

PROCUREMENT POLICY BOARD

Aloha Stadium, Hospitality Room
99-500 Salt Lake Boulevard
Honolulu, Hawaii 96818
Regular Meeting
January 21, 2010
1:00 p.m.

AGENDA

- I. Call to Order
- II. Approval of Minutes – Meeting of October 15, 2009
- III. Executive session, to consult with the Board’s attorney on the Board’s powers and liabilities pursuant to HRS §92-5(a)(4); regarding agenda items IV and V below.
- IV. Items for Board Action

- a. Petition for Declaratory Ruling submitted by Olelo Community Television

Olelo Community Television petitions the Procurement Policy Board, pursuant to Hawaii Revised Statutes (HRS) §91-8, for a declaratory ruling stating that contracts with entities to manage and administer public, education and government (PEG) access channels are contracts for “utility services” within the meaning of HRS §103D-102(b)(4)(F) and, for which the competitive award procedures of HRS Chapter 103D are neither practicable nor advantageous to the State, and so on that basis, such contracts are exempt from the application of the State Procurement Code.

- b. Petition for Declaratory Ruling submitted by Olelo Community Television

Olelo Community Television petitions the Procurement Policy Board, pursuant to Hawaii Revised Statutes (HRS) §91-8 and Hawaii Administrative Rules (HAR) §3-121-32, for a declaratory ruling stating that contracts with entities to manage and administer public, education and government (PEG) access channels and services are contracts for which the competitive award procedures of HRS Chapter 103D are either not practicable or not advantageous to the State, and so on that basis, such contracts are exempt from the application of the State Procurement Code within the meaning of HRS §103D-102(b)(4)(L).

- V. Announcements

- VI. Adjournment

Agenda and available agenda items may be viewed at <http://hawaii.gov/spo/procurement-policy-board-minutes-of-meeting>. Individuals may present testimony on matters on the Procurement Policy Board’s agenda when the agenda item is taken up by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting.

Written testimony also will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, January 19, 2010. Testimony received after the January 19, 2010 deadline will be forwarded to the board as time permits. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 10 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., January 18, 2010 to discuss accommodation arrangements.

Agenda Item IVa

BEFORE THE HAWAII STATE PROCUREMENT POLICY BOARD

In the Petition Of)
)
'Ōlelo Community Television,)
)
Petitioner)
)

'06 SEP 12 P3:44

ADMINISTRATION
STATE PROCUREMENT OFFICE
STATE OF HAWAII

PETITION FOR DECLARATORY RULING
PURSUANT TO H.R.S. § 91-8

Petitioner 'Ōlelo Community Television, a Hawaii nonprofit corporation ("Ōlelo"), by and through its counsel, hereby petitions the Hawaii State Procurement Policy Board (the "Board"), pursuant to Hawaii Revised Statute (H.R.S.) § 91-8, for a declaratory ruling stating that:

Contracts with entities to manage and administer public, education and government ("PEG") access channels are contracts for "utility services" within the meaning of H.R.S. § 103D-102(b)(4)(F) and, for which the competitive award procedures of H.R.S. Chapter 103D are neither practicable nor advantageous to the State. On that basis, such contracts are exempt from application of the State Procurement Code.¹

1. Petitioner 'Ōlelo Is An Interested Person Within The Meaning Of H.R.S. § 91-8.

'Ōlelo was created as an independent, private, non-profit corporation to manage the dedicated PEG access channels and provide PEG services to the public for the island of Oahu. 'Ōlelo is a qualified petitioner under H.R.S. § 91-8, which states that any interested person, including a corporation (H.R.S. § 91-1(2)) "may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency."

¹ The statutory exemption addressed by the instant Petition is not the same exemption that was ruled on by the State Procurement Office ("SPO"). To 'Ōlelo's knowledge, the declaratory ruling sought herein has not been previously presented to the SPO or the Board for determination.

‘Ōlelo currently administers and manages PEG access channels for Oahu and intends to continue to do so if permitted by the State.

2. Legal Basis For The Requested Declaratory Ruling.

‘Ōlelo contends the Hawaii legislature intended that the Hawaii Procurement Code (the “Code”) exclude from its coverage contracts for the management and administration of PEG access channels, facilities, and equipment. For the following reasons, the Board should determine that the Code’s own terms exempt contracts for PEG access services from the Code’s requirements and procedures.

a. The Legislature Specifically Identified “Utilities Services” As Among The Categories Of Contracts That Would Not Be Covered By The Code.

The Code is contained in H.R.S. Chapter 103D. The Code generally applies to all procurement contracts made by a government body. However, the legislature recognized that certain types of contracts are not susceptible to the competitive methods and standard contract administration procedures embodied in the Code. Accordingly, the legislature enumerated specific categories of contracts to which the Code would not apply. H.R.S. § 103D-102(b). Among the categories of contracts exempt from the Code’s application, the legislature specifically identified contracts for utility services. The relevant provisions of H.R.S. § 103D-102(b) state:

(b) . . . this chapter shall not apply to contracts . . . :

. . . .

(4) To procure the following goods or services which are available from multiple sources but for which procurement by competitive means is either not practical or not advantageous to the State:

. . . .

- (F) Utility services whose rates or prices are fixed by regulatory processes or agencies.

H.R.S. § 103D-102(b)(4)(F); emphasis added.

b. Contracts To Procure Services Of PEG Access Providers Are Contracts For “Utility Services” Within The Meaning Of H.R.S. § 103D-102(b)(4)(F).

Although the Procurement Code does not define “utility services”, the statute governing the Public Utilities Commission (“PUC”) defines a “public utility” to include:

. . . every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles or incorporation or otherwise, any plant or equipment or any part thereof, directly or indirectly for public use, for . . . transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State...”

H.R.S. § 269-1(1); emphasis added.

PEG access providers are not subject to PUC regulation. However, they generally conform to the description of “utilities” under the definition provided in H.R.S. § 269-1 because they “manage . . . equipment . . . for public use, for . . . transmission of telecommunications messages.” H.R.S. § 269-1(1). The unique telecommunications role of PEG access providers was created to preserve for the public benefit uses that were not likely to be served by regulated commercial utilities that operate cable franchises.

In this context, Oceanic Cablevision, Inc. (“Oceanic”) is a utility awarded a franchise to operate Hawaii’s cable transmission system. As a holder of the local telecommunication franchise, Oceanic is directly regulated by the Hawaii State Department of Commerce and Consumer Affairs (“DCCA”). Pursuant to the governmentally directed PEG access program, certain of Oceanic’s channels are

set aside for public, governmental, and educational uses to serve the public need for noncommercial programming.

‘Ōlelo currently manages six of the cable television channels awarded to Oceanic. ‘Ōlelo’s management and administration of these channels is solely for the transmission of public, educational, and governmental programs to the citizens of Hawaii. ‘Ōlelo also manages telecommunications equipment and facilities for use by the public to create PEG programming that would not otherwise be available through commercial resources. Under the circumstances, ‘Ōlelo stands in the place of Oceanic for the designated PEG access channels and “manag[es] . . . equipment . . . for public use, for . . . transmission of [PEG Access channel] telecommunications messages.” It therefore meets the general definition of a “utility” under H.R.S. § 269-1(1). Here, the only distinctions between ‘Ōlelo and Oceanic are ‘Ōlelo’s status as a non-commercial entity and ‘Ōlelo’s limited mission of providing PEG access services instead of general commercial programming.

As a further indication that contracts for PEG access services fall within the Code’s exemption for “utility services” contracts, all PEG access contract payments are set by government agencies. The Code specifically includes in the exemption for utility services a stipulation that the utility’s “rates or prices” must be “fixed by regulatory processes and agencies.” H.R.S. § 103D-102(b)(4)(F). Contracts for PEG access services also conform to this requirement,

‘Ōlelo’s six PEG access channels are included in Oceanic’s basic tier of cable service. The rates for this service are regulated by the Federal Communications Commission which sets a ceiling for the basic cable tier. Rates for PEG access providers, such as ‘Ōlelo, are also directly regulated by the DCCA. DCCA controls the amount of PEG revenues paid to all PEG service

providers. DCCA directly regulates the designation and handling of franchise fee funds, and it oversees the allowable fees for PEG access services.²

Based upon the foregoing, contracts for management and administration of PEG access channels fall directly within the category of “utility services” contracts the legislature intended to exclude from coverage of the Code. PEG access contracts are clearly awarded to “procure . . . utility services whose rates or prices are fixed by regulatory processes or agencies” as provided in H.R.S. § 103D-102(b)(4)(F).

c. The “Utility Services” Exemption Applies To PEG Access Contracts Because Their Procurement Through Code Procedures Is Not Practicable And Not Advantageous To The State.

The Code exempts utility service contracts if “procurement by competitive means is either not practicable or not advantageous to the State.” H.R.S. § 103D-102(b)(4). The Code’s implementing rules further acknowledge “there may be situations where procurement [through Code procedures] is either not practicable or not advantageous to the State.” H.A.R. § 3-120-4(a). The procurement of PEG access services is just such a situation. Because of their unique nature, contracts for PEG access services cannot be procured under the Code in a practicable manner and the arms-length relationship created under the Code will result in circumstances that are disadvantageous to the State.

(1) The Role Of PEG Access Providers Requires That The Provider Serve As A Protector Of Public Rights And Interests.

PEG service providers, such as ‘Ōlelo, were created and designed to stand in a fiduciary relationship with the public and to remain accountable to DCCA for the administration of public resources. Unlike normal government contractors, the PEG access providers do not provide their services directly to the State. Instead, they serve the individual members of the public by ensuring

² The majority of these services are provided free of charge to the public.

citizens and organizations have access to the public's broadcasting resources for the expression of their ideas and beliefs.

In exercising their Constitutional rights of expression, the citizens and groups served by PEG access providers often seek to transmit programs that promote unpopular or less accepted views. These views may be critical of the government and directly challenge leaders in federal, state and local government, including DCCA. The function of the PEG access provider in this environment is to ensure all citizens have equal and fair access to the public's transmission resources, without regard to any conflict their views may have with those of government leaders.

To accomplish their difficult duty of facilitating the exercise of individual rights of expression, PEG access providers must maintain a delicate balance. On one hand, the provider must ensure all persons have equal access to the public's communication resources, even though the transmission of their views may be contrary to the views of the majority and in conflict with the government. On the other hand, the providers must remain responsive to the government in accounting for the efficient and responsible administration of the public resources entrusted to them.

This delicate balance has been successfully achieved in Hawaii by the use of a flexible, non-adversarial partnership between the DCCA and the PEG access providers. The partnership includes DCCA involvement in the selection of PEG access organization Board Members, and DCCA oversight of fiscal and property accountability. However, the partnership also affords the PEG access provider great flexibility in its dealings with individual citizens and independence in programming decisions.

DCCA's partnership relationship with 'Ōlelo is currently defined by a series of agreements that regulate the management and operation of the PEG access facilities and equipment for the island of Oahu. Annually DCCA requires 'Ōlelo to provide updates of 'Ōlelo's strategic long-range planning document so that

DCCA can oversee 'Ōlelo's organizational development. DCCA also influences the internal management of 'Ōlelo. Nine persons comprise the 'Ōlelo Board of Directors. Six of the Directors are appointed by DCCA³ (the remaining three are appointed by Oceanic).

DCCA further controls 'Ōlelo's use of its revenues. For example, in 1998, DCCA directed 'Ōlelo to cede control of its educational channels to the Hawaii Educational Network Consortium (HENC) and to pay HENC 25 percent of the previous year's annual PEG access fees.

Despite DCCA's influence over the fiscal and organizational management aspects of PEG access providers, the providers principally serve the individual citizens and organizations of the State as a fiduciary to ensure their rights of free expression are unfettered and not subject to the oversight of any government entity.

(2) Ensuring Fair Competition For The PEG Access Contracts Is Not Practicable And The Predictable Results Are Not Advantageous To The State.

The delicate relationship presently in existence between the State and the PEG access providers is entirely different than the relationships that will be created through the Code's competitive processes and firm contract terms. In creating a contract, the Code contemplates the open solicitation of offers from independent parties and the creation of an arms-length relationship with strictly defined rights and obligations between the State and an independent contractor.

The Code intends for the relationship between contractors and the government to be arms-length even before the contract is formed. Competitors for a contract may challenge both the State's formulation of the solicitation and the State's award of the contract. H.R.S. § 103D-701. The challenge to the solicitation may include whether the State's specifications are unduly restrictive

³ DCCA requires that one of its six director appointees be elected from the PEG Access organization's client base.

because they depart from purely functional requirements. See H.R.S. 103D-405; H.A.R. § 3-122-10. Unresolved disagreements about the form of any solicitation or the award of the contract may be submitted to an independent hearings officer for *de novo* determination. H.R.S. § 103D-709.

The concepts embodied in the competitors' right to challenge the solicitation and award are adversarial in nature and can be contentious. Accordingly, the Code procedures intended to ensure competitor rights to challenge the solicitation will operate to endanger the partnership now present between the DCCA and the PEG access providers.

Further, formulation of the solicitation will risk the loss of the delicate balance of competing duties that has made the current program successful. A requirement that the DCCA have authority over the selection of the contractor's governing board (as is the case with the current PEG access providers) will be an extreme departure from the Code's concept of independent contractors. Further, the DCCA oversight (through selection of board members or otherwise) can be challenged as a nonfunctional requirement unrelated to the actual performance of the work. As such the incorporation of such a requirement is subject to direct challenge as an unduly restrictive specification, intended to limit competition to the current PEG access providers (whose Board is already subject to this requirement) and to exclude any competitors whose Board was appointed through normal procedures. See H.A.R. § 3-122-10.

