

## **Job Memorandum**

**Date:** February 25, 2010  
**To:** Cathy Luu, FTA Region IX  
**From:** Tim Mantych, Jacobs Engineering  
**Subject:** Honolulu High-Capacity Transit Corridor  
West Oahu/Farrington Highway Design-Build (DB) Contract  
PMOC Assessment of Notices to Proceed (NTP) #1 and 1A

The City and County of Honolulu executed an agreement with Kiewit Pacific Company on November 17, 2009 to provide DB services for the West Oahu/Farrington Highway segment of the subject project. This segment consists of 6.8-mile section of guideway on the west end of the full 20-mile corridor. It should be noted that the DEIS did include any of variant alternatives for this segment other than a no-build option. The City subsequently issued NTP #1 on December 1, 2009 to that limited Kiewit to

“elements of Preliminary Engineering whose principal purpose is refinement and validation of information supporting the environmental review process until the Federal Transit Administration (FTA) issues its Record of Decision (ROD). The City informally notified the FTA on February 12, 2010 that they intended to issue NTP #1A that would authorize Kiewit to proceed with the following activities:

- (1) Soil Borings to confirm geotechnical conditions
- (2) The preparation of a geotechnical data report
- (3) All initial design activities preliminary to various interim design submittals”

It should be noted that, as of the date of this assessment report, the City had not issued NTP #1A. The City has indicated they are awaiting concurrence from the FTA.

The PMOC has assessed NTP #1 and #1A in accordance with federal requirements, specifically those outlined in Federal Register Volume 72, No. 12 dated January 19, 2007. To do so, the PMOC reviewed the contract documents, including NTPs #1 and 1A in accordance with the applicable provisions of the Federal Register Notice. The purpose of this assessment was to determine:

- (1) Whether the City conformed to the requirements outlined in the Federal Notice Regarding advertisement and award of DB contracts prior to completion of the NEPA process; and
- (2) Whether the activities authorized under NTP #1 and 1A met the criteria for Preliminary Design as defined in the Federal Register Notice

It should be noted that the City utilizes a two-part Request for Proposals (RFP) process for procurement of DB contract:

- (1) RFP Part 1 – Serves as a qualifications-based selection mechanism that allows the City to identify priority-listed proposers.
- (2) RFP Part 2 – Serves as the formal request for technical and cost proposals only from the priority-listed proposers.

### **Procurement of DB Contracts Prior to Completion of NEPA Process**

Page 2590 of the Federal Register Notice outlines criteria for procurement of DB contracts prior to completion of the NEPA process to help ensure that the findings are not prejudiced. The following sections cite the pertinent requirements from the Federal Register Notice and provide the PMOC’s assessment of that requirement having been satisfied.

*(l) Certain Environmental Matters.*

*With respect to the design-build elements of a Pilot Project's procurement:*

*(i) The project sponsor may:*

- (A) Issue an RFQ prior to the conclusion of the NEPA process as long as the RFQ informs proposers of the general status of NEPA review;*
- (B) Issue an RFP after the conclusion of the NEPA process;*
- (C) Issue an RFP prior to the conclusion of the NEPA process as long as the RFP informs proposers of the general status of the NEPA process and that no commitment will be made as to any alternative under evaluation in the NEPA process, including the no-build alternative;*

PMOC Assessment – RFP Part 1 references the status of the DEIS but does not specifically discuss the no-build option. Section 1.0 of RFP Part 2 contains the following language:

“Priority-Listed Offerors should be aware that the Environmental impact statement process is still ongoing. The final decisions for the Project will be made based on the findings of the Record of Decision (ROD), which is expected in early October 2009. The Contract will not be executed until the ROD is received. The environmental process shall continue with support to the City from the successful Offeror, post Contract Execution, to secure permits prior to the commencement of construction.”

The PMOC is of the opinion that, although RFP Part 1 is not explicit in the status of the NEPA process or potential for a no-build option, the language in RFP Part 2 satisfies this requirement.

