



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

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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 is is in response to~~ your letter, dated October 20, 2009, that describes various proposed activities by the Department of Transportation Services of the City and County of Honolulu (City). These activities include the award of the first Design-Build (D-B) contract for the guideway in the West Oahu section, the effort to accelerate the next procurement for guideway along Kamehameha Highway through Pearl City and Aiea as a D-B procurement in November 2009, and to proceed with the D-B procurement of the Core Systems including vehicles and the Maintenance Facility.

~~Theis response purpose of this~~ letter is to advise the City of the Federal Transit Administration's (FTA) policies and procedures related to automatic pre-award authority, issuance of Letters of No Prejudice, and design-build contracting prior to the completion of NEPA. requirements for eligible contract award actions during the various phases of the New Starts project development process: at completion of National Environmental Policy Act (NEPA) requirements, at entry into Final Design and those actions that would require Letter of No Prejudice.

FTA's approval to enter preliminary engineering (PE), dated October 15, 2009, provides automatic pre-award authority for preliminary engineering 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 preliminary engineering as described below: limits eligible costs to those costs related to PE.

"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

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and financial plans that have little, if any, need for change after approval of the project into final design.”

Other eCosts for activities other than those covered by this expanded definition of preliminary engineering may not be incurred on this project absent explicit FTA approval actions that trigger additional automatic pre-award authority (completion of NEPA, approval into Final Design) or through issuance of a Letter of No Prejudice (LONP). -on-authority that arises from the completion of NEPA and Record of Decision (ROD), approvals for entry into Final Design and award of a Letter of No Prejudice and/or grant awards for the activities contemplated.

Upon ~~Once~~ the completion of NEPA, which occurs with FTA’s issuance of a Record of Decision (ROD), OD, 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~~the~~ authority to incur costs for right-of-way acquisition, utility relocation and procurement of vehicles. Upon FTA aApproval to enter Final Design, the City will have automatic pre-award authority to incur costs for -will be required for other non-construction activities such as but not limited to, the procurement of rails, ties, and other specialized equipment,; the procurement of commodities,; and demolition.

FTA will consider LONPs for activities not covered by automatic pre-award authority as described above. Otherwise, no project costs can be incurred for any portion of the entire 20-mile alignment absent FTA approval of entry into the next New Starts phase. FTA will consider LONPs for critical path construction activities by a case-by-case analysis of the specific requests but not before approval of entry into final design.

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 our 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;

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(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 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 complies 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 your letter. In particular, your letter states that you are "prepared to announce the award of the first D-B contract", which has been described in a later telephone conversation 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, and how this action fits within the FTA policies and procedures described above.

Please also note that FTA and the City are required by Federal law (23 USC 139(c)(4)) to implement the mitigation commitments made in an Final Environmental Impact Statement (FEIS). FTA will require the FEIS to be signed by an official who has the authority to commit the City to the mitigation presented in the FEIS. Therefore, FTA requests that you inform FTA who will be signing the FEIS for the City, and by what authority that official can commit the City to the mitigation measures presented therein.

FTA is aware of concerns regarding the final alignment at the Honolulu International Airport. The City should include in the FEIS an alternative that avoids airport runway impacts. Both design options can be considered in the FEIS, with the selection of one as a preferred alternative.

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We want to ensure that the City proceeds in a manner consistent with FTA 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 Rogers
Regional Administrator