Evaluation of offers will also risk challenges because objective factors, such as pricing, will not be available. Price cannot be used for evaluation of the competitors because PEG access "rates or prices" are set by the DCCA. Instead, evaluation of offers for the PEG access contracts will be limited to clearly subjective factors which will be subject to question.

As a result, the primary evaluation factors will be matters such as Key Personnel Qualifications, Experience, Organizational Past Performance, and Quality of Performance Plan. Under the circumstances here, the current PEG

access providers have been performing the contract requirements for decades and their personnel are intimately familiar with the scope of the work. The limitation of evaluation factors will operate to make the competition appear to be a sham calculated to ensure the current providers are selected. If the current providers are not selected, the fairness of the evaluations will also be suspect. Whatever the result, questions about the integrity of the procurement process will be raised.

(3) Award Of A Fixed Contract Conforming To The Standards Of The Code Will Result In Predictable Results That Are Not Advantageous To The State.

Once award is made, the State is strictly bound by the terms of the contract created. To the extent the State determines contract requirements need to be changed, the State may do so but only within the scope of the contract and consistent with the terms of the relevant contract clause. See H.A.R. § 3-125-3. In the case of a contract modification, the State will be obligated to make additional payments to compensate the contractor for any increased costs the contractor experiences because of the modification. H.A.R. § 3-125-3(b)(2), implementing H.R.S. § 103D-501.

These Code contract requirements will limit DCCA's ability to modify the PEG fee percentage allocation or other terms of the contract. Likewise, DCCA could not request additional deliverables requiring additional work not covered by the contract unless it compensated the contractor with a price adjustment. The flexible manner in which DCCA has previously negotiated and conducted business with PEG access providers such as 'Ōlelo would be replaced by fixed contract terms, to the detriment of the State.


In the event the parties disagreed over contract terms and requirements, the matter would be subject to litigation pursuant to the contract disputes clause and H.R.S. §§ 103D-703 and 103D-711. Thus, unlike the current partnership arrangement, a contract created under the Code would risk the creation of an adversarial relationship not advantageous to the State.

3. Conclusion

Competitive award of public contracts serves the public interest in ensuring fairness to all interested contractors and preventing corruption in government. However, the legislature has recognized that certain circumstances make competitive award procedures contrary to public interests. For this reason, the legislature included in the Code specific authorization for the exemption of individual contracts or categories of contracts in H.R.S. § 103D-102.

As discussed above, the PEG access contracts are clearly among the "utility services" contracts the legislature considered appropriate for exemption from the Code. The circumstances surrounding PEG access services indicate that competition of these contracts is not practicable and the results of competition will not be advantageous to the State. Consequently, 'Ōlelo respectfully requests that the Board issue a declaratory ruling exempting PEG access service contracts from application of the State Procurement Code under the "utility services" exemption of Section 103D-102(b)(4)(f).

DATED: Honolulu, Hawaii, September 12, 2006.


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Agenda Item IVb

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‘ŌLELO COMMUNITY TELEVISION

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition of:

‘ŌLELO COMMUNITY TELEVISION,

Petitioner

**‘ŌLELO COMMUNITY TELEVISION'S
PETITION FOR DECLARATORY
RULING PURSUANT TO H.R.S §§ 91-8
AND 103D-102(b)(4)(L); CERTIFICATE
OF SERVICE**

10AUG'09 PM 2:37 SP0-A

PETITION FOR DECLARATORY RULING
PURSUANT TO H.R.S. §§ 91-8 AND 103D-102(b)(4)(L)

Petitioner ‘Ōlelo Community Television (“‘Ōlelo”), by and through its counsel, hereby petitions the Procurement Policy Board (the “Board”), pursuant to Hawaii Revised Statutes (H.R.S.) section 91-8 and Hawaii Administrative Rules (H.A.R.) section 3-121-32, for a declaratory ruling stating that:

Contracts with entities to manage and administer public, educational and governmental (“PEG”) access channels and services are contracts for which the competitive award procedures of H.R.S. Chapter 103D are either not practicable or not advantageous to the State. On that basis, such contracts are exempt from application of the State Procurement Code within the meaning of H.R.S. section 103D-102(b)(4)(L).

1. Petitioner ‘Ōlelo Is An Interested Person Within The Meaning Of H.R.S. Section 91-8.

‘Ōlelo is an independent, private, non-profit corporation that was created in 1989 to manage the dedicated PEG access channels and provide PEG access services for the island of Oahu. ‘Ōlelo is a qualified petitioner under H.R.S. section 91-8, which states that any interested person, including a corporation (H.R.S. § 91-1(2)) “may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency.”

‘Ōlelo currently administers and manages the PEG access channels and services (referred to collectively herein as “PEG access services”) for Oahu pursuant to a contract with the Department of Commerce and Consumer Affairs (“DCCA”).

2. Legal Basis For The Requested Declaratory Ruling.

The Hawaii State Procurement Code, H.R.S. Chapter 103D (the “Procurement Code” or “Code”), excludes from its coverage contracts for services which the Board determines are available from multiple sources but “for which procurement by competitive means is either not practicable or not advantageous to the State.” H.R.S. § 103D-102(b)(4)(L); see also H.A.R. § 3-120-4(a). For the following reasons, the contracts for PEG access services are such services. Therefore, the Board should

determine that the Code's own terms exempt the contracts for PEG access services from the Code's competitive selection requirements and procedures.

3. Factual Summary

'Ōlelo has provided PEG access services on the island of Oahu pursuant to written contracts with the DCCA since 1990. As described in the current contract with DCCA, PEG access is "a media resource that promotes community development and lifelong learning; facilitates communication; and increases civic participation in the democratic process." 'Ōlelo accomplishes these goals by providing equipment, production training, facilities and staff support to each of the three sectors (public, educational and governmental) that allows each sector to create and cablecast programming on channels assigned to 'Ōlelo. As the PEG access services provider, 'Ōlelo serves as the electronic equivalent of the "soapbox in the park," providing a mechanism that allows private citizens to exercise their First Amendment rights.

The source of funding for PEG access services is the cable operator, Time Warner Entertainment L.P. ("Time Warner"), which makes payment to the PEG access services contractors at the DCCA's direction. The amount of PEG access funding is inherently uncertain, as it is based on a percentage of Time Warner's gross revenues. Thus, the funding fluctuates from year to year, based on variables that include the number of cable subscribers and the types of cable services they purchase at any given time.

In October 2005, the State of Hawai'i Attorney General issued a written opinion to the DCCA stating that the State's contracts for PEG access services were subject to the Procurement Code.¹ Following issuance of the Attorney General's opinion, the State Procurement Office ("SPO") determined that the State's PEG access services contracts, including the current 'Ōlelo/DCCA contract, should be the subject of a competitive

¹ Although issued in October 2005, the Attorney General's letter was not made public until November 14, 2008, pursuant to a Court Order in litigation initiated by the Maui PEG access services provider, Akaku: Maui Community Television. See Ex. B to the Declaration of Barbara A. Krieg attached to the concurrently-filed Evidence In Support Of Petitions For Declaratory Ruling ("Krieg Decl.").

selection process and award. The DCCA subsequently requested that the SPO exempt the PEG access services contracts from the Code's application on the grounds that it was not practicable or advantageous for the State to compete the contracts. However, the SPO denied the DCCA's exemption request.²

On September 12, 2006, 'Ōlelo submitted a Petition For Declaratory Ruling Pursuant To H.R.S. § 91-8 requesting the Board's issuance of a declaratory ruling that the PEG access services contracts are exempt from the Code as "utility services" pursuant to H.R.S. § 103D-102(b)(4)(F) (the "2006 Petition"). The 2006 Petition, which will be set for reconsideration by the Board,³ included a summary of reasons that application of the Code to PEG access services contracts is not practicable or advantageous to the State. It did not, however, seek a declaratory ruling with respect to the exemption identified herein (H.R.S. § 103D-102(b)(4)(L)).

In the years since 'Ōlelo filed its 2006 Petition, a number of events have occurred that highlight the appropriateness of the H.R.S. § 103D-102(b)(4)(L) exemption (and/or exemption as a utility service) for PEG access services contracts. These events include:

- Although the SPO issued an RFP in July 2007, 'Ōlelo and others submitted protests against the contents of the RFP on numerous grounds. (See Krieg. Decl., ¶ 3 & Ex. A.) The SPO ultimately cancelled the solicitation on or around February 19, 2009. (See Ex. E to Krieg Decl.)
- The Attorney General's opinion letter that initiated the application of the Code to the PEG access services contracts was made public by Court order

² The SPO has granted a series of temporary exemptions for the PEG access services contracts in six month increments. Thus, the DCCA's contracts with the current PEG access services providers have remained in effect while the State has been attempting to compete the contracts.

³ Pursuant to agreement between the Board and 'Ōlelo, 'Ōlelo is submitting the concurrently filed "Evidence In Support Of Petitions For Declaratory Ruling; Declaration of Barbara A. Krieg: Exhibits A-I" for the Board's consideration in support of the 2006 Petition. See Krieg Decl., ¶10 & Ex. I. The same evidence likewise supports the instant Petition and is referenced herein. Id.

in November 2008. The opinion letter specifically noted that the Board has the authority to determine that the PEG access contracts are exempt from the State Procurement Code on the grounds that procurement by competitive means is either not practicable or not advantageous to the State. (See Krieg Decl., ¶ 4 & Ex. B, p.5.)

- A Task Force appointed by the Hawai'i State Legislature issued a report in December 2008 recommending exempting the PEG access contracts from the competitive provisions of the State Procurement Code at either a statutory or administrative level. (See Ex. C to Krieg Decl.)
- In January 2009, the State legislature proposed legislation to create a Hawaii Broadband Commission ("HBC"), to which the Public Utilities Commission ("PUC") would transfer its oversight of telecommunications functions. (See Krieg Decl., ¶ 6 & Ex. D.) The legislation envisioned that the HBC would regulate, in a statutory framework mirroring the PUC, all telecommunications services including telephone, cable television and PEG access services - thereby indicating that PUC regulation is not determinative of whether PEG access services are, or are not, "utility services" and that such services are deemed similar to utility services that are currently regulated by the PUC.
- In March 2009, the DCCA Director gave public testimony in which he confirmed the DCCA's continuing support for exemption of the PEG access services contracts from the competitive selection provisions of the Procurement Code. (See Krieg Decl., ¶ 8 & Ex. F, p.4.)
- There is still no resolution to the disputes over the extent to which the State has, or does not have, any rights with respect to property owned by 'Ōlelo and the other PEG access services providers.

4. Procurement Of The PEG Access Services Contracts By Competitive Means Is Not Practicable And/Or Not Advantageous To The State.

As summarized in 'Ölelo's 2006 Petition and for the reasons presented therein, contracts for PEG access services cannot, because of their unique nature, be procured under the Code in a practicable manner and the arms-length relationship created under the Code will result in circumstances that are not advantageous to the State. For these and the following additional reasons, the Board should determine that competition for the PEG access services contracts is not practicable and/or not advantageous to the State.

a. It Is Not Practicable For The State To Craft An Appropriate Competitive Selection Process.

It has become evident that an RFP cannot be successfully crafted for the PEG access contracts at this time. The SPO issued an RFP for the PEG access services contracts in July 2007, following the issuance of two separate Requests for Information and constructive feedback regarding same. Upon issuance of the actual RFP, 'Ölelo and others filed protests against the content of the solicitation. (See Krieg Decl., ¶ 3 & Ex. A. As identified in 'Ölelo's protest, the RFP contained major flaws, including (but not limited to) the following:

- The RFP lacked any performance standards;⁴
- The RFP did not identify what property, if any, would be provided to the successful offeror;
- The RFP was fatally uncertain as to the pricing of the contract, in part due to the variable funding mechanism;

⁴ See Request For Proposals To Operate, Maintain, And Manage Public, Educational, and Governmental (PEG) Access Channels, Funds, Facilities, And Equipment For The State Of Hawaii, RFP-07-043-SW, p.41. (For the Board's convenience, referenced excerpts of RFP-07-043-SW are attached as Ex. G to Krieg Decl. to the Evidence In Support Of Petitions.)

- The RFP impermissibly designated a non-competed subcontractor (an association of public and private entities) to provide the educational component of PEG services; and
- The RFP did not convey a reasonable understanding of the terms and conditions of the contractor's performance and services.

The SPO responded to 'Ōlelo's protest 18 months after it was filed - by cancelling the solicitation. (See Ex. E to Krieg Decl.) No other solicitation has yet been issued and the circumstances identified in 'Ōlelo's Protest still exist. These circumstances demonstrate the complexity of the PEG services requirements and the inability of the State, after diligent and good faith effort, to craft an appropriate RFP that can effectively compete the PEG access services contracts. This warrants a determination that it is not practicable for these contracts to be subject to competitive selection.

