



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

15 JAN -6 AIO:26

TO: Chief Procurement Officer
FROM: Department of Commerce and Consumer Affairs
Name of Requesting Department

ADMINISTRATION
STATE PROCUREMENT OFFICE
STATE OF HAWAII

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

1. Describe the goods, services or construction:
Statewide non-commercial broadcast of the wide range and unique educational, cultural, historical, and informational television programs available through the Public Broadcasting Service ("PBS") and other forms of non-commercial programming (local and/or Hawaii Public Television Foundation, dba PBS Hawaii ("PBS Hawaii") produced and nationally produced), outreach, story-telling, and educational services made available to viewers of all ages across the State of Hawaii ("State"), without direct fees or any service charges, available seven days a week with easy access through multiple content platforms.

2. Vendor/Contractor/Service Provider:	Hawaii Public Television Foundation, dba PBS Hawaii	3. Amount of Request:	\$ \$3,300,000/year (approx)*		
4. Term of Contract From:	7/1/2015	To:	6/30/2025	5. Prior SPO-007, Procurement Exemption (PE):	N/A

6. Explain in detail, why it is not practicable or not advantageous for the department to procure by competitive means:
See attached.

7. Explain in detail, the process that will be or was utilized in selecting the vendor/contractor/service provider:
See attached.

8. Identify the primary responsible staff person(s) conducting and managing this procurement. (Appropriate delegated procurement authority and completion of mandatory training required).

*Point of contact (Place asterisk after name of person to contact for additional information).

Name	Division/Agency	Phone Number	e-mail address
Ji Sook Kim*	CATV	586-2624	jisook.kim@dcca.hawaii.gov

*All requirements/approvals and internal controls for this expenditure is the responsibility of the department.
I certify that the information provided above is, to the best of my knowledge, true and correct.*

Catherine P. Awala Colon

Department Head Signature

1/5/15

Date

For Chief Procurement Officer Use Only

Date Notice Posted: 1.9.15

Inquiries about this request shall be directed to the contact named in No. 8. Submit written objection to this notice to issue an exempt contract within seven calendar days or as otherwise allowed from date notice posted to:

state.procurement.office@hawaii.gov

Chief Procurement Officer (CPO) Comments:

Approved

Disapproved

No Action Required

Chief Procurement Officer Signature

Date

Attachment to "Notice of Request for Exemption from HRS Chapter 103D"

To: Chief Procurement Officer

From: Catherine P. Awakuni Colón, Interim Director of DCCA

Date: January 5, 2015

3. Amount of Request: Approximately \$3,300,000 per year. Under the cable television franchise orders issued to cable operators in the State of Hawaii ("**State**"), the Department of Commerce and Consumer Affairs ("**DCCA**") directs the cable operators (i.e., Oceanic Time Warner Cable LLC ("**OTWC**") and Hawaiian Telcom Services Company, Inc. ("**HTSC**")) to each pay one percent (1%) of their respective annual gross revenues to Hawaii Public Television Foundation, dba PBS Hawaii ("**PBS Hawaii**"). For fiscal year 2014, this amount totaled approximately \$3,300,000.

6. Explain in detail, why it is not practicable or not advantageous for the department to procure by competitive means:

DCCA has an existing contract with PBS Hawaii, the State's only locally owned, noncommercial statewide public television broadcast station that is authorized to provide programming offered by the Public Broadcasting Service ("**PBS**"), a national nonprofit organization. PBS Hawaii, which has a noncommercial license from the Federal Communications Commission ("**FCC**") as a statewide educational broadcaster in Hawaii, operates a signal that reaches more Hawaii households than all other television program providers in the State – commercial and cable – effectively reaching 98% of Hawaii's population. Unlike other television program providers, PBS Hawaii's signal reaches the most financially disadvantaged areas in Hawaii, as verified by data from the 2012 U.S. Census. In addition, while other broadcasters may also provide educational and cultural programming in the State, PBS Hawaii is the sole Hawaii member of PBS which provides access to quality television programming and related services to hundreds of member stations, including PBS Hawaii.

