

**FIRST AMENDMENT
TO TOWER ROAD INTERCHANGE CONTRACT**

THIS FIRST AMENDMENT TO TOWER ROAD INTERCHANGE CONTRACT (“**First Amendment**”) is made and entered into as of the date stated on Denver’s signature page below, by and between the **CITY AND COUNTY OF DENVER**, a home rule municipal corporation of the State of Colorado organized pursuant to Article XX of the Colorado Constitution (“**Denver**”), including on behalf of its Department of Aviation (“**DEN**”) and Department of Public Works (“**Public Works**”), and **THE CITY OF COMMERCE CITY**, a home rule municipal corporation organized and existing under and by virtue of the laws of the State of Colorado (“**Commerce City**”) (collectively “**the Parties**”).

WHEREAS, the Parties entered into an intergovernmental agreement called the “Tower Road Interchange Contract” dated March 17, 1992 (the “**Interchange IGA**”); and

WHEREAS, the Interchange IGA provided for construction and funding of two initial ramps at the intersection of Tower Road and Peña Boulevard, and acknowledged potential future expansion to include two additional ramps; and

WHEREAS, a third ramp, an off-ramp to Tower Road from eastbound Peña Boulevard, was constructed by Public Works with financial contribution from adjacent private property owners; and

WHEREAS, Commerce City seeks to construct the fourth and final ramp, which is an onramp from the west side of Tower Road to westbound Peña Boulevard (“**Final Interchange Improvements**”) in connection with a capital project to widen Tower Road; and

WHEREAS, DEN is conducting a comprehensive traffic study of Peña Boulevard to assess the current and estimated future use of Peña Boulevard by vehicles not associated with Denver International Airport (“**Non-Airport Traffic**”) and to identify and evaluate funding mechanisms for the maintenance and improvement of Peña Boulevard allocated to the Non-Airport Traffic; and

WHEREAS, the Federal Aviation Administration, which maintains regulatory authority over DEN, has advised that a funding mechanism must be established for maintenance of the portion of Peña Boulevard that will experience new vehicle traffic, and more specifically Non-Airport Traffic, as a result of the Final Interchange Improvements; and

WHEREAS, the Parties consider it to be in their mutual interest to update the Interchange IGA and to allow for construction of the Final Interchange Improvements; and

WHEREAS, the Parties wish to amend the Interchange IGA in accordance with the

terms stated in this First Amendment.

NOW THEREFORE, for the consideration set forth in this First Amendment and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1. DEFINITIONS, EXHIBITS AND INTERPRETATION

- 1.1 Terms used but not defined herein shall have the meanings ascribed in the Interchange IGA.
- 1.2 By entering into this First Amendment, the Parties do not intend to terminate, modify, waive or amend their rights in any other agreement between the Parties, other than as expressly set forth herein.
- 1.3 In the event of any conflict between the terms or provisions of this First Amendment and any terms or provisions of the Interchange IGA, the terms and provisions of this First Amendment shall control.
- 1.4 **Exhibits**. The following exhibits are attached hereto and incorporated herein by reference:

Exhibit D	Final Interchange Improvements Map
Exhibit E	Access Property Map
Exhibit F	Insurance Requirements

ARTICLE 2: AMENDMENTS TO INTERCHANGE IGA

- 2.1 Section 1 of the Interchange IGA, entitled “Scope of Project and Denver Consent,” is amended and restated to read as follows:

The Parties agree that a partial Tower Road/Peña Boulevard interchange was constructed in accordance with Section 1.a-c of the Interchange IGA, and neither party has any further responsibilities under Section 1.

- 2.2 Section 2 of the Interchange IGA, entitled “Payment,” is amended and restated to read as follows:

The Parties agree that all payments required by Section 2 of the Interchange IGA were made, and neither party has any continuing responsibilities under Section 2. Future costs, including for the Final Interchange Improvements, shall be paid as described in Section 8, *infra*, provided, Commerce City shall not be obligated to pay for any current or future improvements to Tower Road or the onramps (including widening and signal modifications) beyond those improvements currently proposed for the pending Tower Road widening project.

2.3 The text of Section 3 of the Interchange IGA, entitled “Maintenance,” is deleted in its entirety and shall be marked as Reserved. Ongoing maintenance of the Final Interchange Improvements shall be performed in accordance with Section 8 *infra*.

2.4 Section 4 of the Interchange IGA, entitled “Availability of Land,” is amended and restated to read as follows:

The Parties agree that land was provided for a Tower Road/Peña Boulevard interchange in accordance with Section 4 of the Interchange IGA, and neither party has any further responsibilities under Section 4, *excepting that* Commerce City acknowledges that it holds no claim of title to the real property that was made available for the initial interchanges or to be made available for the Final Interchange Improvements, which title resides with Denver.