Moreover, competition for the PEG access contracts is not practicable (or even possible) unless and until the unresolved issues of property ownership rights have been resolved. The State has somehow taken the position that it – and not the PEG access services providers – owns all assets purchased with the funds paid by the cable company over the entire term of the parties' contractual relationship (notwithstanding the lack of any contract term to establish the State's ownership). However, the State's position is disputed by 'Ōlelo (and others) and contrary to the status quo. All of 'Ōlelo's assets are owned 100 percent by 'Ōlelo. This includes a building in Mapunapuna that was purchased by 'Ōlelo in 1994 (see Warranty Deed attached as Ex. H to Krieg Decl.); video production equipment, computers and office equipment; and all other resources utilized by 'Ōlelo to deliver PEG access services throughout Oahu. Absent resolution of this dispute, the State cannot make any representation to prospective competitors about the property, if any, that would be provided to the selected contractor.⁵ Thus, it is not practicable at this time for the State to compete the contracts for PEG access services.

⁵ The 2007 RFP represented that "DCCA intends to provide the Contractor with PEG Access Facilities and Equipment at the start of the Contract." See RFP 07-043-SW, p.8 (Ex. G). Another section of the RFP, however, states that if the issues of property

b. As A Separate And Alternative Ground, Competition Of The PEG Access Services Contracts Is Not Advantageous To The State.

‘Ōlelo’s 2006 Petition contains a summary of reasons that competitive selection of the PEG access services contractors is not advantageous to the State. Among other reasons, the PEG access services are unique services for which the “standard” competition considerations, such as the most favorable price, are simply inapplicable. See also ‘Ōlelo’s Protest (Ex. A). For all of these reasons, and for the reasons identified in ‘Ōlelo’s Protest, the competitive provisions of the Code are not, as applied to the PEG access services contracts, advantageous to the State.


In addition, the competitive selection of a PEG access services contractor would result in the loss of the critical community-building aspect of PEG access services. In public testimony before the Board in support of ‘Ōlelo’s 2006 Petition, hundreds of State residents expressed their fears that the result of a competed contract would be the loss of community-based and community-building services for the underserved. The SPO assured the Board, and the individuals who testified, that there would be no such adverse consequence. However, the State subsequently declined to incorporate these services into the RFP, for the stated reason that PEG access services contracts “are not contracts for social services.” (See Second Request for Information and Draft RFP dated 3/16/07.) The loss of the community-building aspect of PEG access services as a result of the competitive selection process is an additional reason that competition for the PEG access services contracts would be not advantageous to the State’s deserving residents and, as a result, to the State.

ownership are not resolved prior to the contract being awarded, the selected contractor may not, in fact, be provided any or all of the identified PEG Access Facilities and Equipment. *Id.*, p.25. The RFP further provides that if this occurs, the amount of compensation to the contractor would be subsequently negotiated (notwithstanding the prior competitive selection purportedly based on, among other criteria, the amount of funding required by the contractor.) *Id.* These conflicting and potentially unlawful conditions demonstrate that it is not practicable for the State to compete the contracts until the property issue has been resolved.

5. Conclusion

The circumstances surrounding PEG access services indicate that competition of these contracts is not practicable and/or the results of competition will not be advantageous to the State. The applicability of the statutory exemption on these grounds has been supported by the DCCA and the Legislature's appointed Task Force. The Board's authority to determine the applicability of the exemption has also been recognized by other State authorities. For these reasons, 'Ōlelo respectfully requests that the Board issue a declaratory ruling exempting PEG access service contracts from the competitive selection requirements of the State Procurement Code under the exemption of Section 103D-102(b)(4)(L) because they are contracts for which the competitive award procedures of H.R.S. Chapter 103D are either not practicable or not advantageous to the State.

DATED: Honolulu, Hawaii, August 10, 2009.


TERRY E. THOMASON
BARBARA A. KRIEG
Attorneys for 'Ōlelo Community Television

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition of:

‘ŌLELO COMMUNITY TELEVISION,
Petitioner,

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE


The undersigned hereby certifies that on this date two copies of the foregoing document was duly served upon the following parties via hand-delivery to their last known addresses as follows:

Procurement Policy Board
c/o Mr. Aaron Fujioka
State Procurement Office
Department of Accounting and General Services
Kalanimoku Building
1151 Punchbowl Street, Room 230A
Honolulu, Hawai‘i 96813

and a courtesy copy of the same was duly served upon the following, via hand-delivery, as follows:

Patricia Ohara, Esq.
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813

DATED: Honolulu, Hawai‘i, August 10, 2009.


TERRY E. THOMASON
BARBARA A. KRIEG

Attorneys for Petitioner
‘ŌLELO COMMUNITY TELEVISION

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
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Attorneys for Petitioner
‘ŌLELO COMMUNITY TELEVISION

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition of:

‘ŌLELO COMMUNITY TELEVISION,

Petitioner

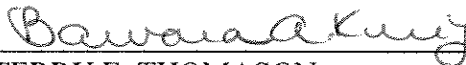
**PETITIONER ‘ŌLELO COMMUNITY
TELEVISION’S EVIDENCE IN
SUPPORT OF PETITIONS FOR
DECLARATORY RULING;
DECLARATION OF BARBARA A.
KRIEG; EXHIBITS A-I; CERTIFICATE
OF SERVICE**

10AUG'09 PM 2:37 SPQ-A

**PETITIONER 'ŌLELO COMMUNITY TELEVISION'S
EVIDENCE IN SUPPORT OF PETITIONS FOR DECLARATORY
RULING**

Petitioner 'Ōlelo Community Television submits this Evidence In Support Of
Petitions For Declaratory Ruling for consideration with respect to its: (1) Petition For
Declaratory Ruling Pursuant To H.R.S. § 91-8 filed September 12, 2006; and (2) concurrently-
filed Petition For Declaratory Ruling Pursuant To H.R.S. §§ 91-8 And 103D-102(b)(4)(L).

DATED: Honolulu, Hawai'i, August 10, 2009.



TERRY E. THOMASON
BARBARA A. KRIEG

Attorneys for Petitioner
'ŌLELO COMMUNITY TELEVISION

DECLARATION OF BARBARA A. KRIEG

I, Barbara A. Krieg, declare under penalty of perjury as follows:

1. I am an attorney with the law firm of Alston Hunt Floyd & Ing. I represent petitioner 'Ōlelo Community Television ('Ōlelo) before the Procurement Policy Board ("Board").

2. I make this declaration based on my personal knowledge and am competent to testify about the matters contained in this Declaration.

3. Attached to this declaration as Exhibit A is a true and correct copy of 'Ōlelo's Protest Against The Content Of The Solicitation of Request For Proposals No. RFP-07-043-W ("Protest"). I participated in the preparation of the Protest, signed it and caused it to be delivered to the stated addressee and filed on August 7, 2007. The referenced Request For Proposals, to which the Protest was directed, was entitled "Sealed Offers To Operate, Maintain, And Manage Public, Educational, And Governmental (PEG) Access Channels, Funds, Facilities, And Equipment For The State Of Hawaii" (the "RFP"). Attached as Exhibit G are true and correct copies of the cover pages and pages 8, 25 and 41 of the RFP, as issued by the State Procurement Office (SPO) and made publicly available by electronic means.

4. Attached to this declaration as Exhibit B is a true and correct copy of a document filed in the Circuit Court of the Second Circuit, State of Hawai'i, Civil No. 07-1-0280(1) on November 14, 2008, consisting of a caption page followed by a one-page letter from Rodney Tam, Esq. to The Honorable Joel E. August dated November 13, 2008 and accompanying letter dated October 12, 2005 from the State of Hawaii, Department of the Attorney General to Honorable Mark E. Recktenwald, Director, Department of Commerce and Consumer Affairs, with the referenced subject "Applicability of HRS Chapter 103D to State

Contracts for PEG Access Services.” Exhibit B was made public by order of the Court in Civil No. 07-1-0280(1) on November 18, 2008.

5. Attached to this declaration as Exhibit C is a true and correct copy of the H.C.R. 358 Task Force Report to the 25th Legislature dated December 12, 2008, without attachments, as maintained and made available on the website of the Department of Commerce and Consumer Affairs.

6. Attached to this declaration as Exhibit D is a true and correct copy of the Measure History of the Hawaii State Legislature 2009 Regular Session for SB1680, entitled “Relating To Technology”, and the first five pages of SB1680 as introduced on January 28, 2009, all of which are maintained and made available on the Hawaii State Legislature Website: capitol.hawaii.gov. The legislation proposed the creation of a Hawaii Broadband Commission (“HBC”), to which the Public Utilities Commission (“PUC”) would transfer its oversight of telecommunications functions. The legislation envisioned that the HBC would regulate, in a statutory framework mirroring the PUC, all telecommunications services including telephone, cable television and PEG access services.

7. Attached to this declaration as Exhibit E is a true and correct copy of a letter dated February 19, 2009 from the State Procurement Office, Ruth Yamaguchi, to my office, responding to ‘Ōlelo’s Protest and informing us that the RFP was cancelled.

8. Attached to this declaration as Exhibit F is a true and correct copy of written testimony dated March 18, 2009 by the Department of Commerce and Consumer Affairs to the Senate Committees on Economic Development and Technology and Commerce and Consumer Protection, 25th Legislature, entitled “Testimony On House Bill No. 984, H.D. 4

Relating To Technology” as maintained and made available on the Hawaii State Legislature Website: capitol.hawaii.gov.

9. Attached to this declaration as Exhibit H is a true and correct copy of the officially recorded Warranty Deed for the building purchased by ‘Ōlelo in 1994 located at 1122 Mapunapuna Street in Honolulu, currently occupied by ‘Ōlelo and operated as its principal place of business.

10. This declaration and the attached exhibits are submitted in support of:
(a) ‘Ōlelo’s concurrently-filed Petition For Declaratory Ruling Pursuant To H.R.S. §§ 91-8 And 103D-102(b)(4)(L), and (b) ‘Ōlelo’s Petition For Declaratory Ruling Pursuant To H.R.S. § 91-8 filed on September 12, 2006 (the “2006 Petition”). By agreement of counsel, the Board has agreed to receive supplemental evidence from ‘Ōlelo, to consider such evidence, and reconsider the 2006 Petition. A true and correct copy of a July 23, 2009 letter from Patricia Ohara, Esq. to me, confirming this agreement, is attached as Exhibit I.

I declare under penalty of perjury under the laws of the United States of America and the State of Hawai`i that the foregoing facts are true and correct.

Executed in Honolulu, Hawaii, on August 10, 2009.



Barbara A. Krieg



August 6, 2007

Via Hand Delivery

Ms. Ruth E. Yamaguchi
Procurement Officer
State Procurement Office
Kalanimoku Building
1151 Punchbowl Street, Room 416
Honolulu, HI 96813

TERRY E. THOMASON
BARBARA A. KRIEG

Honolulu, Hawaii
E-MAIL:
tthomason@ahfi.com
bkrieg@ahfi.com

Re: Protest Against The Content Of The Solicitation –
Request For Proposals No. RFP-07-043-SW; Sealed
Proposals To Operate, Maintain, And Manage Public,
Educational, And Governmental (PEG) Access Channels,
Funds, Facilities, And Equipment For The State Of Hawaii

Dear Ms. Yamaguchi:

On behalf of our client, 'Ōlelo Community Television ("Ōlelo"), we submit this Protest against the content of the solicitation designated as RFP-07-043-SW (the "RFP"), subject as described above.

A. Summary Of Protest Claims.

This Protest is submitted pursuant to Hawaii Revised Statutes § 103D-701, Hawaii Administrative Rules ("HAR") § 3-126-3 and SPO General Provisions, para. 27 (pg. 18).

As addressed in the discussion below, the RFP is legally deficient because it is formulated in a manner that will not create a binding and enforceable contract.

Its principal legal deficiencies are:

1. The RFP lacks performance standards.
2. The RFP cannot identify what property, if any, will be provided to the successful offeror.

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"EXHIBIT A"

3. The RFP is fatally uncertain as to the pricing of the contract.
4. The RFP impermissibly designates a non-competed subcontractor to provide educational services.
5. The RFP unlawfully requires offerors to provide information whose disclosure is unauthorized and/or protected.
6. The RFP seeks to establish a relationship that is not arms-length.
7. The RFP documents do not convey a reasonable understanding of the terms and conditions of performance of the work.

B. ʻŌlelo's Address And Contact Information.

ʻŌlelo's business address is:

ʻŌlelo Community Television
1122 Mapunapuna Street
Honolulu, HI 96819

All correspondence, instructions, and inquiries related to this Protest should be directed to this office on behalf of ʻŌlelo.

C. Remedy Requested.

ʻŌlelo requests that the Procurement Officer exercise her powers under HRS § 103D-706 and related authorities to amend the RFP to remedy the defects identified in this Protest. To accomplish this, ʻŌlelo requests that the Procurement Officer stay all further action on this procurement pending amendment of the solicitation to remove the legal deficiencies. See HAR § 3-126-5.

Corrective action must be sufficient to ensure the RFP provides a fair basis for competition and will result in the award of a legally binding and enforceable contract. If the Procurement Officer is unable to overcome the defects in this RFP, it should be referred to the Chief Procurement Officer for action to exempt the contract from competitive requirements under HRS § 103D-102.

D. Standing and Timeliness.

ʻŌlelo is the current provider of public, educational and governmental ("PEG") access services for the City and County of Honolulu. ʻŌlelo intends to submit a proposal in response to the RFP and has registered with the Hawaii Electronic Procurement System (HePS). Thus, ʻŌlelo is a prospective offeror within the meaning of HRS § 103D-701(a) and has standing to assert this Protest.