PBS membership is limited to television stations that are able to meet certain financial, technical, and programming requirements and obligations set forth by the organization (i.e., PBS) and the FCC. In addition, the PBS Board of Directors' "Policy of Admission to PBS Membership," adopted on February 6, 2000, revised on June 22, 2012, and which is still in effect, makes PBS membership unavailable to new applicants in areas already served by a full PBS member station. Thus, as a full member station of PBS, PBS Hawaii is the only television broadcast station in Hawaii that would be granted PBS membership and can provide the programming offered by PBS.

Given the above, for compliance with the requirements of Hawaii Revised Statutes (“HRS”) Chapter 103D, DCCA submitted numerous “Notice and Request for Sole Source” with the State Procurement Office (“SPO”) which have all been approved, as documented via SPO Sole Source Nos. below:

- Sole Source No. 06-063-C (from 7/1/2006 – 06/30/2008);
- Sole Source No. 08-071-C (from 7/1/2008 – 06/30/2010);
- Sole Source No. 10-045-D (from 7/1/2010 – 06/30/2012);
- Sole Source No. 12-068D (from 7/1/2012 – 06/30/2014); and
- Sole Source No. 14-077D (from 7/1/2014 – 06/30/2015).

For the first eight (8) years, under the restrictions of sole source procurement, SPO approved DCCA’s procurement of PBS Hawaii’s services for four, two- (2) year periods. Upon the end of each two (2) -year period, DCCA renewed procurement of the service as a new procurement for another two (2) years, as evidenced above. However, during the last procurement cycle, SPO approved DCCA’s procurement of PBS Hawaii’s services for a single year, and requested that DCCA reevaluate the process used to procure PBS Hawaii’s services.

Upon reexamination, rather than continually submitting notices and requests for sole source approval, DCCA believes that the more appropriate route, at this time, is to submit a notice for exemption from the requirements of HRS Chapter 103D, pursuant to HRS § 103D-102 and Hawaii Administrative Rules (“HAR”) § 3-120-4. Specifically, as noted in SPO’s rules, “[n]otwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not practicable or not advantageous to the State.” HAR § 3-120-4(a) (emphasis added).

At this juncture, DCCA advises SPO that procurement of PBS Hawaii’s services for the State through competitive means is neither practicable nor advantageous to the State. Accordingly, DCCA requests approval of this exemption request for a period of ten (10) years (i.e., from July 1, 2015 through June 30, 2025). The basis of our request is set forth below.

First, and foremost, application of the requirements of HRS Chapter 103D is not advantageous to the State in this case since the price that the State pays for the service is not based on market forces, and is not under the control of the vendor, PBS Hawaii. As noted previously, through the cable television franchise orders issued to cable operators in the State, DCCA orders the cable operators (i.e., OTWC and HTSC) to each pay one percent (1%) of their respective annual gross revenues to PBS Hawaii for the provision of its services. Thus, the price paid for PBS Hawaii’s service is: based on OTWC’s and HTSC’s annual gross revenues, pursuant to DCCA’s orders; will vary year by year; is not contingent on market forces; and is not subject to vendor manipulation or control.

Second, given that PBS Hawaii is the sole Hawaii member of PBS and is the only broadcaster in the State that can access the unique and award-winning programs and shows that PBS offers its member stations (i.e., no other vendor can provide the service), DCCA in the past complied with the requirements of HRS Chapter 103D via the sole source procurement process. As mentioned above, each DCCA request and notice for sole source procurement of PBS Hawaii's services was approved. As we had in the past, in 2014, DCCA received verification that PBS' "Policy of Admission to PBS Membership" is still in effect. In short, PBS' policy, which was adopted by the PBS Board of Directors on February 6, 2000 and revised on June 22, 2012, states that membership will not be made available to new applicants since it would duplicate service provided by member stations. Given that restricting duplication of service is the basis for the policy to deny PBS membership in areas already served by a full PBS member and this policy is not expected to be altered in the future, no other vendor likely will provide the service that PBS Hawaii provides as long as PBS Hawaii is a member station. Thus, the application of HRS Chapter 103D with respect to DCCA's procurement of PBS Hawaii's service is not practicable and is not advantageous to the State since PBS Hawaii will continue to be the only vendor that will be authorized to provide this service in the future.

