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VIA FACSIMILE

May 23, 2006

Mr. Aaron Fujioka  
Administrator  
State Procurement Office  
P.O. Box 119  
Honolulu, HI 96810-0119

Dear Mr. Fujioka:

Re: Procurement Exemption Request for Cable Television Public, Educational, and Governmental (PEG) Access Services, SPO Reference No. PE-06-064-J

In response to your memorandum of May 3, 2006, the Department of Commerce and Consumer Affairs submits further information in support of its Procurement Exemption Request. For convenience, your original question is first stated and then followed by the Department's response.

**1. SPO Question**

*The request states that comments received during PEG public hearings included: a new PEG provider may not appreciate the purpose of PEG services; may censor or favor certain views; will need considerable time to build relationships with a community; may be less sensitive to particular communities; may not allow PEG access volunteers to participate; may not have the knowledge, history and practices current PEGs have; and may be bias and not as neutral as existing PEG boards.*

While these are comments from producers, viewers, community persons, and staff of the PEGS, is there any substantiated evidence to support these concerns? Please explain.

### **DCCA Response**

As the question notes, the referenced comments were submitted by producers, viewers, community persons and staff of the PEGs. The department is not aware whether those making the comments have substantial evidence to support their concerns. In the absence of knowing who the “new PEG provider” is, it is impossible to offer “evidence” of its collective personality or how it will conduct business. Many of the concerns, however, can be anticipated to be likely, or at least possible. Based on the department’s experience, we can offer the following observations:

- *A new PEG provider ... may not appreciate the purpose of PEG services*

Unless a stated appreciation for or agreement with a particular understanding of PEG services is included as a requirement under a request for proposal, a new PEG provider might hold any of a number of possible understandings of the purpose of PEG service. Hence, it appears distinctly possible, if not likely, that a new PEG provider may not concur with, and thus may not appreciate, a particular understanding of the purpose of PEG services.

- *A new PEG provider ... may censor or favor certain views*

Any action that involves the exercise of PEG management discretion could have the effect, on a case by case basis, of favoring certain points of view. The current PEG boards have a diversity of views represented so as to minimize the risk of bias, which is a safeguard that may be lacking under a new PEG.

- *A new PEG provider ... will need considerable time to build relationships with a community*

This depends, in large part, on the degree to which a new PEG provider will retain existing PEG staff, officers and/or directors. The department appreciates the sentiment behind the implicit observation that each PEG provider has a relationship with its community, and that it is important to that relationship that the PEG provider and the community develop a mutual understanding of what the community wants from the PEG and what the PEG offers to the community. It is distinctly possible that a new PEG provider might retain many of the current PEG staff, officers or directors, and thus minimize the degree to which relationship building will be necessary. It is also distinctly possible that a new PEG provider might retain new staff, officers or directors and, presumably then, it may then need “considerable time to build relationships with a community.”

- *A new PEG provider ... may be less sensitive to particular communities*

To the extent that the new PEG provider includes staff, officers and/or directors who are not from a particular community or familiar with that community, it seems likely that a new PEG provider will likely – to some degree, or for some period of time – be more or less “sensitive to particular communities” than was the prior PEG provider.

- *A new PEG provider ... may not allow PEG access volunteers to participate*

This would depend entirely on how the new PEG provider elects to use volunteers. Unless the RFP were structured to require volunteers to participate, it would seem to be distinctly possible that a new PEG provider “may not allow PEG access volunteers to participate” to some extent.

- *A new PEG provider ... may not have the knowledge, history and practices current PEGs have*

Like many of the other contentions above, this would seem indisputably possible, but heavily dependent on the degree to which the new PEG provider includes people different from those who make up the incumbent PEG provider.

- *A new PEG provider ... may have bias, and may not be as neutral as the existing PEG board*

This also seems indisputably possible, but heavily dependent on the identity of the new PEG provider and the ability of the RFP to foreclose bias and require neutrality.

