

Department of Commerce and Consumer Affairs
State of Hawaii

HCR 358 TASK FORCE MEETING

Date: Thursday, October 9, 2008
Time: 8:00 a.m. – 11:30 a.m.
Place: The following State of Hawaii Video Conference Centers:

Big Island:
Hilo State Office Building
75 Aupuni Street, Basement
Hilo, HI 96720

Kauai:
Lihue State Office Building
3060 Eiwa Street, Basement
Lihue, HI 96766

Maui:
Wailuku Judiciary Building
2145 Main Street, Room 120
Wailuku, HI 96793

Oahu:
Kalanimoku Building
1151 Punchbowl Street, Room B10
Honolulu, HI 96813

Members of the public may attend the meeting at any of the specified above locations and for their convenience are asked to take note of the meeting chronology set forth in the Agenda. No food or drinks (including water) are allowed in the video conference centers.

AGENDA

1. Call to Order (Chair)
2. Approve Agenda (All)
3. Accept Minutes from September 24, 2008 Meeting (All)
4. Public Testimony (Public)
5. Old Business (All)
6. Procurement Code and alternatives (All)
7. Selection Process of the Board of Directors of PEG Access Organizations (All)
8. The Report to the Legislature
9. Preparation for Next Meeting (All)
 - a. Date - **October 22, 2008, 8 a.m. – 10:30 a.m.**
 - b. Agenda
10. Adjournment

Depending upon time considerations, each speaker may be limited to a specific time for public comment. Written comments may be emailed to cabletv@dcca.hawaii.gov or mailed to DCCA-CATV, P.O. Box 541, Honolulu, HI 96806, Attn: HCR 358 Task Force or faxed to 808-586-2625. Persons with special needs for this meeting may call CATV at (808) 586-2620 at least seven (7) days prior to the meeting to discuss accommodation arrangements.

HCR 358 TASK FORCE
FINAL ACCEPTED MINUTES OF MEETING

Date: October 9, 2008
Time: 8:00 a.m.
Place: The following State of Hawaii Video Conference Centers:

Big Island:
Hilo State Office Building
75 Aupuni Street, Basement
Hilo, HI 96720

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1151 Punchbowl Street, Room B10
Honolulu, HI 96813

The Agenda for this meeting was filed with the Office of the Lieutenant Governor.

I. Call to Order (Chair) (Meeting Rules)

A. Roll

i. Present

1. Eric Knutzen
2. Jay April
3. Roy Amemiya
4. Gilbert Benevides
5. Shelley Pellegrino
6. Geri Ann Hong
7. Gregg Hirata
8. Gerald Tekase
9. David Lassner
10. MaBel Fujiuchi

ii. Excused

1. Clyde Sonobe

iii. Absent

1. Keith Rollman

B. Approve Agenda

1. Add New Business after Item VIII; Chair notes unfairness of adding substantive item at last minute. Member April notes that he sees issues that come up during the meeting being discussed in that new Item.

II. Accept Minutes from September 24, 2008 Meeting (Task Force)

A. Accepted (Unanimous with 1 abstention)

III. Public Testimony (Public)

A. Rules

- i. Keali'i Lopez: Suggests that the Task Force ask DCCA Staff to give update on Rulemaking Hearings (attendance and general nature of the testimony)
- ii. Lance Collins: Procurement Code – ***Testimony attached***. No procurement occurs therefore attempt to make it apply is incorrect;

Final Accepted Minutes
HCR 358 Task Force
October 9, 2008 Meeting

reiterates permit alternative. Delegated powers cannot be delegated therefore Director of DCCA cannot delegate powers to anyone including the Chief Procurement Officer. Certain parts of the Procurement Code must be secret however there is nothing in the Statute to allow the Director to adopt an exemption to the Open Records Law.

1. Question – April – Director claims following State Law, Lance says opposite, how reconcile? Collins: People who work with Government develop customs and practices over time, then things change as here, Director has power to designate access organizations, applying Code contradicts that power.
 2. Chair – reads from AG statement – Notes opinion says DCCA could provide PEG access services; Collin takes exception and says State law does not permit. Chair indicates that DCCA pays access fees directly; Collins says there is evidence that these are not public funds.
- iii. Noel Ching Johnson – Question and comment; was a party to the contract process re Akaku; funds were directed to Akaku as a non profit; attorneys told them they could come up with own rules, decided to keep them separate which made them noticeable. Questions how things have come to pass today, diametrically opposed. Under the impression that public servants are that. Refers to cease and desist note and that it was ignored. Approach DCCA and tell them if you are not going to wait then what are we doing? What is that about? They are fired.
- iv. Lauren Wong – DCCA is working on a response to Lance Collins September 25, 2008 letter.

IV. Old Business (Task Force)

- A. Member April – inquires on the status of the video report linking to the DCCA website and the status of the request of the AG opinion and to the Procurement Policy Board re the Olelo and Akaku petitions. Chair requests mailed and mentioned October 3, 2008 letter transmitted yesterday. Member April mentions that DCCA has yet to post link; cites letter from PPB as being incorrect. **Member April to draft corrections to PPB issue to be sent to Chair and forwarded to Task Force. Chair will contact DCCA to inquire about video report link to Akaku.**

V. Procurement Code and Alternatives (Task Force)

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A. Chair asks, do we want to stay with existing source (within or outside the Code) and continue working with the entities that exist?

i. Pros to staying with existing source

1. Replacing an entity can be costly
2. Difficult to change horses in mid-stream
3. Continues non-experimental quality performance
4. Minimizes risk of global competition without ably assessing regulated performance compliance
5. Local community determines what is needed as those needs differ; uniquely local "community television"
6. Permits general continuity of service without interruption every few years
7. Can evaluate current entities, look at best practices, talk to local people; there is the factor of "unknown" with a new entity; not business to business comparison
8. Difficult for start ups to enter the market

ii. Cons to staying with existing source

1. How do we know that the entity is successful?
2. If entity is truly broken, cannot continue entity
 - a. Member April – can use Board of Convener and public hearing process to address
3. Key is to get the best services which can make an "innovative outcome"
4. Need to review how best to provide the structure of community voice
5. No real competition on quality provider, globally
6. Difficult for start ups to enter the market as there are "barriers to entry"
7. Staying with existing source could run contrary to 103(d)
8. County framing of public access might not be optimal; perhaps best to look at State-wide and consider whether each really needs to be P.E.G.
 - a. Disputed by Member April who believes that the PEGs serve local communities and need to be P.E.G.
9. Overhead associated with having four (4) separate organizations