In 1993, the Director of DCCA determined that it was in the public interest to provide funding for PBS Hawaii's predecessor-in-interest, the Hawaii Public Broadcasting Authority ("HPBA") and ordered the cable operator to provide one percent (1%) of its annual gross revenues to HPBA. Consistent with the precedent established in 1993, DCCA continues to require cable providers operating in the State to provide PBS Hawaii one percent (1%) of their annual gross revenues which is the amount reflected in DCCA's contract with PBS Hawaii. The price for PBS Hawaii services is "fair" and consistent with how many other states support public broadcasting service throughout the nation. Records indicate that thirty-five (35) of the fifty (50) states provide public funds for public broadcasting service and that many states provided funding over thirty-five (35%) of the PBS organizations' total budgets. Moreover, some states including South Dakota, West Virginia, Iowa, Missouri, Georgia, Arkansas and Wyoming provide public funds for PBS organizations in their respective states amounting to over fifty percent (50%), over sixty percent (60%), and even over seventy percent (70%) of the organizations' total budgets. In 2014, the amount provided to PBS Hawaii for its service (approximately \$3,300,000) was equal to approximately thirty percent (30%) of PBS Hawaii's budget for the year. In contrast, the PBS organizations in Kentucky received state funding of approximately \$26.5 million which equates to roughly forty-nine (49%) of their budgets. In addition, each year, PBS Hawaii submits its "Year in Review" report to DCCA which details the programs and services that it provides to the public.

Finally, prior to 2000, the services provided by PBS Hawaii were provided by HPBA, a State governmental entity and PBS Hawaii's predecessor-in-interest. DCCA established the "price" for HPBA's programs and services as one percent

(1%) of the cable operator's annual gross revenues in 1993. These factors are significant since HRS Chapter 103D is not applicable for contracts by governmental bodies: (1) for the disbursement of funds to governmental bodies of the State, pursuant to HRS § 103D-102(b)(2)(G); and (2) solicited or entered into before July 1, 1994, pursuant to HRS § 103D-102(b)(1). Although, PBS Hawaii (formerly HPBA) is no longer a State governmental body and the contract with PBS Hawaii was not formally entered into until 1998, DCCA believes that these matters are relevant to SPO's consideration of this exemption request.

Based on the factors set forth above, DCCA advises SPO that the requirements of HRS Chapter 103D which obligates DCCA to procure services by competitive means in this case is neither practicable nor advantageous to the State. Thus, DCCA requests approval of this exemption request for a period of ten (10) years (i.e., from July 1, 2015 through June 30, 2025).

7. Explain in detail, the process that will be or was utilized in selecting the vendor/contractor/service provider:

As noted above, the services now provided by PBS Hawaii were initially provided and governed by HPBA, a State entity. The 1972 Hawaii State Legislature ("**Legislature**") determined that there was a need to "stimulate the growth and development of public broadcasting to enlighten all citizens of Hawaii" and established the HPBA and the board to govern it. Act 199, Session Laws of the State of Hawaii ("**SLH**") 1972 ("**Act 199**") at 1. The purpose of the HPBA was to "establish, manage, control and operate public broadcasting facilities, to produce or otherwise obtain for broadcast, programs intended to enlighten the people of the State, and to air such programs to the citizens of Hawaii." Act 199 at 2.

