

Department of Commerce and Consumer Affairs
State of Hawaii

HCR 358 TASK FORCE MEETING

Date: Wednesday, September 24, 2008
Time: 1:00 p.m. – 4:00 p.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

- I. Call to Order (Chair)
- II. Accept Minutes from August 27, 2008 Meeting (Task Force)
- III. Public Testimony (Public)
- IV. Review Procurement Code and if possible the State Concession Law (including alternatives within the Procurement Code) in a thirty (30) minute Q & A Session followed by a discussion of pros and cons and alternatives to Procurement Code with the State Procurement Office present as a resource (Task Force)
- V. Benchmarking regarding alternatives to procurement by other PEGS (Kealii Lopez and Task Force)
- VI. Selection Process of the Board of Directors of PEG access organizations (Task Force)
- VII. The Report to the Legislature
- VIII. Preparation for Next Meeting (Task Force)
 - Date - October 22, 2008 8 am – 10:30 am (Note: time differs from that reported at August 27, 2008 meeting)
 - Agenda
- IX. 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: September 24, 2008
Time: 1:00 p.m.
Place: The following State of Hawaii Video Conference Centers:

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75 Aupuni Street, Basement
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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. MaBel Fujiuchi
9. Clyde Sonobe (arrived during Public Testimony)

ii. Absent

1. Keith Rollman
2. David Lassner
3. Gerald Takase

B. Approve Agenda

i. Comment

1. Consider add sections re approve Agenda, New Business, Old Business as part of Next Meeting – Agenda; Status of Document Request to Agenda and Alternatives to Procurement Code in item IV

II. Accept Minutes from August 27, 2008 Meeting (Task Force)

A. Accepted (Unanimous)

III. Public Testimony (Public)

A. Rules

B. Public Testimony

- i. John Bruce (Ch – Akaku) – Monies are not tax, Akaku gets \$800K; Issue of PEG is a figure of speech, is actually community action television, money should therefore be kept together in one place so it can be used by one (1) organization; low budget operation compared with other TV, off to the side of cable, not helped by them much. Alts to Procurement, procurement does not fit, not the State's budget, should be sole source to keep control, cites frequent audits, tell the State that the Task Force suggests that they be left alone, sole source, and fund them the best they can. Dangerous for State to do things. Would change name of PEG to "Community access television"; Asked if aware that sole source is part of Code? Answered should not go to Procurement every three years especially because resources limited; cites need for autonomy. Asked, what if discovered PEG could not perform or if there is malfeasance, what can DCCA do? Answered are audited and watched internally with sterling employees; should be rules. Asked, what is his idea for funding without using term "sole source" which comes out of Code? Answered, should be flexible, procurement should be gone so organization can be strengthened, Jay April is great.
- ii. Noel Ching Johnson – Supports Mr. Bruce and ask Task Force to follow the suggestions of people that know Akaku, dump the procurement code. Because of the cable company funds go to the community PEG; no one can take over Akaku and do better, what it is today is a blossoming of what it was; it is amazing to see; No one can do it better than they can do it; public community allows public to run their videos; others have opportunity to do so but do not do so; consider the source of procurement, does not belong in community television. Asked what he recommends? Wants to see rules in place to help facilitate the community television the way it is; wants to see more attention as to what the community benefits are, has become a target for money, needs to be set straight and then left alone; likes fact that public can use community television where everyone has a voice; cannot be beaten! Volunteers are so in favor with the mission, no shenanigans; Need more money. Great place where people can learn, don't fix if not broken.

Final Minutes
HCR 358 Task Force
September 24, 2008 Meeting

- iii. Kenny Hulquist – Producer, took classes, got bit by video bug, now has 53 programs on list at Akaku, cites Senate bills funded by [developer] that were designed to cripple or destroy Akaku; still a major push by people who do not want Akaku or other public access stations. Maui Media Lab funded by [developer] to have an established media outlet to make bidding to take over Akaku, easier. Believes that people want to push the PEG process on all public access stations in Hawaii.
- iv. Ellen Lavinski – Subscriber, supports Akaku, has been involved in several programs with them. Concerned about RFP process, where else is this interruption in place in the US? Would support Jay April's suggestions. Why disrupt and start all over? They have learned a lot, RFP not in our best interest. What about looking at the money spent by the Community College? Wants to know that the money used properly (cites relevance as money going to Akaku also goes to Community College); with Akaku, can go on after classes, Akaku is very user friendly, Akaku is doing a great job and should be allowed to continue community; increase cable fees to 7%.
- v. Lance Collins – Represents Akaku, (***See attached Written Testimony "Akaku Knutzen Letter Pub Hearing.pdf"***) cites HRS and powers of DCCA and DCCA rules, use D&O to regulate then moved to Procurement Code (stopped by J. August); How will use of the Procurement Code effect current process? Does not work within cable television paradigm, use of Procurement undercuts public use. Cost effectiveness and cost savings not the same. Question, charge to come up with a report to provide to Leg outside its Procurement Process, how check could go from the cable to the provider? **Answered, August 26 letter with Rules**, permit could be put together to provide services. Question, Lance talks about marketplace providers not sufficient, what is the viable alternative? PEG access mandated in Federal Law, was an intervention in the market, cost savings here not appropriate because it does not work for cable access; figure out a regulation to come up with cost efficiency that serve all stakeholders BUT not cost savings. Permitting process provides a viable alternative (does not insist that a particular access organization will continue its monopoly; if do not meet and beat standard regulations, someone else will come in) and permitting process allows for the issue of cost efficiency, oversight, flexibility, and maximum participation of all stakeholders.
- vi. Keali'i Lopez – Task of Task Force – come up with alternative to procurement process, supports Lance's comments generally; until Task Force gets AG opinion as to whether or not subject to the procurement code, might need to work within Code. If so, exemption is the best option, accountability can be addressed through DCCA rulemaking; concerned as rulemaking hearings are

coming up soon; thinks Task Force should take a position. Sole source may be seen by State as not sole source as there are four (4) providers. Focus on items that are likely to be successful. People see fees as a tax which it is NOT (it is a fee). Came up recently in a City resolution, which refers to franchise fees as being "taxed twice". RFP is somehow mixed in with this issue. If Permit is a viable alternative, would support it. Suggest look at alternatives if found subject to (look to exemption) or not (Permit?). Sole source issue, could look at it only from Counties perspective which could eliminate structural issue (need legal opinion). Is procurement advantageous or practicable to state? Thinks not, until property issues resolved, should State put out to bid and possibly lose resources? Addresses issue of providing oversight to sole source contracts.

Note: Keali'i subsequently provided the following links in support of her testimony:

Notice of Public Hearing

http://hawaii.gov/dcca/areas/catv/main/press_releases/HAR_Public_Hearing_Notice.pdf

Notice of the public hearings scheduled from September 30 to October 8, 2008.

Hawai'i Administrative Rules (Chapter 16-131)

http://hawaii.gov/dcca/areas/catv/main/har/HAR_16_131_70_Proposed_Changes.pdf

The above document contains 27 pages, including the cover sheet.

However, the proposed rule change starts on page 24, SUBCHAPTER 16, ACCESS ORGANIZATIONS

City Council Resolution No. 08-206

<http://www4.honolulu.gov/docushare/dsweb/Get/Document-80294/RES08-206.%20PROPOSED%20FD1.pdf>

This is intended to be adopted by all four County Councils for inclusion in the Hawaii State Association of Counties legislative package for 2009. The Honolulu City Council passed Reso. No. 08-206 FD1 this morning.

IV. Review Procurement Code and if possible the State Concession Law (including alternatives within the Procurement Code) in a thirty (30) minute Q & A Session followed by a discussion of pros and cons and alternatives to Procurement Code with the State Procurement Office present as a resource (Task Force)

A. SPO Q and A (See attached)

- i. Member April takes issue with Answer 2, believes that PEG access is not a commodity, believes that Procurement Code is down the wrong road; disappointed that SPO views this as a marketplace issue which Jay believes it is not. Chair indicates that did not go through with RFP and that SPO does not believe that there are alternatives to using the Procurement Code.

