



**STATE PROCUREMENT OFFICE
NOTICE OF AND REQUEST FOR EXEMPTION
FROM CHAPTER 103D, HRS**

1. TO: Chief Procurement Officer

2. FROM: Department of Commerce & Consumer Affairs, Cable Television Division

Department/Division/Agency

Pursuant to §103D-102(b)(4), HRS, and Chapter 3-120, HAR, the Department requests a procurement exemption to purchase the following:

3. Description of goods, services or construction:

CABLE TELEVISION PUBLIC, EDUCATIONAL, AND GOVERNMENTAL (PEG) ACCESS SERVICES

Federal law (47 U.S.C. § 531) allows the State of Hawaii ("State"), the franchising authority, to establish requirements in a cable television franchise with respect to the designation or use of channel capacity for public, educational, and government ("PEG") use. The State, through the Department of Commerce and Consumer Affairs ("DCCA"), requires cable operators to designate PEG access channels through the franchise orders issued pursuant to HRS chapter 440G. In these franchise orders, DCCA recognized the benefit that PEG access provides the public and required cable operators (as one of the conditions to obtain cable television franchises in the State) to provide channels for PEG use and to pay annual PEG access fees for operations, facilities and equipment.

PEG access services include the following:

- the management of channels allocated for PEG access;
- the provision of facilities and equipment for the production of programming to be cablecast on the PEG access channels;
- the provision of training for individuals and organizations in the use of cameras, editing equipment, and production facilities;
- the cablecasting of non-commercial programs submitted by an individual or organization on PEG access channels;
- the marketing and promotion of the PEG access center and PEG access channels and programs; and
- the provision of support services to users of access facilities and equipment which may include assistance in the production of access programs and support of special projects.

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The name and address of each PEG access organization and the approximate amounts that the cable operator paid to each PEG access organization in 2005 are as follows:

4. Name of Vendors: Address:		5. Price:	
Ōlelo Community Television 1122 Mapunapuna Street Honolulu, HI 96819		Approximate annual amount \$4,100,000	
Na Leo 'O Hawaii 91 Mohouli Street Hilo, HI 96720		Approximate annual amount \$692,000	
Ho'ike: Kauai Community Television 4211 Rice Street, Suite 103 Lihue, HI 96766		Approximate annual amount \$336,000	
Akaku: Maui Community Television 333 Dairy Road, Suite 104-A Kahului, HI 96732		Approximate annual amount \$813,000	
6. Term of Contract:	From: July 1, 2006	To: _____	7. Prior Exemption Ref. No. PE-06-20-J

8. Explanation describing how procurement by competitive means is either not practicable nor advantageous to the State:

In determining whether to seek an exemption from the RFP process, the Department conducted meetings across the state, soliciting public comment and input on the current PEG access system and the impact of the competitive bid process on PEG access services. More than 200 persons attended the public comment meetings held on the islands of Hawaii, Maui, Molokai, Kauai and Oahu, and over 100 persons provided oral statements. The Department is making available to SPO DVD copies of the public comment meetings on all islands for its use. DCCA received hundreds of written comments on whether the Department should seek an exemption from the SPO or proceed directly with the RFP process. Copies of the written comments are posted on DCCA's webpage:

http://www.hawaii.gov/dcca/areas/catv/peg_contracts/. Hard copies are also available for review by SPO.

There were thoughtful comments from producers, viewers, community persons, and staff, as well as testimony by many individuals as to the importance of PEG access services, channels and programming in their lives. The vast majority of public comment presented support DCCA's seeking an exemption from SPO.

The following are some of the comments offered in support of DCCA proceeding directly with an RFP:

- “Subsidized” PEG access entities compete with independent producers for lucrative “for-pay” contracts;
- Greater financial accountability by providers under RFP system;
- Contract should require access provider to strictly comply with all applicable state open records and Sunshine laws;
- Contract should require access provider to strictly comply with first-come, non-discriminatory programming;
- Able to select providers of services based on objective cost/value analysis from many different options available within the community;
- Being able to require more access services for the same contract price, or requiring the same amount and type of services for a lesser contract price;
- Successful bidder may be new access provider with new innovative ideas and greater flexibility in developing programs to meet new community needs.