A protest based upon the content of the solicitation is timely if it is submitted in writing within five working days after the aggrieved party knows or should have known of the facts giving rise thereto, and prior to the date set for the receipt of offers. HRS § 103D-701(a). The RFP was issued on July 30, 2007, and the date for receipt of offers is set as October 1, 2007. 'Ōlelo will deliver this protest to the contracting officer on August 6, 2007. Thus, the Protest is timely.

E. Reasons For Protest.

1. The RFP lacks performance standards.

Every procurement must include performance standards. HAR § 3-122-13(a). However, the RFP admittedly contains no such standards for the stated reason that the resulting contract for PEG access services will be "unique" and quantifiable standards are "difficult to establish." See RFP § 8.12.2.b [p.41]. The lack of performance standards renders the RFP unlawful, creates fatal uncertainty for potential offerors and will result in an unenforceable contract.¹

'Ōlelo agrees with the State's characterization of PEG access services as "unique," and fully appreciates the difficulty of crafting standards that, if accurate, would necessarily have to reflect amorphous concepts such as community building and community services. The State's admitted inability to craft definable standards for successful contract performance demonstrates that, because of their unique nature, PEG access services contracts should be exempt from the competition requirements of HRS Chapter 103D. The impossibility of defining performance standards the contractor must meet to be successful renders the competition of PEG access services contracts simply not practicable.

2. The RFP cannot identify what property, if any, will be provided to the successful offeror.

The RFP instructs potential offerors that their proposals should be based on the assumption that the State will provide the selected contractor(s) the property identified in the respective inventory lists of the current PEG access providers, although not the cash assets of such entities. See RFP §§ 2.02 [p. 6], 3.02.2 [p.8], 3.03.2 [p.21], 4.07.1 [pp.24-25], 4.09.3 [pp.25-26], 5.01.3, 4 [pp.27-28]. However, the RFP also states that there is no certainty that the property and/or cash reserves will be available to the contractor. Id. Absent certainty about what property, if any, will be provided to the

¹ See also 'Ōlelo's Response to Request for Information dated December 26, 2006 attached at Tab A, which is incorporated herein by reference ("Response to First RFI"); 'Ōlelo's Response to Request for Information dated April 13, 2007 attached at Tab B, which is incorporated herein by reference ("Response to Second RFI").

successful offeror, no offeror can make a meaningful estimate of the cost of performing the contract. Consequently, there can be no effective and fair competition and no legally binding contract can be awarded.

As disclosed in the RFP, the current PEG access providers dispute the State's position about their ownership of the listed property. RFP §§ 3.02.2 [p 8]. With respect to 'Ōlelo, a dispute about the State's right to take its property in connection with the competed contract has been the subject of ongoing communications with the Department of Commerce and Consumer Affairs (DCCA) for the past eleven months. 'Ōlelo's position, for the reasons stated in the enclosed correspondence, is that the RFP is premature and should not have been issued until the disputes about the PEG contractors' property rights have been resolved. See July 31, 2007 letter to Lawrence M. Reifurth attached at Tab C, which is incorporated herein by reference; May 2, 2007 letter to Lawrence M. Reifurth and referenced letters 1 through 15 attached at Tab D, which are incorporated herein by reference; see also Response to First RFI at p.3; Response to Second RFI at pp.2-3.

Compounding these defects, the RFP states that if the identified property cannot be provided to the successful offeror at the start of the competed contract, or if the property provided to the contractor is different from the listed property, the parties will negotiate about the services to be provided by the contractor and the compensation paid by the State for such services. See RFP § 4.09 [pp.25-26]. In effect the RFP states that, if the State cannot execute a fundamental and material term of the competed contract, the State will merely negotiate (without further competition) a new contract with materially different terms.

This RFP section violates the fundamental concepts of competition for government contracts and the very reason for the RFP's issuance. The Hawaii Procurement Code does not allow the State to negotiate, without competition, a new contract whose terms differ materially from the contract awarded through competition.

The RFP also contains unlawful provisions with respect to any property that may be purchased by the selected contractor, during the term of the contract, with a combination of both PEG access fees and the contractor's own funds. The RFP requires the contractor to transfer the title to any such property to the State at the end of the contract, but fails to provide any compensation to the contractor for its private funds used for the purchase. See RFP §§ 3.02.2.g(2) [p.9], 3.02.4.b(3) [p.12]. This provision, if enforced, would constitute an unlawful taking in violation of the United States and Hawaii Constitutions.

The provision of government-owned property, if any, is a material term of the contract and, unless and until there can be certainty about the property, the RFP process should not proceed because it cannot result in a binding and enforceable contract.

3. The RFP is fatally uncertain as to the pricing of the contract.

The RFP cannot result in a binding and enforceable contract due to the lack of certainty about pricing and compensation to the contractor. The primary reason for the uncertainty is that the RFP is nominally structured as a "fixed-price" contract, but neither the price nor the services are "fixed". Many of the deficiencies with respect to pricing are detailed in 'Ōlelo's Response to First RFI and Response to Second RFI. The RFP contains additional terms that compound the previously-identified deficiencies, to which 'Ōlelo maintains its objections.

a. Additional uncertainty about the level of funding

The funding and compensation scheme for the PEG access services RFP is inherently uncertain. Actual funding is dependent on the number of cable subscribers who pay fees to the cable operator. The State knows that, through the course of the contract, the number of subscribers will vary. Consequently, the funding available to compensate the contractor is necessarily subject to change.

The RFP requires an offeror to offer its performance at a fixed price for the term of the contract. However, the State cannot guarantee that the fixed price accepted as the contractor's compensation will be funded by available subscriber fees at any time during the contract's term. Therefore, if the number of cable subscribers is insufficient to generate the agreed-upon contract price, the selected contractor is nevertheless obligated to provide all of the services included in its proposal, without any offset for diminished funding.²

The RFP also requires potential offerors to provide an estimate of "the initial amount of funding required at the start of the contract" but disclaims the availability of any initial funding due to the unresolved property ownership issues. See RFP § 5.01.3 [p.27]. This creates additional uncertainty about the funding available to compensate the selected contractor. The resulting undefined level of initial funding and potential compensation makes it impossible for offerors to provide a cost proposal critical to meaningful competition.

In addition, as previously identified, the RFP provides for monthly payments from the cable operators to the PEG contractors. This term will result in reduced funding for PEG access services compared to the current payment arrangement. See RFP § 5.01.3 [pp.27-28]; 'Ōlelo's Response to Second RFI, p.4. The stated reason for the change to a monthly payment schedule is not consistent with business reality.

² The RFP permits renegotiation only if the number of cable subscribers falls to below 50 percent of the households within a county. See RFP § 7.04.2 [p.34]. With respect to the City and County of Honolulu, the contractor would experience over a \$1 million annual shortfall before reaching the designated threshold.

especially with respect to the payment of capital contributions which are fixed annual sums. Thus, there is no possibility of "over-and under-payments by the cable operator" of capital contributions and no "after-the-fact examination of the cable operator's records," complicated or otherwise, to determine the correct amount of such payments. See RFP § 5.01.3 [p.27].

The RFP also provides that the monthly payments will be made at the end of the calendar month in which the revenues are received by the cable operators. RFP § 5.01.3 [pp.27-28]. This provision operates to reduce contractor compensation and deprives contractors of available funding. To illustrate this point, the PEG funding paid to the selected contractor at the end of January 2008 would represent the fees paid by subscribers to the cable operator in January 2008. However, the cable operators currently pay fees to the PEG access service providers in the year after the revenues have been collected. Therefore, by January 2008, the cable operators will have collected millions of dollars in PEG access fees throughout the entire calendar year 2007. Under the new payment schedule established in the RFP, those fees would never be used to provide PEG access services, contrary to their authorized purpose and to the detriment of the recipients of such services.

In the context of this competition, the provision in question requires contractors to include in their cost estimate start-up costs when the State has available funding but declines to give offerors assurance of compensation.

b. Increase in performance requirements without commensurate compensation.

The RFP form is economically flawed and will prevent meaningful competition because it does not provide for equitable adjustments to contract price and performance requirements. The RFP contemplates the creation of an economically impossible contract because (1) it requires that the selected contractor provide additional services that are not provided by the current contractors, and (2) at the same time, requires the performance of those services (in addition to all of the currently-provided services) within the same, if not diminished, funding limits. The RFP also permits DCCA to demand unlimited additional services, in its sole discretion, also without additional compensation, and prohibits the selected contractor from charging any fees for its services. These concerns were identified by 'Ōlelo in its Response to First RFI and Response to Second RFI. Although informed of these economic flaws in the RFP, the State has included additional terms to the RFP that compound the economic impossibilities created. These additional errors are as follows.³

³ The RFP even provides a mechanism for the State to take away funds from PEG client services by instituting fines for a contractor that makes a late production to DCCA of its annual audited financial statements. See RFP § 3.02.16.b(5) [p.20].

The RFP requires the selected contractor to fund the production costs and staffing for the government meetings that are cablecast on the PEG access channels. RFP § 3.02.5.c [p.14].⁴ However, under the current contracts for PEG access services, production services are not provided free of charge – and contrary to the RFP's representation, the governmental entities have other approved sources of funding to support the production of programming for the PEG access channels. Compliance with this new requirement would also result in fundamental inequity in the provision of PEG access services, as the current providers do not fund the production costs for public programming.

The RFP's unfunded mandate for governmental services would require the Oahu contractor to allocate at least \$500,000 annually from the PEG access fees to fund these additional services and would have a similar effect on the other area providers. It is economically infeasible for the contractors to add the additional service without compensation.

4. The RFP impermissibly designates a non-competed subcontractor to provide educational services.

The RFP requires the selected contractor for the City and County of Honolulu to "provide the same level of services/benefits to HENC [Hawaii Educational Networking Consortium]" as currently provided by 'Ōlelo. RFP § 3.02.5(b) [p.13.] 'Ōlelo currently passes through to HENC and its designees 25 percent of the PEG access fees that it receives from Time Warner Oceanic Cable Co., as required by DCCA Decision & Order No. 261 ("D&O 261"). The total payments to HENC and its designees in 2007 amount to \$1,080,000.

These RFP-mandated payments are for HENC to continue its performance of the education component of the PEG access services. By requiring the selected contractor for the City and County of Honolulu to use HENC for the performance of the education component and make payments as the State designates, the State is effectively appointing HENC, a non-government entity, as the subcontractor to provide the education component of the PEG access services contract -- without requiring HENC to compete for the contract.

There is no lawful basis for the State to appoint HENC as the education component provider here. In this case, the State decided earlier that it must compete the PEG access services contract. The logic applied in this initial determination means the State must compete all aspects of the PEG access contract. Consequently, (1) the State could not award a contract for education access services directly to HENC without

⁴ The RFP also prohibits the contractor from charging any governmental entities for any services provided under the resulting contract. RFP § 5.01.6 [p.28].

competition; and (2) the State cannot indirectly order a contractor to award a subcontract for the same services to HENC. The RFP scheme here violates Hawaii Procurement Code competition requirements and, at a minimum, gives the perception of impermissible favoritism.⁵

In addition, the RFP misleads potential offerors because it fails to disclose the terms of D&O 261, which superseded the arrangements established by the contract attached as Exhibit E to the RFP.

5. The RFP unlawfully requires offerors to provide information whose disclosure is unauthorized and/or protected.

Section 4.02 [p.23] of the RFP ("Offeror's Qualifications") seeks a wide array of information about potential offerors, their officers, directors and employees. These inquiries are unlawful, unnecessary and intrusive.

As stated in 'Ōlelo's Response to Second RFI (at p. 11), the State has no right or legal authority to require any offeror to provide the identified information except in response to a questionnaire prepared and authorized by the Procurement Policy Board. One reason for the limitation on the collection of such information is so that it can be kept confidential. See HRS § 103D-310(d).

The RFP not only seeks the information in an unauthorized manner, it also requires an offeror's directors, officers, managers and key employees to waive their confidentiality rights in such information. RFP § 4.02.11. To submit a proposal, an offeror must inquire into personal matters of its directors, officers, managers and key employees, including arrest and court records and other information which is entirely unrelated to the offeror's ability to provide PEG access services. The offeror's inquiry into such matters, as well as any actions taken in response to an individual's refusal to supply the requested information, could subject the offeror to liability for violation of HRS section 378-2.5. The disclosure of such information in connection with a proposal, and the subsequent release of the information into public record, could violate the constitutional privacy rights of the offeror's directors, officers, managers and key employees. These are not permissible or reasonable consequences, and the offensive provisions must be deleted to conform to the legal limitations the Hawaii Procurement Code imposes on the government.

6. The RFP seeks to establish a relationship that is not arms-length.

As stated in 'Ōlelo's Response to First RFI (pp. 5-6) and Response to Second RFI (pp. 10-11), the RFP is designed to result in a contractual relationship that is

⁵ The perception is heightened by the DCCA Cable Television Division's past, if not current, participation in HENC's Advisory Board.

inconsistent with the arms-length relationship that should be the result of the procurement process. The RFP's terms, like the previous drafts, require unwarranted and inappropriate DCCA involvement in the governance of the selected contractor. See, e.g., RFP § 3.02.3.a(2)(c) [p.10] (requiring the contractor to deposit all rental income or revenue from all buildings and real estate, even if privately owned, in the PEG trust account); § 16.a(1) [p.19] (requiring the contractor to use the accrual method of accounting); see also section E.7 below (authorizing unlimited intrusion by DCCA into the contractor's business).