- B. Concession Code Discussion
- i. Cites structure as applying well to businesses described in the Code and could apply to telecom businesses; not dissimilar to code given you have bidders.
 - ii. What are differences?
 1. Roy – major difference, when you procure subject to the Code you assume that government/public money used; with Concession, no government money used. Sees relationship to PEG issue.
 2. Gil – Concession structures as an invitation for bid with bonds and award goes to highest bidder. Subject to competition, no difference except goes to highest bidder.
 3. Jay – based on marketplace and competition with no community building mechanisms; another version of an RFP for procurement.
 4. Shelley – Lance can provide information on Concession law as part of his discussion on alternatives.
- C. Alternatives to Procurement Code (Lance Collins Presentation)
- i. State Concession Law – believes that it is preempted by Cable Communications Statute
 - ii. **See attached Lance Collins Written Testimony “Akaku Knutzen Letter Concession Law”**
 1. 2 methods
 - a. Rulemaking
 - i. J. August requires
 - ii. DCCA goes route of Procurement Code (cites general problems)
 - b. Contested case
 2. During Franchise process, licensing or permitting of PEG entities (**See Collins August 26 Letter**)
 - a. Contested case in the Administrative Procedure Act allows decision maker to have a complete record; all stakeholders can participate so all interests are represented; most flexibility to decision makers
 - i. Also members of public can be involved
 - ii. ADR is also allowed
 - iii. Administrative procedures act has been well litigated so we know what things
 - iv. Drawback is that it is not done often; needs to allow for 8 -10 years between to ensure performance, etc.
 - v. Unlike the Procurement Process, regulator is not at arms length so is free to have hearings, etc. If condition violated, regulator can take action

- vi. Can also end in a "designation" which is like a permit
 1. Regulator can put any appropriate conditions in the "designation"
 2. Distinct from sole source – with sole source there is no contract (e.g. D&O); Code does not allow sole source
 - b. Task Force prefers referring to process as the "Public Hearing Rules Process"
 3. Chair, asks if we want to replace the PEG entities or work within them? Note: To be discussed
- V. Benchmarking regarding alternatives to procurement by other PEGS (Keali'i Lopez and Task Force) (See Keali'i Lopez Written Testimony – To be Attached When Received)
- A. Keali'i provided her views on the state of competitive bidding of PEG Access Contracts (nowhere in US) and provided examples of benchmarks (e.g. measure timing between introduction of idea and production, etc.)
 - B. Member April proposed that the Task Force send the following statement to the DCCA Hearings:
 - i. 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 (Subchapter 16-131-70) for the designation and selection of access organizations until after the HCR 358 task force has issued its Final Report to the Legislature.
 - ii. Approved by Task Force (Hirata – no, Sonobe – abstains)
- VI. Selection Process of the Board of Directors of PEG Access Organizations (Task Force)
- VII. The Report to the Legislature
- VIII. Preparation for Next Meeting (Task Force)
- Date - October 9, 2008, 8 am – 11:30 am
 - Agenda
 - Call to Order (Knutzen)
 - Approval of Agenda (All)
 - Accept Minutes from September 24, 2008 Meeting (All)
 - Public Testimony
 - Old Business (All)
 - Procurement Code and Alternatives (All)
 - Selection Process of the Board of Directors of PEG Access Organizations (All)

Final Minutes
HCR 358 Task Force
September 24, 2008 Meeting

- Report to Legislature (All)
- Preparation for Next Meeting (October 22, 2008, 8:00 am – 10:30 am)
- Adjournment

IX. Adjournment at 4:05 pm

September 24, 2008

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

Re: Concession Law Comments in Writing

Dear Mr. Knutzen and Task Force Members,

During the task force meeting today, I made a few comments on the concession law that I have reduced to writing. Haw. Rev. Stat. 102-1 states:

§102-1 Definition. The word "concession" as used in this chapter means the grant to a person of the privilege to:

- (1) Conduct operations involving the sale of goods, wares, merchandise, or services to the general public including but not limited to food and beverage establishments, retail stores, motor vehicle rental operations under chapter 437D, advertising, and communications and telecommunication services, in or on buildings or land under the jurisdiction of any government agency;
- (2) Operate a parking lot on property owned or controlled by the State with the exception of buildings, facilities, and grounds operated by or otherwise under the jurisdiction of the department of education; and
- (3) Use, for compensation, space on public property to display advertising, or to conduct operations for communications or telecommunications purposes.

It would be under subsection (3) that the cable operators' use of public property to conduct operations for telecommunications purposes would be included. However, because cable communication systems regulation is established by a grant from the federal government, there is federal preemption on this issue. The federal government has delegated cable operators' use of public property back to the states. The state has enacted Chapter 440G, Haw. Rev. Stat. in response to this delegation.

The rule of statutory construction is that if two statutes call for two different courses of action or regulations, the statute which is more specific to a particular circumstance controls. In this instance, the cable statute is more specific than the concession statute and therefore the cable statute

applies to the use of public property in relationship to cable operations. Access channels and access organizations are state requirements and conditions for a cable franchise – these activities are derivative of the cable franchise.

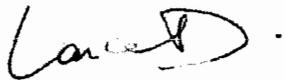
The concession law and procurement law are similar in that they both seek to have government participate in the market in a non-discriminatory manner that fosters open competitions. However, they are different in that the procurement law places the government in the position of a consumer or purchaser of goods or services while the concession law places the government in the position of a landlord.

Under these analogies, the state has a landlord/lessee relationship with the cable operators who are enfranchised. However, the state does not have that relationship with the access organizations. The existence of access organizations are conditions of the cable franchise. In this sense, under the landlord/lessee analogy, access organizations would be a condition placed upon a lease requiring the maintenance of a park on the side of leased property and the lessee hiring someone to keep it tidy and safe. The park manager is derivative to the leased property itself.

While in a very general way, it may be tempting to think of the state as a consumer of the park manager's services, it is not, in fact, a consumer of the park manager's services. Obviously the state as landlord can condition what kinds of features it would like to see in a park or what kinds of qualifications the company running the park would have as a derivative power of a landlord but not directly as a consumer. This is why the procurement code is not an appropriate fit to access organizations.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS



LANCE D COLLINS
Attorney for Akaku: Maui Community Television

cc: client

September 24, 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 September 24, 2008

Dear Mr. Knutzen and Task Force Members,

I represent Akaku: Maui Community Television and write you today to present argument regarding preliminary matters to evaluating “alternatives to procurement”. In order to properly evaluate “alternatives to procurement” and make recommendations to the Legislature, three questions must be definitely answered and understood by the task force members. These questions are: (1) What is the current statutory framework for access organization designation? (2) What are the previous and current practices regarding that power to designate? (3) How will the use of the procurement code as described in proposed rule-making effect current practice?

1. **What is the current statutory framework for access organization designation?**

The Cable Communications Policy Act of 1984 amended the federal Communications Act to explicitly allow cable franchising authorities to require cable operators to set aside channel capacity for PEG use and to provide adequate facilities or financial support for those channels. While the federal law leaves to the discretion of cable franchising authorities the discretion to require channel capacity for PEG use, Hawai'i state law requires it: “The cable operator shall

designate three or more channels for public, educational, or governmental use.” Haw. Rev. Stat. 440G-8.2(f)

Hawai'i state law delegates the power of enfranchisement to the DCCA director and power includes the designation of non-profit access organizations to operate and manage PEG channels: “oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8.” Haw. Rev. Stat. 440G-3(1)

2. **What are the previous and current practices regarding that power to designate?**

The Director of the DCCA has promulgated limited rules on PEG channels and they relate to channel capacity (Haw. Admin. Rules 16-131-32 through -37) and relate solely to conditions imposed upon cable franchisees. The Director has never promulgated administrative rules relating to access organizations and has used so-called “decisions and orders” and “agreements” to regulate access organization funding and management.

In 2005, the Director inquired of the Attorney General whether his power to designate was subject to the procurement code. The Attorney General answered in the affirmative. The DCCA began the process of changing designation and regulation to the procurement process but was stopped in 2007 by the Hon. Joel E. August who indicated that rules for designation are required. The DCCA is in the process of promulgating rules which attempt to use the procurement process as the method of designation.

3. **How will the use of the procurement code as described in proposed rule-making effect current practice?**

Federal law's inclusion of PEG access in the powers of local franchising authorities was intended to recognize that access to media and exercise of other First Amendment rights simply are

not supported by market conditions or the structure of the television market. To counteract the problems of concentrated ownership of media, federal law was amended in 1984 to allow local franchising authorities to require PEG access.

Aside from the questions regarding the legality of the use of the procurement code to the designation of access organizations without statutory changes to the Cable Communications Systems Act, the principles of public procurement are antithetical to the purpose and intent of PEG access.

The principles of public procurement is intended to remove barriers and open up new, non-discriminatory and competitive markets through a legal and rational process offering the State and the people of Hawai'i the highest quality goods and services at the lowest reasonable price.

However, there are no instances where the market supports access services. The requirement of access channels and services is a direct intervention in the free-market by the federal and state government to provide a public benefit that the market simply cannot provide. The telecommunications market has been unable to support the types of programming access provides because the mechanisms for attracting capital to viewpoints that are not popular, minority, minoritarian, fringe or unfamiliar fundamentally do not function within the current cable television or broadcast television paradigm. For this reason, the logic of highest quality, lowest price does not work for these services.

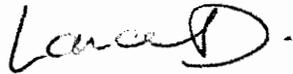
Some have argued that the services themselves can be subject to the free market model. This simply is not true. Market-based television and cable network stations are supported by the capital their programming attracts through viewership. Yet, the government has intervened in the marketplace to require PEG access because PEG programming is not likely to attract the kind of capital necessary to support itself.

The result is that the use of procurement in the long-term, will likely undercut the public

benefit the original market intervention intended to support. The original intent of providing funding to access organizations linked to the profits and rates of the cable franchisee is a rational method of funding access in proportion to the overall use of the cable franchise.

Cost-effectiveness and cost-savings are not the same policy consideration. While cost-savings is not appropriate for the access model, cost-effectiveness can be appropriate. This is an issue of proper regulation and oversight. The proper regulation of access organization and management still must be addressed and should be the focus of the task force until its end.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS

A handwritten signature in black ink, appearing to read "Lance D." with a stylized flourish at the end.

LANCE D COLLINS
Attorney for Akaku: Maui Community Television

cc: client

LAW OFFICE OF
LANCE D COLLINS

A LAW CORPORATION

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September 25, 2008

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

Re: Public Hearing Process Rules Presentation

Dear Mr. Knutzen and Task Force Members,

For your convenience, I have reformatted portions of my letter to the task force of July 31, 2008 covering the Hawai'i Administrative Procedure Act, Chapter 91, Haw. Rev. Stat., the legal framework for PEG access, and the argument for the public hearing/contested case process. I am including Appendix A from the August 26, 2008 letter which is a sample or proposal of what administrative rules would look like codifying a "public hearing" process. Comments from my September 24, 2008 testimony and letter are also incorporated. These efforts are being done for the task force members convenience.