B. Alternatives to Procurement (a one (1) to two (2) page synopsis of each Alternative will be submitted in writing by the suggesting

Final Accepted Minutes
HCR 358 Task Force
October 9, 2008 Meeting

member by October 16, 2008 for Task Force consideration at the October 22, 2008 Meeting)

- i. Board of Convener and Public Hearing Process with periodic DCCA oversight (Member April)
- ii. Pattern after Cable Franchise Renewal Process (Member Amemiya)
- iii. Framework "Granting" Process (Member Benevides)
- iv. Structural Review (Member Lassner)
- v. Use DCCA Rules (Member Hong)

VI. **Selection Process of the Board of Directors of PEG access organizations (Task Force) (Chair to request a description (e.g. Bylaws, etc.) of the PEG Board Selection Process undertaken by each PEG organization for discussion at the October 22, 2008 Meeting)**

VII. **The Report to the Legislature**

VIII. **New Business**

- A. Rulemaking Hearing – Akaku and Olelo updated Task Force on the recent hearings.
- i. Akaku – Member April indicated that the Hearings demonstrated that the public supports community television and that attendees were almost unanimously against procurement. Member April also thanked DCCA (Lori and Glen) for attending and staying for the entire hearing which went longer than anticipated
 - ii. Olelo – Olelo's Keali'i Lopez noted limited attendance and that the public is tired but are also opposed to procurement (***Keali'i to send transcript of Hearing for Task Force review***)
 - iii. DCCA – Members of the Task Force requested a short update on the recent Hearings; request to be passed to Clyde Sonobe for an update at the October 22 Meeting

IX. **Preparation for Next Meeting (Task Force)**

- Date - October 22, 2008, 8 am – 10:30 am
- Agenda
 - Call to Order (Chair)
 - Approve Agenda (All)
 - Accept Minutes of October 9, 2008 Meeting (All)
 - Public Testimony
 - Old Business (All)
 - Presentations, Discussion, and Voting re Alternatives to Procurement (all)
 - Selection Process of Board of Directors of PEG Access Organizations (All)
 - Discussion of 1st Amendment Rights of PEG Access Organizations (All)

Final Accepted Minutes
HCR 358 Task Force
October 9, 2008 Meeting

- Report to Legislature
- New Business
- Preparation for Next Meeting
 - November 5, 2008, 8:00 a.m. – 11:30 a.m.
- Adjournment

X. Adjournment at 11:15 a.m.

October 10, 2008

Eric Knutzen
Chairman
H.C.R. 358, H.D. 1 Task Force
4444 Rice Street Ste 427
Lihue, HI 96766

Re: Extended Written Testimony of October 9, 2008

Dear Mr. Knutzen and Task Force Members,

Please find below written testimony related to my oral testimony of the Task Force meeting of October 9, 2008. The main argument is as follows: The Director of the DCCA would need a change in the Chapter 440G, Haw. Rev. Stat. statute in order to use procurement. The proposed rules are unlawful.

Rules Constitutes Unlawful Delegation of Duties and Authority

The language of the proposed rules states in part:

(b) The director shall comply with the applicable provisions of chapter 103D, HRS, when designating and selecting an access organization to oversee the development, operation, supervision, management, production, or broadcasting of programs on PEG channels obtained under chapter 440G, HRS. ***

(d) The relative weights of the factors or criteria considered by the director under subsection (c) shall be specified in any applicable request for proposals or invitation for bids issued under chapter 103D, HRS.”

“It is a fundamental rule that delegated power cannot be delegated. This applies to legislatures as well as to other bodies.” Territory ex rel. Oahu County v. Whitney, 17 Haw. 174, 177 (1905)

First, the Chapter 103D pertains to procurement and not to designation of access organizations. However, assuming arguendo that the procurement code were applicable to the Director's power of designation, the specific provisions of the code would be ineffective without an

unlawful delegation of power being effected.

Haw. Rev. Stat. 103D-205 states, in part:

(a) ... each chief procurement officer shall serve as the central procurement officer and:

- (1) Procure or supervise the procurement of all goods, services, and construction;
- (2) Exercise general supervision and control over all inventories of goods;
- (3) Sell, trade, or otherwise dispose of surplus goods; and
- (4) Establish and maintain programs for the inspection, testing, and acceptance of goods, services, and construction.

(b) Consistent with the provisions of this chapter and rules adopted by the policy board to implement its provisions, the chief procurement officers may adopt operational procedures to assist in the performance of these duties and responsibilities.

However, the Director of the DCCA cannot delegate to the chief procurement officer any of the duties in subsection (a) and certainly cannot adopt rules which delegate to the procurement policy board the authority to adopt further rules over the “operational procedures to assist in the performance of these duties and responsibilities.”

If the Director were lawfully able to adopt a procurement-code like system of regulation, he would have to adopt all of the rules for this regulatory regime and cannot delegate his discretion to the chief procurement officer or his rule-making authority to the procurement policy board.

Additionally, Haw. Rev. Stat. 103D-205 and 103D-206 list all of the duties and powers of the chief procurement officer. Nothing in these sections gives the chief procurement officer any role or power over the designation of access organizations.

Haw. Rev. Stat. 103D-211(a) states: “(a) The procurement policy board shall adopt all rules necessary to carry out the purposes of this chapter and to implement its provisions in accordance with chapter 91. The policy board shall not delegate its power to adopt rules.” The procurement code itself states that further implementing rules are “necessary to carry out the purposes of this chapter and to implement its provisions.” The Procurement Code is not itself a regulatory regime but the legislative delegation of one to the state procurement office and the procurement policy board. Therefore attempting to adopt the Procurement Code by making reference to the chapter in

the Haw. Rev. Stat. is an unlawful delegation of the Director's power to designate access organizations.

