STATE PROCUREMENT OFFICE
NOTICE OF AMENDMENT TO EXEMPTION FROM CHAPTER 103D, HRS, CONTRACT

1. TO: Chief Procurement Officer

2. FROM: Department of Commerce & Consumer Affairs/CATV
Department/Division/Agency

3. Name of Contractor: See, Attachment Sheet

4. P.E. Reference No. 06-064-J

5. Description of goods, services, or construction:
Cable television public, educational, and governmental ("PEG") access services

6. Scope of work for the contract is revised as follows:
Request to extend procurement exemption for an additional six (6) month period (i.e., from July 15, 2008 to ~~January 15, 2009~~ 12/31/08).

Original Contract Price: $Attachment

Amended Contract Price: $ Attachment

7. Reason: This / These amendment(s) are necessary because:
See, Attachment Sheet to 06-064-J

8. Direct questions to: Clyde S. Sonobe Phone: 586-2620

Agency shall ensure adherence to applicable administrative and statutory requirements.

9. ***Pursuant to § 103D-102, HRS, and § 3-120-5, HAR, I certify that the information provided above is, to the best of my knowledge, true and correct***

Lawrence M Reifurth 5/30/08
Department Head Date

Reserved for SPO Use Only

10. Date Posted: 5/30/08

11. Submit written objections to this notice of intent to amend a procurement exemption contract within seven calendar days or as otherwise allowed from the above posted date to:
Chief Procurement Officer
State Procurement Office
P.O. Box 119
Honolulu, Hawaii 96810-0119

Chief Procurement Officer's Comments:

See attached CPO Comments.

12. [X] APPROVED [ ] DISAPPROVED

Aaron S. Fujioka 6/24/08
Chief Procurement Officer Date

13. P.E. No. 06-064-J
AMD 3

SPO-07B (Rev. 05/29/2007)

PE No. 06-064-J, Amendment 3

CPO Comments: The DCCA's prior justification for the extension of exemption no. PE-06-064-J was to allow the agency time to promulgate rules to meet the requirement of Circuit Court Judge Joel E. August's Order of November 15, 2007. Although the rule making process was to be completed by July 15, 2008, to date, no public hearings have been held on the rules. The DCCA is currently requesting a third extension to the procurement exemption to meet the objective of HCR 358, HD1, SLH 2008, which is to examine methods other than the public procurement code (code) to contract public, educational and government (PEG) access services. The objective of HCR 358, HD1, is contrary to the purpose and mandate of the State public procurement code. The State Procurement Office (SPO) has consistently not supported any legislation exempting agencies from the code.

Although it is understandable that the DCCA in good faith would like to comply with HCR 358, HD1, in seeking alternate methods, as stated above, it is not a position supported by SPO and is not a justifiable reason for an extension of the exemption. There is also no assurance that any resolution will result in an alternate method other than the public procurement code for PEG access services and that no further extensions will be requested by DCCA.

This exemption is granted on the condition that DCCA completes the rulemaking process before December 31, 2008 and submits to the SPO monthly status reports on their progress. This does not prevent the DCCA from fulfilling the purpose of HCR 358, HD 1, but will help assure the SPO that if no resolution to an alternate procurement method is obtained through the task force, the DCCA will have rules in place to proceed with the PEG access services on a timely basis.

3. Name of Contractor(s):

Currently, the Department of Commerce and Consumer Affairs ("**DCCA**") has contracts with the following PEG access organizations for the provision of PEG access services in the State:

a. Olelo Community Television ("**Olelo**");
b. Akaku: Maui Community Television ("**Akaku**");
c. Hoike: Kauai Community Television ("**Hoike**"); and
d. Na Leo O Hawaii ("**Na Leo**").

6.

		Original Contract Price	Amended Contract Price for period July 15, 2008 to January 15, 2009
a.	Olelo --	$4,100,000	$2,251,703
b.	Akaku --	$813,000	$512,261
c.	Hoike --	$336,000	$226,233
d.	Na Leo --	$692,000	$466,720

7. Reason: This/These amendment(s) are necessary because:

In late 2005, it was determined that DCCA's PEG access services contracts were subject to the State's Procurement Code ("**Code**") unless one of the exemptions in HRS section 103D-102(b) applied.