The Hawai'i Administrative Procedure Act, Rule-Making and Designation

Government agencies that are delegated specific responsibilities by the legislature engage in government activity that is characteristic, in different cases, of all three branches of the government: the legislative, executive and judicial.

Since World War II, administrative procedure acts were developed for four basic purposes: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2)

to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.

Administrative action is organized into two types: (1) rule-making and (2) adjudication.

Hawai'i has adopted an administrative procedure act at Chapter 91, Haw. Rev. Stat.

"Rule' means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." However, excluded from the definition of a 'rule' are "regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda." Haw. Rev. Stat. 91-1(4)

Adjudicated procedures are called 'contested cases.' "'Contested case' means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. 91-1(5) The Hawai'i Supreme Court recently determined that whenever a statute requires a "public hearing" it means a "contested case." E & J Lounge Operating Co., Inc. v. Liquor Commission, 189 P.3d 432 (July 29, 2008)

Under rule-making, an agency is required to give thirty days' notice for a public hearing of rule-making. The notice must include (1) a summary of the proposed action, (2) a copy of the proposed rule after action, (3) notice of where the proposal may be inspected and (4) the date time and place where the public hearing will be held. Haw. Rev. Stat. 91-3(a)(1)

Additionally, the agency must "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule." Haw. Rev. Stat. 91-3(a)(2)

Generally, when circumstances allow for some thing to be accomplished by more than one method, a rule ought to be adopted to guide the agency and the public. There must be an accepted

manner of doing things even where the same thing reasonably might be done a number of different ways. When a state or county agency is delegated authority to do something by the legislature and it has discretion to choose a particular method over another, a rule is required. Haw. Rev. Stat. 91-1

It is within this framework that the power of the Director of the DCCA to designate access organizations is restrained. Whatever regulation the Director of the DCCA chooses to designate access organizations, it must be done pursuant to standards established through rule-making. Any matter committed to agency discretion must not be done in a standardless, arbitrary or capricious way.

Current Rule Framework for Designating Access Organizations

The Director of the DCCA has promulgated limited rules on PEG channels and they relate to channel capacity (Haw. Admin. Rules 16-131-32 through -37) and relate solely to conditions imposed upon cable franchisees. The Director has never promulgated administrative rules relating to access organizations and has used so-called "decisions and orders" and "agreements" to regulate access organization funding and management.

In 2005, the Director inquired of the Attorney General whether his power to designate was subject to the procurement code. The Attorney General answered in the affirmative. The DCCA began the process of changing designation and regulation to the procurement process but was stopped in 2007 by the Hon. Joel E. August who indicated that rules for designation are required. The DCCA is in the process of promulgating rules which attempt to use the procurement process as the method of designation.

Conditioned License / Public Hearing Process of Designation

The alternative presented and adopted by the Senate, through Senate Bill No. 1789, is a

modified contested case or public hearing proceeding similar to the enfranchisement of cable operators. "For purposes of distinction between administrative agency rule-making and adjudication, "rule-making" is essentially legislative in nature because it operates in future, whereas, "adjudication" is concerned with determination of past and present rights and liabilities of individuals where issues of fact often are sharply controverted." Application of Hawaiian Electric Co., Inc., 81 Haw. 459

The public hearing process is preferable to other methods of designation for a number of reasons. First, the designation of access organizations is an integral part of the cable enfranchisement process and should not be separated from the process of enfranchisement. Second, it is the most familiar government process to most people – whether by seeking a variance for a home improvement project, zoning change, building within the coastal zone management area, resolving disputes between management and workers, water permits, public utility permits. Third, the contours of the process have been well litigated throughout the United States for over sixty years allowing the Director to bypass "reinvention of the wheel."

Fourth, the public hearing process is the most concise well-known process which requires the decision-maker to consider the complete record. Interested parties may intervene and present evidence and argument that can help the decision-maker make the best decision based upon a full and complete record. The contested case process supports transparency, rationality and consistency.

Differences between Contract, License and Permit

With respect to the difference between a "contract" and "license" or "permit", I would like to provide the task force with the Black's Law Dictionary (8th ed.) definitions with some comments. Contract is defined as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." (at 341)¹

¹ Restatement (Second) of Contracts §1 defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty."

This term does not appropriately describe the relationship between the DCCA and access organizations because there are no obligations of the DCCA which are enforceable or otherwise recognizable at law owed to access organizations. There is no requirement or obligation that the DCCA designate a particular access organization. The lack of administrative rules makes the situation more self-evident. The only duties or obligations of the DCCA are the restraints placed upon it are those found in the constitution and the Hawai'i Administrative Procedure Act and these are required of the DCCA whether or not any entities do or do not exist or promise anything to the DCCA. In other words, the obligation of the DCCA to follow the constitution or HAPA is unaffected by access organization's overseeing "the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8." Haw. Rev. Stat. 440G-3(1)

License is defined as "a permission, usually revocable to commit some act that would otherwise be unlawful; especially an agreement (not amounting to a lease or a profit a prendre)." (Black's at 938) A lease requires a contract, which we have already established is impossible since there are no obligations that the state enters into here. Profit a prendre is very similar to the idea of running a public concession, and as mentioned elsewhere, it is the relationship between the state and the cable franchise operators that is a public concession and not the derivative conditions of the franchise (like providing channels and money for cable access) that finds this idea of a concession.

Permit is defined as "a certificate evidencing permission; a license." (at 1176) Permission is defined as "the act of permitting" or "a license or liberty to do something; authorization." (Id)

While the end result of any designation is necessarily a permit or a license for access organizations to "oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8" (Haw. Rev. Stat. 440G-3(1)), it is the process of getting to that license which is at the heart of the question before

the task force. That process is the regulation itself and it is committed to the director of the DCCA's discretion. Haw. Rev. Stat. 440G-3(1).

Conclusions

The procurement code, which does not easily fit into the regulatory framework of cable franchising, abstractly presents one possible process of regulation. However, there are a number of provisions within the procurement code that require legislative changes in order for the Director to use this method of designation. The use of it would amount to the Director acting in excess of his statutory authority.

The concession law also would not easily fit into the regulatory framework of cable franchising if applied to access organization designation because cable franchising is itself a specific concession law already. Cable access is a term and condition of every cable franchise. However, with a number of legislative changes and policy decisions made by the legislature, it is abstractly possible to make concession law apply to designation.

Both of these alternatives, however, in different ways, attempt to reintroduce the concept of market control over cable access. The requirement of access channels and services is a direct intervention in the free-market by the federal and state government to provide a public benefit that the market simply cannot provide. Reintroduction of market forces in determining the future of cable access will undercut the public benefit the original market intervention intended to support.

Cost-effectiveness and cost-savings are not the same policy consideration. While cost-savings is not appropriate for the access model, cost-effectiveness can be appropriate. This is an issue of proper regulation and oversight.

A public hearing process which allows all stakeholders to participate and provides decision-makers with a complete record upon which to create terms and conditions for an access

organization designation is a fair and reasonable method of designating that is familiar to the public. It offers openness to the public and other stakeholders, flexibility to the regulator, and consistency to access organizations.

If you have any questions, please do not hesitate to contact my office.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS

A handwritten signature in black ink that reads "Lance D." followed by a stylized flourish.

LANCE D COLLINS
Attorney for Akaku: Maui Community Television

cc: client

APPENDIX A

§16-132-70 Purpose. The purpose of these rules is to implement Hawai'i Revised Statute chapter 440G, relating to the designation of access organizations and to establish application procedures for such designation, time periods within which hearings must be held, and procedures to provide notice to individuals who may be affected. The rules further the policy of the state to ensure access to cable television. The rules also assist the director in giving full consideration to the state policy of access stations.

§16-132-71 Scope of Designation and Area of Designation. (a) The rules contained in this chapter shall apply to all access organization designations within the state of Hawai'i wherever the director has enfranchised a cable operator pursuant to Hawai'i Revised Statute chapter 440G.

(b) The director shall designate one access organization for each county irrespective of the number of franchises granted within a particular county.

§16-132-72 Notice of Application. (a) The applicant shall prepare a notice of application. The form of the notice shall be provided to the applicant by the director. Prior to publication, the department shall review the notice of application for completeness. The applicant shall submit the notice of application for publication once in a daily newspaper of general circulation in the county of access organization area.

(b) A public hearing before the director shall commence within ninety days, or as soon thereafter, after the director has determined the application complete.

(c) When a public hearing is required to be held pursuant to these rules, the department shall notify the applicant of the date of the public hearing at least forty-five days prior to the public hearing date.

(d) Not less than thirty days prior to the public hearing date the director shall publish a notice of public hearing twice in a daily newspaper of general circulation in the county of access organization area. The notice shall state the nature of the application, the date, time and place of the hearing, and all other matters of importance.

(e) The director may authorize the consolidation of the hearing with any other hearing required pursuant to any of these rules.