The Director of the DCCA cannot empower the chief procurement officer to resolve disputes regarding the designation of access organizations under Haw. Rev. Stat. 103D-701. The Director of the DCCA cannot empower the chief procurement officer to debar access organizations seeking designation under Haw. Rev. Stat. 103D-702.

The Director of the DCCA does not have the authority to limit the time for judicial relief regarding his power to designate as provided for under Haw. Rev. Stat. 103D-703. The Director of the DCCA does not have the authority to exclude remedies related to his designation of access organizations as permitted under the procurement process at Haw. Rev. Stat. 103-704.

Similarly, the Director cannot delegate to the hearings officers the authority to hear disputes over designation as provided in Haw. Rev. Stat. 103D-709 because, although 26-9(f) gives the Director of the DCCA the authority to utilize hearings officers for the DCCA's regulatory regimes, 103D-709 gives the procurement policy board the authority to make rules regarding hearings officers duties. The Director, however, cannot enlarge the authority delegated to him by adopting administrative rules that attempt to confer that enlargement onto him.

Most troubling about the consequences of this proposed rule change is the exemption from Chapter 92F, Haw. Rev. Stat. that permits the "contract file" to be exempt from disclosure during the bidding and selection process. There is no authority for the Director of the DCCA to exempt parts of the designation process from public view. The Director would not be permitted to adopt Haw. Admin. Rules 3-122-58 directly and therefore cannot adopt it by reference.

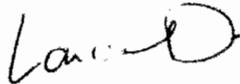
Authority to Adopt, Authority to Not Adopt, Authority to Exempt

Haw. Rev. Stat. 440G-3 and 440G-8 unequivocally delegate the authority to franchise cable

operators and designate access organizations to the Director of the DCCA. He and he alone has the rights, power, duties and authority relating to that designation. By attempting to insert or apply the procurement code to these power, there is a direct and unavoidable conflict with Haw. Rev. Stat. 103D-207 that vests all rights, powers, duties and authority related to procurement in the chief procurement officer. These statutes, however, do not naturally conflict because "designation of access organizations" is not a procurement.

However, if one is to logically accept that the Director had the authority to adopt the procurement code, the Director would have the corresponding authority not to adopt the procurement code. The Director also would have the authority to adopt a permanent exemption or permanent sole source. The attempt to adopt the procurement code is in violation of statutory provisions, in excess of the statutory authority and jurisdiction of the Director and it would amount to an arbitrary and capricious exercise of discretion which is clearly unwarranted and characterized by abuse.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS



LANCE D COLLINS
Attorney for Akaku: Maui Community Television

cc: client

David Franzel

From: David Franzel [davidfranzel@hawaii.rr.com]
Sent: Wednesday, October 08, 2008 5:21 PM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'
Subject: RE: HCR 358 - Document

Task Force Members,

I just received the attached from Chair Knutzen.

See you tomorrow (Thursday) at 8 am.

David.

From: David Franzel [mailto:davidfranzel@hawaii.rr.com]
Sent: Wednesday, October 08, 2008 9:58 AM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'
Subject: RE: HCR 358 - Meeting Reminder - October 9, 2008

Sorry all, the meeting is at 8:00 am as noted in the Agenda

David

From: David Franzel [mailto:davidfranzel@hawaii.rr.com]
Sent: Wednesday, October 08, 2008 9:52 AM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'
Subject: RE: HCR 358 - Meeting Reminder - October 9, 2008

Task Force

As a reminder, we meet tomorrow at 8:30 am. We might be tight on our quorum so please let me know as soon as possible if you are not attending.

Thanks

David

12/15/2008

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) 586-1600

October 3, 2008

Mr. Eric Knutzen
Chairperson
HICR 358, H.D. 1 (2008) Task Force
4444 Rice Street, Suite 427
Kapul'e Building
Lihue, Hawaii 96766

Dear Mr. Knutzen:

Re: Applicability of HRS Chapter 103D to DCCA's Power to
Designate PEG Access Organizations Under HRS Chapter 440G

This is in response to your September 3, 2008 letter and inquiry regarding the applicability of the State of Hawaii's Procurement Code in Hawaii Revised Statutes chapter 103D to the Director of DCCA's power to designate public, educational, and governmental access organizations under HRS chapter 440G.

For your information, we previously addressed a substantially similar inquiry from Representative Angus L. K. McKelvey on July 6, 2007. Because Representative McKelvey has waived the attorney-client privilege and made our July 6, 2007 advice and counsel letter to him available to the public, we are enclosing a copy of that letter as our response to your inquiry.

Very truly yours,

Rodney J. Tam
Deputy Attorney General

APPROVED:
A handwritten signature in black ink, appearing to read "Mark J. Bennett".

Mark J. Bennett
Attorney General

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 6, 2007

CONFIDENTIAL-ATTORNEY-CLIENT MATERIAL

The Honorable Angus L. K. McKelvey
Representative, 10th District
State Capitol, Room 315
Honolulu, Hawaii 96813

Dear Representative McKelvey:

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

This is in response to your May 31, 2007 letter and inquiry regarding the applicability of the State of Hawaii's ("State") Procurement Code in Hawaii Revised Statutes ("HRS") chapter 103D to State contracts for public, educational, and governmental ("PEG") access services with PEG access organizations in the State.

I. ISSUE

Specifically, you asked whether the acquisition by government agencies of services from PEG access organizations is subject to the State's Procurement Code.

II. SHORT ANSWER

We believe that when the State seeks to contract with a PEG access organization to provide PEG access services, it must comply with the State's Procurement Code.

III. FACTS

To address your inquiry, we provide background information on PEG access and the current contracts with the PEG access organizations that we obtained from the Department of Commerce and Consumer Affairs ("DCCA"). At the outset, we define what is meant by "PEG access."

CONFIDENTIAL-ATTORNEY-CLIENT MATERIAL

The Honorable Angus L. K. McKeivey

July 6, 2007

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"PEG access" is often characterized as the video equivalent of a speaker's soapbox or the electronic parallel to the printed leaflet. It provides an electronic forum through which people can voice concerns to the community, encourage community dialogue, cablecast the creative programs that they produced, etc. Through PEG access, members of the public are provided access to television production equipment and can produce their own shows and have them cablecasted on local cable systems.

