

**INTERGOVERNMENTAL AGREEMENT
BY AND BETWEEN
E-470 PUBLIC HIGHWAY AUTHORITY
AND
CITY OF COMMERCE CITY
REGARDING
FUNDING RELATED TO TOWER ROAD/PENA BOULEVARD INTERCHANGE**

This **INTERGOVERNMENTAL AGREEMENT** (the “Agreement”) is made and entered into effective the ____ day of _____, 2014 (the “Effective Date”), by and between the **CITY OF COMMERCE CITY**, a Colorado home rule municipality whose principal business address is 7887 E. 60th Avenue, Commerce City, CO 80022 (the “City”) and the **E-470 PUBLIC HIGHWAY AUTHORITY**, a body corporate and political subdivision of the State of Colorado, whose principal business address is 22470 East 6th Parkway, Suite 100, Aurora, CO 80018 (the “Authority”), (collectively referred to herein as the “Parties” or each individually as a “Party”).

RECITALS

WHEREAS, the City is a municipal corporation organized and existing as a home rule city under Article XX of the Colorado Constitution and the Home Rule Charter of the City; and

WHEREAS, the Authority was created and organized pursuant to Sections 45-43-4-501 *et seq.*, C.R.S. (the “Act”) for the purpose of financing constructing, operating, and/or maintaining E-470, and in this regard to carry out all or any part of those functions or activities permitted by the Act and the Authority’s establishing contract; and

WHEREAS, the Authority and the City, as Colorado governments, are constitutionally and statutorily empowered pursuant to Colo. Const., Article XIV, §18 and Sections 29-1-201, *et seq.*, C.R.S. to cooperate or contract via intergovernmental agreement with one another to provide functions, services or facilities authorized to each cooperating government; and

WHEREAS, the City and the Authority are parties to that certain Intergovernmental Agreement regarding Coordination of Road Improvements and Operations, dated January 27, 1995 (the “IGA”); and

WHEREAS, Section 3 of the IGA provides that in the event the west ramps of the Tower Road and Pena Boulevard interchange (the “Interchange”) have not been constructed by January 1, 2012, and upon the request of the City, the Authority agrees to construct such ramps, at no cost to the City, based on a design mutually agreed upon by the Parties; and

WHEREAS, to date, only the northwest ramp to the Interchange, as identified in **Exhibit A** attached hereto and incorporated herein by this reference (the “Northwest Ramp”), has not been constructed; and

WHEREAS, it is the City’s desire that the Northwest Ramp be constructed; and

WHEREAS, the Parties have identified some IGA terms to interpret in connection with the Northwest ramp; recognize that all obligations of the Parties under the IGA, other than those related to the Northwest Ramp, have been satisfied; wish to enter into this Agreement for satisfaction of the Northwest Ramp obligation by payment from the Authority to the City related to the Northwest Ramp, and accordingly agree that the IGA shall no longer have any force or effect and that this Agreement shall replace any remaining obligations under the IGA.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

COVENANTS AND AGREEMENTS

The Recitals set forth above are hereby incorporated into the covenants and agreements set forth below.

1. TERMINATION OF IGA. The Parties hereby acknowledge and agree that all rights and obligations of the Parties under the IGA have been or by this Agreement hereby are, satisfied. Accordingly, the Parties agree that as of the Effective Date of this Agreement the IGA shall no longer have any force or effect and is terminated.

2. NORTHWEST RAMP.

A. Authority Funds. In order to facilitate the timely construction of the Northwest Ramp, the Authority agrees to pay costs incurred by the City in connection with the design and construction of the Northwest Ramp, in an amount up to, but not exceeding, Three Million Two Hundred and Seven Thousand Seven Hundred Dollars and Zero Cents (\$3,207,700.00) (the "Authority Funds"), provided, however, that no more than Fifty-One Thousand Three Hundred and Twenty-Two Dollars (\$51,322) of the Authority Funds may be used on permitting-related environmental services ("Permitting Services") and no Authority Funds may be used on any other aspect of permitting or any aspect of approvals or consents. The Authority Funds shall be provided as follows: (1) within thirty (30) days of the Effective Date the Authority shall deposit the Authority Funds into a designated and segregated Authority account used solely for the purpose of this Agreement (the "Escrow"); and (2) the Authority shall release funds from the Escrow to the City upon the presentation to the Authority and mutual approval by the Authority and the City of progress invoices for the design and construction of the Northwest Ramp. Any interest which may accrue on the Authority Funds shall be the property of the Authority and shall not increase the Authority Funds available under this Agreement.