§16-132-73 Designation review guidelines. The selection of an access organization shall include, but not be limited to, consideration of the following factors or criteria:

(1) The management and technical experience of the organization, and its existing or proposed staff;

(2) The broadcast or cablecast media and telecommunications experience of the organization and its existing or proposed staff;

(3) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the director;

(4) The organization's short-term and long-term plans for PEG access services for a designated franchise area;

(5) The financial capability of the organization;

(6) The ability of the organization to provide reports, audits, and other information to the director;

(7) The non-economic value of the organization like goodwill, community involvement and other social capital; and

(8) Other factors or criteria deemed applicable or necessary by the

director.

§16-132-74 Application procedures. (a) Any organization who seeks a designation shall file an application with the department on a form provided by the department, which shall require:

- (1) All information and documentation required pursuant to section 16-132-73,
 - (2) True and correct copies of the organizations current Articles of Incorporation and Bylaws, if any,
 - (3) State and Federal tax clearances,
 - (4) Verification of federal tax exempt status, and
 - (5) List of current officers, directors and employees,
- (b) Upon review of the application for completeness, the director shall review the application based on the criteria and factors set forth in this chapter, and, if necessary, request that the applicant provide any additional data or information as may be required for review of the proposed designation. The application shall not be deemed complete until the director is satisfied that the application has addressed the criteria and factors.

(c) The director shall submit the application, with all relevant information, to the cable advisory committee for review and comment within forty five days from the date on which the application was transmitted for review and shall request the cable advisory committee to address issues of the public interest consistent with the objectives and policies of this chapter and Hawai'i Revised Statutes chapter 440G.

(d) Upon receipt of comments from the cable advisory committee, the application shall be deemed complete by the director and shall be scheduled for public hearing.

(e) The director shall designate an access organization, subject to terms and conditions, necessary and proper for the policy objectives of cable access and chapter 440G, HRS.

(f) Findings of fact, conclusions of law, and decisions and order shall be issued in accordance with these.

(g) Conditions of designation including regular reporting requirements shall be attached as an exhibit to the findings of fact, conclusions of law, and decision and order.

§16-132-75 Designation term and extension. (a) The term of designation shall end six months after the expiration of the cable franchise for the access organization area. In the event that more than one cable franchise exists in one access organization area, the expiration of the last cable franchise shall be used to compute the term.

(b) If the term of any cable franchises within the access organization area are extended or renewed before their expiration, the term of designation shall extend to six months after the new expiration of the cable franchise unless the director conducts a public hearing to determine good cause for keeping the original term of designation.

§16-132-76 Emergency designation. The director has the power to designate an incumbent access organization as the access organization for a term of six months, that may be renewed once, when no access organization would otherwise be designated. Within seven days of such designation, the director shall notify the cable advisory committee.

§16-132-77 Petition to intervene. (a) Petitions to intervene may be filed in accordance with the provisions of this part in proceedings relating to access organization designation.

(b) Petitions to intervene shall be in conformity with these rules and shall be filed with the director and served upon the applicant no less than fourteen days before the first public hearing date. Untimely petitions will not be permitted except for good cause, but in no event will

intervention be permitted after the director has issued his final decision.

(c) **Intervenors.**

(1) All departments and agencies of the state and the county shall be admitted as parties upon timely application for intervention.

(2) All other parties may apply to the director for leave to intervene as parties.

(3) Leave shall be freely granted, provided that the director or his hearing officer, if one is appointed, may deny an application to intervene when in the director's or hearing officer's sound discretion it appears that:

(i) The position or interest of the applicant for intervention is substantially the same as a party already admitted to the proceeding;

(ii) The admission of additional parties will render the proceedings inefficient and unmanageable; or

(iii) The intervention will not aid in development of a full record and will overly burden broad issues.

(d) If more than one intervenor is admitted to a contested case proceeding, the hearing officer and/or director may require intervenors to assign responsibilities between themselves for the examination and cross-examination of witnesses. The hearing officer or director shall have the right to impose reasonable subject matter, as well as time, limitations on examination and cross-examination of witnesses, whether or not parties are represented by counsel.

(e) If any party opposes the petition to intervene that a party files, within five days after being served, his or her motion opposing the petition on the director, all other parties and the petitioner for intervention.

(f) All petitions to intervene shall be heard and ruled upon prior to the director taking final action on an application.

(g) A person whose petition to intervene has been denied may appeal such denial to the circuit court pursuant to chapter 91-14, HRS, as amended.

§16-132-78. Contents of Petition to Intervene. (a) The petition shall contain the following:

(1) The nature of the petitioner's statutory or other right to intervene;

(2) The nature and extent of petitioner's interest in the proceeding; and

(3) The effect of any decision in the proceeding on petitioner's interest.

(b) If applicable, the petition shall also make reference to the following:

(1) Other means available whereby petitioner's interest may be protected;

(2) Extent petitioner's interest may be represented by existing parties;

(3) Extent petitioner's interest in the proceeding differs from that of the other parties;

(4) Extent petitioner's participation can assist in development of a complete record;

(5) Extent petitioner's participation will broaden the issue(s) or delay the proceedings; and

(6) How the petitioner's intervention would serve the public interest.

§16-132-78. Formal requirements for filing of documents. (a) Time and place. All documents required to be filed with the director in any proceeding shall be filed with the office of the director at Honolulu, O'ahu, Hawai'i, within the time limit prescribed by law on business days between 7:45 a.m. and 4:30 p.m. or as otherwise ordered by the director. Unless otherwise ordered, the date on which the documents are received shall be regarded as the date of filing. However, applicants, petitioners for intervention and intervenors who do not reside on the island of O'ahu may mail, U.S. first-class mail, postage pre-paid to the director with the words "ACCESS ORGANIZATION DESIGNATION DOCUMENTS" on the outside cover, and the postmark shall be accepted as the date of filing.

(b) Format

(1) Form and size. Documents shall be bound at the top and typewritten upon paper 8.5 x 11 inches in size. Tables, maps, charts, exhibits or appendices may be larger and shall be folded to that size where practical. The impression shall be on one side of the paper only and shall be double spaced, except that footnotes and quotations in excess of a few lines may be single spaced. Copies shall be clear and permanently legible.

(2) Title and number. Petitions, pleadings, briefs, and other documents shall show the title of the proceeding before the director and the name and address of the person or attorney.

(3) Signatures. The original of each application, petition, complaint, answer, motion or amendment shall be signed in black ink by each party or his or her counsel. If such party is a corporation or association, the pleading may be signed by an officer thereof.

(c) Copies. Unless otherwise required by these rules or the director, there shall be filed with the director an original and one copy of each pleading or amendments thereof. Additional copies shall be provided if the director so requests. The original shall be on bond paper to distinguish it from copies or shall be identified as the "original."

(d) Extensions of time. Whenever a party is required to file a pleading within the period prescribed or allowed by these rules, by notice given hereunder or by an order or regulation, the director may:

(1) For good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period;

(2) Pursuant to a stipulation between all of the parties, extend such period; or

(3) Permit the act to be done after the expiration of a specific period where the failure to act is clearly shown to be the result of excusable neglect. Unless it is made during the course of a hearing all requests for continuances shall be by written motion.

(e) Amended pleading. All pleadings may be amended at any time prior to hearing. Amendments offered prior to hearing shall be served on all parties and filed with the director. All parties shall have the opportunity to answer and be heard on amendments filed after hearing commences, and the director shall decide whether such amendments shall be allowed.

(f) Retention of documents by the director. All documents filed with or presented to the director shall be retained in the files of the director. However, the director may permit the withdrawal of original documents upon submission of properly authenticated copies to replace said original documents.

§16-132-79. Service; effective date. (a) By whom served. The director shall cause to be served all orders, notices and other papers issued by the director together with any other papers required by law to be served by the director. Every other paper shall be served by the filing party.

(b) Upon whom served. All papers served by either the director or any other party shall be served upon all counsel of record at the time of such filing and upon all parties not represented by counsel or upon their designated agents, in fact or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall so notify all other counsel then of record and all parties not represented by counsel.

(c) Service upon parties. The final order and any other papers required to be served by the director upon a party shall be served upon such party or his or her representative authorized to receive service of such papers.

(d) Method of service. Service of papers shall be made by first-class certified mail, return receipt requested, or other means authorized by law.

(e) When service completed. Service by mail shall be regarded as complete when deposited in the United States mail properly addressed and stamped.

SUBCHAPTER 15

PENALTIES

§16-131-68 Penalties. (a) If the director determines, after a hearing in accordance with chapter 91, HRS, that any cable operator has violated section 440G-9(b)(1) through (8) as amended, HRS, the director may fine the cable operator an amount not less than \$50 nor more than \$25,000 for each separate violation.

(b) If the director has provided a cable operator with written notice of a potential violation, each day's continuance of an apparent violation may be deemed a separate violation. Nothing in this subsection shall limit the aggregate amount of the fine imposed on any cable operator as a result of any violation that continues subsequent to notice of a potential violation.

(c) A violation that concurrently affects more than one subscriber of a cable system shall be deemed an event which constitutes a single violation. Subsection (b) shall apply to violations under this subsection.

(d) Written notice of a potential violation shall be provided to a cable operator by hand delivery or by registered mail, return receipt requested. [Eff and comp 12/23/91; comp] (Auth: HRS §§440G-9, 440G-12) (Imp: HRS §440G-9)

SUBCHAPTER 16

ACCESS ORGANIZATIONS

§16-131-70 Designation and selection of access organizations. (a) For purposes of this section, "PEG" means public, educational, and governmental.

(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.

