

PROCUREMENT POLICY BOARD MEETING (PPB)

October 15, 2009

1:00 pm

Conference Room 410

1151 Punchbowl Street

Honolulu, Hawaii 96813

Members Present

Pamela Torres, Chair
Darryl Bardusch, Vice Chair
Russ Saito, Secretary
Leslie Chinen, member
Daryle Ann Ho, member
Keith Matsumoto, member

Others

Aaron Fujioka, State Procurement Office
Ruth Yamaguchi, State Procurement Office
Patricia Ohara, Department of the Attorney General
Lance Inouye, General Contractors Association/Ralph S. Inouye Co., Ltd.
Kathy Kanemori, Honolulu Board of Water Supply
Barbara Krieg, Alston Hunt Floyd & Ing

Agenda Item I - *Call to Order*

Chair Pamela Torres called the meeting to order at 1:00 p.m.

Agenda Item II - *Minutes*

Mr. Leslie Chinen made a motion, seconded by Mr. Darryl Bardusch, to approve the minutes of the July 16, 2009 meeting. The motion was unanimously carried.

Agenda Item III – *Request by PPB Member Russ Saito: Discussion on administrative rules implementation requirements for ACT 10 (A Bill for an Act Relating to Labor) and ACT 17 (A Bill for an Act Relating to Procurement), Special Session 2009.*

Mr. Russ Saito stated he made this request because he wanted the State Procurement Office (SPO) to report on the administrative rules needed for these ACTs. Mr. Aaron Fujioka stated that no rules were needed for ACT 10 and for ACT 17, SPO would need to develop definitions and procedures to apply the preference. Mr. Fujioka added the rules for ACT 17 would be dependent on DLIR providing the structure for the apprenticeship program (i.e. process to register apprenticeship agreements, certification requirements, reporting responsibilities, etc.)

Mr. Saito stated he also wanted the PPB to familiarize themselves with these ACTs to address the application of the ACTs through the rules to be promulgated by SPO. He also said ACT 17 is vague and there have been different interpretations. Mr. Lance Inouye added that Act 17 requires the bidder to be a party to the apprenticeship agreement but often general contractors are not parties to trade apprenticeship programs.

Mr. Saito made a motion, seconded by Mr. Keith Matsumoto to take out of order Agenda Item V – Announcements. The motion was unanimously carried.

Agenda Item V – *Announcements.*

Mr. Fujioka announced the next PPB meeting is tentatively scheduled for Thursday, November 19, 2009 at 1:00 pm.

Mr. Fujioka briefed the Board that during the past legislative session, two bills became acts that involved the SPO. ACT 150-Relating to Government, and ACT 175-Relating to Hawaii Public Procurement Code.

ACT 150 authorized the SPO to adopt interim rules to implement the procurement procedures when expending funds granted by the federal American Recovery and Reinvestment Act (ARRA). The SPO prepared the interim rules as HAR Chapter 3-133 as well as a Procurement Circular with a comparison chart summarizing the differences between the current procurement requirements of HRS Chapters 103D and 103F, and the requirements of the new HAR Chapter 3-133 rules.

ACT 175 is an omnibus bill amending various sections of HRS chapter 103D. The SPO has issued several Procurement Circulars to provide guidance to the other jurisdictions and departments regarding these amendments. One of the areas still to be addressed is the protest portion of the ACT. At a future meeting, the SPO will be submitting proposed amendments to the HAR to the PPB for their review and adoption.

All of the referenced documents, the handouts, ACTS 150 and 175, HAR Chapter 3-133 and the Procurement Circulars are available on the SPO website: <http://hawaii.gov/spo>, under *statutes and rules* or *procurement circulars*.

Mr. Saito made a motion, seconded by Mr. Chinen to go into executive session to consult with the Board's attorney in follow-up on the previous discussions on July 16, 2009, on the Board's powers and liabilities relative to on-going matters in litigation. The motion was unanimously carried.

The PPB went into executive session at 1:40 pm.

Agenda Item IV – *Request by PPB Member Keith Matsumoto for an executive session in follow up on the previous discussion on July 16, 2009, on the Board's powers and liabilities relative to on-going matters in litigation.*

Mr. Saito was excused from the meeting at 2:05 pm. The PPB adjourned the executive session at 2:37 p.m., and Chair Torres called the meeting back to order at 2:37 pm.

Mr. Matsumoto reported that the PPB in consultation with their attorney discussed the resolution of Olelo's appeal in Circuit Court of the PPB's denial of Olelo's Petition for Declaratory Ruling Pursuant to H.R.S. § 91-8. It was agreed that the PPB would consider hearing the Petitions of Olelo Community Television submitted on September 12, 2006 and August 10, 2009.