In February 2006, and in light of that determination, DCCA held public comment meetings on Oahu, Maui, Hawaii, and Kauai to get public input on whether to issue an RFP or seek an exemption from the Code for PEG access service contracts. After considering the public comments received, DCCA submitted a "Notice of and Request for Exemption from Chapter 103D, HRS" to the State Procurement Office ("**SPO**") on April 10, 2006. The SPO reviewed DCCA's exemption request and subsequently determined that the PEG access services contracts should be awarded in accordance with the Code. However, to ensure that PEG access services would continue to be provided to the public until the new contract(s) were awarded, the SPO approved DCCA's exemption request from July 1, 2006 to June 30, 2007 to complete the competitive procurement process in accordance with HRS chapter 103D.

On November 22, 2006, on behalf of DCCA, the SPO issued a Request for Information ("**RFI**") to obtain the public's comments on and suggested amendments to a draft Request For Proposals ("**RFP**") for PEG access services.

In December 2006, DCCA held public comment meetings on Oahu, Hawaii, Maui, Molokai, and Kauai to obtain the public's input on the draft RFI and PEG access services.

After considering the public's input and comments, DCCA requested that the exemption be extended for another six-month period (i.e., from June 30, 2007 to December 31, 2007) to allow DCCA to issue a second RFI. On March 16, 2007, the SPO issued a second RFI. The public was again invited to submit written comments on and suggested amendments to a second draft of the RFP. On March 27, 2007, SPO approved DCCA's request for an extension of the exemption to December 31, 2007.

After reviewing the comments to the second RFI, DCCA and the SPO issued the final RFP on July 30, 2007. Protests were filed shortly thereafter, and the RFP was subsequently postponed on or about August 14, 2007, until further notice.

On August 3, 2007, Akaku filed three (3) lawsuits against DCCA in Maui regarding the RFP. In one of the lawsuits, Akaku v. Lawrence Reifurth, et al., Civil No. 07-1-0278(1) in the Circuit Court of the Second Circuit, Akaku argued that the method DCCA uses to designate and select a PEG access organization is a "rule" and that DCCA's RFP was invalid because DCCA failed to follow the rulemaking requirements of HRS chapter 91.

Akaku subsequently filed a Motion for Preliminary Injunction against DCCA, which was heard by the Honorable Joel E. August on October 4, 2007. In his November 15, 2007 Order, Judge August denied Akaku's Motion for Preliminary Injunction. However, Judge August also stated his belief that DCCA needed to adopt a rule that specified the method, factors and criteria that DCCA would use to designate and select a PEG access organization. Judge August further suggested that if DCCA proceeded to designate and select a PEG access organization under the Code without such a rule, then in all likelihood, the Court would grant any renewed request that Akaku might make for a preliminary injunction against DCCA.

Accordingly, to comply with Judge August's suggestions, DCCA commenced the rulemaking process. On December 4, 2007, DCCA requested a further extension of its procurement exemption to July 15, 2008 to allow DCCA to complete the rulemaking process before proceeding with the RFP. The SPO approved this extension request on December 13, 2007.

On February 10, 2008, Governor Lingle approved DCCA's request to proceed with a public hearing on the proposed rules.

As DCCA was in the process of scheduling the public hearings on the proposed rule amendments, bills and resolutions on PEG access organizations were introduced in both the Senate and House of Representatives during the 2008 Legislative Session. Legislative committees were holding public hearings on and approving measures calling for the designation of PEG access organizations to be exempt from the Code. DCCA put the rulemaking public hearings on hold until after the 2008 Session was over.

During the 2008 Session, the Hawaii State Legislature adopted the attached House Concurrent Resolution No. 358 ("**HCR 358**"), which requests that DCCA establish a task force to solicit public input and examine methods other than the Public Procurement Process to oversee the PEG access organizations' expenditures and to ensure proper checks and balances. The task force will be comprised of twelve (12) members including representatives from each PEG access organization, one representative from each county, the Superintendent of Education or the Superintendent's designee, the President of the University of Hawaii or the President's designee, and a member of DCCA's Cable Advisory Committee. HCR 358 directs the task force to come up with recommendations and submit a report of suggested policy changes to the Legislature prior to the 2009 Session.