(c) When designating and selecting an access organization, the director shall, at a minimum, consider the following factors or criteria:

- (1) The management and technical experience of the organization, and its existing or proposed staff;
- (2) The broadcast or cablecast media and telecommunications experience of the organization and its existing or proposed staff;

- (3) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the director;
 - (4) The organization's short-term and long-term plans for PEG access services for a designated franchise area;
 - (5) The financial capability of the organization;
 - (6) The amount of funding required by the organization to provide the PEG access services requested by the director;
 - (7) The ability of the organization to provide reports, audits, and other information to the director;
 - (8) Whether the organization agrees to expand the marketplace of ideas, and is committed to allowing members of the public to express their First Amendment free speech rights;
 - (9) The organization's prior dealings and relationships with the State, if any;
 - (10) The organization's references;
 - (11) Other additional services, if any, the organization proposes to provide to the State and the public, and
 - (12) Other factors or criteria deemed applicable or necessary by the director.
- (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.
 (Eff _____)] (Auth: HRS §§440G-3, 440G-12) (Imp: HRS §§440G-3, 440G-12)

SUBCHAPTER [16] 17

SEVERABILITY

§16-131-73 Severability. If any section, subsection, sentence, clause, phrase, or portion of this chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof." [Eff and comp 12/23/91; comp _____] (Auth: HRS §440G-12) (Imp: HRS §440G-12)

David Franzel

From: Roy.Amemiya@centralpacificbank.com
Sent: Wednesday, September 24, 2008 8:20 AM
To: David Franzel; eknutzen@kauai.gov
Cc: 'Clyde Sonobe'; 'David Lassner'; 'Eric Knutzen'; gbenevides@co.hawaii.hi.us; 'Geri Ann Hong'; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; 'Hae Okimoto'; 'Jay April'; keo@keoinc.org; krollman@honolulu.gov; 'Laureen Wong'; shelly.pellegrino@co.maui.hi.us
Subject: RE: HCR 358 Task Force - Questions for SPO Consideration

Chair Eric,

I think David F. point below is worth discussing at our meeting. Would you consider adding to the agenda?

My personal opinion is that we won't get far unless we address the root question:

Are the current entities guaranteed their roles by virtue of having been created by DCCA for this purpose or can other entities apply/ compete to become PEG entities serving their communities? If the former, then there's a whole host of issues around roles, responsibilities and governance to address (unless we want to bury our heads in the sand and pretend everything is ok). If the latter, then we're into talking about some kind of open process for selection

without using the "P" word.

Regarding that very subject, the concession law seems to indicate in (b) 10 that the head of the DCCA (as opposed to the SPO) has the authority to determine that there is only one source.

(10) For operation of concessions that furnish goods or services for which there is only one source, as determined by the head of the awarding government agency in writing that shall be included in the contract file;

Again, I think it would be helpful if someone at the State that has been through complex concession procurement and comprehensive experience in awarding concession contracts were present to discuss this alternative.

Roy K. Amemiya, Jr.
 Director - Governmental Relations
 220 S. King St., 4th Floor
 Honolulu, Hawaii 96813
 Phone: (808) 535-2555 Cell: (808) 372-7744

"David Franzel" <davidfranzel@hawaii.rr.com>

09/23/2008 09:48 PM

To "David Lassner" <david@hawaii.edu>, <roy.amemiya@centralpacificbank.com>, "Eric Knutzen" <eknutzen@kauai.gov>

cc "Clyde Sonobe" <Clyde.Sonobe@dcca.hawaii.gov>, <gbenevides@co.hawaii.hi.us>, "Geri Ann Hong" <Geri_Ann_Hong@notes.k12.hi.us>, <ghirata@honolulu.gov>, <Glen.WY.Chock@dcca.hawaii.gov>, <gtakase3@hotmail.com>, "Jay April" <jay@akaku.org>, <keo@keoinc.org>, <krollman@honolulu.gov>, "Laureen Wong" <laureen.k.wong@dcca.hawaii.gov>.

9/24/2008

<shelly.pellegrino@co.maui.hi.us>, "Hae Okimoto" <hae@hawaii.edu>
Subject RE: HCR 358 Task Force - Questions for SPO Consideration

Chair Knutzen suggested that I provide HRS 102 as shown in the link that David provided.

§102-1 Definition. The word "concession" as used in this chapter means the grant to a person of the privilege to:

(1) Conduct operations involving the sale of goods, wares, merchandise, or services to the general public including but not limited to food and beverage establishments, retail stores, motor vehicle rental operations under chapter 437D, advertising, and communications and telecommunication services, in or on buildings or land under the jurisdiction of any government agency;

(2) Operate a parking lot on property owned or controlled by the State with the exception of buildings, facilities, and grounds operated by or otherwise under the jurisdiction of the department of education; and

(3) Use, for compensation, space on public property to display advertising, or to conduct operations for communications or telecommunications purposes. [L 1963, c 93, §1; Supp, §7B-1.5; am L 1967, c 189, §3; HRS §102-1; am L 1997, c 208, §2; am L 2001, c 303, §1]
§102-2 Contracts for concessions; bid required, exception. (a) Except as otherwise specifically provided by law, no concession or concession space shall be leased, let, licensed, rented out, or otherwise disposed of either by contract, lease, license, permit or any other arrangement, except under contract let after public notice for sealed bids in the manner provided by law; provided that the duration of the grant of the concession or concession space shall be related to the investment required but in no event to exceed fifteen years; provided further that and subject to approval by county council resolution, the fifteen-year limit shall not apply to nonprofit corporations organized pursuant to chapter 414D.

(b) The bidding requirements of subsection (a) shall not apply to concessions or space on public property set aside for the following purposes:

(1) For operation of ground transportation services and parking lot operations at airports, except for motor vehicle rental operations under chapter 437D;

(2) For lei vendors;

(3) For airline and aircraft operations;

(4) For automatic teller machines and vending machines, except vending machines located at public schools operated by blind or visually handicapped persons in accordance with section 302A-412;

(5) For operation of concessions set aside without any charge;

(6) For operation of concessions by handicapped or blind persons; except concessions operated in the public schools by blind or visually handicapped persons in accordance with section 302A-412;

(7) For operation of concessions on permits revocable on notice of thirty days or less; provided that no such permits shall be issued for more than a one year period;

(8) For operation of concessions or concession spaces for a beach service association dedicated to the preservation of the Hawaii beach boy tradition, incorporated as a nonprofit corporation in accordance with state law, and whose members are appropriately licensed or certified as required by law;

(9) For operation of concessions at county zoos, botanic gardens, or other county parks which are environmentally, culturally, historically, or

9/24/2008

operationally unique and are supported, by nonprofit corporations incorporated in accordance with state law solely for purposes of supporting county aims and goals of the zoo, botanic garden, or other county park, and operating under agreement with the appropriate agency solely for such purposes, aims, and goals;

(10) For operation of concessions that furnish goods or services for which there is only one source, as determined by the head of the awarding government agency in writing that shall be included in the contract file;

(11) For operation of concession or concession spaces at the convention center under chapter 201B; and

(12) For any of the operations of the Hawaii health systems corporation and its regional system boards.

(c) The bidding requirements of subsection (a) shall not apply to any nonrenewable dispositions granting rights for a period not in excess of fourteen days. [L 1959, c 245, §1; am L 1960, c 14, §2; am L 1962, c 5, §2; am L 1963, c 93, §§2, 3; Supp, §7B-1; am L 1967, c 189, §§1, 2; HRS §102-2; am L 1986, c 185, §2; am L 1987, c 101, §1; am L 1991, c 232, §1; am L 1996, c 44, §1 and c 89, §9; am L 2001, c 303, §2; am L 2002, c 253, §6; am L 2004, c 201, §§2, 6; am L 2007, c 15, §1 and c 290, §14]

Attorney General Opinions

Chapter's bidding requirements not applicable to sale of broadcasting right to University of Hawaii athletic events. Att. Gen. Op. 84-5.

Case Notes

Noninclusion of foreign exchange concessions under section emphasizes legislature's contemplation that foreign exchange concession at airport could be exclusive. 745 F.2d 1281.

Hawaii Legal Reporter Citations

Antitrust. 80-1 HLR 800049.

§102-3 Qualification of bidders. Before any prospective bidder is entitled to submit any bid for the occupancy of any such space, the prospective bidder shall, not less than six calendar days prior to the day designated for opening bids, give written notice to the officer charged with letting the contract of the prospective bidder's intention to bid, and the officer shall satisfy oneself of the prospective bidder's financial ability, experience and competence to carry out the terms and conditions of any contract that may be awarded. For this purpose, the officer may, in the officer's discretion, require prospective bidders to submit answers, under oath, to questions contained in a form of questionnaire setting forth a complete statement of the experience, competence and financial standing of the prospective bidders. Whenever it appears to the officer, from answers to the questionnaire or otherwise, that any prospective bidder is not fully qualified and able to carry out the terms and conditions of the contract that may be awarded, the officer shall, after affording the prospective bidder an opportunity to be heard and if still of the opinion that the bidder is not fully qualified to carry out the terms and conditions of the contract that may be awarded, refuse to receive or consider any bid offered by the prospective bidder. The officer charged with letting the contract shall not divulge or permit to be divulged the names and the number of persons who have submitted their notice of intention to bid until after the opening of bids. All information contained in the answers to questionnaires shall remain confidential, and any government officer or employee who knowingly divulges or permits to be divulged any such information to any person not fully entitled thereto shall be fined not more than \$250. Questionnaires so submitted shall be returned to the bidders after having served their purpose. [L 1959, c 245, §2; am L 1962, c 5, §3; Supp, §7B-2; HRS §102-3; gen ch 1985]

Case Notes

Bidders qualifications may be considered after bids have been received and considered as well as before. 47 H. 499, 393 P.2d 60; 5 H. App. 13, 674 P.2d 1019.