## 2. **SPO Question**

*The request also has similar statements such as "The procurement process is intended to ensure government neutrality, but leaves open the possibility that successful bidders may themselves have bias."*

Can the DCCA provide more clarification on this statement regarding procurement and neutrality, and what ‘bias’ would surface from successful bidders?

### **DCCA Response**

- *Procurement and neutrality*

The procurement process requires that all procurement factors be stated explicitly so as to ensure that bidders can understand the requirements and that the requirements are reasonably related to the result sought. Government preferences, except to the extent that they are disclosed and made part of the process, are prohibited. Government preference for a contractor or proposal is prohibited except as it follows from and relates directly to the process and the submittals.

- *Bias and the successful bidder*

It is distinctly possible that a group strongly devoted to narrow interests might be attracted to the possibility of operating a county's public access stations in order to more effectively advance their views. For instance, people have speculated that real estate developers would wish to be in such a position, and have argued that those developer interests would be inclined to exclude programming that did not support development. Conversely, presumably, anti-development interests might do the same thing.

### **3. SPO Question**

*The request states that retaining qualified experienced staff on a long-term basis would be impacted by the frequent contract bidding process.*

The procurement code, HRS chapter 103D, provides for multi-term or multi-year contracts. The RFP would detail the term of contract that for example may be for 5, 8, or more years. We note your request does not state the end date for these proposed exempt contracts. What is the term of contract you are requesting?

### **DCCA Response**

The Department has not determined the length of the contract term.

**4. SPO Question**

*The request details the significant resources necessary for DCCA to develop a request for proposals (RFP) and for PEGs to submit offers.*

State of Hawaii purchasing agencies are required to comply with the procurement code and expend the necessary resource to conduct their procurements. It is the intent of the Legislature to have a procurement code that ensures the fair and equitable treatment of all persons who deal with the procurement system and to increase public confidence in the procedures followed in public procurement.

With PEG access service contracts that total approximately \$6 million a year, preparing a RFP and having offerors submit proposals is a small requirement considering what's at stake. Realizing the importance of the PEG access services, the SPO is willing to assist the DCCA in developing and issuing the RFP. Please advise if you want the assistance of SPO.

**DCCA Response**

The Department welcomes the assistance of SPO in developing an RFP if the exemption request is denied.

**5. SPO Question**

*The request states a RFP would reduce flexibility for PEGs to adapt or respond to changing technological developments or needs of the community and the DCCA may end up dictating programming, or procedural questions historically left to the PEGs.*

Explain why the DCCA cannot include terms and provisions in a RFP that allow for the flexibility of the PEGs without the DCCA dictating procedures normally left to the PEGs?

**DCCA Response**

An RFP could be drafted that would reduce PEG flexibility and dictate procedures normally left to the PEGs. However, that would reduce the new PEG providers' ability to respond to changing conditions during the contract term.

**6. SPO Question**

*The request states the DCCA's approach has been to delegate the resolution of these issues to the PEG entities, within certain parameters.*

Explain why the DCCA cannot provide guidance and recommendations in the RFP to address the issues that are being managed and addressed by the current PEG entities?

**DCCA Response**

See DCCA Response to Question 5.

**SPO Question**

Provide a complete description of services that are currently required and performed by the contracted PEG entities.

**DCCA Response**

- Manage channels allocated for PEG access Channels. Schedules programming on access channels (on Oahu 4 channels, on neighbor islands 3 channels) as well as being responsible for 2 other channels programmed by University of Hawaii and the State Department of Education.
- Maintain all PEG access facilities (e.g., production studios, offices, edit bays, control rooms, building, etc.) and equipment (e.g., video equipment, cameras, tripods, editing equipment, furniture, etc.) for the production of programming to be cablecast on the PEG access channels. Purchase new equipment to replenish and/or update existing equipment.
- Develop and provide training to educational, governmental, and community organizations and also to the general public in the use of the PEG access production facilities and equipment.
- Market and promote the PEG access center and the PEG access channels and programs.
- Provide support services to the users of the PEG access facilities and equipment. These services may include assistance in the production of PEG access programs and support of special projects.
- Provide information and reports as requested by the Department
- Provide other services related to PEG access as reasonably requested by the Department.