Federal law does not mandate PEG access; however, federal law does allow a local franchising authority ("LFA") to require a cable television operator to set aside channels for PEG use. See, 47 U.S.C.A. § 531 (2001). In Hawaii, the legislature authorized DCCA to be the LFA, and DCCA, recognizing the benefit that PEG access provides to the public, chose to establish PEG access in the State through the cable television franchise ("franchise") orders it issued to cable operators¹ under HRS chapter 440G. In these franchise orders, DCCA required the cable operators to provide channels for PEG use as one of the conditions of the franchise.

Federal and State law do not dictate whether a governmental agency or private entity is to provide the PEG access services to the public. DCCA itself could have provided these PEG access services. However, DCCA decided against doing this and initially required the cable operators to provide the PEG access services to the public. Subsequently, DCCA contracted with four separate nonprofit organizations (i.e., PEG access organizations) to provide PEG access services in their respective counties to the public. These 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.² Under these PEG access contracts, the PEG access organizations provide (among other things) the following services: managing and operating the PEG access channels, providing PEG access facilities and equipment to create programs, training the public to use the PEG access facilities and equipment, and cablecasting the programs created and submitted by the public on the cable operator's channels.

To provide funding and compensate the PEG access organizations for providing the PEG access services to the public, DCCA requires the cable operators to pay franchise fees, part of which is given to the PEG access organizations. Under federal law, DCCA has the authority as the LFA to require a cable operator to pay an annual franchise fee that does not exceed five

¹ Initially, there were multiple cable operators in the State. Currently, there is only one cable operator in the State, namely Time Warner Entertainment, L.P. ("TWE").

² 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.

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The Honorable Angus L. K. McKelvey

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percent (5%) of the cable operator's gross revenues under the terms of a franchise. See, 47 U.S.C.A. §§ 542(a) and (b) (2001). Although part of this franchise fee may be used to satisfy any requirements to support PEG access channels or the use of such channels³, federal (and State) law is silent with respect to the amount of funding that a LFA may require for PEG access, and does not specify which governmental agency or private entity may actually receive funds for PEG access.

In Hawaii, DCCA has imposed franchise fees on the cable operators and determined that a portion of these franchise fees should be used for PEG access. DCCA could have required the cable operators to pay the entire amount of the franchise fees directly to DCCA, including the portion that relates to PEG access. However, instead of receiving all of the franchise fees owed by the cable operators, DCCA determined that it would be more efficient to require the cable operators to pay that portion of the franchise fees that DCCA deems to be related to PEG access directly to the four designated PEG access organizations.

Through the franchise orders, DCCA ordered the cable operators to pay two types of funds for PEG access services directly to the PEG access organizations: PEG Access Operating Fees and capital contributions.⁴ The PEG Access Operating Fees are based on a percentage of the cable operator's gross revenue, and are used for PEG access purposes and for other public purposes as designated by DCCA. See, e.g., section 5.1 of Decision and Order ("D&O") No. 154, as amended by D&O No. 261. Separate from the Access Operating Fees, the capital contributions are specific amounts provided by the cable operator that are to be used for PEG access facilities and equipment. See, e.g., section 5.4 of D&O No. 154, as amended by D&O No. 310. It is our understanding that the four designated PEG access organizations are primarily funded by these PEG Access Operating Fees and capital contributions.

The PEG access contracts are terminable at will by DCCA, and are automatically terminated whenever the applicable cable operator's franchise is terminated. Once a current PEG access contract is terminated, the PEG access organization is required to relinquish all claims to the PEG Access Operating Fees and capital contributions, and PEG access facilities

³ See, 47 U.S.C.A. §§ 542(c)(2) (2001).

⁴ In 2006, we understand that the PEG access organizations received the following amounts from TWE: Oieho received approximately \$4,224,825 in PEG Access Operating Fees and \$823,000 in capital contributions, Akaku received approximately \$862,905 in PEG Access Operating Fees and \$154,521 in capital contributions, Na Leo received approximately \$762,068 in PEG Access Operating Fees and \$125,000 in capital contributions, and Ho'iike received approximately \$370,345 in PEG Access Operating Fees and \$75,000 in capital contributions.

Under federal law, the cable operator is allowed to pass the Access Operating Fees on to cable television subscribers, and the cable operator has elected to pass these fees onto subscribers on a monthly basis.

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The Honorable Angus L. K. McKelvey

July 6, 2007

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and equipment. Thereafter, the PEG access organization is required to transfer the balances in its accounts and all PEG access facilities and equipment to DCCA or its designee. Thus, DCCA has a continuous claim to the funds it requires the cable operator to pay the PEG access organizations and the PEG access facilities and equipment.

IV. ANALYSIS

In general, a State contract is subject to the State's Procurement Code if it falls within the parameters of HRS § 103D-102, which 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).⁵

HRS § 103D-102 (Supp. 2006). The State's Procurement Code defines the terms “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 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.”

HRS § 103D-104 (Supp. 2006).

⁵ 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

The Honorable Angus L. K. McKelvey

July 6, 2007

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The PEG access contracts described above are agreements between DCCA, a governmental body, and PEG access organizations that are private, nonprofit corporations. Under these contracts, DCCA is clearly acquiring services to (among other things) manage and operate the PEG access channels, provide PEG access facilities and equipment to create programs, train the public to use the PEG access facilities and equipment to create programs, and cablecast the programs submitted by the public on the cable operator's channels. As compensation for providing these PEG access services, DCCA directs a portion of the franchise fee, which is owed to it by the cable operator, to be paid directly by the cable operator to the four designated PEG access organizations, and allows the PEG access organizations to receive the PEG Access Operating Fees and capital contributions directly from the cable operator. DCCA is therefore "buying", "purchasing", and "acquiring" PEG access services from the PEG access organizations under these contracts, and these contracts are "procurement contracts" for purposes of HRS § 103D-102(a).