The RFP also impermissibly requires the current contractors to respond to inquiries from potential competitors regarding PEG access services and to host a "guided tour" of the contractors' private property. See RFP § 8.04 [pp.37-38]. This requirement reflects a fundamental misconception about the procurement process, as it is the duty of the State – and not the private contractors – to provide all necessary information in connection with a request for proposals. Compliance with the RFP's requirement also creates a risk of liability of the current contractors with respect to information that they provide to potential offerors who may later assert claims against the current contractors. The current contractors have no duty to "educate" their competitors, and the RFP impermissibly attempts to create such a duty.

7. The RFP documents do not convey a reasonable understanding of the terms and conditions of performance of the work.

The RFP provides that the submission of a proposal "shall constitute an incontrovertible representation by the Offeror . . . that the RFP documents are sufficient in scope and detail to indicate and convey a reasonable understanding of all terms and conditions of performance of the work." RFP § 6.03.8 [p.30]. As currently drafted, the conflicting, uncertain, and economically illogical RFP provisions prevent any offeror from making such a representation.

As detailed in 'Ōlelo's Response to First RFI and Response to Second RFI, the RFP contains numerous open-ended requirements that grant unlimited discretion to DCCA to require that the contractor perform additional services during the term of the contract, without a corresponding right to receive additional compensation. See, e.g., RFP § 3.02.15.b(1)(j) [p. 18] (DCCA right to receive reports on unlimited subjects); § 3.02.15.e [p.19] (requiring contractor to provide unlimited information to DCCA within 30 days of request); § 3.02.16.c [p.20] (contractor must pay for as many as two financial audits per year when required by DCCA); § 7.04.3.c(4) [p.36] (permitting DCCA to require unlimited accounting audits or reviews). The RFP even requires the contractor to "provide all other PEG Access Services, facilities, and equipment" requested by DCCA – but without any limit or definition. RFP § 3.02.18 [p.21]. Potential offerors cannot reasonably determine the scope and detail of such additional services.

Ms. Ruth E. Yamaguchi
August 6, 2007
Page 10

In addition, the scope of one of the contractor's basic responsibilities – the management of the PEG access channels – is not clear because the RFP does not fix the number of channels within the contractor's responsibility. See RFP § 3.02 [p.7]. This uncertainty is compounded by the DCCA's unilateral right to change the number of channels managed by the contractor. Id.

As another example of the RFP's deficiencies in conveying a reasonable understanding of its terms, the evaluation factors are not clear; there are separate scoring categories for "alternative services" and "other services" but no definition to provide a distinction between them. RFP § 7.02 [p.32]. Likewise, the PEG Chart of Accounts are unclear (including apparent duplicates), undefined and unlawful (with respect to HENC). See Exh. G to RFP.

Finally, the RFP omits any description of the vital community-building aspect of PEG access services. See Response to First RFI, p.4; Response to Second RFI, pp.7-8. Thus, it is impossible for potential offerors to reasonably understand the scope of PEG access services and the terms and conditions of their performance under any contract resulting from the RFP.

F. Conclusion.

This protest is made in good faith with the intention of preserving for all offerors, including 'Ōlelo, a fair opportunity to compete for award of a legally binding and enforceable contract. We fully appreciate the Procurement Officer's duty to protect the public's interests by ensuring competition in awarding contracts. If the Procurement Officer grants the remedy 'Ōlelo seeks, effective competition will be assured without disadvantaging any of the offerors that would compete for the award.

Very truly yours,



Terry E. Thomason
Barbara A. Krieg

Enclosures

cc: Keali'i Lopez (w/encls.)

TET/BAK:fmk
652992/1

COPY

FILED NOV 14 2008

AT 2:10 O'CLOCK P M
/s/ Annette L. Hoopii

Clerk, Second Judicial Circuit

CONFIDENTIAL

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY
TELEVISION,

Plaintiff,

VS.

MARK BENNETT, ETC., ET AL.,

Defendants.

) CIV. NO. 07-1-0280(1)
)
) OCTOBER 12, 2005 LETTER FROM
) THE DEPARTMENT OF THE
) ATTORNEY GENERAL TO THE
) DEPARTMENT OF COMMERCE
) AND CONSUMER AFFAIRS
) REGARDING THE APPLICABILITY
) OF THE STATE'S PROCUREMENT
) CODE TO DCCA CONTRACTS
) WITH THE PEG ACCESS
) ORGANIZATIONS SUBMITTED
) FOR IN CAMERA REVIEW
)
) FILED/SEALED UNDER SEPARATE
) COVER

OCTOBER 12, 2005 LETTER FROM THE DEPARTMENT OF THE ATTORNEY GENERAL TO THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS REGARDING THE APPLICABILITY OF THE STATE'S PROCUREMENT CODE TO DCCA CONTRACTS WITH THE PEG ACCESS ORGANIZATIONS SUBMITTED FOR IN CAMERA REVIEW

FILED/SEALED UNDER SEPARATE COVER

"EXHIBIT B"

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
COMMERCE AND ECONOMIC DEVELOPMENT DIVISION
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1180

November 13, 2008

The Honorable Joel E. August
Circuit Court of the Second Circuit
2145 Main Street, Suite 4D
Wailuku, Hawaii 96793

Dear Judge August:

Re: Civil No. 07-1-0280(1); Akaku vs. Mark Bennett and Lawrence Reifurth
October 12, 2005 Letter from the Department of the Attorney General to the
Department of Commerce and Consumer Affairs

Pursuant to your September 29, 2008 Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment in the Akaku v. Bennett, Civil No. 07-1-0280(1), case, enclosed please find a copy of the October 12, 2005 letter from the Department of the Attorney General to the Department of Commerce and Consumer Affairs ("DCCA") regarding the applicability of the State's Procurement Code to DCCA contracts with the PEG access organizations.

Defendants Mark Bennett and Lawrence Reifurth provide this letter to the Court while reserving and without waiving any rights, privileges, and/or immunities they may have regarding that letter.

Very truly yours,

A handwritten signature in black ink that reads "Rodney J. Tan".

Rodney J. Tan
Deputy Attorney General

Attorney for Defendants Mark
Bennett and Lawrence Reifurth

c: Lance D. Collins, Esq.

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

October 12, 2005

CONFIDENTIAL-ATTORNEY/CLIENT MATERIAL

Honorable Mark E. Recktenwald
Director
Department of Commerce and Consumer Affairs
State of Hawaii
335 Merchant Street
Honolulu, Hawaii 96813

Dear Director Recktenwald:

Re: Applicability of HRS Chapter 103D to State Contracts for PEG Access Services

This is in response to your August 25, 2005 letter and inquiry regarding the applicability of the State of Hawaii ("State") Procurement Code in Hawaii Revised Statutes ("HRS") chapter 103D to the Department of Commerce and Consumer Affairs' ("DCCA") contracts with public, educational, and governmental ("PEG") access organizations in the State.

I. Issue

Specifically, you asked whether DCCA's contracts with PEG access organizations are subject to the State's Procurement Code?

II. Short Answer

We answer this question in the affirmative, unless the exemptions in the Procurement Code apply. In our opinion, based on what you have told us, it does not appear that any of the exemptions are currently applicable.

III. Facts

According to your letter, DCCA established PEG access in the State through the franchise orders it issued to cable operators under HRS chapter 440G, and the contracts with the PEG

CONFIDENTIAL-ATTORNEY/CLIENT MATERIAL

Honorable Mark E. Recktenwald

October 12, 2005

Page 2

access organizations. In these franchise orders, DCCA recognized the benefit that PEG access provides to the public and required cable operators (as one of the conditions to obtain cable television franchises in the State) to provide channels for PEG use and to pay annual PEG access fees for facilities and equipment.

To assist the public (i.e., producers and the viewing public) with PEG access, DCCA entered into separate contracts with four PEG access organizations to provide PEG access services in their respective counties.¹ The four PEG access organizations are Olelo: The Corporation for Community Television ("Olelo") on Oahu, Akaku – Maui County Community Television, Inc. ("Akaku") on Maui, Na Leo O' Hawaii, Inc. ("Na Leo") on Hawaii, and Ho'ike: Kauai Community Television, Inc. ("Ho'ike") on Kauai. Under the PEG access contracts, these organizations provide (among other things) the following services: managing and operating the PEG access channels, training the public to use the PEG facilities, providing equipment to create programs, and cablecasting the programs created and submitted by the public on the cable operator's channels.

DCCA appointed or assisted in appointing the initial board of directors of each of the PEG access organizations and, pursuant to the organizations' bylaws, continues to have the authority to appoint and remove a majority of the directors of the PEG access organizations. Despite the fact that DCCA appoints directors to PEG access organizations, DCCA does not consider these organizations to be State or government agencies because they are private, non-profit corporations that are run independently of government, and have filed articles of incorporation and registered with your Business Registration Division.

The PEG access organizations are funded primarily from the annual PEG access fees that the cable operator is required to pay pursuant to DCCA's franchise orders. The cable operator pays these annual PEG access fees directly to the PEG access organizations, and is allowed to pass these fees on to cable television subscribers under federal law. The cable operator has elected to pass these fees onto subscribers and assesses subscribers on a monthly basis. The PEG access organizations do not receive any governmental monies from either the general fund or DCCA's Compliance Resolution Fund.

Up until 2004, the PEG access contracts were automatically renewed annually. After 2004, DCCA began re-negotiating these contracts and has been extending them in approximately three-month intervals until the negotiations are completed. The PEG access contracts are

¹ We understand that the current contract with Olelo was entered into on December 24, 1998, the current contract with Akaku was entered into on June 17, 1999, the current contract with Na Leo was entered into on June 17, 1999, and the current contract with Ho'ike was entered into on August 25, 1999.

CONFIDENTIAL-ATTORNEY/CLIENT MATERIAL

Honorable Mark E. Recktenwald

October 12, 2005

Page 3

terminable at will by DCCA, and are automatically terminated whenever the applicable cable operator's franchise is terminated. Once a PEG access contract is terminated, the PEG access organization is required to relinquish all claims to the PEG access fees, and PEG facilities and equipment. Thereafter, the PEG access organization is required to transfer the balances in its accounts and all PEG facilities and equipment to DCCA. Thus, DCCA has a continuous claim to the funds it requires the cable operator to pay the PEG access organizations and the PEG facilities and equipment.

While reviewing the PEG access contracts, your Department raised a question about the applicability of the State's Procurement Code to these contracts.

IV. Analysis

HRS § 103D-102 (Supp. 2004) sets forth the scope of the Procurement Code and provides in relevant part as follows:

"(a) This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement."
(Emphasis added).²

HRS § 103D-104 (Supp. 2004) defines "procurement" and "contract" as follows:

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of

² Prior to 1995, HRS § 103D-102 provided in pertinent part as follows:

"(b) This chapter shall apply to every expenditure of public funds irrespective of their source by a governmental body as defined herein, under any contract; provided that the expenditure of federal assistance moneys shall be in accordance with federal requirements."

In 1995, the Legislature amended this subsection by deleting the reference to and definition of "public funds", and clarifying that the Procurement Code "applies to all procurement contracts made by governmental bodies unless otherwise exempt". See, Act 178 (1995) and House Standing Committee Report No. 811, House Journal 1333 (1995).

CONFIDENTIAL-ATTORNEY/CLIENT MATERIAL

Honorable Mark E. Recktenwald

October 12, 2005

Page 4

contract administration.”

““Contract” means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.”

The PEG access contracts are agreements between DCCA, a governmental body, and PEG access organizations that are private, non-profit corporations. Under these contracts, DCCA is acquiring services to manage and operate the PEG channels DCCA requires the cable operator to provide under the franchise orders, train the public to use the PEG facilities and equipment to create programs, and cablecast the programs submitted by the public on the cable operator's channels. Thus, the PEG access contracts are “procurement contracts” under HRS § 103D-102.

Although not defined in the Procurement Code, “consideration” is an essential component of all contracts, and has been defined as a bargained for exchange whereby the promisor receives some benefit or the promisee suffers a detriment. Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Haw. 482, 496, 993 P.2d 516, 530 (2000) (citations omitted). In exchange for providing the PEG access services, DCCA allows the PEG access organizations to receive PEG access fees and capital fees for facilities and equipment the cable operator is required to provide under DCCA's franchise orders. According to the franchise orders, the PEG access fees are approximately three percent (3%) of the cable operator's annual gross revenues. In 2005, Olelo received approximately \$4,088,000 in PEG access fees and \$823,000 in capital fees, Akaku received approximately \$812,000 in PEG access fees and \$105,000 in capital fees, Na Leo received approximately \$690,000 in PEG access fees and \$125,000 in capital fees, and Ho 'ike received approximately \$335,000 in PEG access fees and \$75,000 in capital fees.

