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

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DRAFT, LONGER VERSION 10.27.09

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 the Department of Transportation Services for the City and County of Honolulu's (Honolulu) 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; the effort to accelerate the next procurement for the guideway along Kemehameha Highway through Pearl City and Aiea as a D-B procurement in November 2009; and the effort to proceed with the D-B procurement of the Core Systems in early 2010, including vehicle acquisition and construction of the Maintenance Facility.

This response is to advise Honolulu of the Federal Transit Administration (FTA) policies and procedures related to automatic pre-award authority, issuance of Letters of No Prejudice (LONP), and design-build contract requirements prior to the completion of the National Environmental Policy Act (NEPA) process. 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. In its 2006 New Starts policy guidance, FTA expanded the amount of engineering and design work that fits within the definition of New Starts PE as described below:

> 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. This approach will, in many instances, require a different perspective on the work performed and eligible costs for federal reimbursement than has traditionally been associated with the term "preliminary engineering." For example, varying definitions of preliminary engineering, such as "the engineering necessary to complete NEPA," or "30% design" would be supplanted-for New Starts projects-by an 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. *Notice of Availability of Final Guidance on New Starts Policies*

and Procedures, Updated Reporting Instructions and New Starts Rating and Evaluation Process, Federal Register, May 22, 2006

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. These activities may include, but are not limited to, 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 as described above. 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 includes 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 will consider LONP requests for critical path construction activities on a case-by-case basis.

Please note that a Federal agency and project sponsor must conduct an objective evaluation of the alternatives under study in a NEPA document, including the ``no-action'' alternative. FTA generally prohibits project sponsors from taking any action that would advance any particular ``build'' alternative under study prior to the issuance of a ROD. In design-build contracting, however, there may be good reasons 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 design- build contracts for New Starts projects prior to the completion of NEPA is best described in its Federal Register notice dated January 19, 2007, on the Public Private Partnership Pilot Program, which states in pertinent part:

> (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);
>
> (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;
>
> (C) The design-build contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA document will be implemented;
>
> (D) The design-builder may not prepare the NEPA document or have any decision-making responsibility with respect to the NEPA process;

(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 sub-consultant 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;

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

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

(iii) The project sponsor must receive prior FTA concurrence (A) Before issuing the RFP [Request for Proposals] and (B) awarding a design-build contract. Should the project sponsor proceed with any of the activities specified in this section before the completion of the NEPA process, FTA's concurrence merely constitutes FTA's acquiescence that any such activities comply with Federal requirements and does not constitute project authorization or obligate Federal funds, unless otherwise provided by FTA.

In addition, if the NEPA process has been completed prior to issuing the RFP, the project sponsor may allow a consultant and/or sub-consultant who acted as preparer of the NEPA document to submit a proposal in response to the RFP.

If the NEPA process has not been completed prior to issuing the RFP, the project sponsor may allow a sub-consultant to the preparer of the NEPA document to submit a proposal in response to the RFP only if the project sponsor releases such sub-consultant from further responsibilities with respect to the preparation of the NEPA document.

FTA would like to receive more information about the status of the various contractual commitments described in Honolulu's letter. In particular, Honolulu states that it is "prepared to announce the award of the first D-B contract" which was subsequently described in a telephone conversation with FTA as a selection of a contractor and not an award with binding commitments. Please provide information on the nature of this action including the identification of any costs incurred. Award of certain types of contracts prior to completion of the NEPA process may be prejudicial to the NEPA process. Therefore, FTA approval is required prior to award of the proposed D-B contract.

Please also note that FTA and Honolulu are required by Federal law (23 U.S.C. Section 139(c)(4)) to implement the mitigation commitments made in a Final Environmental Impact Statement (FEIS). 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 and title of the individual who will be signing the FEIS for Honolulu. You should also indicate the scope of the commitment authority of the individual.

FTA is aware of the Federal Aviation Administration's (FAA's) interest in resolving the proposed alignment's impacts on operations at the Honolulu International Airport. The City may have to consider and evaluate, prior to the conclusion of the environmental process, an alternative that addresses FAA's concerns.

FTA wants to ensure that Honolulu proceeds in a manner consistent with FTA requirements and policy. 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