Although not defined in the State's 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), and see also, Douglass v. Pflueger Hawaii, Inc., 110 Haw. 520, 534, 135 P.3d 129, 143 (2006) (citations omitted). DCCA and the PEG access organizations both benefit from the PEG access contracts. DCCA and the State collectively benefit because they do not have to operate and manage the PEG access channels themselves, and have contracted with the PEG access organizations to provide PEG access 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 Access Operating Fees and capital contributions 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 PEG access services to the public, and the provision of the fees and capital contributions (that DCCA is owed under the franchise orders and could have received directly) to the PEG access organizations in return are the consideration for the contracts under HRS § 103D-102.

V. CONCLUSION

Accordingly, the PEG access contracts fall within the scope of HRS § 103D-102 and are subject to State's Procurement Code, unless one or more of the exemptions in HRS chapter 103D apply. In our opinion, none of the exemptions in HRS chapter 103D (including those in HRS § 103D-102(b)) specifically encompass contracts such as those between DCCA and the PEG access organizations.

CONFIDENTIAL-ATTORNEY-CLIENT MATERIAL

The Honorable Angus L. K. McKelvey

July 6, 2007

Page 6

We understand that on April 10, 2006, DCCA submitted a formal request to the State Procurement Office ("SPO") to specifically exempt the PEG access contracts from the competitive procurement requirements of the State's Procurement Code. See, the attached April 10, 2006 "Notice of and Request for Exemption from Chapter 103D, HRS". The SPO reviewed DCCA's exemption request and subsequently determined on June 16, 2006 that the PEG access contracts shall be awarded in accordance with the State's Procurement Code.⁶ *Id.* Thus, the agency with the primary jurisdiction to interpret and apply the State's Procurement Code (i.e., the SPO) has similarly concluded that the PEG access contracts are subject to the State's Procurement Code, and determined that none of the exemptions apply.⁷ Therefore, DCCA's acquisition of PEG access services from PEG access organizations must comply with the requirements of the State's Procurement Code.

⁶ However, to ensure that PEG access services are continued until the new contract(s) are awarded, the SPO temporarily approved DCCA's exemption request from July 1, 2006 to June 30, 2007 to allow DCCA to complete the competitive procurement process in accordance with HRS chapter 103D. It is our understanding that the SPO subsequently extended this exemption to December 31, 2007.

⁷ We note that after the SPO determined that the PEG access contracts are subject to the State's Procurement Code, DCCA and the SPO have issued two (2) Requests for Information on November 22, 2006 and March 16, 2007, respectively, to obtain the public's input on draft Requests for Proposals ("RFP") for PEG access services.

We have been informed that DCCA and the SPO received some comments protesting the RFP for PEG access services, and criticizing the RFP process as being unnecessary and overly burdensome. Although it may be time-consuming to go through the procurement process (including but not limited to the preparation and submission of a proposal), inconvenience is not a sufficient legal justification to refuse to comply with the requirements of the State's Procurement Code and the SPO's determination. The State's Procurement Code was established to ensure that the State and public receive the best available service from the best available entity at the best available price by periodically going through the competitive bidding process and testing the market. See, e.g., Carl Corp. v. State Department of Education, 85 Haw. 431, 455-456, 946 P.2d 1, 25-26 (1997) (citations omitted), Town of New Ross v. Ferretti, 815 N.E.2d 162, 169 (Ind. Ct. App. 2004) (citations omitted), and 64 Am.Jur.2d, Public Works and Contracts, § 36 (2001).

CONFIDENTIAL-ATTORNEY-CLIENT MATERIAL

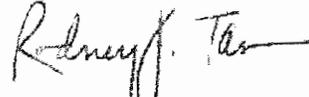
The Honorable Angus L. K. McKeivey

July 6, 2007

Page 7

If you have any questions on the above, please do not hesitate to contact our office at (808) 586-1180.

Very truly yours,



Rodney J. Tan
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General



LORDA LEONG
GOVERNOR
JAMES R. ARONA, 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: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

October 8, 2008

Mr. Eric Knutzen
County of Kauai
4444 Rice Street, Suite 427
Lihue, Hawai'i 96766

By Mail and Facsimile
(808) 241-6266

Re: HCR 358 Task Force Recommendation

Dear Mr. Knutzen:

I received yesterday the HCR 358 Task Force's letter dated September 30, 2008, which reads as follows:

The HCR 358 Task Force recommends that the cable television division of the DCCA and the State Procurement Office suspend decision making on its current draft rule making for the designation and selection of access organizations until after the HCR 358 Task Force has issued its Final Report to the legislature expected in late December.

I appreciate the work of the Task Force and am hopeful that it will develop reasonable alternatives to chapter 103D, HRS procurement for public access contracts for the Legislature to consider. I also appreciate the sentiment that underlies the request. Nevertheless, the recommendation ignores the factual context in which the referenced rulemaking occurs (and of which, I understand, the Task Force has been fully advised).

First, the rulemaking to which your recommendation refers is purely a Department of Commerce and Consumer Affairs' ("DCCA") function. The State Procurement Office ("SPO") can not suspend DCCA's decision making relating to that rulemaking.

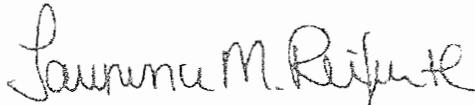
Second, the rulemaking is proceeding, in large part, because Maui Circuit Court Judge Joel August directed that it proceed. The Judge's ruling was made over the DCCA's objection and at the request of Akaku, one of the members of this Task Force.

Mr. Eric Knutzen
October 8, 2008
Page 2

Finally, and as the Task Force knows, DCCA already proposed to suspend the rulemaking process; but we were told that we could not. Specifically, on May 30, 2008, DCCA requested a continuation of the temporary exemption from chapter 103D for the department's existing PEG contracts from the SPO until such time as the HCR 358 Task Force has completed its work. SPO denied that request while it temporarily exempted the contracts through the end of the calendar year in order to allow DCCA to complete the rulemaking process. As a result, suspending decision making on the draft rules as the Task Force recommends would place DCCA in violation of the terms of the SPO extension, at which point we would no longer have even a temporary exemption from chapter 103D. This would put DCCA and our PEG contracts in rather clear violation of the law, and the RFP process would have to re-commence immediately.

While I share the Task Force's thought that it would make more sense of the Task Force's assignment if the rulemaking was deferred to permit the Task Force to first complete its work, SPO has already answered the underlying question for us by denying our request for temporary exemption on that basis. As a result, DCCA can not suspend the rulemaking process.