The following are some of the comments supporting a request for an exemption, arguing that procurement by competitive means is either not practicable, or advantageous to the State:

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- Competition for a PEG access contract is not consistent with the intent of PEG access. A new entity coming in to operate PEG access services may not appreciate the electronic soap box purpose of access services, and censor or favor certain views as opposed to others.
- PEG access involves community building. PEG access providers are part of the community they serve. They help to build community as well as encourage and support everyday citizens to share their ideas and messages with viewers.
 - Over the course of many years, each of the existing PEG access organizations has been able to build up a tremendous amount of trust within their communities and has developed a strong collaboration between the community and producers, viewers, staff and volunteers. If a new organization were to take over the access channels within a community, it would take considerable time to rebuild relationships, and the new bidder may not have sufficient time to develop deep relationships with a community given the limited time frame of a PEG access contract.
 - Neighbor island comments voiced concern that there may develop a loss of control to outsiders who may be less sensitive to particular island communities.
- Disruption of Service.
 - Volunteers who are crucial to PEG access may no longer participate if there is a new PEG access entity.
 - If a new access provider were to take over access services, there could be a profound loss of knowledge, history, and practices which the current access providers have developed. Each PEG access entity has developed guidelines and processes on programming questions for its constituents and producers.
- Retention of qualified staff. Retaining qualified experienced staff on long time basis would be impacted by frequent contract bidding process.
- Small pool of qualified competitors. While there may be those who have voiced an interest in participating in a competitive bidding process for PEG access services contracts, there are few other access services providers on each island with consistent

experience who would be able to manage PEG access channels and provide the other needed services.

- Significant resources required to develop RFP bid.
 - DCCA would spend considerable staff time to design and develop the RFP requirements and scope of services.
 - For an access organization to prepare and submit a bid to a complex RFP proposal would entail a significant amount of time and effort, and severely tax the resources of an access entity. For small access organizations, this would be an overwhelming task and burden. This effort would periodically detract from the central mission of the access entities, and for the smaller organizations, could prove to be very costly in terms of financial resources and manpower.
- Increased cost. For any new provider of PEG access services, the learning curve and mobilization would take substantial time and could be very costly. In addition, DCCA would spend considerable staff time to design and develop the RFP requirements and scope of services.
- DCCA's loss of flexibility. PEG services are constantly changing in light of changes to technology and based upon the needs of local communities, its constituents and viewers. RFP structure would reduce flexibility for PEG access entities to adapt or respond to changing technological developments or the changing needs of the community. Each PEG access entity has been allowed to develop flexibility to create and design customized programming and practices to best fit the needs of its constituents and viewers. If the DCCA were to write RFP requirements, there is the possibility that the Department may very well end up dictating to potential bidders programming, procedural questions that were historically left to the PEG access entities to decide.
- Statewide monopolization of service. A competitive bid process may foster monopolization of PEG access services by a few qualified providers and drive out competitors. The competitive bid process would tend to discourage cooperation among PEG access providers to share resources and programming.

The department discussed the public comments at the DCCA's Cable Advisory Committee (CAC) meeting on March 9, 2006 and received comments from two committee members at that meeting. The department is making available to SPO a DVD of the March 9, 2006 CAC meeting for its information.

After careful consideration of the public comments, as well as based on its own experience working with the PEG entities and its understanding of the applicable laws and rules, DCCA has determined that a request for an exemption from the procurement code for PEG access services contracts is warranted. For the following reasons, procurement is either not practicable or advantageous to the state, or both:

The PEG contracts are fundamentally different from other government contracts, in that they involve a unique service: facilitating the exercise of citizens' free speech rights. Public access channels have been characterized as the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet.

In determining how to facilitate the exercise of those rights, PEG access operators face a

wide range of difficult policy choices, not ordinarily faced by run-of-the-mill government contractors. Some of these issues were highlighted when DCCA conducted a series of public comment meetings on PEG access in 2003 (and are identified in DCCA's 2004 PEG access plan, a copy of which is posted on DCCA's website).

Among other issues, the PEGs must address: (1) the frequency and times at which programs will air initially, (2) whether it is appropriate to engage in "block" programming, i.e., grouping programs with certain subject matters together at the same time, (3) whether to facilitate productions (i.e., having PEG personnel directly participate in producing programming) by members of the public who want their message aired but cannot create the programming themselves, (4) whether to produce programs which allow political candidates to express their views, and if so, the appropriate format and ground rules for those programs, and (5) how often, and when, programs will be replayed. This list is intended to be illustrative, not exclusive. Government contractors do not typically exercise such wide-ranging discretion, nor do they address issues so fundamental to our citizenship.

DCCA's approach has been to delegate the resolution of these issues to the PEG entities, within certain parameters. Over time, each PEG has developed its own set of procedures, policies and practices to address them. They have done so in light of the unique circumstances that exists in each of the counties (as well as the communities within those counties) that they serve. There is a substantial risk that this institutional knowledge would be lost if the PEG contracts were procured.