§102-4 Advertisement for bids. Public notice of a call for bids shall be made not less than three different days statewide, with respect to any state agency, or county-wide within the particular county with respect to any county or county agency. [L 1959, c 245, §3; Supp, §7B-3; HRS §102-4; am L 2001, c 303, §3]

9/24/2008

§102-5 Bids; opening; rejection. The time of opening of such tenders shall be not less than five days after the last publication. All bids shall be sealed and delivered to the officer advertising therefor and shall be opened by the officer at the hour and place to be stated in the call for tenders in the presence of all bidders who attend, and may be inspected by any bidder. All bids which do not comply with the requirements of the call for tenders shall be rejected. The officer calling for bids may reject any or all bids and waive any defects when in the officer's opinion such rejection or waiver will be for the best interest of the public. [L 1959, c 245, §4; Supp, §7B-4; HRS §102-5; gen ch 1985]

Case Notes

Mandamus compelling acceptance of bid is inapplicable when officer has discretion to reject any and all bids. 47 H. 499, 393 P.2d 60.

§102-6 Deposits of legal tender, etc., to accompany bid. (a) All bids shall be accompanied by a deposit of legal tender or by a certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, in a sum not less than five per cent of the amount bid, payable at sight or unconditionally assigned to the officer advertising for tenders; provided that when the amount bid exceeds \$50,000, the deposit shall be in a sum not less than \$2,500 plus two per cent of the amount in excess of \$50,000.

If the bid deposit is in the form of a surety bond, it shall be issued in accordance with subsection (b).

(b) A bid may be accompanied by a surety bond executed to the officer calling for bids by the bidder as principal and by any bonding company listed in the United States Treasury List; provided that the bond furnished by any surety listed shall not exceed the bonding capacity rating of that surety on the Treasury List; in a sum of equal amount, conditioned upon the bidder entering into the contract and furnishing satisfactory security within ten days after the award or within any further time as the officer may allow, if the bidder is awarded the contract. [L 1959, c 245, §5; am L 1962, c 5, §4; Supp, §7B-5; am L 1967, c 142, §1; HRS §102-6; am L 1975, c 167, §2; am L 1976, c 88, §2; am L 1983, c 108, §1; am L 1990, c 345, §2; am L 1992, c 274, §2; am L Sp 1993, c 8, §3; am L 1994, c 186, §3]

§102-7 Forfeiture of deposits, return thereof. If the bidder to whom the contract is awarded fails or neglects to enter into the contract and furnish satisfactory security, as required by sections 102-11 and 102-12, within ten days after the award or within such further time as the officer awarding the contract may allow, the officer shall pay the amount of the deposit into the treasury as a realization of the State, county or other governmental agency, as the case may be. If the contract is entered into and the security furnished within the required time, the deposit, certificate, or check shall be returned to the successful bidder. The deposits made by the unsuccessful bidders shall be returned to them after the contract is entered into or, if the contract is not awarded or entered into, after the officer's determination to publish another call for tenders. [L 1959, c 245, §6; Supp, §7B-6; HRS §102-7]

§102-8 Bond may be substituted for deposits. In lieu of the deposits prescribed by section 102-6, a bid may be accompanied by a surety bond executed to the officer calling for bids by the bidder as principal and by any corporation organized for the purpose of becoming surety on bonds, authorized under the laws of the United States or of the State to act as surety and doing business in the State under the laws of the United States or of the State, if a foreign corporation, and under the laws of the State, if a Hawaii corporation, as surety, in a penal sum of equal amount, conditioned upon the bidder entering into the contract and furnishing satisfactory security within ten days after the award or within any further time as the officer may allow, if the bidder is awarded the contract. [L 1959, c 245, §7; Supp, §7B-7; HRS §102-8; am L 1990, c 345, §3; am L 1992, c 274, §3]

§102-9 Contracts to be in writing; highest responsible bidder. All such contracts shall be in writing, shall be executed by the officer letting the contract in the name of the State, county, or the board, bureau, or commission thereof authorized to let contracts in its own name, as the case may be, and shall be made with the highest responsible bidder, if such bidder qualifies by providing the security required by sections 102-11 and 102-12. If the highest and best bid or any other bid is rejected, or if the bidder to whom the contract was awarded fails to enter into the contract and

furnish satisfactory security, the officer may, in the officer's discretion, award the contract to the next highest and best remaining responsible bidder. [L 1959, c 245, §8; Supp, pt of §7B-8; HRS §102-9; gen ch 1985]

Case Notes

Mandamus will not be granted unsuccessful bidder where contract has been executed and there has been part performance by awardee; taxpayer's suit contesting award of contract under invalid specifications. 47 H. 499, 393 P.2d 60.

§102-10 Modification of contract terms. If during the term of the contract (including contracts which have been executed and are presently in force) there has been a reduction of fifteen per cent or more in the volume of business of the concessionaire for a period of sixty days or more, computed on the average monthly gross income for the eighteen months just prior to the period or as long as the concessionaire has been in the business, whichever period is shorter, and such reduction as determined by the officer letting the contract is caused by construction work conducted during the period of time on, or within or contiguous to, the public property upon which the concession is located by either the state or county governments, or both, the officer, with the approval of the governor in the case of a state officer and the chief executive of the respective county in the case of a county officer, may modify any of the terms of the contract, including the agreed upon rent, for a period which will allow the concessionaire to recoup the amount lost by such reduction; provided that if the contract includes provisions allowing modification for the above contingencies, this section shall not be applicable thereto; provided further that this provision shall not apply to any particular concession if the application thereto may impair any contractual obligations with bondholders of the State or counties or with any other parties. [L 1963, c 93, §5; Supp, pt of §7B-8; HRS §102-10]

§102-11 Security for performance; conditions. (a) Before any contract is entered into, the party with whom the contract is proposed to be made shall give security for the performance thereof as follows:

(1) For a concession required to provide security under the contract in an amount less than four months' rental and other charges, if any:

(A) A good and sufficient bond;

(B) A deposit of legal tender; or

(C) A certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration; and

(2) For a concession required to provide security under the contract in an amount equal to or greater than four months' rental and other charges, if any: a good and sufficient bond.

(b) All security provided under this section shall:

(1) Be conditioned on the full and faithful performance of the contract in accordance with the terms and intent thereof;

(2) Be in an amount not less than two months' rental and other charges, if any, required under the contract; provided that any contract for the sale and delivery of in bond merchandise at Honolulu International Airport shall require a bond in an amount not less than four months of the highest minimum annual rental guaranty required under the contract; and

(3) By its terms inure to the benefit of the State or of the county, as the case may be. [L 1959, c 245, §9; Supp, §7B-9; HRS §102-11; am L 1982, c 141, §1; am L 2006, c 37, §2]

§102-12 Surety on bond; justification. A surety company authorized to do business under the laws of the State may be accepted as surety on the bond, whenever, in the opinion of the officer letting the contract, the rights of all parties in interest will be fully protected. If the surety or sureties on the bond, whether individual or corporate, shall be other than a surety company authorized to do business under the laws of the State, there shall be not more than four sureties who shall severally justify in such amounts as, taken together, will aggregate the full amount of the bond; provided that in the case of the other sureties the officer letting the contract shall require that the surety shall also severally deposit with the officer

9/24/2008

certified checks, certificates of deposit, or share certificates (unconditionally assigned or on demand on or after such period as the officer may stipulate) or bonds, stocks, or other negotiable securities, or execute and deliver to the officer a deed of trust of real property, all of such character as shall be satisfactory to the officer, each surety to furnish the security to the full cash value of one hundred per cent of the amount for which the surety shall so have justified; provided further that the contracting officer, in the officer's discretion, may waive the necessity of furnishing the security, to any extent that the officer may deem warranted, in cases where, upon an actual examination, the officer is satisfied as to the financial responsibility of the proposed surety or sureties; provided that if there is but one personal surety the surety shall so justify for the full amount of the bond. [L 1959, c 245, §10; Supp, §7B-10; HRS §102-12; gen ch 1985; am L 1990, c 345, §4]

§102-13 Amendment of contracts, when authorized. Where there is an outstanding contract, lease, license, permit, or any other such arrangement for the operation of concessions or concession spaces on governmental property, the parties may amend the instrument to permit a related use with an increased rental adjustment where the lessee, licensee or permittee, as the case may be, can show financial hardship arising out of changes of circumstances or otherwise, if required to continue operation under the original permitted use. [L 1962, c 5, §5; Supp, §7B-11.5; HRS §102-13]

§102-14 Use of public buildings by blind or visually handicapped persons.
 (a) For the purpose of providing blind or visually handicapped persons, as defined in sections 235-1, 347-1, and 347-2 with remunerative employment, enlarging their economic opportunities and stimulating them to greater efforts in striving to make themselves self-supporting, blind or visually handicapped persons registered by the department of human services under section 347-6 and issued permits under subsection (c) shall be authorized to operate vending facilities and machines in any state or county public building for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and such other articles or services prepared on or off the premises in accordance with all applicable laws.