Both parties benefit from these contracts. In general, states and other governmental bodies are not required to provide PEG access in their respective jurisdictions. Federal law allows, but does not require, a local franchising authority to establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use. See, 47 U.S.C.A. § 531 (2001). As explained in your letter, the local franchising authority (i.e., DCCA) established PEG access in the State through its franchise orders issued to the cable operator. Under the Hawaii Cable Communications Systems Law in HRS chapter 440G, a cable operator is required to designate three or more channels for public, educational, or governmental use. See, HRS § 440G-8.2.³

³ Although HRS chapter 440G does not have any substantive provisions pertaining to PEG access organizations, an “access organization” is defined as follows:

“[A]ny nonprofit organization designated by the director to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section

CONFIDENTIAL-ATTORNEY/CLIENT MATERIAL

Honorable Mark E. Recktenwald

October 12, 2005

Page 5

DCCA and the State collectively benefit from the PEG access contracts because they do not have the resources to operate and manage these PEG access channels, and have contracted with the PEG access organizations to provide these services to the public. The PEG access organizations assist DCCA in implementing DCCA's policy to provide PEG access in the State, and benefit from the contracts because they are compensated for their services through the fees DCCA requires the cable operator to pay under the franchise orders. Thus, the benefit DCCA receives in having the PEG access organizations provide the contracted services to the public and the fees the PEG access organizations receive in return are the consideration for the contracts under HRS § 103D-102.

V. Conclusion

Based on the foregoing, under HRS § 103D-102, the PEG access contracts are procurement contracts made by a governmental body and the consideration for the contracts is the PEG access fees that DCCA allows the PEG access organizations to receive in exchange for providing PEG access services to the public. Accordingly, the State's Procurement Code applies to these contracts, unless the exemptions in HRS chapter 103D apply. None of the specific exemptions in HRS § 103D-102(b) encompass contracts such as those between DCCA and the PEG access organizations. However, we note that the exemption in HRS § 103D-102(b)(4)(L) allows the procurement policy board to determine in its rules or the chief procurement officer to determine in writing that a particular good or service is exempt from the Procurement Code even though such good or service is available from multiple sources, because procurement by competitive means is either not practicable or not advantageous to the State. Because the procurement policy board or the chief procurement officer is responsible for making this determination, we cannot express an opinion on whether such an exemption would be approved for the PEG access contracts.

440G-8, and any officers, agents, and employees of such an organization with respect to matters within the course and scope of their employment by the access organization."

Haw. Rev. Stat. § 440G-3 (1993). HRS chapter 440G further defines "public, educational, or governmental access facilities" as "(1) channel capacity designated for public, educational, or governmental uses and (2) facilities and equipment for use of that channel capacity." Id.

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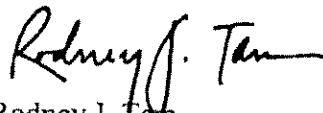
Honorable Mark E. Recktenwald

October 12, 2005

Page 6

If you have any questions on the above, please do not hesitate to contact us.

Very truly yours,



Rodney J. Tan
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General

H.C.R. 358 Task Force
Report to the 25th Legislature

Submitted to: Representative Calvin K. Y. Say, Speaker of the House
Senator Colleen Hanabusa, President of the Senate

December 16, 2008

"EXHIBIT C"

HCR 358 Task Force Report

Introduction

A Task Force pursuant to H.C.R. 358, HD1 was established to solicit public input and examine methods other than the Public Procurement Code to oversee PEG expenditures and ensure proper checks and balances. Furthermore, the Task Force was to examine the selection process for PEG advisory board members, and in so doing, take into account the first amendment rights of PEG. H.C.R. 358, HD1 called for the Task Force to submit a report of suggested policy changes to the Legislature no later than 20 days prior to the convening of the Regular Session of 2009 (See Attachment "A").

Following the Legislative Session, members of the Task Force were appointed in accord with the requirement of the resolution and a facilitator was hired by the DCCA to support the work of the Task Force. The first Task Force meeting was held on June 30, 2008, and Eric Knutzen of the County of Kaua'i was nominated and selected by Task Force members to lead the Task Force. The group met continuously and diligently via videoconferencing until its final meeting on December 8, 2008.

The following section sets forth the five policy recommendations of the Task Force. The Task Force is additionally providing all its agendas, minutes, working papers, substantive Task Force group emails and all written input received from the public as supporting documentation to this report (See Attachment "B").

Task Force Recommendations:

Based upon public input received and its own analysis of the regulatory and legislative framework, the Task Force submits the following recommendations.

- (1) The Legislature should exempt the designation of PEG access organizations from the provisions of the State Procurement Code.
- (2) Should the designation of PEG access organizations not be exempted from the State Procurement Code, the Task Force recommends that the designation of PEG access organizations be exempt administratively from the competitive requirements of the State Procurement Code on the grounds that competitive procurement is not practicable or advantageous to the State.
- (3) The Task Force recommends that in place of competitive procurement, the DCCA be charged with adopting Administrative Rules that guide a new process for the designation of PEG Access organizations in a manner that is similar to the process used by the DCCA for cable franchises, a process that is already well-understood by the DCCA and the public. This process should provide ample opportunity for input by the public on each island within the local franchise area and allow for interested parties to intervene. A sample set of draft rules is set

forth for consideration as Attachment "C".

Additionally, the Task Force has reviewed the pertinent sections of the bylaws governing the selection of board members for each of the PEG Access organizations. The Task Force notes that these organizations are required to comply with laws governing non-profit organizations and believes that the DCCA should not have any authority to require a PEG Access organization to change its board selection process as a condition to designation. Therefore, the Task Force recommends that:

(4) The process for designation of PEG Access organizations should require each PEG Access organization to provide its processes for selection of board members and any changes proposed. This will be made available for public comment and reviewed as part of the renewal process, but the DCCA should not have any authority to require that an organization's board selection process be changed.

Similarly, the Task Force has engaged in discussion regarding the first amendment rights of PEG and the expectation that non-discriminatory access be provided. The Task Force recommends that:

(5) PEG Access organizations should provide information regarding their past performance and proposed practices for ensuring that PEG Access supports the diversity of viewpoints and non-discriminatory first amendment rights of the people of the local communities they serve. This will be made available for public comment and reviewed as part of the renewal process.

H.C.R. 358 Task Force Members

Mr. Eric Knutzen, HCR 358 Task Force Chair, County of Kaua'i

Mr. Roy K. Amemiya, Jr., Central Pacific Bank, 'Olelo

Mr. Jay April, President and CEO, Akaku – Maui Community Television

Mr. Gilbert Benevides, County of Hawaii

Ms. MaBel Fujiuchi, Ho'ike

Mr. Gregg Hirata, Office of the Mayor, City and County of Honolulu

Ms. Geri Ann Hong, State Department of Education

Mr. David Lassner, University of Hawaii

Ms. Shelley Pellegrino, Office of the Mayor, County of Maui

Mr. Keith Rollman, CAC Representative

HCR 358 Task Force Report

Mr. Clyde S. Sonobe, Cable Television Division, DCCA

Mr. Gerald Takase, Na Leo'o Hawai'i

Presentation of Report to Legislature

The Task Force through its Chair, Eric Knutzen, will seek to present supporting testimony at the Legislature as early in the next Legislative session as possible.

Attachments

Attachment "A" – H.C.R. 358 HD1 House Concurrent Resolution

Attachment "B" – Agendas, Minutes, Working Papers, Bylaws, Substantive Task Force Group Email, Written Testimony

Attachment "C" - Draft Rules

Contact

Mr. Eric Knutzen, Task Force Chair

County of Kauai

4444 Rice Street, Suite 427

Lihue, HI 96766

(808) 241-4406

Cc: Mr. Lawrence Reifurth, Director, Department of Commerce and Consumer Affairs

Hawaii State Legislature

2009 Regular Session

SB1680 SD2 HD1

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Measure Title: RELATING TO TECHNOLOGY.

Report Title: Hawaii Broadband commissioner; Broadband Regulation; Broadband Franchising; Broadband Permitting

Description: Implements key recommendations of the Hawaii broadband task force by establishing the Hawaii broadband commissioner (HBC) in the Department of Commerce and Consumer Affairs (DCCA). Transfers functions relating to telecommunications from the public utilities commission to the HBC and functions relating to cable services from DCCA to the HBC. Establishes a work group to develop procedures to streamline state and county broadband regulation, franchising, and permitting and report to the legislature. Effective July 1, 2112. (SB1680 HD1)

Companion:

Package: Sen Majority

Current Referral: EBM, CPC, FIN

Introducer(s): FUKUNAGA, BAKER, CHUN OAKLAND, ENGLISH, ESPERO, GALUTERIA, GREEN, HANABUSA, HEE, HOOSER, IGE, IHARA, KIDANI, KIM, KOKUBUN, NISHIHARA, SAKAMOTO, TOKUDA, TSUTSUI, Bunda, Gabbard, Takamine, Taniguchi

Date	Status	Text
1/28/2009	S	Introduced.
1/30/2009	S	Passed First Reading.
1/30/2009	S	Referred to EDT/CPN, WAM.
1/30/2009	S	The committee(s) on EDT-CPN has scheduled a public hearing on 02-04-09 1:15pm in conference room 016.
2/4/2009	S	The committee(s) on EDT-CPN deferred the measure until 02-11-09 1:15 PM in conference room 016.

"EXHIBIT D"

2/11/2009	S	The committee(s) on EDT/CPN deferred the measure until 02-13-09 1:15pm in conference room 016.
2/13/2009	S	The committee(s) on CPN recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in CPN were as follows: 4 Aye(s): Senator(s) Baker, Ige, Espero, Sakamoto; Aye(s) with reservations: none ; 0 No(es): none; and 3 Excused: Senator(s) Green, Ihara, Hemmings.
2/13/2009	S	The committee(s) on EDT recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in EDT were as follows: 4 Aye(s): Senator(s) Fukunaga, Baker, Ige, Slom; Aye(s) with reservations: none ; 0 No(es): none; and 1 Excused: Senator(s) Hee.
2/20/2009	S	Reported from EDT/CPN (Stand. Com. Rep. No. 353) with recommendation of passage on Second Reading, as amended (SD 1) and referral to WAM.
2/20/2009	S	Report adopted; Passed Second Reading, as amended (SD 1) and referred to WAM.
2/24/2009	S	The committee(s) on WAM will hold a public decision making on 02-26-09 9:00am in conference room 211.
2/26/2009	S	The committee on WAM deferred the measure.
2/26/2009	S	The committee(s) on WAM will hold a public decision making on 03-02-09 9:30 AM in conference room 211.
3/2/2009	S	The committee(s) on WAM recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in WAM were as follows: 10 Aye(s): Kim, Tsutsui, Chun Oakland, English, Fukunaga, Galuteria, Hooser, Kidani, Tokuda, Hemmings; Aye(s) with reservations: none ; 0 No(es): none; and 2 Excused: Hee, Kokubun.
3/6/2009	S	Reported from WAM (Stand. Com. Rep. No. 714) with recommendation of passage on Third Reading, as amended (SD 2).
3/6/2009	S	48 Hrs. Notice 03-10-09.
3/10/2009	S	Report adopted; Passed Third Reading, as amended (SD 2). Ayes, 24; Aye(s) with reservations: none . Noes, 1 (Senator(s) Slom). Excused, 0 (none). Transmitted to House.
3/10/2009	H	Received from Senate (Sen. Com. No. 410) in amended form (SD 2).
3/12/2009	H	Pass First Reading
3/12/2009	H	Referred to EBM, CPC, FIN, referral sheet 27
3/12/2009	H	Bill scheduled to be heard by EBM on Tuesday, 03-17-09 7:30AM in House conference room 312.
3/17/2009	H	The committees on EBM recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 9 Ayes: Representative(s) McKelvey, Choy, Evans, Manahan, Tokioka, Tsuji, Wakai, Wooley, Ward; Ayes with reservations: none; Noes: none; and 1 Excused: Representative(s) Berg.
3/19/2009	H	Reported from EBM (Stand. Com. Rep. No. 1073) as amended in HD 1, recommending

		passage on Second Reading and referral to CPC.
3/20/2009	H	Passed Second Reading as amended in HD 1 and referred to the committee(s) on CPC with none voting no (0) and Chang, McKelvey, Morita, Takai, Thielen excused (5).
3/20/2009	H	Bill scheduled to be heard by CPC on Monday, 03-23-09 2:15 PM in House conference room 325.
3/23/2009	H	The committees on CPC recommend that the measure be PASSED, UNAMENDED. The votes were as follows: 11 Ayes: Representative(s) Herkes, Wakai, Belatti, Ito, Karamatsu, Luke, Mizuno, Morita, Tsuji, Marumoto, Thielen; Ayes with reservations: none; Noes: none; and 4 Excused: Representative(s) Cabanilla, Carroll, McKelvey, Souki.
3/25/2009	H	Reported from CPC (Stand. Com. Rep. No. 1221), recommending referral to FIN.
3/27/2009	H	Report adopted; referred to the committee(s) on FIN with none voting no and Chang, Herkes, McKelvey, Pine, Takai, Tokioka excused.
4/1/2009	H	Bill scheduled to be heard by FIN on Friday, 04-03-09 4:30PM in House conference room 308.
4/3/2009	H	The committee(s) recommends that the measure be deferred until 04-06-09.
4/5/2009	H	Bill scheduled for decision making on Monday, 04-06-09 5:30pm in conference room 308.
4/7/2009	H	The committee(s) recommends that the measure be deferred.

S = Senate
H = House
D = Data Systems
\$ = Appropriation measure
ConAm = Constitutional Amendment

Please read our [Disclaimer Statement](#).

Some of the above items require Adobe Acrobat Reader. Please visit [Adobe's download page](#) for detailed instructions.