As a follow up to the PPB's request for outside opinions on the merits of the arguments made in Olelo's Petition for Declaratory Ruling, Ms. Pat Ohara distributed copies of correspondence from the Public Utilities Commission; the Department of Commerce and Consumer Affairs (DCCA) Division of Consumer Advocacy, and the DCCA Cable Television Division.

Mr. Matsumoto made a motion, seconded by Mr. Bardusch to hear the Petitions of Olelo Community Television submitted on September 12, 2006 and August 10, 2009. Ms. Torres, Mr. Bardusch, Mr. Chinen and Mr. Matsumoto voted in favor, Ms. Daryle Ann Ho abstained and Mr. Saito was excused. The motion carried.

Agenda Item VI - *Adjournment*

Mr. Matsumoto made a motion, seconded by Mr. Bardusch, to adjourn the meeting. The motion was unanimously carried. The meeting was adjourned at 2:42 p.m.

Respectfully submitted,

11/3/09
Date



RUSS K. SAITO, Secretary
Procurement Policy Board

Attachments: October 15, 2009 Agenda
PUC letter
DCCA, Consumer Advocacy letter
DCCA, Cable television letter

PROCUREMENT POLICY BOARD (PPB)
1151 Punchbowl Street, Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
October 15, 2009
1:00 pm

AGENDA

- I. Call to Order.
- II. Approval of Minutes – Meeting of July 16, 2009.
- III. Request by PPB Member Russ Saito: Discussion on administrative rules implementation requirements for ACT 10 (A Bill for an Act Relating to Labor) and ACT 17 (A Bill for an Act Relating to Procurement), Special Session 2009.
- IV. Request by PPB Member Keith Matsumoto for an executive session in follow up on the previous discussion on July 16, 2009, on the Board's powers and liabilities relative to on-going matters in litigation.
- 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 being discussed 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 testimonies will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, October 13, 2009. Testimonies received after the October 13, 2009 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 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., October 12, 2009 to discuss accommodation arrangements.

LINDA LINGLE
GOVERNOR

COMPTROLLER'S OFFICE
DAGS



2009 AUG 17 A 10:08

STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
465 S. KING STREET, #103
HONOLULU, HAWAII 96813

BAV
Comptroller
Deputy
Accounting
ASO
PWD
② PROCUREMENT

CARLITO P. CALIBOSO
CHAIRMAN

JOHN E. COLE
COMMISSIONER

LESLIE H. KONDO
COMMISSIONER

e-mail: Hawaii.PUC@hawaii.gov

Telephone: (808) 586-2020
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August 14, 2009

18AUG'09 PM 1:57 SPO-P

Pamela Torres
Chairperson
Procurement Policy Board
P. O. Box 119
Honolulu, Hawaii 96810-0119

Re: PUC Opinion No. 09-0001 - Procurement Policy Board/Olelo Community Television

Dear Chairperson Torres:

This is in response to your letter dated August 5, 2009, received on August 11, 2009, asking whether Olelo Community Television ("Olelo") provides a public utility service in accordance with chapter 269, Hawaii Revised Statutes ("HRS"). You have attached for our review a copy of Olelo's petition for a declaratory ruling, filed with the Procurement Policy Board on September 12, 2006 ("Petition").

Pursuant to chapter 269, HRS, the Public Utilities Commission ("Commission") is responsible for the regulation of public utilities operating within the State of Hawaii. Based on our review of the Petition, it is our understanding that:

1. Oceanic Cablevision, Inc. ("Oceanic"), is the holder of a cable franchise to operate a cable transmission system. Olelo is a private, non-profit Hawaii corporation that administers and manages public, educational, and governmental ("PEG") organization access channels for the island of Oahu.
2. "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. Olelo currently manages six of the cable television channels awarded to Oceanic Olelo's six PEG access channels are included in Oceanic's basic tier of cable service."¹
3. Olelo, in their Petition, reasons that it: (A) stands in the place of Oceanic for the designated PEG access channels; and (B) generally conforms to the description of "utilities" under the definition provided in HRS § 269-1 because it manages equipment for public use, for the transmission of telecommunications messages.²

¹Petition, at 3-4.

²See Petition, at 3-4.

Pamela Torres
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In response, we note that the definition of "telecommunications service" set forth in HRS § 269-1 specifically excludes cable service from the definition of a public utility, as follows:

"Telecommunications service" or "telecommunications" means the offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without benefit of any closed transmission medium, and does not include cable service as defined in section 440G-3.

