



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

Memorandum

Subject: PIN X103.27, Miller Highway Project
59th to 72nd Streets
New York County

Date: August 8, 1996

From: Harold J. Brown
Division Administrator
Albany, New York

Reply to
Attn. of: HA-NY

To: Director, Design Services Bureau, *4-G01B, MC 0432
New York State Department of Transportation
Albany, New York

Please refer to your Mr. McLoughlin's June 5, 1996 memorandum for this project. We also met with your personnel and Mr. Hartley on June 28, 1996 to further discuss this reply to our January 23, 1996 memorandum. We have the following comments on the reply:

1. We understand Mr. McLoughlin's disagreement with the statements in our January 23, 1996 memorandum but that interpretation is the Federal Highway Administration (FHWA) position. Restated, the earlier Appropriations Act funds are, in our interpretation, subject to the restriction provided in Public Law 104-50. Consequently those funds are not available for use on this project. Until expiration of the current Appropriations Act (Public Law 104-50) any request for additional authorization will be denied.

We recently provided you with a copy of Administrator Slater's July 15, 1996 letter to Senator Moynihan. We believe that letter confirms our current directive that no further work should be progressed on this project.

In our discussions it was pointed out that some funds do remain available from the original Federal-aid authorization amount of \$4,440,398.00. The remaining unexpended Federal-aid funds total \$142,096.00 according to your budget accounting in Attachment 1. The request to expend those funds to continue the project study is noted, however, for the various reasons below we are compelled to deny your request.

- Our calculations using the total spent to date (attachment 1) of \$5,372,878.00 and the estimate to complete (Attachment 5) \$310,665.00 plus 18% (Empire State Development Corporation (ESDC)/New York State Department of Transportation (NYSDOT) salaries (\$56,000) indicates an overrun will occur in the total funds authorized (\$5,550,498.00) thereby exceeding the Federal funds limitation of \$4,440,398.00. Consequently there are insufficient funds to complete the project study unless a commitment of New York State funding can be made. We also believe the estimate to complete may be conservative

considering the controversy involving this project. Preparation of a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS)/Section 4(f) may well exceed the current estimate.

- Support for the project appears to be lacking since 100% State funds have not been made available to bring the study to completion.
- As noted in Administrator Slater's letter, the construction funds for this project are not provided for in the current five year Transportation Improvement Program (TIP). As a result, completion of the FEIS/Section 4(f) with an estimated one year from now completion date indicates the FEIS/Section 4(f) would be required to be updated and re-evaluated when and if the project funding was secured and placed on the TIP. Under National Environmental Policy Act (NEPA) there is a three year limitation on the validity of the FEIS/Section 4(f). We believe the completion of the project study now would not be prudent considering the known need to update and re-evaluate the document prior to construction if funds were available.
- The proposed Department of Transportation appropriation bill (H. R. 3675) dated June 19, 1996 continues the restriction on funding this project. A copy of that proposed bill with that provision is attached.
- We believe the intent of the Public Law 104-50 language restricting the use of any funds on the project for the duration of that act is to effectively stop work on the project.

These are significant issues in determining our current position and the reason for our continuation of the stop work Federal-aid Ineligibility Notification (FAIN) of January 17, 1996. The Section 4(f) evaluation report as submitted on December 22, 1995 is a logical termination of the project. Consequently, we request that you take all actions necessary to close out this project as quickly as possible. We have revised the January 17, 1996 FAIN which is more specific in those ineligible costs as discussed in item 2 below. We will work with your staff to close out this project by October 1, 1996.

2. The specific citations of ineligible work is included in the attached revised #3604 FAIN. This is a summary of our response to your memorandum as discussed at our June 28, 1996 meeting:
 - a. We concur in your recommendation that the work done "at-risk" during the shut down period for only the Section 4(f) avoidance study is now eligible for Federal-aid funding. These specific costs should be outlined as part of the project closeout.
 - b. Supplemental Agreement (SA) #1 included the following extra work and total costs which received prior approval by FHWA:

Extra Work Request #40100-1 - Additional Alternatives from Scoping	\$172,603.00
Extra Work Request #20104-1 - Additional Traffic Counts	<u>\$10,800.00</u>
Total Cost	\$183,403.00

We should note that a formal SA #1 has not been submitted but the EWR's are eligible for Federal-aid and the formal SA #1 should be initiated.

- c. SA #2 has not been submitted to date. We did receive Extra Work Request (EWR) #40200-1 on December 21, 1995 for our action. We verbally advised you at that time no action would be taken on the EWR since all the work was done and costs incurred without prior FHWA approval. EWR #40200-1 is for \$84,601.00 total cost.
- d. In addition to the extra work in item b. and c. above, the consultant has extensively overrun task budgets for Task 40000, Part IV - Preliminary Design and Task 60000, Other Project Activities. As discussed at our meeting, these over-budget costs were not given prior approval by your Department or FHWA. Consequently, those costs are not eligible for Federal-aid funds. Our revised FAIN further identifies these ineligible costs.

As discussed, a request for waiver from the Administrator can be made regarding items c. and d. above in accordance with 23 CFR 1.9. This request needs to be made prior to the intended closeout of October 1, 1996.

3. We refer you to item 1 above as a response to your recommendation in your comment 3. In addition, we are perplexed as to why your recommendation proposes completion of the DEIS stage only. Completion of a FEIS is a logical stopping point, not a DEIS, even if this project was to proceed with 100% State funds.

As noted above, we believe the circumstances surrounding this project indicate the need to close out the project as soon as possible. Any continuation of the environmental/design work with Federal-aid funds would require Congressional action. Furthermore, the continued lack of support for constructing this project and consequent obsolescence of any FEIS document produced precludes the future expenditure of public funds. We await your action to resolve the concerns noted above and closeout of the project.

/s/HAROLD J. BROWN

Attachment

cc:
Chief Engineer, Office of Engineering
NYSDOT MC 0504

bcc: PIN File: X103.27, District A Day, s:\fycur96\millerhw.wpd, HAUSLER:fea:jl:8/8/96