This report was generated on Jul 17, 2009 at 4:25:42 PM
SB1680 SD2 HD1

Report Title:

Hawaii Communications Commissioner; Broadband Regulation; Broadband Franchising; Broadband Permitting

Description:

Implements key recommendations of the Hawaii broadband task force by establishing the Hawaii communications commissioner (HCC) in the department of commerce and consumer affairs (DCCA). Transfers functions relating to telecommunications from the public utilities commission to the HCC and functions relating to cable services from DCCA to the HCC. Establishes a work group to develop procedures to streamline state and county broadband regulation, franchising, and permitting and report to the legislature.

A BILL FOR AN ACT

RELATING TO TECHNOLOGY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. (a) Through Act 2 of the first special session of 2007, the legislature created the Hawaii broadband task force to provide recommendations on how to advance Hawaii's broadband capabilities and use. The legislature finds that advanced broadband services are essential infrastructure for an innovation economy and a knowledge society in the twenty-first century. High-speed broadband services at affordable prices are essential for the advancement of education, health, public safety, research and innovation, civic participation, e-government, economic development and diversification, and public safety and services. The legislature also recognizes the evolution in the manner in which communications and information services are delivered to the consumer, including by wireline, wireless, cable television, and satellite infrastructures, and that the voice, video, and data services provided over these infrastructures are converging. In order to position Hawaii for global competitiveness in the twenty-first century, this Act promotes the following goals:

- (1) Access to broadband communications to all households, businesses, and organizations throughout the State by 2012 at speeds and prices comparable to the average speeds and

prices available in the top three performing countries in the world;

- (2) Availability of advanced broadband communications service on a competitive basis to reduce prices, increase service penetration, and improve service to all persons in the State;
- (3) Increased broadband availability at affordable costs to low income and other disadvantaged groups, including by making low-cost, broadband-capable computers available to eligible recipients;
- (4) Increased sharing of the infrastructure used to deploy broadband in order to reduce costs to providers, ease deployment of broadband, and ease entry into a competitive broadband marketplace;
- (5) Increased, flexible, timely, and responsible access to public rights-of-way and public facilities for broadband service providers; and
- (6) A more streamlined permit approval process that reduces the time and cost of infrastructure deployment, to be created jointly by disparate permitting agencies, stakeholders, and other interested parties.

(b) The purpose of this Act is to establish the Hawaii communications commissioner under the administrative authority of the department of commerce and consumer affairs and require the commissioner to:

- (1) Investigate, promote, and ensure the growth and development of broadband infrastructure within the State in accordance with the aforementioned goals;
- (2) Champion the State's broadband, telecommunications, and

video programming services interests before the federal government, including the United States Congress, the executive branch of the United States, and the Federal Communications Commission; and state and local agencies, including the governor, the state legislature, and municipal and county governments;

- (3) Maintain close working relationships with community groups, civic associations, industry trade organizations, industry leaders, and other stakeholders to ensure that the State's interests and concerns are understood;
- (4) Develop state policies relating to the provision of broadband communications services and interstate and international communications services and facilities serving or transiting the State of Hawaii;
- (5) Facilitate the construction of shared telecommunications and broadband infrastructure and expand the introduction and capabilities of advanced broadband communications services;
- (6) Consolidate the regulation of telecommunications carriers currently regulated by the public utilities commission and cable operators currently regulated by the director of commerce and consumer affairs, creating a "one stop shop" to allow businesses providing broadband, telecommunications, and video programming services to make their services more readily available to the public;
- (7) Promptly examine rate regulation for telecommunications carriers, including alternatives such as price cap regulation; and

- (8) Investigate the possibility of implementing incentive regulation for telecommunications carriers to increase investment in broadband infrastructure within the State.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER

HAWAII COMMUNICATIONS COMMISSIONER

PART I. GENERAL PROVISIONS

§ -1 **Definitions.** As used in this chapter, unless the context otherwise requires:

"Access organization" means any nonprofit organization designated by the commissioner to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section -67, and any officers, agents, and employees of an organization with respect to matters within the course and scope of their employment by the access organization.

"Applicant" means a person who initiates an application or proposal.

"Application" means an unsolicited filing.

"Basic cable service" means any service tier that includes the retransmission of local television broadcast signals.

"Broadband" means an "always on" data networking service that enables end users to access the Internet and use a variety of applications, at minimum speeds set by the commissioner.

"Cable franchise" means a nonexclusive initial authorization or renewal thereof issued pursuant to this chapter, whether the authorization is designated as a franchise, permit, order, contract, agreement, or otherwise, which authorizes the construction or

LINDA LINGLE
GOVERNOR



PROCUREMENT POLICY BOARD
DARRYL W. BARDUSCH
LESLIE S. CHINEN
DARYLE ANN HO
KEITH T. MATSUMOTO
RUSS K. SAITO
PAMELA A. TORRES

AARON S. FUJIOKA
ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE:**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4700 Fax: (808) 587-4703
www.spo.hawaii.gov

SPO 09-195

February 19, 2009

Alston Hunt Floyd & Ing Lawyers
American Savings Bank Tower
18th Floor
1001 Bishop Street
Honolulu, HI 96813

Subject: Protest to Request for Proposals No. RFP-07-043-SW
for Sealed Proposals to Operate, Mairtain, and Manage Public,
Educational and Governmental (PEG) Access Channels, Funds,
Facilities and Equipment for the State of Hawaii

Gentlemen:

This is in response to the protest submitted for the subject solicitation on behalf of your client, Olelo Community Television (Olelo). After careful review and consideration of the written submittals, the arguments therein, and discussions with the affected agencies, it would be in the State's best interest to cancel the subject solicitation.

Consequently, the protest is denied, and this decision is final and conclusive.

Pursuant to Hawaii Administrative Rules (HAR) Chapter 3-126, Subchapter 5 (hereinafter "Subchapter 5"), you have the right to an administrative hearing for which you are required to submit a request directly to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, 335 Merchant Street, Suite 100, Honolulu, Hawaii 96813, telephone (808) 586-2828, within seven (7) calendar days, as computed by section 3-126-49, from date of this letter. Further, you are required to inform Mr. Aaron Fujioka, Administrator, State Procurement Office, within seven (7) calendar days after the decision if an administrative appeal will be filed. Subchapter 5 is available at www.spo.hawaii.gov, "Administrative Rules," "Hawaii Public Procurement Code, Chapter 103D, HRS," then "Chapter 3-126, Legal and Contractual Remedies."

Sincerely,

A handwritten signature in black ink, appearing to read "Ruth E. Yamaguchi", with a long horizontal line extending to the right.

Ruth E. Yamaguchi
Procurement Officer

EXHIBIT E



LINDA LINGLE
GOVERNOR
JAMES R. APONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: (808) 586-2850
Fax Number: (808) 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

TO THE SENATE COMMITTEES ON
ECONOMIC DEVELOPMENT AND TECHNOLOGY AND
COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Wednesday, March 18, 2009
1:45 p.m.

TESTIMONY ON HOUSE BILL NO. 984, H.D. 4
RELATING TO TECHNOLOGY

TO THE HONORABLE CAROL FUKUNAGA AND ROSALYN H. BAKER, CHAIRS,
AND MEMBERS OF THE COMMITTEES:

My name is Lawrence Reifurth and I am the Director of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to provide testimony in strong support of enhancing broadband in Hawaii by creating access on a competitive basis, increasing service quality and penetration, streamlining the permit process, and providing access to businesses and residents at speeds that will make us world leaders.

In situations where the companion measures that affect important issues have both crossed over, the House and Senate have frequently replaced the contents of the companion bill that it received from the other body with the contents of the bill that it

EXHIBIT F

transmitted to the other body. As the Department anticipates that this Committee will continue with this practice, the Department's testimony will be directed toward S.B. 1680, S.D. 2 and not H.B. 984, H.D. 4. We also anticipate that the House will similarly replace the contents of S.B. 1680, S.D. 2, H.D. 1 with the contents of H.B. 984, H.D. 4. Consequently, our testimony to the House will be based on H.B. 984, H.D. 4.

S.B. 1680, S.D. 2, consolidates regulation of communications services under one regulator, a new Hawaii Communications Commission ("HCC" or "Commission"), in order to expedite the availability of the latest communications services at the earliest possible time to Hawaii's residents. As the Department has already explained the importance of the bill when the Committee heard the Senate companion, our testimony will focus on our concerns with S.B. 1680, S.D. 2.

Addressing the concerns of the cable and telephone competitors.

The Department has been meeting with the cable operator (Oceanic Time Warner ("OTW")) and the telephone company (Hawaiian Telcom ("HT")) in an attempt to address their concerns with the bill. Furthermore, we have listened attentively to the comments of TW Telcom and AT&T, most of which are reflected in OTW and HT testimonies. All of the concerns expressed by the industry competitors warrant attention, and some of them, we believe, warrant amendment. **Attachment 1** contains suggested language by which we propose to address those concerns. The Department requests that the Committees incorporate the suggested language contained in **Attachment 1**.

Use of American Recovery and Reinvestment Act moneys.

To help ensure that the Hawaii Communications Commission is able to receive and utilize federal moneys, the bill contains language to authorize the Commission to apply for and use federal moneys, including those from the American Recovery and Reinvestment Act of 2009. **Attachment 2** contains suggested amendments to the provisions relating to the use of the federal moneys.

Commission staff.

To ensure that the Commission has sufficient and proper staff necessary to effectuate the purposes of the Act, the Department requests that the suggested language contained in **Attachment 3** also be incorporated into the bill. That language has been developed in concert with the Department of Budget and Finance, the Department of Human Services Development, and the Department of the Attorney General.

INET-related moneys, currently in OTW account.

To ensure that the Commission has access to those INET-related moneys currently held in trust in an OTW account for the expansion of the State's INET infrastructure, the Department requests that the Committees incorporate the language in **Attachment 4**. Additionally, the Commissioner should be able to use funds in the commissioner special fund for broadband purposes. **Attachment 4** also contains suggested language authorizing the Commissioner to use moneys in the special fund for broadband programs.

Technical clarifications.

Attachment 5 contains technical and other issues that the Department has identified. We respectfully request that the Committees incorporate the suggestions into the bill.

PEG-related issues.

Although the Department recognizes the importance of public access television, respects the role that the incumbent Public, Education, and Government ("PEG") entities have played in developing PEG programming and PEG services, and has fostered an environment whereby Hawaii's PEGs in many respects have become the standard to which other PEGs aspire, we respectfully suggest that this bill is not the vehicle by which to attempt to resolve issues pertaining to PEGs. The Department has supported and continues to support exempting the PEG contracts from chapter 103D requirements; nevertheless, we believe that, if possible, PEG-related issues should be taken up by the Legislature separately. We are concerned that PEG issues may prove divisive, as they have over the last several years, and may adversely affect, if not prove fatal, to the bill.

In addition, we note that the language included in the bill would not appear to accomplish its presumed objective (to exempt PEG contracts from chapter 103D), but would, instead, prohibit the Commissioner from expending revenues derived from franchise fees on anything BUT cable access (which will only represent a small percentage of the Commissioner's expenditures).

Testimony of DCCA
March 18, 2009
H.B. No. 984, H.D. 4
Page 5

Therefore, the Department requests that the PEG-related language be removed from SB1680 and placed into its own separate bill. **Attachment 6** provides suggested language regarding the removal of the PEG-related language.

Thank you for the opportunity to submit testimony on this very important issue.

REQUEST FOR PROPOSALS
TO
OPERATE, MAINTAIN, AND MANAGE
PUBLIC, EDUCATIONAL, AND GOVERNMENTAL (PEG) ACCESS
CHANNELS, FUNDS, FACILITIES, AND EQUIPMENT
FOR THE
STATE OF HAWAII

RFP-07-043-SW

NOTICE TO ALL OFFERORS

This is a HePS Solicitation.

TO BE CONSIDERED FOR AWARD, OFFEROR SHALL BE REGISTERED WITH SICOMMNET. FOR THIS SOLICITATION, THE TRANSACTION FEE ASSOCIATED WITH THE HePS WILL BE WAIVED.

EXHIBIT 9

SEALED OFFERS
TO
OPERATE, MAINTAIN, AND MANAGE
PUBLIC, EDUCATIONAL, AND GOVERNMENTAL (PEG) ACCESS
CHANNELS, FUNDS, FACILITIES, AND EQUIPMENT
FOR THE
STATE OF HAWAII

RFP-07-043-SW

NOTICE TO ALL OFFERORS

A PRE-PROPOSAL CONFERENCE SHALL BE HELD ON THE DATE SPECIFIED IN SECTION 1.03, RFP SCHEDULE AND SIGNIFICANT DATES, AT 9:00 A.M., OR AS AMENDED.

This is a HePS Solicitation.

TO BE CONSIDERED FOR AWARD, OFFEROR SHALL BE REGISTERED WITH SICOMMNET. FOR THIS SOLICITATION, THE TRANSACTION FEE ASSOCIATED WITH THE HePS WILL BE WAIVED.

- c. As part of the Offeror's proposal, state the number of activated channels the Offeror will need to provide the PEG Access Services covered in the Contract.
- d. Describe the Offeror's policy regarding first-run programming and repeat programming, and include an explanation as to how this policy supports the number of activated channels requested in the Offeror's proposal.