HRS § 269-1. Accordingly, pursuant to HRS § 269-1, to the extent that Olelo provides cable service as defined in HRS § 440-3, HRS, Olelo does not provide a public utility service under chapter 269, HRS.³

This informal opinion is based upon the information you have provided and the laws in effect as of the date of this letter, and is not binding on the Commission.

Sincerely,


for Michael Azama
Commission Counsel

MA:cp

c: Division of Consumer Advocacy
(w/copies of the letter dated August 5, 2009 and Olelo's Petition enclosed)

³The scope of this opinion is limited to the Commission's interpretation of chapter 269, HRS. The Commission offers no interpretation or opinion on: (1) the Procurement Code (chapter 103D, HRS), which is subject to the jurisdiction of the Procurement Policy Board and Procurement Office; or (2) the Hawaii Cable Communications Systems Law (chapter 440G, HRS), which is subject to the jurisdiction of the Department of Commerce and Consumer Affairs.

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



LAWRENCE REIFURTH
DIRECTOR
CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR

STATE OF HAWAII
DIVISION OF CONSUMER ADVOCACY
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 326
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2800
Fax Number: 586-2780
www.hawaii.gov/dcca/dca

August 19, 2009

Ms. Pamela A. Torres
Chair
Procurement Policy Board
State Procurement Office
P.O. Box 119
Honolulu, Hawaii 96810-0119

20AUG'09 AM 8:43 SPO-4

RE: Request for Opinion Concerning Public, Educational, and Governmental Access Organizations and the "Utilities" Exemption Under Hawaii Revised Statutes Chapter 103D.

Dear Ms Torres:

On August 11, 2009, the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs, State of Hawaii ("Consumer Advocate") received your letter dated August 5, 2009 requesting the Consumer Advocate's written views and opinion concerning the merits of the arguments advanced by Petitioner Olelo Community Television ("Olelo") in a Petition for Declaratory Ruling ("Petition") submitted to the State Procurement Policy Board ("Board") on or about September 12, 2006. For the reasons discussed below, the Consumer Advocate believes that managers of cable television channels are not "public utilities" as that term is defined in Hawaii Revised Statutes ("HRS") Chapter 269 and administrative rules of the Hawaii Public Utilities Commission ("PUC"). Based upon HRS § 269-1 (2007), the definition of "telecommunications service" or "telecommunications" does not include the provision of cable service as that term is defined in HRS Chapter 440G. Accordingly, the primary argument advanced by Olelo in the Petition for Declaratory Ruling submitted to the Board on or about September 12, 2006 appears to be less than persuasive.

DISCUSSION

Hawaii Revised Statutes § 103D-102 (Supp. 2008) states, in relevant part, as follows:

- (a) This chapter[,] [HRS Chapter 103D, the State's Public Procurement Code,] shall apply to all procurement contracts made by

governmental bodies whether the consideration for [such] . . . 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.

(b) Notwithstanding subsection (a), [above,] this chapter shall not apply to contracts by governmental bodies:

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

Utility services whose rates or prices are fixed by regulatory processes or agencies is specifically exempted from procurement procedures according to HRS § 103D-102(b)(4)(F) (Supp. 2008). HRS § 103D-104 (Supp. 2008) does not define the term "utility services" for purposes of HRS Chapter 103D.

The Hawaii Supreme Court has often advised that when construing a statute, a court's foremost obligation is to ascertain and give effect to the intention of the Legislature, which is to be obtained primarily from the language contained in the statute itself.¹ When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty concerning an expression used in a statute, an ambiguity exists.² In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.³ Laws *in pari materia*, or upon the

¹ Gray v. Administrative Director of the Court, State of Hawaii, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) (citing State v. Toyomura, 80 Hawaii 8, 18, 904 P.2d 893, 903 (1995)).

² Gray, 84 Hawai'i at 148, 931 P.2d at 590 (citing Toyomura, 80 Hawaii at 19, 904 P.2d at 904).

³ Gray, 84 Hawai'i at 148, 931 P.2d at 590 (citing Toyomura, 80 Hawaii at 19, 904 P.2d at 904).

same subject matter, shall be construed with reference to each other.⁴ What is clear in one statute may be called in aid to explain what is doubtful in another.⁵ Moreover, the courts may resort to extrinsic aids in determining legislative intent.⁶

In the Petition submitted to the Board on September 12, 2006, Olelo reasons, in relevant part, as follows:

Although the Procurement Code does not define “utility services,” the statute governing the [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 [(sic)] incorporation or otherwise, any plant or equipment or any part thereof, directly or indirectly for public use, for . . . [the] 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

[HRS § 269-1 (emphasis added).]