Sincerely,



LAWRENCE M. REIRURTH
Director

c: Mr. Clyde Sonobe
Mr. Aaron Fujioka
Ms. Pamela Torres

David Franzel

From: David Franzel [davidfranzel@hawaii.rr.com]
Sent: Thursday, October 09, 2008 3:49 PM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'
Subject: RE: HCR 358 - Chair's Letter and Response

Task Force Members.

Attached please find the Chair's September 30, 2008 letter and the DCCA response which I just received.

Thanks.

12/15/2008

Bill "Kaipo" Asing
Acting Mayor

Gary Heu
Administrative Assistant



COUNTY OF KAUAI

Wallace Rezentes, Jr.
Director of Finance

Belma Baris
Deputy Director of Finance

September 30, 2008

Larry Reifurth
Director
DCCA
1151 Punchbowl Street
Honolulu, Hawaii 96813

Re: Request from H.C.R. 358 H.D. 1 (2008) Task Force

Dear Sir,

On behalf of the H.C.R. 358 H.D. 1 (2008) Task Force as its chairman, the Task Force recommends that the cable television division of the DCCA and the state procurement office suspend decision making of its current draft rule making¹ for the designation and selection of access organizations until after the HCR 358 Task Force has issued its Final Report to the legislature expected in late December.

Please feel free to contact me with any questions you may have at (808) 241-4406 or via email

Sincerely,

Eric Knutzen
Chairman
H.C.R. 358 H.D. 1 (2008) Task Force

Cc: Aaron Fujioka, Pamela Torres

¹ Subchapter 16-131-70



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

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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www.hawaii.gov/dcca

LAWRENCE M. REDFORTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

October 8, 2008

Mr. Eric Knutzen
County of Kauai
4444 Rice Street, Suite 427
Lihue, Hawai'i 96766

By Mail and Facsimile
(808) 241-6266

Re: HCR 358 Task Force Recommendation

Dear Mr. Knutzen:

I received yesterday the HCR 358 Task Force's letter dated September 30, 2008, which reads as follows:

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I appreciate the work of the Task Force and am hopeful that it will develop reasonable alternatives to chapter 103D, HRS procurement for public access contracts for the Legislature to consider. I also appreciate the sentiment that underlies the request. Nevertheless, the recommendation ignores the factual context in which the referenced rulemaking occurs (and of which, I understand, the Task Force has been fully advised).

First, the rulemaking to which your recommendation refers is purely a Department of Commerce and Consumer Affairs' ("DCCA") function. The State Procurement Office ("SPO") can not suspend DCCA's decision making relating to that rulemaking.

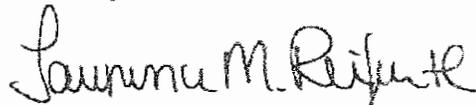
Second, the rulemaking is proceeding, in large part, because Maui Circuit Court Judge Joel August directed that it proceed. The Judge's ruling was made over the DCCA's objection and at the request of Akaku, one of the members of this Task Force.

Mr. Eric Knutzen
October 8, 2008
Page 2

Finally, and as the Task Force knows, DCCA already proposed to suspend the rulemaking process; but we were told that we could not. Specifically, on May 30, 2008, DCCA requested a continuation of the temporary exemption from chapter 103D for the department's existing PEG contracts from the SPO until such time as the HCR 358 Task Force has completed its work. SPO denied that request while it temporarily exempted the contracts through the end of the calendar year in order to allow DCCA to complete the rulemaking process. As a result, suspending decision making on the draft rules as the Task Force recommends would place DCCA in violation of the terms of the SPO extension, at which point we would no longer have even a temporary exemption from chapter 103D. This would put DCCA and our PEG contracts in rather clear violation of the law, and the RFP process would have to re-commence immediately.

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Sincerely,



LAWRENCE M. REIRURTH
Director

c: Mr. Clyde Sonobe
Mr. Aaron Fujioka
Ms. Pamela Torres

From: Keali'i Lopez [mailto:klopez@olelo.org]
Sent: Friday, October 17, 2008 11:03 AM
To: eknutzen@kauai.gov
Cc: David Franzel; Roy.Amemiya@centralpacificbank.com
Subject: Cable Franchise Fees

Aloha Eric,

Although there hasn't been a solicited request to obtain clarification to define what cable franchise fees are, I have observed on several occasions that the understanding of what they are would be helpful to the group. Based on this observation I have developed the attached summary.

I offer it in the spirit of assisting the Task Force in developing a clear understanding. If you feel it is appropriate to share the attached with the Task Force members, please do so. Please feel free to contact me if you have any questions or concerns.

Mahalo,
Keali'i

'Ölelo Community Television
1122 Mapunapuna Street
Honolulu, HI 96819
(808) 834-0007, ext. 131

‘Ōlelo Community Television
Submission to HCR 358 Task Force

What are Franchise Fees?

Cable franchise fees, which provide the funding for PEG access, are not taxes; nor are they a "pass through" to cable subscribers. Instead, franchise fees are fees paid by a cable operator as compensation or rent for use of public rights-of-way.

More than ten years ago, a federal appellate court directly addressed the mischaracterization of cable franchise fees as taxes. In that case, *City of Dallas, Texas v. FCC*, 118 F.3d 393 (5th Cir. 1997), the court explained:

Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. *See, e.g., City of St. Louis v. Western Union Telegraph Co.*, 148 U.S.92 . . . (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272,283,282 P.2d 36,43 (1955) (same); *Erie Telecommunications v. Erie*, 659 F.Supp. 580, 595 (W.D.Pa.1987), *affirmed on other grounds*, 853 F.2d 1084 (3d Cir.1998) (same in cable television context).

The court went on to state:

Furthermore, even if franchise fees were treated as a tax, they would still be treated as a normal expense of doing business unless the tax was imposed directly upon the subscriber.