- (D) Proceed with the award of a design-build contract prior to the conclusion of the NEPA process;*
- (E) Issue notice to proceed with preliminary engineering pursuant to a design-build contract that has been awarded prior to the completion of the NEPA process; and*

PMOC Assessment – The City's intent under NTPs #1 and 1A is to authorize Kiewit to proceed strictly with PE activities. The PMOC's assessment of the activities identified in these two NTPs is addressed later in this report.

- (F) Allow a design-builder to proceed with final design and construction for any projects, or segments thereof, for which the NEPA process has been completed.*
- (ii) If the project sponsor proceeds to award a design-build contract prior to the conclusion of the NEPA process, then:*

- (A) The design-build contract must include appropriate provisions preventing the design-builder from proceeding with final design activities and physical construction prior to the completion of the NEPA process (e.g., contract hold points or another method of issuing multi-step approvals must be used);*

PMOC Assessment – It is the PMOC's opinion that the use of multiple NTPs serves as a sufficient mechanism of hold points for this contract.

- (B) The design-build contract must include appropriate provisions ensuring that no commitment is made to any alternative being evaluated in the NEPA process and that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated;*

PMOC Assessment – As noted above, RFP Part 1 references the publication of the DEIS, and RFP Part 2 states that NEPA process is still ongoing. In addition, page 2 of the agreement has the following language:

“Until the Federal Transit Administration ("FTA") issues its Record of Decision, no action by the DESIGN-BUILDER shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Any such action would be considered grounds for possible termination of the Contract for cause.”

The PMOC is of the opinion that this requirement has been sufficiently addressed.

*(C) The design-build contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA document will be implemented;*

PMOC Assessment – The Scope of Work contained in contract documents states that the contractor is responsible for environmental mitigation. Special Provisions 17-3 specifically states that the contractor is responsible for all mitigation measures identified in the EIS.

It should be noted that the proposals were solicited and received prior to completion of the NEPA process, and therefore, the proposers had to assume some limitation of mitigation measures on which to base their bids. This is a potential change order issue only. The PMOC is of the opinion that this requirement has been sufficiently addressed.

*(D) The design-builder may not prepare the NEPA document or have any decision-making responsibility with respect to the NEPA process;*

PMOC Assessment – The PMOC is of the opinion that this is not an issue.

*(E) Any consultants who prepare the NEPA document must be selected by and subject to the exclusive direction and control of the project sponsor, but this shall not preclude a sub-consultant on the design-builder/developer team from preparing the NEPA decision document, provided that such subconsultant does not have a financial or other interest in the outcome of the project (except as otherwise permitted by FTA in its sole discretion) and provided further that the services of the sub-consultant relating to the preparation of the NEPA decision document shall at all times be subject to the exclusive direction and control of the project sponsor;*

PMOC Assessment – The PMOC is of the opinion that this is not an issue.

*(F) The design-builder's work product may be considered in the NEPA analysis and included in the record; and*

PMOC Assessment – The PMOC is of the opinion that this is not an issue.

*(G) The design-build contract must include termination provisions in the event that the no-build alternative is selected.*

PMOC Assessment – Neither the RFP or contract documents explicitly discuss termination of the contract as a result of selection of the no-build alternative. However, both the RFP and contract documents contain provisions that allow for the suspension or termination of the contract if sufficient funds are not available.

The PMOC is of the opinion that this requirement has been sufficiently addressed since it is intuitive that if a no-build alternative is selected as a result of the NEPA process, funds would not be made available to complete the project. However, the PMOC would have recommended more explicit language in both the RFP and contract documents stating possibility of selection of a no-build alternative.

- (iii) *The project sponsor must receive prior FTA concurrence:*
- (A) *Before issuing the RFP and*
  - (B) *awarding a design-build contract.*

PMOC Assessment – The City did not seek concurrence prior to either issuance of an RFP or award of a contract in the case of the West Oahu/Farrington Highway DB Contract.

It should be noted that the City has begun procurement of three other DB contracts (Maintenance and Storage Facility, Core Systems/Vehicles, and Kamehameha Highway Guideway DB Contract) prior to completion of the NEPA process without seeking concurrence from the FTA.