(b) The department of human services, after consultation with authorities responsible for management of state or county public buildings, shall adopt rules in accordance with chapter 91, necessary for the implementation of this section, including, but not limited to rules to assure that priority be given to registered blind or visually handicapped persons in the operation of vending facilities in state or county public buildings and to establish, whenever feasible, one or more vending facilities in all state and county public buildings.

(c) Assignment of vending facilities and space for vending machines shall be by permit issued by the department of human services.

(d) No person shall advertise or otherwise solicit the sale of food or beverages for human consumption in any public building which is in competition with a vending facility or machine operated or maintained by a duly authorized blind or visually handicapped person as prescribed by rules and regulations established under chapter 91. Any person who violates this subsection shall be subject to a fine of not more than \$1,000.

(e) After July 1, 1981, or upon the expiration of vending machine contracts in existence on June 10, 1981, no vending machines shall be placed in any state or county public building in which there is a vending facility or machine assigned by permit to a blind or visually handicapped person except pursuant to a permit issued by the department of human services.

(f) Any permit granted pursuant hereto may be terminated by the department of human services if the department determines that the vending facility or machine is not being operated in accordance with prescribed rules.

(g) This section shall not apply to the judiciary history center facilities in the Ali'iolani Hale building, University of Hawai'i system, public library system facilities, department of education facilities, department of transportation airport and harbor restaurant and lounge facilities and operations, public parks, and state and county facilities designed and intended for use as facilities for entertainment and other public events.

(h) After July 1, 1981, any department, agency, or instrumentality of the State or any of its political subdivisions planning the construction, substantial alteration, or renovations of any building shall consider including plans for a vending facility maintained or operated by a blind or visually handicapped person. The present vendor who is operating a vending facility shall not be displaced or dislocated from any state or county building because of renovations or substantial alterations, except for any

temporary displacement or dislocation which may be necessary for the completion of the renovations or alterations. Any such vendor shall have the first option to operate the facility upon completion of the renovations or substantial alterations. [L 1937, c 208, §1; RL 1945, §465; RL 1955, §7-20; am L 1959, c 246, §14; am L 1964, c 30, §2; HRS §102-14; am L 1981, c 131, §1; am L 1987, c 339, §4; am L 1993, c 328, §2; am L 1994, c 57, §3; am L 1996, c 138, §2]

Revision Note

In subsection (e), "June 10, 1981" substituted for "the effective date of this Act."

Cross References

Adoption of rules, see chapter 91.

Case Notes

As the federal adjudication path applied to disputes arising from the Hawaii Randolph-Sheppard Act, trial court lacked subject matter jurisdiction to decide the merits of the case. 112 H. 388, 146 P.3d 103.

§102-15 Violation voids contract. After May 31, 1959, any contract awarded or executed in violation of sections 102-1 to 102-12 shall be void. [L 1959, c 245, §11; Supp, §7B-11; HRS §102-15]

§102-16 Penalty. Any officer of the State or of any municipal, county, or other political subdivision thereof, or any person acting under or for such officer or any other person who violates any provisions of sections 102-1 to 102-12 shall be fined not more than \$1,000 or imprisoned not more than one year, or both. [L 1959, c 245, §12; Supp, §7B-12; HRS §102-16]

-----Original Message-----

From: David Lassner [mailto:david@hawaii.edu]
 Sent: Tuesday, September 23, 2008 6:29 AM
 To: roy.amemiya@centralpacificbank.com; David Franzel; Eric Knutzen
 Cc: aaron.fujioka@hawaii.gov; Clyde Sonobe; gbenevides@co.hawaii.hi.us; Geri Ann Hong; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; Jay April; keo@keoinc.org; krollman@honolulu.gov; Laureen Wong; shelly.pellegrino@co.maui.hi.us; David Lassner; Hae Okimoto
 Subject: Re: HCR 358 Task Force - Questions for SPO Consideration

Roy & Colleagues -- Concession law is is described in HRS Chapter 102. It's not all that long, and can be viewed by starting with definitions at:

http://www.capitol.hawaii.gov/hrscurrent/Vol102_Ch0046-0115/HRS0102/HRS_0102-0001.htm

and hitting NEXT a bunch of times. Unfortunately, I don't know any experts or authorities on this.

I'm sure that some simple lawyering or analysis will easily explain why the concession law (102) is legally inapplicable to this situation.

My guess is that the same people who believe that competitive procurement processes can not possibly be used to select a PEG entity will find comparable objections to the competitive concession process of 102, which appears to have even less discretion than the RFP processes of 103D. Their point is that the current entities should be guaranteed their current roles.

And I similarly speculate that the people who believe that the current PEG entities should have to compete against other qualified organizations won't care much whether competitive procurement (103D) or competitive concession (102) is used to open up the opportunity to serve as a PEG entity. Their point is that the current entities

9/24/2008

should be challenged or changed since they are not fulfilling the roles these community members believe appropriate for a PEG entity.

My personal opinion is that we won't get far unless we address the root question:

Are the current entities guaranteed their roles by virtue of having been created by DCCA for this purpose or can other entities apply/ compete to become PEG entities serving their communities? If the former, then there's a whole host of issues around roles, responsibilities and governance to address (unless we want to bury our heads in the sand and pretend everything is ok). If the latter, then we're into talking about some kind of open process for selection without using the "P" word.

david

P.S. to answer the 2nd part of question 1, here's the section on Bidder Qualifications from the concession law:

§102-3 Qualification of bidders. Before any prospective bidder is entitled to submit any bid for the occupancy of any such space, the prospective bidder shall, not less than six calendar days prior to the day designated for opening bids, give written notice to the officer charged with letting the contract of the prospective bidder's intention to bid, and the officer shall satisfy oneself of the prospective bidder's financial ability, experience and competence to carry out the terms and conditions of any contract that may be awarded. For this purpose, the officer may, in the officer's discretion, require prospective bidders to submit answers, under oath, to questions contained in a form of questionnaire setting forth a complete statement of the experience, competence and financial standing of the prospective bidders. Whenever it appears to the officer, from answers to the questionnaire or otherwise, that any prospective bidder is not fully qualified and able to carry out the terms and conditions of the contract that may be awarded, the officer shall, after affording the prospective bidder an opportunity to be heard and if still of the opinion that the bidder is not fully qualified to carry out the terms and conditions of the contract that may be awarded, refuse to receive or consider any bid offered by the prospective bidder. The officer charged with letting the contract shall not divulge or permit to be divulged the names and the number of persons who have submitted their notice of intention to bid until after the opening of bids. All information contained in the answers to questionnaires shall remain confidential, and any government officer or employee who knowingly divulges or permits to be divulged any such information to any person not fully entitled thereto shall be fined not more than \$250. Questionnaires so submitted shall be returned to the bidders after having served their purpose. [L 1959, c 245, §2; am L 1962, c 5, §3; Supp, §7B-2; HRS §102-3; gen ch 1985]

Case Notes

Bidders qualifications may be considered after bids have been received and considered as well as before. 47 H. 499, 393 P.2d 60; 5 H. App. 13, 674 P.2d 1019.

On Sep 22, 2008, at 5:34 PM, roy.amemiya@centralpacificbank.com wrote:

>
 > David, Eric -
 >
 > I must say that as a taskforce member, I am frustrated with the
 > vagueness of answers in the attachment. It appears to me that our
 > taskforce is not being given full cooperation for information and
 > candid answers that I believe we are entitled to and will need if we
 > are to make informed decisions.
 >
 > Which brings me to my request. Can we get someone that is an
 > authority on the concession chapter to be present at Wednesday's
 > meeting so that we can learn about these alternative procurement
 > measures? Thank you.
 >
 > Aaron -
 >
 > If Chair Knutzen is agreeable to my above request, whom would you
 > recommend as person(s) that can knowledgeable discuss procurement of

9/24/2008

> concessionaires with the taskforce?
>
> Also, I'm not sure whether you misunderstood question #3, but I
> believe we would like a listing and description of exemptions that
> have been granted to the procurement law. This will allow us to
> examine these and see if they can be applied to PEG access
> procurement. Please provide us with such a list?
>
> Sincerely,
>
> Roy K. Amemiya, Jr.
> Phone: (808) 535-2555 Cell: (808) 372-7744
>
>
>
> "David Franzel" <davidfranzel@hawaii.rr.com>
> 09/22/2008 04:49 PM
>
> To
> <aaron.fujioka@hawaii.gov>
> cc
> <jay@akaku.org>, <keo@keoinc.org>, <gtakase3@hotmail.com>,
> <roy.amemiya@centralpacificbank.com
> >, <gbenevides@co.hawaii.hi.us>, <eknutzen@kauai.gov>,
> <shelly.pellegrino@co.maui.hi.us
> >, <ghirata@honolulu.gov>, <Geri_Ann_Hong@notes.k12.hi.us>,
> <david@hawaii.edu
> >, <krollman@honolulu.gov>, <Clyde.Sonobe@dcca.hawaii.gov>,
> <Glen.WY.Chock@dcca.hawaii.gov
> >, <laureen.k.wong@dcca.hawaii.gov>
> Subject
> RE: HCR 358 Task Force - Questions for SPO Consideration
>
>
>
>
> Aaron, thanks very much.
>
> Task Force Members, I just received this response to our questions
> from SPO.
>
> See you Wednesday.
>
> David.
>
>
>
> From: David Franzel [mailto:davidfranzel@hawaii.rr.com]
> Sent: Monday, September 15, 2008 10:03 AM
> To: 'aaron.fujioka@hawaii.gov'
> Cc: 'jay@akaku.org'; 'keo@keoinc.org'; 'gtakase3@hotmail.com';
> 'roy.amemiya@centralpacificbank.com
> '; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov';
> 'shelly.pellegrino@co.maui.hi.us
> '; 'ghirata@honolulu.gov'; 'Geri_Ann_Hong@notes.k12.hi.us';
> 'david@hawaii.edu
> '; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov';
> 'Glen.WY.Chock@dcca.hawaii.gov
> '; 'laureen.k.wong@dcca.hawaii.gov'
> Subject: HCR 358 Task Force - Questions for SPO Consideration
>
> Aloha Aaron,
>
> The HCR 358 Task Force has several questions for you. I understand
> that you will not be present at our next meeting so your written
> response to the questions by Monday, September 22, 2008 would be
> much appreciated.
>
> 1. Please provide an overview of the concession law and
> include methods used to analyze bidder qualifications.
> 2. What alternatives are there to procurement?
> 3. Does SPO know of other exceptions to the procurement law?
> 4. How many bidders responded to the recent RFP? Were they
> qualified?
>
> Your response will be discussed at the upcoming September 24, 2008
> meeting and follow up questions on these and other topics will be