Moreover, in devising an RFP, one key question will be how to address these difficult policy issues. One approach would be to have the RFP very specifically define what the contractor must do with regard to those issues. The problem with that approach is that government will then be effectively making decisions that have up until now been made by the PEG boards, even though the PEG boards are more familiar with the needs of their respective communities.

Another approach would be to have the RFP for each county reflect the policy choices that have been made by the existing boards. The problem with this approach is that it assumes that the issues are static. In fact, they are not—they constantly change as the community and other conditions change.

Alternatively, the RFP could leave it to the contractor to resolve these issues as it sees fit. However, the question then would be whether the contractor would or could be a neutral decision-maker. In the current system, the PEG entities are managed by boards of directors, the majority of whose members are appointed by the Director of DCCA; other directors are appointed by the cable operator, and one director on each board is chosen by open election. Although some observers may disagree with some of the decisions reached by the boards, overall, the Department believes that this system has resulted in boards that are familiar with their communities and that try to make decisions that are fair and even-handed.

The procurement process is intended to ensure government neutrality, but leaves open the possibility that successful bidders may themselves have bias. Simply put, there is a distinct possibility that a winning bidder would not be as neutral as the existing PEG boards. For

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example, it could have a particular ideological particular point of view, or have institutional priorities that cause it to tilt in favor of certain types of speech. While the contracts could include safeguards to prevent those factors from affecting the decisions that are made, there is a risk that there could nevertheless be a potential bias that could result in some points of view not being treated fairly.

Transition issues are another concern under the circumstances. Questions include whether the process of turning over assets (i.e., those that were purchased with cable fees) to a new entity will go smoothly? If there are disruptions in staff or with regard to equipment and facilities, will they affect services?

These are difficult issues, and the process of developing an RFP that will address them will itself be a challenging one that will require significant input from the community and other affected parties. It is doubtful that the cable television division will be able to address them using its existing in-house resources, and accordingly it will need to contact outside consultants for assistance in developing the RFP. The cost of that effort is another factor that must be considered in determining whether an RFP will be advantageous to the state.

Considering all of these factors, the department has concluded that the costs and risks of issuing an RFP at this time do not outweigh the potential benefits. Accordingly, it is our conclusion that issuing an RFP at this time would neither be practical nor advantageous to the state, and we respectfully request an exemption from the procurement code. It is our understanding that even if an exemption is granted, we would retain the discretion to issue an RFP in the future, should we conclude that the current approach is not working and that a PEG provider is not providing the services that the public deserves. We believe that allowing the department that flexibility in these unique circumstances best serves the public interest.

9. Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable:

The vendors listed above are the long time service providers for PEG access services in the various cable franchise areas throughout the State. If an exemption is granted, the DCCA plans to negotiate contracts with the existing PEG access organizations.

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10. A description of the agency's internal controls and approval requirements for the exempted procurement:

The Cable Television Division (CATV) will develop the scope of required access services and performance measures and reporting and evaluation requirements for the PEG access providers and will negotiate with the PEGs to have those items incorporated in the contracts. Once those contracts are signed, CATV will be responsible for monitoring the performance of access providers. The Director of Commerce and Consumer Affairs will review and approve the scope of services and performance measures, as well as the contracts themselves. The Director will also review the performance of the access providers under the contracts.

12. A list of agency personnel, by position, who will be involved in the approval process and administration of the contract:

Name	Position	Involvement in Process	
Mark E. Recktenwald	Director, DCCA	<input checked="" type="checkbox"/> Approval	<input checked="" type="checkbox"/> Administration
Clyde S. Sonobe	Administrator, CATV	<input checked="" type="checkbox"/> Approval	<input checked="" type="checkbox"/> Administration
		<input type="checkbox"/> Approval	<input type="checkbox"/> Administration
		<input type="checkbox"/> Approval	<input type="checkbox"/> Administration
		<input type="checkbox"/> Approval	<input type="checkbox"/> Administration
		<input type="checkbox"/> Approval	<input type="checkbox"/> Administration

13. Direct inquiries to:

Department: Department of Commerce and Consumer Affairs
 Contact Name: Clyde S. Sonobe
 Phone Number: 586-2620
 Fax Number: 586-2625

Agency shall ensure adherence to applicable administrative and statutory requirements

14. *I certify that the information provided above is, to the best of my knowledge, true and correct.*

Mark E. Recktenwald

APR 10 2006

Department Head

Date

