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

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

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 letters dated October 20 and November 3, 2009, concerning the Honolulu High-Capacity Transit Corridor Project in Honolulu, HI (the "Project"). The Federal Transit Administration (FTA) is committed to assisting the City and County of Honolulu (the "City") in advancing this project in compliance with the requirements of the National Environmental Policy Act (NEPA) and the Federal Transit Administration's (FTA's) New Starts process. FTA and the City share a mutual goal, a project that will well serve the citizens of the area. To that end, this letter responds to your letters in detail. In addition, FTA is currently reaching out to the Federal Aviation Administration (FAA) to understand more fully its position regarding the proposed alignment and the NEPA issues associated with any potential mitigation at the Honolulu International Airport (the "Airport").

Your initial letter, dated October 20, references the proposed Programmatic Agreement under Section 106 of the National Historic Preservation Act, a proposed agreement by the FAA concerning mitigation for operational impacts at the Airport, and proposed procurement activities, including the award of the Project's first Design – Build (D-B) contract, which FTA understands has already taken place. Your second letter, dated November 3, proposes an approach to address mitigation related to the Airport, and has a concurrence signature by a Program Manager from the FAA. Before addressing the substance of the second letter, please allow~~let~~ me to clarify an important point. Although you represent that FTA agreed to the proposed approach at a meeting held on October 19, 2009, FTA **has not** agreed to any specific mitigation approach. Any representation or understanding to the contrary is incorrect. FTA's concurrence with an agreement of this type must be demonstrated by a written statement or by inclusion of an executed agreement in the official environmental administrative record, neither of which has occurred.

This response addresses the proposed mitigation plan in the November letter and clarifies what is necessary with respect to the NEPA process for the Project's proposed alignment and mitigations in the vicinity of the Airport. It also clarifies FTA's policies and procedures related to automatic pre-award authority, Letters of No Prejudice (LONPs), and D-B contracts executed before the completion of the NEPA process. Finally, this response asks for information about the City's authority to sign the anticipated Final Environmental Impact Statement (FEIS) for the Project. We offer the following:

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Federal Aviation Administration Agreement on Mitigation at the Airport
FTA is aware that the currently proposed alignment for the Project, absent mitigation, would be within the Runway Protection Zones (RPZs) for two runways at the Airport. If the City intends to keep the currently proposed alignment, the FEIS must address the runway issue in order to satisfy the NEPA process. It must describe not only the alignment and all environmental impacts and necessary mitigations of the alignment within the RPZs, but also any additional environmental impacts and mitigations that would result from making the project alignment compatible with the RPZs for the runways. As part of the mitigation plan, FTA would need a more definitive agreement from FAA about the relocation of the runways and environmental impact mitigations. An agreement merely to study possible runway relocations, as is described in the November 3rd letter, without greater resolution on the alignment impacts and~~or~~ mitigations, is not acceptable for purposes of NEPA.

Should the City decide to choose an alternative to the currently proposed alignment on and/or near the Airport, the environmental review process must be completed for that alternative. Possible alternatives could include a design option modifying the currently proposed alignment in order to avoid the RPZs or an entirely new alignment option and mitigations that would avoid the RPZs totally or in part. Evaluation of an alternative alignment would include analysis of environmental impacts with a fully detailed mitigation plan and cost estimates for that alternative, as well full public involvement. To be clear, the approach that is proposed in your November 3rd letter does not resolve the issue satisfactorily for NEPA purposes. FTA staff is available to discuss with you any options you wish to consider for moving forward with the NEPA review.

Pre-Award Authority, LONPs, and D-B Contracts Prior to Completion of the NEPA Process
As the proposed Honolulu Project would be the City's first New Starts project, it might be beneficial to summarize briefly the use of pre-award authority , LONPs, and D-B contracts for New Starts projects, which differs somewhat from their use for FTA formula-funded projects.

Pre-Award Authority for New Starts Projects. FTA's approval for the Project to enter preliminary engineering (PE), dated October 16, 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. (*FTA 2006 Final Guidance on New Starts Policies and Procedures)*

Costs for activities other than those covered by this definition of PE may not be incurred and reimbursed absent explicit FTA approvals that trigger additional pre-award authority, such as the completion of NEPA and approval into Final Design (FD), or issuance of LONPs.

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After issuance of the Record of Decision (ROD), which completes the NEPA process, and in accordance with FTA's Federal Register Notice, dated September 2, 2009, *Additional Final Guidance on New Starts/Small Starts Policies and Procedures*, the City will have automatic pre-award authority for right-of-way acquisition, utility relocation, and procurement of vehicles. Approval to enter FD will be required for pre-award authority for non-construction activities such as, but not limited to, the procurement of rails, ties, and other specialized equipment; the procurement of commodities; and demolition activities.

LONPs for New Starts Projects. After completion of NEPA, FTA will consider LONPs for activities not covered by automatic pre-award authority on a case-by-case basis. Absent pre-award authority or a~~n~~ LONP, no project costs can be incurred or eligible for~~and subsequently~~ reimbursement or as local match~~d~~ for any portion of the entire 20-mile alignment ~~before FTA approves the project into the New Starts phase which by definition permits such actions~~.

D-B Contracts for New Starts projects. With respect to D-B contracts for the Project, 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 ROD. A sponsor may be allowed, however, to engage a single firm, prior to the issuance of a ROD, to conduct PE and FD, if the sponsor can provide appropriate justification. The contract itself also must be structured in a way that prevents any appearance of tainting the NEPA process.

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. While FTA does not normally review a sponsor's third-party contracts, this is not the case for contracts executed before the completion of NEPA. Accordingly, please provide FTA with a copy of the contract you recently signed so that FTA can ensure compliance with NEPA.

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 Services to sign the Programmatic Agreement under Section 106 of the Historic Preservation Act, committing Honolulu to carry out the mitigation included 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.

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

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