[Public, education, and government (“PEG”)] access providers are not subject to PUC regulation. However, [PEG access providers] generally conform to the description of “utilities” under the definition provided in [HRS] § 269-1 because they “manage . . . equipment . . . for public use, for . . . [the] transmission of telecommunications messages.” [HRS § 269-1]. . . .⁷

In advancing the argument set forth above, Olelo overlooks the definition of “telecommunications service” or “telecommunications” set forth in HRS § 269-1.

⁴ Toyomura, 80 Hawaii at 19 n. 16, 904 P.2d at 904 n. 16 (citations and internal quotation signals omitted).

⁵ Id.

⁶ Gray, 84 Hawai'i at 148, 931 P.2d at 590 (citing Toyomura, 80 Hawaii at 19, 904 P.2d at 904).

⁷ Petition at 3 (emphasis in original).

Ms. Pamela A. Torres
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Specifically, Olelo overlooks the fact that "telecommunications service" or "telecommunications" is defined to mean:

the offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in . . . form or content of . . . information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without [the] benefit of any closed transmission medium, and does not include cable service[s] as defined in [HRS] section 440G-3.⁸

Inasmuch as Olelo currently manages six cable television channels awarded to Oceanic Cablevision, Inc.⁹ pursuant, presumably, to the scheme set forth in HRS Chapter 440G, which pertains to the regulation of cable television systems, the exclusion of "cable services" from the definition of "telecommunications service" or "telecommunications" seems to be of great importance to Olelo's primary argument. Accordingly, the definition of "telecommunications service" or "telecommunications" appears to be dispositive in this particular instance. HRS § 269-1 states that cable services are not included in the types of "telecommunications services" that are regulated under HRS Chapter 269 and by the PUC.

If you have any further questions, please feel free to contact our division at any time.

Sincerely,



Catherine P. Awakuni
Executive Director

CPA:tt

cc: Hawaii Public Utilities Commission
Clyde S. Sonobe, Cable Television Division Administrator, DCCA

⁸ Emphasis added.

⁹ See Petition at 4 (stating that Olelo currently manages cable television channels for Oceanic Cablevision, Inc.).

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR



LAWRENCE M. REIFURTH
DIRECTOR

CLYDE S. SONOBE
CABLE TELEVISION ADMINISTRATOR

STATE OF HAWAII
CABLE TELEVISION DIVISION
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335 MERCHANT STREET
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(808) 586-2620
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VIA FACSIMILE and U.S. Mail

October 14, 2009

Ms. Pamela Torres
Chair
Procurement Policy Board
P.O. Box 119
Honolulu, HI 96819-0119

16OCT'09 PM 2:13 SPQ-

Dear Ms. Torres:

Re: Your Request Concerning PEG Access Organizations and "Utilities" Exemption Under H.R.S. Chapter 103D

On August 11, 2009, the Cable Television Division ("CATV"), Department of Commerce and Consumer Affairs ("DCCA") received your August 5, 2009 letter and attached Petition for Declaratory Ruling Pursuant to H.R.S. §91-8 ("Petition") submitted by Olelo Community Television ("Olelo") to the Procurement Policy Board ("Board") on September 12, 2006. Your letter requested CATV's opinion concerning the merits of the arguments raised in the Petition that public, educational and governmental ("PEG") access organizations are "utilities" or sufficiently similar to utilities so as to qualify for an exemption from the Hawaii Public Procurement Code under H.R.S. §102(b)(4)(F).

CATV also received copies of an August 14, 2009 Public Utilities Commission ("PUC") Opinion No. 09-0001 and an August 19, 2009 letter from Ms. Catherine Awakuni, Executive Director, Division of Consumer Advocacy ("DCA"), DCCA, concerning the same request presented to them. The PUC and DCA both concluded that services provided by Olelo are not public utility services under chapter 269, H.R.S. In light of their expertise and responsibilities in the regulation of public utilities operating within the State, CATV concurs with the conclusions of the PUC and DCA.


DCCA, however, reserves the right to take issue with other points raised in Olelo's Petition at the appropriate time and limits this response solely to the question

Pamela Torres
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posed by the Board as to whether PEG access organizations are "utilities" or sufficiently similar to utilities to qualify for an exemption under the Procurement Code.

If you have further questions, please feel free to contact me at 586-2620.

Sincerely,

A handwritten signature in black ink, appearing to read "Clyde S. Sonobe". The signature is fluid and cursive, with the first name being the most prominent.

Clyde S. Sonobe
Cable Television Administrator

c: Lawrence Reifurth, Director