2. PEG Access Facilities and Equipment

- a. Operate, maintain, and manage the PEG Access Facilities and Equipment provided to the Contractor by the State at the start of the Contract, and acquired during the term of the Contract for the production of programming to be cablecast on the PEG access channels.
- b. DCCA intends to provide the Contractor with PEG Access Facilities and Equipment at the start of the Contract.⁷ The current PEG Access Organizations either contend that some or all of the PEG Access Facilities and Equipment belong to the access organization, or are ambivalent in their response(s) (i.e., the current PEG Access Organizations have argued that they own some or all of the PEG Access Facilities and Equipment).
 - (1) For the County of Kauai, the PEG Access Facilities and Equipment that DCCA intends to provide the Contractor at the start of the Contract are described in Exhibit "A."⁸
 - (2) For the County of Hawaii, the PEG Access Facilities and Equipment that DCCA intends to provide the Contractor at the start of the Contract are described in Exhibit "B."⁹
 - (3) For the City and County of Honolulu, the PEG Access Facilities and Equipment that DCCA intends to provide the Contractor at the start of the Contract are described in Exhibit "C."¹⁰
 - (4) For the islands of Maui, Molokai and Lanai, the PEG Access Facilities and Equipment that DCCA intends to provide the Contractor at the start of the Contract are described in Exhibit "D."¹¹
- c. If there are any outstanding liabilities on any PEG Access Facilities and Equipment that are to be transferred at the start of the Contract (i.e., a mortgage, note, etc.), the Contractor shall take appropriate steps to assume responsibility for any such liabilities.

⁷ There is no guarantee that any of the financial assets, including but not limited to cash and investments held by the existing PEG Access Organizations will be transferred to the Contractor. The Offeror's proposal should be based on the physical assets, facilities and equipment for the franchise area and on the anticipated annual access operating fees and capital fund payments.

⁸ See footnote 7 above.

⁹ See footnote 7 above.

¹⁰ See footnote 7 above.

¹¹ See footnote 7 above.

Fees and capital contributions described in section 5.01.2 of this RFP, more funding, or less funding). The Offeror's proposal should be based solely upon payments of annual PEG Access Operating Fees and capital contributions described in Section Five of this RFP. The Offeror's proposal should not assume the use or transfer of any financial assets, cash, or investments held by the current PEG Access Organizations.

2. If the Offeror anticipates requiring less funding, explain how the proposed level of service can be provided for the amount proposed without adversely affecting the types and levels of PEG Access Services provided to the General Public, Educational Institutions, and Governmental Entities.
3. If the Offeror anticipates requiring more funding, provide a detailed explanation for the funding increase.

4.08 OTHER SERVICES

1. The PEG Access Services described in this RFP represent the minimum level of services that are required to be provided to the General Public, Educational Institutions, and Governmental Entities.
2. Describe in detail all other additional services or alternatives to the minimum level of services, if any, the Offeror is proposing to provide to the General Public, Educational Institutions, and Governmental Entities, State, and/or DCCA.

4.09 TRANSITION PLAN

1. Describe in detail the Offeror's specific plan and time frame needed to successfully transition the PEG access channels, funds, facilities, and equipment, and ensure that PEG Access Services are provided continuously without interruption to the General Public, Educational Institutions, and Governmental Entities,.
2. Describe the Offeror's willingness to work with DCCA, the incumbent PEG Access Organization, and the cable operator(s) to ensure the smooth transition of the PEG Access Services, channels, funds, facilities, and equipment.
3. In the event the issue of the ownership of the PEG Access Facilities and Equipment in Exhibits "A," "B," "C," and/or "D" is not resolved prior to the Contract being awarded (see sections 3.02.2 and 3.02.3 of the RFP):
 - a. The Contractor may not be provided any or all PEG Access Facilities and Equipment at the start of the Contract;
 - b. DCCA and the Contractor shall negotiate the baseline PEG Access Services that shall be provided by the Contractor until the dispute is resolved (including but not limited to the playback of programming submitted by the General Public, Educational Institutions, and Governmental Entities), and the amount of compensation the Contractor shall receive for these baseline PEG Access Services; provided that if DCCA and the Contractor are unable to negotiate the baseline PEG Access Services and compensation, either party may terminate the

- (e) If the Contractor fails to cure the problem within the thirty (30) day period, DCCA may:
 - i. Direct the cable operator(s) to withhold payments of the PEG Access Operating Fees and/or capital contributions to the Contractor;
 - ii. Terminate the Contract immediately thereafter; and
 - iii. Fine the Contractor ONE HUNDRED AND NO/100 DOLLARS (\$100.00) per day; provided that:
 - (i) The fine(s) shall be paid from the funds in the Contractor's other separate accounts;
 - (ii) If the Contractor does not have sufficient funds in its other separate accounts to pay the fine(s), the Contractor shall pay the fine(s) from funds in the PEG Trust Accounts (or at DCCA's discretion, DCCA may reduce the Access Operating Fees paid to the Contractor by the amount of the fine(s));
 - (iii) The Contractor shall pay the fine(s) within fourteen (14) calendar days from the date the fine(s) are imposed; and
 - (iii) Notwithstanding the payment of any fine(s) by the Contractor, the Contractor shall continue to comply with the requirements of this RFP and provide the PEG Access Services described in this RFP.

b. Performance standards

- (1) During the RFI process, the SPO and DCCA received comments on the lack of "performance standards" for the RFP.
- (2) This Contract is unique because it requires the provision of PEG Access Services, facilities, and equipment to the General Public, Educational Institutions, and Governmental Entities. Thus, quantifiable performance standards (e.g., imposing a certain number of training sessions for producers, requiring that the Contractor train a certain amount of producers during a specified period of time, etc.) are difficult to establish.
- (3) Therefore, for purposes of this RFP, the performance standards shall consist of all of the requirements of this RFP, and the Contractor shall be evaluated on its compliance with the terms and conditions of this RFP and the resulting Contract.

TITLE GUARANTY OF HAWAII
INCORPORATED
HONOLULU, HAWAII

TITLE GUARANTY OF HAWAII, INCORPORATED
HEREBY CERTIFIES THAT THIS IS A TRUE COPY
OF THE ORIGINAL DOCUMENT RECORDED AS
LAND COURT DOCUMENT NO. 2140309
AND NOTED ON TRANSFER CERTIFICATE
OF TITLE NO. 428721
ON MAY 02, 1994 AT 8:01 A.M.

BY:

_____

EXHIBIT H

LAND COURT REGULAR SYSTEM
AFTER RECORDATION, RETURN BY MAIL () PICK-UP ()

BRUCE NOBORIKAWA, ESQ.
1001 BISHOP ST., 18TH FLR.
HONOLULU HI 96813

FILE NO. 357401
94-101-0223
ANN OGINO

WARRANTY DEED

APR 29 1994

THIS WARRANTY DEED is executed this _____ day of _____, 1994, by and between EASTMAN KODAK COMPANY, a New Jersey corporation, whose principal place of business is 343 State Street, Rochester, New York 14650, hereinafter called the "Grantor", and 'OLELO: THE CORPORATION FOR COMMUNITY TELEVISION, a Hawaii corporation, whose principal place of business is 960 Mapunapuna Street, Honolulu, Hawaii 96819, hereinafter called the "Grantee".

W I T N E S S E T H :

Grantor and Grantee entered into that certain Purchase and Sale Agreement dated January 12, 1994, as amended by that certain Amendment of Purchase and Sale Agreement dated March 10, 1994, (the "Purchase Agreement"), regarding the purchase and sale of the Property (as defined in the Purchase Agreement).

Pursuant to the Purchase Agreement, Grantor is obligated to convey any and all of its right, title and interest in and to the Buildings (as defined in the Purchase Agreement) to Grantee.

This Warranty Deed is in satisfaction of Grantor's obligation under the Purchase Agreement to convey any and all of its right, title and interest in and to the Buildings to Grantee.

NOW, THEREFORE, Grantor, in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration to the Grantor paid by Grantee, the receipt whereof is hereby acknowledged, does by these presents grant and convey the Buildings described in Exhibit "A" hereto attached and expressly made a part thereof, unto Grantee, subject to the terms of that certain Indenture of Lease dated July 2, 1970, by and between the Trustees Under the Will and of the Estate of Samuel M. Damon, Deceased, as Lessors, and Grantor, as Lessee, filed in the Office of the Assistant Registrar of the State of Hawaii as Document No. 526086, and noted on Transfer Certificate of Title No. 67,336, as amended by that certain Partial Cancellation of Lease dated March 24, 1971, filed as aforesaid as Document No. 545812, and by that certain Amendment to Ground Lease dated APR 28 1994, 1994, filed as aforesaid as Document No. _____, hereinafter, collectively, called the "Lease";

And the reversions, remainders, rents, issues and profits thereof and all of the estate, right, title and interest of the Grantor, both at law and in equity, therein and thereto;

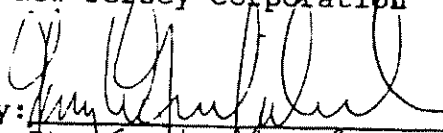
TO HAVE AND TO HOLD the same, as to the Buildings, absolutely and in fee simple;

AND the Grantor hereby covenants with the Grantee that Grantor has good right to sell and convey the Buildings described in said Exhibit "A," subject to the terms of the Lease; that the same are free and clear of all encumbrances made or suffered by Grantor except as set forth herein and in said Exhibit "A" and the lien of real property taxes not yet by law required to be paid; and that the Grantor will WARRANT AND DEFEND the same unto the Grantee against the lawful claims and demands of all persons, except as aforesaid. Notwithstanding anything to the contrary contained in this Warranty Deed, Grantor makes no representations or warranties as to the condition of the Buildings which Grantee has agreed to accept AS IS WITH ALL FAULTS, except as otherwise specifically set forth in the Purchase Agreement.

IT IS MUTUALLY AGREED that the terms "Grantor" and "Grantee", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, the singular or plural number, individuals, associations, trustees, partnerships or corporations, and their and each of their respective successors in interest, heirs, personal representatives and permitted assigns, according to the context thereof. If these presents shall be signed by two or more grantors or by two or more grantees, all covenants of such parties shall for all purposes be joint and several.

IN WITNESS WHEREOF, the Grantor has executed these presents effective as of the day and year first above written.

EASTMAN KODAK COMPANY,
a New Jersey corporation

By: 
Its: Senior Vice President

Attachment:

Exhibit "A" - Description of the Buildings and all other encumbrances shown on the preliminary title report

STATE OF NEW YORK)
)
COUNTY OF MONROE)

SS:

On this 25th day of April, 1994, before me appeared Gary P. Van Graafeiland to me personally known, who being by me duly sworn, did say that he is the Senior Vice President of EASTMAN KODAK COMPANY, a New Jersey corporation; that said instrument was signed on behalf of said corporation by authority of its Board of Directors; and said officer acknowledged said instrument to be the free act and deed of said corporation.

Mark P. Wright

Notary Public, in and for said
above-named State and County

My commission expires: 4/28/94

MARK P. WRIGHT
Notary Public for the State of New York
NOTARY PUBLIC
Commission Expires 4/28/94

EXHIBIT "A"

All of the Grantor's right, title and interest in and to all of the improvements, including the Buildings (as defined in the Purchase Agreement), located on the following:

All of that certain parcel of land situate at Moanalua, Honolulu, City and County of Honolulu, State of Hawaii, described as follows:

LOT 3264-B-2-B-1, area 2.422 acres, more or less, as shown on Map 467, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1074 of Trustees under the Will and of the Estate of Samuel M. Damon, deceased;

Being the land(s) described in Transfer Certificate of Title No. 67,336 issued to Trustees under the Will and of the Estate of Samuel M. Damon, deceased.

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

July 23, 2009

BY US MAIL and E-MAIL

Barbara A. Krieg, Esq.
Alston Hunt Floyd & Ing
American Savings Bank Tower
18th Floor
1001 Bishop Street
Honolulu, HI 96813

Dear Ms. Krieg,

Re: Olelo Community Television v. Procurement Policy Board
First Circuit Court, Civil No. 09-1-0751-04

This is to confirm that the Procurement Policy Board will reconsider Olelo's Petition for a Declaratory Ruling Pursuant to H.R.S. § 91-8 which was filed on September 12, 2006, decided by the Board on February 24, 2009, and now on appeal before the First Circuit Court. Olelo may submit additional justification in support of the Petition. The Board will review the Petition file and any new material submitted by Olelo, and then will schedule the reconsideration of the Petition to be heard at an open meeting of the Board.

I will prepare a stipulation for your review and approval to dismiss the appeal without prejudice.

Very truly yours,

A handwritten signature in black ink, appearing to read "Patricia Ohara".

Patricia Ohara
Deputy Attorney General

c: Pamela Torres, Chair, Procurement Policy Board
Aaron Fujioka, Administrator, State Procurement Office

EXHIBIT I

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAI'I

In the Petition of:

‘ŌLELO COMMUNITY TELEVISION,
Petitioner,

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date two copies of the foregoing document was duly served upon the following party, via hand-delivery, to their last known addresses as follows:

Procurement Policy Board
c/o Mr. Aaron Fujioka
State Procurement Office
Department of Accounting and General Services
Kalanimoku Building
1151 Punchbowl Street, Room 230A
Honolulu, Hawai'i 96813

and a courtesy copy of the same was duly served upon the following via hand-delivery as follows:

Patricia Ohara, Esq.
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813

DATED: Honolulu, Hawai'i, August 10, 2009.



TERRY E. THOMASON
BARBARA A. KRIEG

Attorneys for Petitioner
‘ŌLELO COMMUNITY TELEVISION