**7. SPO Question**

What makes these PEG contracts fundamentally different from other government contracts? While it is claimed that the PEG access services may be unique, explain why this factor(s) should prevent other qualified entities from competing, and thereafter awarded a contract to provide the same or better service.

**DCCA Response**

The PEG access contracts involve facilitation of the exercise of citizens' first amendment rights of free speech. This service is qualitatively different from other services, such as janitorial services or printing services that can be standardized and quantified. PEG access entities are afforded considerable discretion in their operations and it would be difficult to incorporate these aspects in an RFP. A change in PEG services contractors may not be cost effective in that it would take considerable effort and time to develop knowledge of the community and relationships with constituents.

**8. SPO Question**

The SPO acknowledges that in the transition from non-competed contracts to contracts awarded via the RFP process presents numerous issues, but why does the DCCA believe that these issues cannot be adequately addressed?

**DCCA Response**

The department does not contend that these issues cannot be adequately addressed. It is possible that they could. The breadth of the transition issues, though, suggests that they also might not. Combining that with the significant issues at stake in contract performance, we believe, means that the wiser course is to exempt these contracts from the process.

**9. SPO Question**

*The request states there are few other PEG access providers on each island with consistent experience to manage PEG access channels.*

Explain why the DCCA cannot include experience in managing PEG access channels as contractor qualifications and/or evaluation criteria in a RFP.

**DCCA Response**

Presumably, the department could include experience in managing PEG access channels as a contractor qualification and/or evaluation criteria in an RFP,

although this would severely limit the number of potential qualified offerors. As discussed in response to question 4, we welcome the SPO's thoughts and involvement in drafting the RFP, if the exemption request is denied.

### **SPO Question**

How did the DCCA determine that the PEG entities are not "*run-of-the-mill government contractors*" and what qualifications make these PEG entities unique? Explain how these unique qualifications cannot be made a part of the RFP, rather than an exception to the competitive process.

### **DCCA Response**

The department observed that PEG entities are confronted with a wide range of difficult policy choices, and that those choices are "not ordinarily faced by run-of-the-mill government contractors." This is because they are called upon to decide unique issues involving the first amendment rights of our citizens. Although not perfect, the current structure of the PEGs has generally produced decisions that are sensitive to those issues. It is not clear that the RFP could be drafted so as to exclude the possibility of less neutral decision-making.

If the unique and fundamental nature of the interests affected by the PEG contracts do not militate in favor of exempting the contracts from the procurement process, the department, as noted in response to question 4, will welcome the SPO's thoughts and involvement in drafting the RFP to ensure that those unique interests can be protected.

- *Provide the names of all possible contractors that the DCCA believes would qualify to provide the required PED access services.*

Other than the existing PEG entities, the DCCA is aware that there have been other organizations or individuals who have expressed interest in bidding on an RFP for PEG access services, or about whom others have speculated may be interested. At this time, the Department has not determined what the qualifications should be, and consequently has not determined whether these organizations or individuals are qualified to provide the required PEG access services.

### **10. SPO Question**

Describe in detail in what manner will PEG access services be diminished if any organizations other than the current providers are selected.



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DCCA Response

It is distinctly possible that a new PEG provider may result in reduced services for a period of time while the new provider develops a track record, establishes credibility, and learns what the community wants. See also the factors discussed in response to question 9 above.

Thank you for your thoughtful consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark E. Recktenwald". The signature is written in a cursive style with some loops and flourishes.

Mark E. Recktenwald  
Director of Commerce and Consumer Affairs

cc: Clyde S. Sonobe, CATV