DCCA is currently in the process of complying with this Resolution. Accordingly, DCCA requests that its procurement exemption be extended for an additional six-month period (i.e., from July 15, 2008 to January 15, 2009) so that the work of the task force can proceed and the required recommendations can be submitted to the Hawaii State Legislature prior to the 2009 Session.

Enc. HCR No. 358, HD 1, 2008 Legislative Session

HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2008
STATE OF HAWAII

H.C.R. NO. 358 HD1

HOUSE CONCURRENT RESOLUTION

REQUESTING THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS TO ESTABLISH A TASK FORCE TO SOLICIT PUBLIC INPUT AND EXAMINE METHODS OTHER THAN THE PUBLIC PROCUREMENT CODE PROCESS TO OVERSEE PUBLIC, EDUCATION, AND GOVERNMENT ACCESS ORGANIZATIONS' EXPENDITURES AND ENSURE PROPER CHECKS AND BALANCES.

WHEREAS, the Department of Commerce and Consumer Affairs (DCCA) entered into and renegotiated contracts between 1990 and 1999 with the following four public, education, and government (PEG) access organizations: Olelo Community Television; Akaku: Maui Community Television; Hoike: Kauai Community Television; and Na Leo O Hawaii; and

WHEREAS, two of these PEG contracts were initially entered into prior to the effective date of Chapter 103D, Hawaii Revised Statutes, the Hawaii Public Procurement Code (state procurement code); and

WHEREAS, DCCA was not aware that these PEG contracts were subject to the state procurement code at the time the two contracts were renegotiated, and two new contracts were entered into by DCCA; and

WHEREAS, the Department of the Attorney General informed DCCA some time after December 2003 that contracts with PEG access organizations must comply with the state procurement code; and

WHEREAS, to provide continuous, high-quality PEG services to the public, DCCA needs to rely on consistent providers; and

I do hereby certify that the within document is a full, true and correct copy of the original on file in this office.
Chief Clerk
House of Representatives
State of Hawaii

WHEREAS, with the application of the state procurement code, problems with purchases of equipment and long-term maintenance of the equipment by current PEG access organizations may arise for the DCCA and current PEG access organizations; and

WHEREAS, the application of the state procurement code to the contract process between the DCCA and current PEG access organizations may disrupt the consistent provision of service and long-term maintenance of equipment; and

WHEREAS, current PEG access organizations are funded primarily through annual PEG access fees that the local cable operator is required to pay pursuant to DCCA franchise orders; and

WHEREAS, current PEG access organizations do not receive any governmental moneys from the state general fund or the DCCA Compliance Resolution Fund; and

WHEREAS, an alternative method needs to be found that allows PEGs to continue providing their valuable services to the state while ensuring proper expenditure of public funds; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-fourth Legislature of the State of Hawaii, Regular Session of 2008, the Senate concurring, that DCCA is requested to establish a task force to solicit public input and examine methods other than the Public Procurement Code process to oversee PEG expenditures and ensure proper checks and balances; and

BE IT FURTHER RESOLVED that the task force should also examine the selection process for PEG advisory board members; and

BE IT FURTHER RESOLVED that the task force should be comprised of 12 members, including:

(1) One representative each from the boards of Olelo Community Television; Akaku: Maui Community Television; Hoike: Kauai Community Television; and Na Leo O Hawaii;

(2) One representative from each county, appointed by the respective county's Mayor;

(3) The Director of Commerce and Consumer Affairs or the Director's designee;

(4) The Superintendent of Education or the Superintendent's designee;

(5) The President of the University of Hawaii or the President's designee; and

(6) The Chairperson of the Cable Access Committee or the Chairperson's designee;

and

BE IT FURTHER RESOLVED that recommendations made by the task force should take into account the first amendment rights of PEG; and

BE IT FURTHER RESOLVED that the task force is requested to submit a report of suggested policy changes to the Legislature no later than 20 days prior to the convening of the Regular Session of 2009; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Director of Commerce and Consumer Affairs, Administrator of the State Procurement Office, President of the University of Hawaii, Superintendent of Education, the Mayors of each county, the Administrator of the Cable Television Division of the Department of Commerce and Consumer Affairs, the Attorney General, and the executive directors and chairpersons of the boards of Olelo Community Television; Akaku: Maui Community Television; Hoike: Kauai Community Television; and Na Leo O Hawaii.