The decision in the *City of Dallas* case is the definitive interpretation of the status of cable franchise fees under federal law and confirms that cable franchise fees are not taxes. By describing franchise fees as rent for use of rights-of-way and a normal expense of doing business, the court recognized that such use was a special and valuable privilege that the cable operator received that most other businesses do not, and for which compensation to the public that owns the rights-of-way is owed. It is no different from the rental payment a business would make if it rented land or a building from city or state government.

The court's decision also noted that, while cable operators are allowed to identify the cost of government regulation (including franchise fee payments) on subscriber bills, that itemization "does not, however, transform a cost imposed on cable operators into a cost imposed upon cable subscribers." The court added:

In sum, there can be no doubt that franchise fees imposed on the cable operator are part of a cable operator's expense of doing business. There is no plausible basis to conclude that cable operators are acting as collection agents on behalf of franchising authorities.

David Franzel

From: David Franzel [david@davidfranzel.com]
Sent: Friday, October 17, 2008 11:09 AM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'; 'Keali'i Lopez'
Subject: FW: HCR 358 Task Force - Request for Selection Process of the Board of Directors of PEG Access Organizations

Task Force,

For your review re Board Member appointment.

Thanks Keali'i!

David.

From: Keali'i Lopez [mailto:klopez@olelo.org]
Sent: Wednesday, October 15, 2008 2:48 PM
To: Eric Knutzen
Cc: david@davidfranzel.com; Roy.Amemiya@centralpacificbank.com
Subject: RE: HCR 358 Task Force - Request for Selection Process of the Board of Directors of PEG Access Organizations

Aloha Eric,

Per your request I am forwarding to you the sections of 'Olelo's bylaws that pertain to Board member appointment. Please feel free to contact me, if you have any questions

Keali'i

From: Eric Knutzen [mailto:eknutzen@kauai.gov]
Sent: Thursday, October 09, 2008 4:33 PM
To: Jay April; J Robertson; Keali'i Lopez
Cc: david@davidfranzel.com
Subject: HCR 358 Task Force - Request for Selection Process of the Board of Directors of PEG Access Organizations

Dear Executive Director,

As you are most certainly aware, the HCR 358 Task Force, as established by the legislature during the 2008 Legislative Session - is currently conducting their work.

Our most recent Task Force meeting of today resulted in a request for information from you in your capacity as Executive Director of your respective PEG Access Organization.

12/15/2008

Selection Process, Board Members

The subject discussed regards the selection process of the Board of Directors of PEG Access Organizations.

Would you please forward to my attention your bylaws or other descriptive documents which outline your selection process?

We are working on a very tight deadline so transmittal via email of scanned documents etc at your earliest possible convenience would be sincerely appreciated.

My contact information is as follows, should you not be able to email the information:

Eric Knutzen
Chairman, HCR 358 Task Force
4444 Rice St., Suite 427
Lihu'e, Hawai'i, USA, 96766
Tel: (808) 241-4406
Fax: (808) 241-6266
E-mail:

Appreciatively,

Eric

Cc: HCR 358 Task Force

David Franzel

From: David Franzel [davidfranzel@hawaii.rr.com]
Sent: Tuesday, October 21, 2008 8:06 PM
To: 'Jay April'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'Hirata, Gregg'; 'Geri_Ann_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'
Cc: 'Glen.WY.Chock@dcca.hawaii.gov'; 'Laureen.K.Wong@dcca.hawaii.gov'; 'Patti.K.Kodama@dcca.hawaii.gov'; 'Keali'i Lopez'
Subject: FW: My Belated Written Comments from Sept 24 Task Force Meeting (Please Distribute)
Importance: High

Task Force.

FYI.

Patti, could you please post with the September 24 minutes?

Thanks!

From: Keali'i Lopez [mailto:klopez@olelo.org]
Sent: Tuesday, October 21, 2008 1:15 PM
To: David Franzel
Cc: eknutzen@kauai.gov
Subject: My Belated Written Comments from Sept 24 Task Force Meeting (Please Distribute)
Importance: High

Please distribute my comments that I presented at the September 24 Task Force meeting. I am delayed in getting these to you and know they are critical to the work of the Task Force. Please let me know if you have any problems with the two attachments.

Aloha,
Keali'i

12/15/2008

PEG ACCESS CONTRACT VIA COMPETITIVE BID

Submitted by Keali'i Lopez
September 24, 2008

Research has included speaking with PEG access industry experts and polling PEG access organizations across the country. No PEG access organizations indicated that their contracts with City Governments or other contracting entities were placed out for bid. These contracts are renewed between the PEG access providers and the contracting entity. The only contracts that are put out to bid are contracts with access providers that solely provide "Public" access services. There are very few of these Public access organizations that do compete for their contracts, however two that I am aware of Quote...Unquote, Inc. in Albuquerque, NM, and Media Bridges Cincinnati in OH.

Access contracts that combine Public access with Educational and/or Governmental access clearly are not awarded through a competitive process. Similar PEG like contracts that were identified and not awarded through competitive process includes Portland, OR, San Jose, CA among others. There are provisions in several of these PEG contracts that may be helpful to the Task Force. I have excerpted some of these provisions that may relate to issues of accountability that seem to be at the root of resistance to an exemption for PEG access services contracts in Hawai'i.

- At least every two (2) years during this Agreement, Contractor shall conduct a Community Needs Assessment. The purpose of the Assessment is to provide a strategic way to evaluate the Contractor's ability to assist the community in addressing critical issues. The Community Needs Assessment shall employ a valid and deliberate assessment process, and shall be designed in consultation with the Commission. The Contractor may use research and surveys conducted by other organizations to supplement information gathered for the Contractor's Assessment. (Mt. Hood Cable Regulatory Commission and Multnomah Community Television)
- Contractor shall annually submit to the Commission a strategic plan, including, at a minimum, the results of Contractor's Community Needs Assessment and Contractor's plans for addressing the issues identified therein and for meeting the objectives of this Agreement. Contractor shall submit the plan in conjunction with its annual budget....(Mt. Hood Cable Regulatory Commission and Multnomah Community Television)
- *PERIODIC PERFORMANCE REVIEW.* SJCMAC shall, during the fourth year of operation under this Agreement, contract with an independent entity from outside the City that is expert in PE access matters to conduct a performance review of SJCMAC's operations to determine if its operations are consistent with best practices in the community media field. Thereafter, SJCMAC shall undertake additional performance reviews no less than every four years. These reviews shall include an opportunity for PE access users and cable subscribers to provide input. Upon completion, a copy of the performance review shall be submitted to the City. (City of San Jose and San Jose Community Media Access Center)