The PMOC is of the opinion that this requirement has not been sufficiently addressed.

#### **PE Activities Authorized under NTPs #1 and 1A**

Page 2587 of the Federal Register Notice defines Preliminary Design as:

*All design and engineering activities undertaken for the purposes of:*

- (a) *Defining the project alternatives and completing the NEPA review process;*
- (b) *Complying with other related environmental laws and regulations;*
- (c) *Supporting agency coordination, public involvement, permit applications and development of mitigation plans; or*
- (d) *Advancing the design development of the preferred alternative when authorized by the lead Federal agency in accordance with 23 U.S.C. 139(f)(4)(D) or as necessitated by 49 U.S.C. 5309.*

*Preliminary design expressly includes, but is not limited to, preliminary engineering and other preconstruction activities such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, and other work that does not materially affect the consideration of alternatives in the NEPA review process. Preliminary design specifically excludes any activity that would constitute an irreversible or irretrievable commitment of resources that has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives.*

PMOC Assessment – Special Provisions 4.7 (h) of the WOFH DB Contract refers to the Design Review Plan, which defines the following design stages:

- (1) Definitive Design
- (2) Interim Designs

- (3) Final Design
- (4) Working Plans
- (5) As-Constructed Plans and Specifications

The City intends to provide Kiewit authorization to advance to the second stage of design (Interim Designs) through NTP #1A. This level of design development is comparable to advanced PE (or 60-65%). The PMOC believes this to be consistent with the approval granted to the City to enter PE.

The PMOC reviewed each of the activities identified in NTPs #1 and 1A to assess whether they meet the requirements of the Federal Register Notice. The PMOC has compiled all activities into a separate spreadsheet and provided an assessment of two categories:

- (1) Satisfies Fed Reg Requirements for "Preliminary Design"
- (2) Satisfies Fed Reg Requirements for DB Contract Prior to Completion of NEPA

One of the following PMOC assessments was provided for each activity listed (along with comments where applicable):

- (1) Yes – does satisfy Federal Register Notice requirements
- (2) Maybe – It depends on completion of the activity or may require additional information from the City. For example, the activity “NPDES Implementation & Permits” cannot be completed until after a Record of Decision is rendered and the full scope of mitigation is known.
- (3) No – does not satisfy the Federal Register Notice requirements

In general, the PMOC is of the opinion that the majority of the activities identified in NTP #1 and 1A meet the requirements of the Federal Register Notice in both categories with the exception of the following activities that are eligible as Preliminary Design activities but whose completion prior to issuance of a ROD could be considered as prejudicing the NEPA process:

- Archeological-Historical Plan
- Hazmat Plan
- Environmental Compliance Plan Final

The following activities may require additional information from the City to confirm they meet the requirements of the Federal Register Notice:

- Payment and Performance Bonds
- Insurance
- Coordination with Local Agencies
- Mobilization 1-50% @ 5% of Contract
- Activate Sub & Suppliers
- Agency Coordination & Permitting
- Agency Master Plan
- NPDES Implementation & Permits
- Provide Facilities & Equip. for City

It should be noted that all activities were identified in NTP #1 with the exception of “Provide Facilities & Equip. for City”, which was identified in NTP #1A.

## Conclusion

The PMOC provides the following conclusions based on an assessment of the procurement and contract documents:

- (1) The City satisfied the requirements outlined on page 2590 of the Federal Register Notice with the exception of one item (number 2 below).
- (2) The City did not satisfy the requirements of the Federal Register Notice with regard to obtaining concurrence from the FTA prior to issuance of RFP of award of contract for the West Oahu/Farrington Highway CDB Contract or issuance of RFP for the three remaining DB contract currently being procured.
- (3) The activities identified in NTP #1 and 1A meet the criteria for Preliminary Design outlined on page 2587. However, additional information may be required from the City for certain activities identified above to confirm they fully satisfy the requirements of the Federal Register Notice.
- (4) The majority of activities identified in NTP #1 meet the requirements for issuance of DB contracts prior to completion of the NEPA process with the exception of those identified above.