In 1999, the Legislature passed Act 63 to transfer the licenses, assets, responsibilities, and functions of the HPBA (commonly known as Hawaii Public Television) to PBS Hawaii, a private, not-for-profit organization. See Act 63, SLH 1999. The Legislature stated that the transfer, with the effective date of July 1, 2000, was necessary due to the result of significant reductions in State and federal funding for the HPBA.

Starting from 1993, before the licenses, assets, responsibilities, and functions for the provisions of public broadcasting were transferred from HPBA (a State entity) to PBS Hawaii (a private non-profit organization), DCCA ordered the cable operator (at that time, Time Warner Entertainment Company, L.P., predecessor-in-interest to OTWC) to pay HPBA one percent (1%) its annual gross revenues. In so doing, DCCA at that time recognized that the Legislature previously provided funding support for HPBA's programming efforts through the State's franchise fees and stated that "the Legislature clearly recognized that providing access to the services of the public broadcasting system [(PBS)] was an important part of the overall services offered through our cable television system." Decision and Order No. 154 issued on January 27, 1993, at 2. Since

then, DCCA recognized the importance of the public programming provided by HPBA (now PBS Hawaii) and determined that providing such funding was in the public interest and has continued to require that the cable operators operating in the State (now OTWC and HTSC) to pay PBS Hawaii one percent (1%) of its annual gross revenues. See Exhibits A and B. In 1998, recognizing the Legislature's intent to transfer the licenses, assets, responsibilities, and functions of HPBA to PBS Hawaii, DCCA entered into a contract with PBS Hawaii for statewide broadcasting of PBS programming and other services since it was the only entity in Hawaii able to access PBS programming as the sole Hawaii member station.

2. Maintenance and repair of the Cable Drop

TWE shall maintain, repair, and, if necessary, replace all infrastructure necessary to provide this service at no cost to the State or Subscribers.

O. High-Speed Broadband Service to Schools

The Director acknowledges that the FCC has classified cable modem service as an interstate information service as defined by Title I by the FCC, which is not currently subject to regulation by LFAs. Without waiving any rights with respect to the foregoing and under applicable Law, and in consideration of other terms and conditions in this Franchise Order, TWE voluntarily agrees to provide high-speed broadband service to schools as described below at no charge or cost to the State or Subscribers.

Upon the granting of the cable franchise, and at the direction of the Director, TWE agrees to provide business class high-speed broadband service, with maximum speeds of 15 MB downstream and 2 MB upstream, to one point of demarcation within each current as well as future DOE schools, institutions of higher learning and libraries throughout the State, for any purpose but primarily for online testing purposes, all at no cost or charge to the State and Subscribers, or to the DOE schools, institutions of higher learning or libraries. Each school, institution or library shall determine the point of demarcation and the cable modem(s) for the broadband connection. The DOE and TWE shall determine the implementation schedule of the high-speed broadband service. Whenever a DOE school has an INET connection, then TWE may remove its business class high-speed broadband service from that DOE school.

P. Public Broadcasting

DCCA believes that the continued viability of public broadcasting is in the public interest. The HPTF, dba PBS Hawai'i, provides statewide non-commercial broadcasting of Public Broadcasting Service's educational, cultural, and historic programs as well as local programming that educates, informs, and entertains residents, businesses, and visitors.

For the duration of the cable franchise term, unless modified by further Decision and Order by the Director, TWE shall provide funding to HPTF or the Director's designee in an amount equal to one percent of its Gross Revenues each year. The HPTF Fee shall be based on an amount no greater than one percent of TWE's Gross Revenue for the applicable preceding calendar year, as directed by the Director. The HPTF Fee may be used for operation and management, and for repair, maintenance, purchase or other acquisition of facilities and equipment for public broadcasting.

Commencing in 2010, during each and every year of the franchise term, TWE shall pay the HPTF Fee directly to HPTF or to the Director's designee no later than January 31st, unless otherwise ordered by the Director. In connection with the payment of the HPTF Fee, TWE shall submit to the Director copies of all such payments and any

other information requested by the Director along with a sworn statement as to the accuracy and completeness of these payments. The Director may consider transitioning the payment of the HPTF Fee to a monthly collection and payment system.