POTENTIAL BENCHMARKING FOR PEG ACCESS SERVICES

Submitted by Keali'i Lopez Report
September 24, 2008

There are no standard industry best practices that have been formally adopted by PEG access organizations across the country. However, there are measures that could be considered with regard to PEG access contracts. The examples of benchmark standards are provided for discussion purposes and are not an endorsement of these benchmarks. The inherent risk in providing such a list is an assumption that these standards will work for all of the Hawai'i PEG access operations. Each of the counties in which PEG access services are provided is unique, as are the resources, the various communities served and the methods of operations. Therefore, it would be a mistake to develop a one size fits all approach to developing standards. Additionally, it is unclear that the PEG providers necessarily have the resources or processes in place to measure these potential standards. The ability to measure these standards in an effective way must be part of the final development of standards for each PEG provider.

Should the Task Force recommend any PEG Access standards, it is important to ensure that the final benchmark of standards for PEG access in each franchise area/county are developed with an independent PEG access consultant who is very familiar with different sized PEG access organizations in very diverse communities.

Suggested Approach:

The first step would be for the PEG access providers and the DCCA to mutually agree to the consultant for this task. The consultant would:

- a.) Provide an initial operational audit of each of the current PEG access operations;
- b.) Obtain input from interested parties and stakeholders (PEG access clients, program producers, the cable operator, DCCA, and non-profit, educational and government agency representatives, etc.) regarding the proposed standards;
- c.) Develop an initial base line of service standards and recommended future increases for each franchise area/county.

Examples of Standards:

Standards of Access

- Maximum wait time to enter training program
- Maximum time elapsed from submitting a program to having it scheduled for cablecast
- Maximum time elapsed from program scheduled for cablecast to first airing
- Minimum number of cablecasts per program
- Minimum hours of facility operation (hours open)
 - Minimum evening and weekend availability
- Minimum time, training and preparation standards for quick program creation (e.g. mini-studio, Open mic, hotline studio, facilitated production, etc.)

Standards of Performance

- Percentage of those entering training who complete training
- Percentage of those using equipment or training who bring a program to cablecast
- Minimum percentage of hours of equipment, facility and studio use relative to overall hours of availability
- Minimal annual percentage of growth in hours of programming originating in the Community served
- Minimum annual number of new not-for-profits, schools, colleges and government agencies using services of CMC
- Minimum of efforts to solicit and act on client and community feedback (assessment, ascertainment, etc.)
- Degree to which client population represents the range and diversity of the community (drawn from a range of geographic areas of community(ies) served, gender balance, age representation, racial representation, socioeconomic representation, etc.)

Standards of Programming

- Minimal annual percentage of growth in hours of first run locally produced programming
- Minimum number of different voices or program providers
- Minimum of efforts to attract viewership

David Franzel

From: Jay April [jay@akaku.org]
Sent: Tuesday, October 21, 2008 9:59 PM
To: David Franzel
Cc: keo@keoinc.org; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; eknutzen@kauai.gov; shelley.pellegrino@co.maui.hi.us; 'Hirata, Gregg'; Geri_Ann_Hong@notes.k12.hi.us; david@hawaii.edu; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; Lauren.K.Wong@dcca.hawaii.gov; Patti.K.Kodama@dcca.hawaii.gov
Subject: Re: HCR 358 Task Force Statement For The Record Under Old Business

Aloha Chairman Knudsen and Task Force Members:

The following statement is for the record under old business for the HCR 358 Task Force meeting of October 22, 2008

For the Record, I would like to point out the following facts and observations regarding the lack of cooperation on the part of several state agencies with the work of the HCR 358 Task Force.

1. The DCCA has not cooperated with the official HCR358 Task Force request to post a link on it's website to a VIDEO REPORT TO THE HCR358 task force as directed by the Task Force and the Chair.
2. The DCCA has declined to honor the motion passed by the HCR 358 Task Force in a 7-1 vote to suspend decision making on it's (DCCA) Designation of PEG Access Organizations using the State Procurement Code until the Task Force has delivered it's written report to the legislature.
3. The State Procurement Office has not sufficiently cooperated with the HCR358 Task Force by refusing to answer questions or evading direct answers to questions posed to it in writing by the task force and declining to appear in person before the Task Force for a question and answer session.
4. The Procurement Policy Board has misrepresented the facts in writing with respect to a HCR 358 Task Force inquiry regarding Akaku and Olelo Petitions for a Declaratory Order (see Letter from Chair Torres)
5. The Attorney General's office has not supplied the full text of the AG opinion requested by the HCR 358 Task Force but has replaced it with a summary of the opinion prepared by Deputy Attorney General, Rodney Tam.

On Oct 21, 2008, at 9:21 PM, David Franzel wrote:

12/14/2008

Task Force

10/21/2008

From: Jay April []
Sent: Tuesday, October 21, 2008 9:12 PM
To: David Franzel
Subject: Re: HCR 358 Task Force potential alternative to procurement (Cable Franchise Renewal)

FOR DISCUSSION:

A BOARD OF CONVENER (BOC) PROCESS FOR PEG ACCESS ORGANIZATIONS

Franchise centric convener process at arms length from state.
Based on a model for creating or revitalizing a Community Media Center.

STEP 1 : Facilitator chosen by DCCA and PEG Provider BOD

STEP 2: Appointments:

- 1. CAC Representative from Franchise
- 1. EDU
- 2. PEG BOD
- 2 PRODUCERS (ELECTED)
- 1 COUNTY COUNCIL
- 4 AT LARGE (SELF SELECTED BY BOC))

STEP 3. Retain Qualified PEG Access Consultant

STEP 4. Provider Evaluation

Access Report Card based on Benchmarks

STEP 5. Recommendations

OPTIONS:

- a. Accreditation for Provider for term
- b. Enter Public Hearings Rule Process

STEP 6. Final Recommendations

<Alternative Two Task Force (Cable Franchise Renewal).DOC>