month period. To the extent the user fee revenues generated from the I-70 PPSL Project as they are required to be applied are, or are estimated to be, inadequate to cover the HPTE O&M Project Expenses, HPTE can request a CDOT Backup Loan to fund all or a portion of the HPTE O&M Project Expenses pursuant to Section II below. Before HPTE submits to CDOT the written notification described in Section II.B below, CDOT and HPTE agree to cooperate in estimating the expected cost of operating the I-70 PPSL Project for the upcoming fiscal year. This estimate, and the expected available revenue from the I-70 PPSL Project for the HPTE O&M Project Expenses shall serve as a basis for submitting the notification described in Section II.B.

G. In consideration of the various terms, covenants, and conditions set forth herein (including the benefits that CDOT will receive as a result of the Project, CDOT hereby provides to a non-exclusive license over, under, upon and in the site of the Project ("License") for HPTE to operate the I-70 PPSL Project. CDOT acknowledges and agrees that HPTE may sublicense the License as needed to operate and maintain the Project. Subject to the License, CDOT reserves the right of use, occupancy and ownership over, under, upon and in the lands comprised of the I-70 PPSL Project.

2. Eastbound PPSL Construction Package 3. On December 18, 2014, the Transportation Commission approved a budget action of \$20.85 million to pay for the Eastbound PPSL Construction Package 3, of which \$17.5 million was available to HPTE to pay for the construction of ITS infrastructure, interchange improvements at mile marker 241 East Idaho Springs, asphalt overlay, and fiber installation for the Project. In a Letter Agreement dated March 5, 2015, CDOT and HPTE agreed that CDOT shall invoice HPTE, and HPTE shall remit payment to CDOT, for those aforementioned elements of the Eastbound PPSL Construction Package 3. CDOT and HPTE agree that all invoicing and payment obligations with respect to the Eastbound PPSL Construction Package 3 have been satisfied in their entirety.

3. General Provisions. With the exception of those terms and conditions specifically modified herein, the Agreement 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 Agreement and the term and provisions of this Amendment, the terms and provisions of this Amendment shall 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.

[Signature page follows.]

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

STATE OF COLORADO
JOHN HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
Executive Director
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE Director

APPROVED:

CYNTHIA COFFMAN
Attorney General

By: _____
Assistant Attorney General

Resolution # TC-16-2-

Approving the First Amendment to Intra-Agency Agreement between CDOT and HPTE for the I-70 Peak Period Shoulder Lane (Mountain Express Lane) Project.

WHEREAS, the Transportation Commission is responsible, pursuant to Section 43-1-106(8), C.R.S., for formulating the general policy with respect to the management, construction and maintenance of public highways and other transportation systems in the State; and

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 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, HPTE, in partnership with CDOT, completed and is operating the I-70 Mountain Express Lane Project, formerly known as the I-70 Peak Period Shoulder Lane Project (the “Project”) over a 13 mile segment of eastbound I-70 through the I-70 Mountain Corridor; and

WHEREAS, by Resolution #TC-3216, dated December 19, 2014, the Transportation Commission previously approved the HPTE I-70 PPSL Project Intra-Agency Agreement (the “Agreement”) between CDOT and HPTE regarding the Project; and

WHEREAS, CDOT and HPTE now desire to further define the allocation of costs and responsibilities for operations and maintenance of the Project, as well as set forth invoicing and payment procedures not described in the original Agreement.

NOW THEREFORE BE IT RESOLVED, the Transportation Commission hereby approves the First Amendment to the I-70 PPSL Project Intra-Agency Agreement between CDOT and HPTE and authorizes CDOT’s Executive Director to sign the First Amendment on behalf of CDOT.

Herman Stockinger, Secretary
Transportation Commission of Colorado

Date