PBS Hawai'i or any successor broadcast television Channel(s) operated by the HPTF or its successor, shall not be deemed Access Channel(s) and shall not be counted or included among the Access Channels described in section IV.F.

Q. Cable System Facilities and Equipment

1. System Functionality

As designed, maintained, and upgraded, all facilities and equipment of the Cable System shall deliver high quality signals that meet federal law and FCC technical quality standards, regardless of the particular manner in which the signal is transmitted.

2. Test Results

As soon as available, but in no event more than thirty calendar days after the date of the test, TWE shall submit to the Director the annual test results from the FCC Cumulative Leak Index signal leakage and aeronautical offset requirements test.

3. Collateralization of Cable System Facilities And/Or Equipment

a. Notification of Collateralization. In the event that the assets of the Cable System will be or have been pledged by TWE as collateral for additional borrowing or other purposes, TWE shall notify the Director in writing no later than fifteen calendar days after the closing of the loan or credit facility. TWE shall inform the Director of the parties to the loan agreement or credit facility, the total amount borrowed, the term of loan, any restrictions or limitations on the borrowed amount and any other information the Director may require.

b. Subsequent Notification of Change. During the term of the franchise, TWE is not required to seek pre-approval of any change in an existing loan agreement or credit facility which encumbers or pledges the assets of the System; provided that the Director shall have the right to pre-approve any financing plan during a franchise renewal or transfer proceeding. Within thirty calendar days after closing, TWE shall notify the Director in writing of changes to any existing loan agreement or credit facility or any new loan agreement or credit facility. The Director shall have the right to request further information or to determine whether the change(s) to the loan agreement or credit facility affect the continued financial viability of the System and to require corrective measures if necessary.

c. Prompt Notification of Default. Notwithstanding any other provision to the contrary, in the event that TWE receives notice indicating that it is in default under any of its loan agreements, TWE shall: (1) promptly notify the Director in

O. **Schools and Institutions of Higher Learning**

1. **Interconnection to Schools and Libraries**

Upon specific request of a DOE school, an institution of higher learning, or a library, and subject to HTSC cable service availability, HTSC shall provide one (1) video signal drop, Basic Service Tier video service, one (1) set-top box or similar device, and DSL service all at no cost or charge to the State or Subscribers, or to the DOE school, institution of higher learning, or library who submitted the request. HTSC shall maintain and repair the cable lines up to the termination points of each site at no charge or cost to the DOE schools, institutions of higher learning, or libraries.

2. **Maintenance and repair of the Cable Drop**

HTSC shall maintain, repair, and, if necessary, replace all infrastructure necessary to provide Cable service at no cost to the State, DCCA, or Subscribers, including the cable from the feeder line to the recipient school, library or institution.

P. **Public Broadcasting**

DCCA believes that the continued viability of public broadcasting is in the public interest. The HPTF, dba PBS Hawai'i, provides statewide non-commercial broadcasting of Public Broadcasting Service's educational, cultural, and historic programs as well as local programming that educates, informs, and entertains residents, businesses, and visitors.

1. **Payment of HPTF Fee to HPTF or the Director's Designee**

For the duration of the Cable Franchise term, unless modified by further Decision and Order by the Director, HTSC shall provide funding to HPTF or the Director's designee in an amount equal to one percent (1%) of its Gross Revenues each year.

2. **Calculation of the HPTF Fee**

The HPTF Fee shall be based on an amount no greater than one percent (1%) of HTSC's Gross Revenues for the applicable preceding calendar year, as directed by the Director. The HPTF Fee may be used for operation and management, and for repair, maintenance, purchase or other acquisition of Facilities and equipment for public broadcasting.

The HPTF Fee shall be paid on a monthly basis. HTSC's Gross Revenues from the Cable Service collected during one (1) month