B. Payment of Excess Costs. If the actual total cost of the design and construction of the Northwest Ramp exceeds the amount of the Authority Funds, or if the actual cost of the Permitting Services exceeds Fifty-One Thousand Three Hundred and Twenty-Two Dollars (\$51,322), the City shall be solely responsible for all such excess costs of any nature.

C. Design and Construction. The City shall be solely responsible for contracting for the full design and construction of the Northwest Ramp, including, but not limited

to, obtaining all necessary permits, consents and approvals for the construction of the Northwest Ramp, in accordance with all applicable federal, state and local statutes, ordinances, codes, rules and regulations. The City shall procure design and engineering specifications for the construction of the Northwest Ramp and provide such specifications to the Authority for review and acceptance prior to the initiation of any construction related activities for the Northwest Ramp. The Authority will have thirty (30) days to review the design and engineering specifications. The Authority's acceptance shall not be unreasonably withheld, conditioned or delayed. If the Authority rejects the design and engineering specifications, in whole or in part, the Authority shall provide, with reasonable specificity, the reasons for such rejection and the City shall cooperate to cure all such objections. The Parties hereby acknowledge and agree that the Authority's review, acceptance and/or request for revisions to the design and engineering specifications shall not create any liability for the Authority. In the event redesign and re-engineering specifications become necessary after construction of the Northwest Ramp has begun, the City shall provide the Authority with said specifications for review and acceptance as provided above. Once design has been completed, approved by the City and accepted by the Authority, the City shall publicly bid the construction of the Northwest Ramp, in accordance with City bidding requirements and state law and based upon a form of construction contract accepted by the Authority in advance of bidding. The construction contract will be awarded to the low responsible bidder, as approved by the City and accepted by the Authority. The City shall ensure that the construction of the Northwest Ramp is performed in a workmanlike manner in accordance with all applicable federal, state and local statutes, ordinances, codes, rule and regulations.

D. Construction Deadline and Repayment and Release of Funds. If construction of the Northwest Ramp is not substantially complete before the date that is five (5) years from the Effective Date of this Agreement, the City, within ninety (90) days, shall repay the Authority in the amount of all Authority Funds spent from the Escrow, plus three percent (3%) per annum compounded interest, with no credit or reduction for any design and/or construction that was completed during such five-year period. Upon said fifth anniversary, all Authority Funds remaining in the Escrow shall be released to the Authority and the City shall pay the Authority three percent (3%) per annum compounded interest thereon, which interest payment obligation shall be reduced by any actual interest accrued on the Authority Funds while in Escrow. After such fifth-year anniversary, the Authority shall have no remaining obligation under this Agreement.

E. Operations and Maintenance. The Authority and the City hereby acknowledge and agree that the operations and maintenance of the Northwest Ramp, together with any repairs or replacements, shall be the sole obligations of the City in perpetuity.

3. INDEMNIFICATION. To the extent permitted by law, the City hereby agrees to indemnify, defend and hold harmless the Authority and each of the governmental entities that is now or may in the future become a party to the Authority's establishing contract, and each of the Authority's directors, employees, agents and consultants, from and against any and all claims, demands, suits, actions, proceedings, judgments, losses, damages, injuries, penalties, costs, and expenses (including reasonable attorneys' fees), and liabilities, of, by or with respect to any claim arising directly or indirectly, in whole or in part, from the actions or inactions of the City and its employees related this Agreement or the Northwest Ramp. Nothing in this Agreement or in any

actions taken by the Authority or the City pursuant to this Agreement shall be deemed a waiver of the Authority's or the City's respective sovereign immunity under the Colorado Governmental Immunity Act, Sections 24-10-101, *et seq.*, Colorado Revised Statutes. Further, the City shall not be liable for any claim, loss, damage, injury or liability arising out of negligence of the Authority, its directors, employees, agents and consultants. The obligations of the indemnifications extended by the City to the Authority under this Paragraph shall survive termination or expiration of this Agreement.

4. **INSURANCE.** The City shall require that the contractor constructing the Northwest Ramp shall obtain and maintain insurance during construction of the Northwest Ramp in amounts mutually satisfactory to the City and the Authority and the Authority shall be named as an additional insured on all policies and have the right to request and receive a certified copy of any policy and any endorsement thereto.

