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

Dear ~~DTS:~~ Mr. Yoshioka:

This is in response to your letter of October 20, 2009 that states that the Department of Transportation Services (DTS) of the City and County of Honolulu is "prepared to announce the award of the first Design-Build (D-B) contract for the guideway in the West Oahu section this week . . . . to accelerate the next guideway procurement along Kemehameha Highway through Pearl City and Aiea . . . to issue the first solicitation for the Kamehameha DB procurement in November . . . . [and also to proceed] with the D-B procurement of the Core Systems including vehicles and the Maintenance Facility."

The purpose of this letter is to (1) ~~address two issues that have recently arisen regarding the Honolulu High-Capacity Transit project. The issues, discussed in detail below, are: (1)~~ clarify the limitations that Federal environmental regulations place ~~certain limitations~~ on ~~design-build~~D-B contracts and contractors, and (2) request clarification ~~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.

Regarding the first issue, your Oct. 20th letter, as well as r~~R~~ecent news reports in Honolulu, indicate that DTS may have executed or 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, the Federal Transit Administration (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)~~its policies on the negotiation and award of D-B contracts relative to the National Environmental Policy Act (NEPA) process in a Federal Register notice on January 19, 2007 on the Public Private Partnership Pilot Program (72 FR 2583). These policies are consistent with Title 40 of the Code of Federal Regulations (CFR), Part 1506, dealing with "Protection of the Environment" and with Title 23 CFR, Part 771, dealing with the "Environmental impact" of proposed highway and transit projects. These policies~~-~~ address the conditions under which a ~~design-build~~D-B ~~(D-B)~~ contract may be executed prior to completion of the environmental review process ~~with~~ which occurs with FTA's signing of an environmental record of decision (ROD). Those conditions are summarized as they pertain to the City and County of Honolulu 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; JOE-- I

COULDN'T FIND A REFERENCE TO "WITHOUT FINANCIAL PENALTY" IN THE CFR or Fed. Register.

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, however, 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.

Regarding the second issue, 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?

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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 b~~y~~e 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