2.5 Section 5 of the Interchange IGA, entitled “Economic Development Grant and Other Funds,” is amended and restated to read as follows:

The Parties agree that all requirements of Section 5 of the Interchange IGA were satisfied, and neither party has any further responsibilities under Section 5.

2.6 Section 8 of the Interchange IGA, entitled “Consent to Future Expansion,” is retitled “**Final Interchange Improvements**,” and amended and restated to read as follows:

A. Design and Construction of Onramp from Tower Road to Westbound Peña Boulevard

1. Final Interchange Improvements. “Final Interchange Improvements” shall mean the improvements depicted on **Exhibit D**, generally described as an onramp providing access from the west side of Tower Road to westbound Peña Boulevard, but shall not include any current or future improvements to Tower Road beneath Peña Boulevard or any onramp (including widening and signal modification) beyond those improvements currently proposed for the pending Tower Road widening project.
2. Commerce City will design and construct the Final Interchange Improvements in accordance with the terms of this agreement.
3. Commerce City shall request DEN’s and Public Work’s consent to the alignment of the Final Interchange Improvements, shall request a license for use of DEN property, and shall not initiate construction without Denver’s approval of the alignment and issuance of a license.

4. Commerce City agrees that Denver shall have no responsibility for any or all capital costs for the Final Interchange Improvements.
5. DEN and Public Works will participate in any technical review and technical advisory group for the ramp design and permitting, including timely review and comment on plans, participation in any environmental review, and good faith efforts to address and resolve issues that might arise during planning, design and construction.

B. Construction Access; Bonds

1. Access Property. DEN hereby grants access to the property depicted in **Exhibit E** (the “**Access Property**”), which property is necessary to complete the Final Interchange Improvements. This right to access shall terminate upon completion of the Final Interchange Improvements.
2. Construction Performance Bond. Prior to commencement of any construction of improvements on the Access Property, Commerce City or its contractors shall furnish bonds to DEN assuring 100% performance and labor and material payment of all construction activity in the amount of 100% of the construction contract price for work on the Access Property only. Such bonds shall guarantee prompt and faithful performance of project and prompt payment by contractors to all persons supplying labor, materials, team hire, sustenance, provisions, provender, supplies, rental machinery, tools and equipment used directly or indirectly by said contractors, subcontractors and suppliers in the prosecution of the work and shall protect Denver from any liability, losses, or damages therefrom.
3. Liens. Commerce City agrees to promptly pay when due all bills, debts and obligations incurred by it in connection with its activities on the Access Property hereunder and not to permit the same to become delinquent and to suffer no lien, mortgage, judgment, or execution to be filed against the Access Property or improvements thereon.

C. Construction Standards and Coordination

1. Airspace Obstructions and Height Restrictions. Commerce City agrees that no obstruction to air navigation and/or airfield surface and air traffic controller sight lines as determined by application from time to time of the criteria of the Federal Aviation Administration (“**FAA**”) will be permitted on DEN property without FAA approval, and any such obstruction placed on DEN property by Commerce City or its contractors shall be removed by Commerce City at its own cost and expense.
2. Legal Compliance; Permits. Commerce City will ensure compliance with all applicable local, state, and federal rules, regulations, statutes, laws or orders, including DEN Rules and Regulations, and shall obtain all permits, licenses, or approvals required by any governmental or quasi-governmental entity

prior to commencing activities on DEN property. Any required manifest, license, or permit shall be issued in the name of Commerce City or its contractor. Any activity conducted by Commerce City, its agents, or its contractors pursuant to this agreement shall be deemed to be taken only on Commerce City's behalf and not as an agent for Denver.

3. Utilities. Commerce City shall be solely responsible for locating all overhead, above ground, and underground utilities, including without limitation electrical, sewer, water, and other utilities, and shall take all necessary precautions to avoid damage to or injury from such utilities. Commerce City agrees to be solely responsible for any such damage to or injury from any such utilities on DEN property which result from activities performed under this agreement.
4. Accidents and Emergencies. Worksite incidents, vehicle incidents, and emergencies must immediately be reported to Airport Emergency Dispatch 303-342-4211 and 911.
5. Reasonable Care. All work performed in connection with this agreement shall be done with reasonable care, all construction debris shall be removed from the Access Property by Commerce City upon completion of the Final Interchange Improvements, and any DEN property damaged or disturbed during construction shall be restored in a manner reasonably similar to its condition immediately preceding the work under this agreement.

D. Peña Boulevard Traffic Study

1. Commerce City shall participate in the Peña Boulevard traffic study and associated discussions regarding allocation of costs for Peña Boulevard maintenance and expansion attributable to Non-Airport Traffic.

