U.S. Department
of Transportation
**Federal Transit
Administration**

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DRAFT: SHORTENED VERSION 11/1/09

Mr. Wayne Yoshioka
Director, Department of Transportation Services
City and County of Honolulu
650 South King Street, 3rd Floor
Honolulu, HI 96813

Re: Honolulu High-Capacity Transit Corridor Project

Dear Mr. Yoshioka:

Thank you for your letter dated October 20, 2009 that describes various proposed activities for the Honolulu High-Capacity Transit Corridor Project in Honolulu, HI (the "Project"). These activities include the award of the first Design-Build (D-B) contract for the guideway in the West Oahu section of Honolulu and efforts to accelerate other procurements for the Project. Your letter also references the proposed Programmatic Agreement under Section 106 of the Historic Preservation Act, as well as the proposed agreement by the Federal Aviation Administration (FAA) concerning mitigations for operational impacts at the Honolulu International Airport (the "Airport").

This response is to clarify the Federal Transit Administration's (FTA's) policies and procedures related to automatic pre-award authority, Letters of No Prejudice (LONP), and D-B contract requirements prior to the completion of the National Environmental Policy Act (NEPA) process. This response also asks for information about the City's signatory party on the anticipated Final Environmental Impact Statement (FEIS) for the Project. In addition, this response clarifies FTA's role in the approval of the agreement anticipated from the Federal Aviation Administration (FAA) regarding mitigations for the proposed project alignment near the Airport.

Pre-award Authority, Letters of No Prejudice, and Pre-NEPA Design-Build Contracts
FTA's approval to enter preliminary engineering (PE) dated October 16, 2009, provides automatic pre-award authority for PE activities, thereby maintaining eligibility of these expenses for reimbursement should Federal New Starts funding be forthcoming. FTA defines the amount of engineering and design work that fits within the definition of New Starts PE as follows:

> All refinements to project scope and alignment should be finalized and major project uncertainties assessed during the New Starts preliminary engineering phase of the New Starts process. . . . [with the] expectation that the New Starts preliminary engineering phase will result in project scope and cost estimates and financial plans that have little, if any, need for change after approval of the project into final design. (*2006 Final Guidance on New Starts Policies and Procedures, FTA)*

Costs for activities other than those covered by this expanded definition of PE may not be incurred on the Project absent explicit FTA approval actions that trigger additional automatic pre-award authority (i.e., completion of NEPA or approval into Final Design (FD)) or through issuance of an LONP.

Upon the completion of NEPA, which occurs with FTA's issuance of a Record of Decision (ROD), and in accordance with FTA's *Additional Final Guidance on New Starts/Small Starts Policies and Procedures*, dated September 2, 2009, Honolulu will have automatic pre-award authority to incur costs for right-of-way acquisition, utility relocation and procurement of vehicles. Upon FTA approval to enter FD, Honolulu will have automatic pre-award authority to incur costs for other non-construction activities, such as the procurement of rails, ties, and other specialized equipment; the procurement of commodities; and demolition activities.

FTA will consider a request for an LONP for activities not covered by automatic pre-award authority. Any costs incurred prior to receiving FTA approval to incur those costs will not be eligible for Federal reimbursement or as local match and may jeopardize the Project's New Starts status. This would include any costs incurred for any portion of the entire 20-mile alignment other than those costs specifically mentioned as having pre-award authority to be incurred. FTA considers LONP requests for critical path construction activities on a case-by-case basis.

Regarding your plans for D-B contracts, please note that FTA generally prohibits project sponsors from taking any action that would advance any particular "build" alternative under study prior to the issuance of an environmental Record of Decision (ROD). There may be good reasons, however, to allow a sponsor to engage a single firm to conduct preliminary engineering and final design prior to the issuance of a ROD, including time savings, economies-of-scale, continuity of expertise, and avoidance of multiple contracting.

FTA's position on award of D-B contracts for New Starts projects prior to the completion of NEPA is best described in its Federal Register notice dated January 19, 2007 (Vol. 72, No. 12, p. 2583). Although this notice deals specifically with the Public Private Partnership Pilot Program, it summarizes the contract provisions FTA expects in all pre-NEPA D-B contracts, and the permissible activities of the contracting parties. Such contracts must not assume the outcome of the NEPA review. To do so would invalidate the NEPA process and render the project ineligible for Federal funds. The notice also states that the project sponsor must receive FTA concurrence (A) before issuing the RFP [Request for Proposals] and (B) awarding a design-build contract. Please contact FTA to provide more information about the status of the various contractual commitments described in your letter of October 20th and to arrange our review of the pending contract(s).

Honolulu's Signatory Party on the Project's Final Environmental Impact Statement
FTA notes recent action by the Council for the City and County of Honolulu authorizing the Department of Transportation's Services' signing of the programmatic agreement under Section 106 of the Historic Preservation Act, committing Honolulu to carrying out the mitigations in that document. FTA and Honolulu will be required by Federal law (23 U.S.C. Section 139(c)(4)) to implement the environmental mitigation commitments made in the anticipated FEIS for the Project. FTA will require the FEIS to be signed by an official who has the authority to commit Honolulu to the mitigation required by the FEIS. Please provide FTA with the name, title, and scope of authority of the individual who will be signing the FEIS for Honolulu.

Federal Aviation Administration Agreement on Mitigations at the Airport
FTA will continue to work with Honolulu, the Hawaii Department of Transportation, and FAA in arriving at a mutually acceptable agreement on the scope of mitigations for the operational impacts of the Project on the Airport. Depending on FAA's response, Honolulu may have to consider and evaluate, prior to the conclusion of the environmental process, alternative mitigations or an alternative alignment that addresses FAA's concerns.

Thank you for your expeditious attention to these important issues. If you have any questions, please contact me at (415) 744-3133.

Sincerely,

Leslie T. Rogers
Regional Administrator