Dear DTS:

The purpose of this letter is to address two issues that have recently arisen regarding the Honolulu High-Capacity Transit project. The issues, discussed in detail below, are: (1) Federal environmental regulations place certain limitations on design-build contracts and contractors, and (2) recent events have raised a question about the authority of the City's Department of Transportation Services (DTS) to sign the Final Environmental Impact Statement and thereby commit the City and County of Honolulu (the City) to the measures to mitigate the adverse community and environmental effects of the project presented therein, without a City Council resolution authorizing that commitment.

Recent news reports in Honolulu indicate that DTS may be close to executing a design-build contract related to the project. In order to realize the benefits of the design-build approach for transit projects, FTA articulated certain related policies in a notice in the Federal Register on January 19, 2007 on the Public-Private Partnership Pilot Program (72 FR 2583). These policies address the conditions under which a design-build (D-B) contract may be executed prior to completion of the environmental review process with FTA's signing of an environmental record of decision (ROD). Those conditions are summarized as follow:

1. The contract must include a clause which gives the City the option of terminating the contract without financial penalty at the completion of the environmental review process, so that the contract is in accord with 40 CFR 1506.1;

2. The design-build contractor, who would have a financial interest in the outcome of the environmental review process, may not be involved in any way in the preparation of environmental documents for the project, in accord with 40 CFR 1506.4(c). The D-B contractor may provide preliminary engineering studies and results to the City for the City to use in preparing environmental documents through another contractor that is working on the environmental review under a separate contract and does not have a similar conflict of interest.

3. No final design or construction activities are allowed prior to the ROD, in accord with 23 CFR 771.113(a).

4. The DB contract must include provisions for enforcement of the City's and FTA's commitments to mitigate the adverse impacts of the project as presented in the Final Environmental Impact Statement, the ROD, and the historic preservation agreement.

5. Prior to the award of the D-B contract, FTA must concur in its award to ensure that these conditions, and other Federal procurement requirements, are met.

FTA recently became aware that the DTS has the authority to commit the City and County of Honolulu to the stipulations in the historic preservation agreement that is currently being negotiated only if a City Council resolution grants DTS that authority.

An important question resulting from this new awareness of the limitation of DTS authority is:

Does DTS have the authority to sign the Final Environmental Impact Statement (FEIS) and thereby commit the City and County of Honolulu to implement the measures presented therein to mitigate the adverse effects of the project, in the absence of a similar City Council resolution granting that authority to DTS?

FTA and the recipient of FTA grant funds are required by Federal law (23 USC 139(c)(4)) to implement the mitigation commitments made in an FEIS. FTA expects the FEIS to be signed by an official of the grant recipient agency who has the authority to commit the grant recipient agency to the mitigation presented in the FEIS. Therefore, FTA requests that DTS inform FTA who will by signing the FEIS for the City and County of Honolulu, and by what authority that official can commit the City and County of Honolulu to the mitigation measures presented therein.

Thank you for your expeditious attention to these important issues. If you have any questions, please contact me at <phone number>.

Sincerely,

Leslie Rogers