E. Maintenance; Responsibility and Costs

1. Maintenance. DEN shall be solely responsible for maintenance of the Final Interchange Improvements upon completion, and DEN shall continue to be responsible for the maintenance of westbound Peña Boulevard experiencing new vehicle traffic as a result of the Final Interchange Improvements. For purposes of this First Amendment, the segment of Peña Boulevard experiencing new traffic is deemed to be the portion of westbound Peña Boulevard from the point of intersection of the planned onramp from Tower Road and Peña Boulevard to the point of intersection of the existing onramp from 56th Avenue and Peña Boulevard, and constitutes 5.44 lane miles. This road segment is referred to herein as the **"Peña Boulevard Segment"**.
2. Annual Payments for Variable Maintenance Costs.
 - a. Commerce City shall be responsible for compensating DEN on an annual, going-forward basis for a portion of the cost to maintain the Final Interchange Improvements and Peña Boulevard Segment. The

combined total distance of the Final Interchange Improvements and the Peña Boulevard Segment is calculated to be 5.94 lane miles.

- b. For purposes of this payment obligation, Commerce City accepts responsibility for the variable maintenance costs attributable to the Non-Airport Traffic using the Final Interchange Improvements and Peña Boulevard Segment, with the exception of the Non-Airport Traffic that is attributable to Denver and Airport-related traffic.
- c. Maintenance costs to be paid by Commerce City for the Final Interchange Improvements and Peña Boulevard Segment during the first five years of this agreement are estimated to be as follows:
 - 1. 2016 - \$23,182
 - 2. 2017 - \$24,593
 - 3. 2018 - \$26,023
 - 4. 2019 - \$27,477
 - 5. 2020 - \$28,954
- d. Payments to DEN shall be due no later than January 31 in each year of this First Amendment, according to the preceding payment schedule. Beginning in Year 2 after the effective date, DEN shall provide Commerce City with an accounting prior to January 31 of the actual maintenance cost attributable to the Non-Airport Traffic on the Final Interchange Improvements and Peña Boulevard Segment for the prior year. The difference between the actual maintenance cost and the amounts provided herein shall be credited against or added to Commerce City's payment obligation for the subsequent year. If DEN fails to provide such true-up accounting prior to January 31, Commerce City shall have no responsibility to compensate DEN in an amount greater than reflected in the preceding payment schedule.

3. Payments for Slab Replacement and Other Major Maintenance.

- a. Commerce City shall be responsible for compensating DEN for a portion of the actual costs of slab replacement and other major maintenance on the Final Interchange Improvements and Peña Boulevard Segment.
- b. For purposes of this payment obligation, Commerce City accepts responsibility for the Non-Airport Traffic using the portion of the Final Interchange Improvements and/or Peña Boulevard Segment upon which the slab replacement or other major maintenance takes place, with the exception of the Non-Airport Traffic attributable to Denver and any Airport-related traffic.

- c. DEN shall be solely responsible for determining whether and when slab replacement or other major maintenance is required; provided however that DEN shall provide Commerce City with no less than 120-days' notice, to include a cost estimate, before undertaking slab replacement or other major maintenance.
 - d. Upon completion of slab replacement or other major maintenance, DEN shall provide Commerce City with an itemized invoice for the costs attributable to the non-airport traffic, which amount shall be payable within 60 days. Commerce City shall have the right to contest the amount invoiced by DEN; provided however that Commerce City must pay the invoiced amount under protest and meet and confer with DEN prior to initiating any legal challenge to the payment demand.
4. Intended Temporary Nature of Payment Obligation. The payment obligations contained in this Subsection (E) are intended to be temporary in nature and to be obviated and superseded by a comprehensive approach to the Non-Airport Traffic that will result from the Peña Boulevard traffic study. Upon adoption of any such comprehensive approach, the Parties shall meet and confer to negotiate, draft and execute such further amendments to this agreement as may be required to, for example and without limitation, ensure that Commerce City is not paying maintenance costs to be borne by other entities or individuals. If no such comprehensive approach is adopted within five years of execution of this First Amendment, the Parties shall meet and confer to evaluate the effectiveness of this First Amendment and to consider revisions to the payment obligations herein.
5. Maintenance of Existing Interchange Improvements. Nothing herein shall alter or affect DEN's continuing obligation to maintain the existing interchange improvements, as provided in the initial Interchange IGA, to standards of maintenance consistent with Peña Boulevard as a whole.

2.7 Paragraph 11 of the Interchange Contract, entitled "Notices," is amended to read as follows:

For Commerce City:

City Manager
City of Commerce City
7887 East 60th Avenue
Commerce City, CO 80022

For City and County of Denver:

Denver International Airport
Chief Executive Officer
8500 Peña Boulevard
Denver, CO 80249

ARTICLE 3: NEW PROVISIONS

3.1 The following new provisions are added to the Interchange IGA:

13. Termination. The term of this agreement shall commence on the date of execution and shall remain in effect until terminated in writing by the mutual consent of the Parties or by court order.