9/24/2008

> directed to you, thereafter.
>
> Mahalo.
>
> David Franzel, Facilitator.
>
> --- Scanned by M+ Guardian Messaging Firewall ---
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>

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9/24/2008

David Franzel

From: Jay April [jay@akaku.org]
Sent: Friday, September 26, 2008 1:45 PM
To: Eric Knutzen
Cc: Lance D Collins, Esq; David Franzel
Subject: HCR358 Task Force Motion

Aloha Eric,

Thank you for your leadership in the Task Force meeting on Wednesday. It was good to finally discuss alternatives to procurement. Please transmit the following language regarding the motion passed by Task Force members, to:

1. Members of the Hawaii State House
2. Members of the Hawaii State Senate
3. Larry Reifurth, Director, Commerce and Consumer Affairs
4. Aaron Fujioka, Administrator, State Procurement Office
5. Pamela A. Torres, Chairman, Procurement Policy Board

Thank You.

HCR 358 TASK FORCE September 24, 2008

MOTION PASSED 7 - 1

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 (SUBCHAPTER 16-131-70) FOR THE DESIGNATION AND SELECTION OF ACCESS ORGANIZATIONS UNTIL AFTER THE HCR 358 TASK FORCE HAS ISSUED IT'S FINAL REPORT TO THE LEGISLATURE.

David Franzel

From: Jay April [jay@akaku.org]
Sent: Monday, September 29, 2008 8:18 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.mauai.hi.us; ghirata@honolulu.gov; Geri_Ann_Hong@notes.k12.hi.us; david@hawaii.edu; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov; Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; 'Keali'i Lopez'
Subject: Re: HCR 358 Task Force - Draft Agenda - October 9, 2008 Task Force Meeting

Aloha David and Eric,

Agenda Item #6 should read, "Alternatives to Procurement Code" consistent with the directive of HCR 358.

Best,

Jay

On Sep 27, 2008, at 3:50 PM, David Franzel wrote:

Task Force Members,

Attached is a draft Agenda for the upcoming meeting. Please get me any comments by the end of the day on Monday, September 29, 2008 so that we can be sure to get this posted within seven (7) days from the October 9, 2008 meeting.

The only change in the document from our meeting is to add an Accept Minutes item after Approval of Agenda.

Thanks,

David

<HCR 358 Draft Agenda October 9, 2008 Meeting.doc>

From: David Franzel [mailto:davidfranzel@hawaii.rr.com]
Sent: Tuesday, September 30, 2008 9:48 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 - Final Agenda - October 9, 2008

Task Force

Sent to DCCA for posting.

Thanks.

12/15/2008

David Franzel

From: David Franzel [davidfranzel@hawaii.rr.com]
Sent: Tuesday, September 30, 2008 8:15 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: Letters Sent to SPO and AG and Response From SPO

Task Force.

FYI

David.

12/15/2008

Bill "Kaipo" Asing
Acting Mayor

Gary Heu
Administrative Assistant



Wallace Rezendes, Jr.
Director of Finance

Belma Baris
Deputy Director of Finance

COUNTY OF KAUA'I

September 3, 2008

Mark Bennett, Esq.
Attorney General
425 S. Queen St
Honolulu HI 96813
Re: Requests 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 requests an opinion from you regarding the applicability of Chapter 103D, Hawai'i Revised Statutes, to the Director of the Department of Commerce and Consumer Affairs' power to designate "access organizations" under Chapter 440G, Hawai'i Revised Statutes.

If in your opinion the Director of the Department of Commerce and Consumer Affairs is required to comply with Chapter 103D in the designation of access organizations under Chapter 440G, does the designation of access organizations fall under any of the applicable exemptions, and if so, please identify these exemptions and the rationale for the exemption.

The Task Force has determined that this information will help assist it in fulfilling its charge from the Hawai'i State Legislature. Your thoughtful consideration in expediting this request and preferably submitting your response by September 22, 2008 is greatly appreciated by the H.C.R. 358 H.D. 1 Task Force, the Hawai'i State Legislature and the public we all serve.

Sincerely,

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

Bill "Kaipo" Asing
Acting Mayor

Gary Heu
Administrative Assistant



Wallace Rezendes, Jr.
Director of Finance

Belma Baris
Deputy Director of Finance

COUNTY OF KAUA'I

September 3, 2008

Pamela Torres
Chairwoman
Procurement Policy Board
1151 Punchbowl Street
Honolulu, Hawaii 96813

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

Dear Madam,

On behalf of the H.C.R. 358 H.D. 1 (2008) Task Force as its chairman, the Task Force requests copies of the Procurement Policy Board's written decisions regarding Olelo: Corporation for Community Television's H.R.S. 91-8 petition for a declaratory order regarding "access organizations" as "utility services" and copies of the Procurement Policy Board's written opinion regarding Akaku: Maui Community Television's H.R.S. 91-8 petition for a declaratory order regarding "funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs" and the applicability of the Procurement Code "to services for providing public educational and governmental cable services."

The Task Force is under the information or belief that the Procurement Policy Board rendered decisions on these petitions in early 2007.

The Task Force has determined that this information will help assist it in fulfilling its charge from the Hawai'i State Legislature. Your thoughtful consideration in expediting this request and preferably submitting your response by September 22, 2008 is greatly appreciated by the H.C.R. 358 H.D. 1 Task Force, the Hawai'i State Legislature and the public we all serve.

Sincerely,

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

LINDA LINGLE
GOVERNOR



PROCUREMENT POLICY BOARD
DARRYL W. BARCUSH
LESLIE S. CHINEN
DARYLE ANN HO
KEITH T. MATSUMOTO
RUGS 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.spc.hawaii.gov

September 22, 2008

Mr. Eric Knutzen
Chairman
H.C.R. 358, H.D. 1 (2008) Task Force
4444 Rice Street, Suite 427
Lihue, Hawaii 96766

Dear Mr. Knutzen:

Thank you for your letter of September 3, 2008 requesting copies of the Procurement Policy Board's written decisions regarding the petitions involving the procurement code and public, educational, and governmental access organizations.

The Board heard public testimony on these petitions, deliberated, and ultimately denied the petitions. However, prior to the issuance of the Board's written decisions, hearings commenced in Circuit Court on Maui in petitioner's first lawsuit against the State. Because the lawsuit involved the same overriding issue as the petitions, that is, the application of the procurement code to contracts with public, educational, and governmental access organizations, counsel for petitioners agreed to drop the petitions and allow the Court to decide the issue. In August 2007, Petitioner filed three lawsuits against the State, challenging the application of the procurement code to contracts with public, educational, and governmental access organizations, which are still pending before the Maui Circuit Court. The first lawsuit was dismissed by the Court in late October 2007.

Very truly yours,

Pamela Torres
Chair
Procurement Policy Board

David Franzel

From: Jay April [jay@akaku.org]
Sent: Monday, September 29, 2008 8:18 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; ghirata@honolulu.gov; Geri_Ann_Hong@notes.k12.hi.us; david@hawaii.edu; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov; Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; 'Keali'i Lopez'
Subject: Re: HCR 358 Task Force - Draft Agenda - October 9, 2008 Task Force Meeting

Aloha David and Eric,

Agenda Item #6 should read, "Alternatives to Procurement Code" consistent with the directive of HCR 358.

Best,

Jay

On Sep 27, 2008, at 3:50 PM, David Franzel wrote:

Task Force Members

Attached is a draft Agenda for the upcoming meeting. Please get me any comments by the end of the day on Monday, September 29, 2008 so that we can be sure to get this posted within seven (7) days from the October 9, 2008 meeting.

The only change in the document from our meeting is to add an Accept Minutes item after Approval of Agenda.

Thanks

David

<HCR 358 Draft Agenda October 9, 2008 Meeting.doc>

From: David Franzel [mailto:davidfranzel@hawaii.rr.com]
Sent: Tuesday, September 30, 2008 9:48 AM
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Subject: RE: HCR 358 - Final Agenda - October 9, 2008

Task Force.

Sent to DCCA for posting.

Thanks.