5. **BREACH AND ENFORCEMENT.** It is specifically understood that, by executing this Agreement, each Party commits itself to perform pursuant to the terms and conditions contained herein and that the failure of either Party to fulfill any obligation set forth herein shall constitute a breach of this Agreement. The Parties agree that this Agreement may be enforced in law or in equity for specific performance, injunctive, or other appropriate relief, as may be available according to the laws and statutes of the State of Colorado.

6. **MISCELLANEOUS PROVISIONS.**

A. **Assignment.** Neither the Authority nor the City may assign this Agreement or parts hereof or its rights hereunder without the express written consent of the other Party.

B. **Time is of the Essence.** The Parties acknowledge that time is of the essence in the performance of this Agreement.

C. **No Partnership or Agency.** Notwithstanding any language in this Agreement or any representation or warranty to the contrary, neither the City nor the Authority shall be deemed or constitute a partner, joint venturer or agent of the other. Any actions taken by the Parties pursuant to this Agreement shall be deemed actions as an independent contractor of the other.

D. **No Third-Party Beneficiaries.** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the Parties. It is the express intention of the Parties that any person other than the City and the Authority shall be deemed to be only an incidental beneficiary under this Agreement.

E. **Governmental Immunity.** Nothing in this Agreement or in any actions taken by the Parties pursuant to this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, Section 24-10-101, *et seq.*, C.R.S.

F. Notices. Any notices or other communications required or permitted by this Agreement or by law to be served on, given to, or delivered to either Party hereto, by the other {arty shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the Party to whom it is addressed or in lieu of such personal services, when received in the United States' mail, first-class postage prepaid addressed to:

The Authority:

E-470 Public Highway Authority
22470 East 6th Parkway
Aurora, CO 80018
Attn: Executive Director

The City:

City of Commerce City
7887 E. 60th Avenue
Commerce City, CO 80022
Attn: City Manager

Either Party may change its address for the purpose of this Section by giving written notice of such change to the other Party in the manner provided in this Section.

G. Headings. The headings and captions in this Agreement are intended solely for the convenience of reference and shall be given no effect in the construction or interpretation of this Agreement.

H. Controlling Law and Venue. The Parties hereto agree that exclusive jurisdiction and venue for the resolution of any dispute relating to this Agreement to be provided hereunder shall lie in the state courts of the State of Colorado.

I. No Waiver. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other of the provisions of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed a waiver of any subsequent default hereunder.

J. Binding Contract. This Agreement shall inure to and be binding on the heirs, executors, administrators, successors, and assigns of the Parties.

K. Entire Contract. This Agreement constitutes the entire agreement between the Parties and sets forth the rights, duties, and obligations of each to the other as of this date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect.

L. Contract Modification. This Agreement may not be amended, altered, or otherwise changed except by a written agreement between the Parties.

M. Severability. The invalidity or unenforceability of any portion or previous version of this Agreement shall not affect the validity or enforceability of any other portion or provision. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and in such event the Parties shall negotiate in good faith to replace such invalidated provision in order to carry out the intent of the Parties in entering into this Agreement.

N. Counterpart Execution. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first above written. By the signature of its representative below, each party affirms that it has taken all necessary action to authorize said representative to execute this Agreement.

E-470 PUBLIC HIGHWAY AUTHORITY

By: John D. McCuskey

Its: Executive Director

ATTEST:

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2014 by John D. McCuskey and _____, as Executive Director and _____ of the E-470 Public Highway Authority.

WITNESS my hand and official seal.

My commission expires: _____

Notary Public

APPROVED AS TO FORM:

ICENOGL | SEAV | POGUE
A Professional Corporation

General Counsel

Director of Finance

DATE APPROVED BY THE BOARD OF DIRECTORS: _____

CITY OF COMMERCE CITY

By: Brian McBroom
Its: City Manager

ATTEST:

By: Laura J. Bauer
Its: City Clerk

Approved as to form:

Robert R. Gehler, City Attorney

STATE OF _____)
)
COUNTY OF _____) ss.

The foregoing instrument was acknowledged before me this _____ day of _____, 2014 by Brian McBroom and Laura J. Bauer, as City Manager and City Clerk of the City of Commerce City.

WITNESS my hand and official seal.

My commission expires: _____

Notary Public

EXHIBIT A

Northwest Ramp