14. Liability.

- a. To the fullest extent permitted by law, Commerce City hereby agrees, and agrees to require its contractors, assignees and successors to agree, to defend, indemnify, and hold harmless Denver, its appointed and elected officials, agents, and employees against all liabilities, claims, judgments, suits, or demands for damages to persons or property to the extent caused by work performed under this agreement by Commerce City or its agents, representatives, contractors, or suppliers ("Claims"); provided, however, that Commerce City's obligation herein shall not apply to the extent said Claims result from any negligent or willful acts or omissions of Denver, its employees, officers, agents and volunteers, or Denver use, operation or maintenance of the completed work. This indemnity shall be interpreted in the broadest possible manner consistent with the applicable law to indemnify Denver.
- b. Commerce City's duty to defend and indemnify Denver shall arise at the time written notice of the Claim is first provided to Denver regardless of whether suit has been filed and even if Commerce City is not named as a Defendant.
- c. The Parties understand and agree that both the City and County of Denver and the City of Commerce City, their officers, officials, and employees, are relying on, and do not waive or intend to waive by any provisions of this agreement the monetary limitations or any other rights, immunities, and protections provided to them by the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101 to 120, or similar protections otherwise legally available to the Parties.

15. Insurance. Commerce City shall obtain and keep in force, or shall require its contractor(s) to obtain and keep in force, during the entire term of this agreement, insurance policies as described in the form insurance certificate, attached to the First Amendment as **Exhibit F** and incorporated herein. The insurance coverage form states the minimum requirements, and these requirements, do not lessen or limit the liability of Commerce City or its contractors.

16. Appropriation. All obligations of either Party under this agreement are subject to the prior appropriation and deposit or encumbrance of funds expressly made through each Party's legally required budgeting, authorization, and appropriation process, and authorization by the FAA where required. The Parties acknowledge that they do not through this agreement irrevocably pledge present cash reserved for payments in future years, and that this agreement is not intended to create a multiple fiscal year direct or indirect debt or obligation of the Parties.

17. No Discrimination in Employment. In connection with the performance of work completed on Denver property under this agreement, Commerce City agrees, and agrees to require its contractors to agree, not to fail or refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and Commerce City further agrees to insert the foregoing provision in all contracts related to work performed under this agreement.

18. Inspection of Records.

- a. The Parties agree that any duly authorized representative of Denver or Commerce City, including the City Auditor, or any internal or external auditor of either party, shall until the expiration of three (3) years after the final reconciliation or payment under this agreement, have access to and the right to copy any non-privileged books, documents, papers, and records involving transactions and work related to this agreement.
- b. In connection with any work performed hereunder on items of work toward which federal funds may be received, Denver, the Comptroller General of the United States, the FAA, and their authorized representatives shall have access to any books, documents, papers, and records for the purpose of making audit, examination, excerpts and transcriptions.

19. General provisions.

- a. Assignment. Commerce City covenants and agrees not to assign, pledge, or transfer its rights in this agreement, in whole or in part, without the prior written consent of Denver.
- b. Bond Ordinances. This agreement is in all respects subject and subordinate to any Denver bond ordinances applicable to DEN and Denver's airport system and to any other bond ordinances which should amend, supplement or replace such bond ordinances. The parties acknowledge and agree that any property subject to this agreement which was financed by the net proceeds of tax-exempt bonds is owned by Denver.
- c. Agreement Subordinate to Agreements With United States. This agreement is subject and subordinate to the terms, reservations, restrictions and conditions of any existing or future agreements between Denver and the United States, the execution of which has been or may be required as a condition precedent to the transfer of federal rights or property to Denver for airport purposes and the expenditure of federal funds for the development of Denver's airport system.

- d. Agreement Subordinate to Funding Agreement. Denver acknowledges that Commerce City is receiving funding for the Final Interchange Improvements pursuant to an Intergovernmental Agreement by and between E-470 Public Highway Authority and City of Commerce City Regarding Funding Related to Tower Road/Pena Boulevard Interchange (“**Funding Agreement**”). Nothing in this First Amendment shall restrict Commerce City from complying with the terms of the Funding Agreement.

3.2 Except as otherwise provided in this First Amendment, all of the terms, provisions, and conditions of the Interchange IGA shall remain in full force and effect as though set out in full herein, and are hereby ratified and reaffirmed.

3.3 This First Amendment shall not be or become effective or binding on either party until approved and fully executed by all required signatories of each party.

[END OF CONTRACT; SIGNATURES PAGES AND EXHIBITS FOLLOW]