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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. 06-064-1

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 January 1, 2009 to June 30, 2009)

Original Contract Price: \$See attachment Amended Contract Price: \$See attachment

7. Reason: This / These amendment(s) are necessary because:
See Attachment Sheet to 06-064-1

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. Reipert December 12, 2008
Department Head Date

Reserved for SPO Use Only

10. Date Posted: 12/12/08

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:

The DCCA has fulfilled the condition of the prior approved exemption by completing the rule making process with the new rules effective as of 12/3/08. This request to extend from 12/31/08 to 6/30/09 is approved to ensure the continued provisions of PEG access services and to provide additional time to proceed with the solicitation and award of contracts.

12. APPROVED DISAPPROVED

Oliver S. Fujita 12/19/08
Chief Procurement Officer Date

13. P.E. No. 06-064-1
and 4

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 Received in 2008	Amended Contract Price for period Anticipated operating fees for 2009
a.	Olelo -- \$4,503,406	½ of 3% of cable operator's gross revenue for respective franchise area
b.	Akaku -- 1,024,522	
c.	Hoike -- 452,466	
d.	Na Leo -- 933,442	

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.

As DCCA was in the process of scheduling public hearings on the proposed rule amendments, during the 2008 Session, the Hawaii State Legislature adopted House Concurrent Resolution No. 358 ("**HCR 358**"). HCR 358 requested 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. HCR 358 directed the task force to come up with recommendations and submit a report of suggested policy changes to the Legislature prior to the 2009 Session.

On May 30, 2008, DCCA submitted a Notice of Amendment to Exemption from Chapter 103D, HRS, Contract to SPO, requesting 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.

On June 24, 2008, SPO granted the exemption to December 31, 2008 on the condition that DCCA completes the rulemaking process before December 31, 2008 and submits to SPO monthly status reports on its progress.

Accordingly, DCCA proceeded with the rulemaking process and conducted six (6) public hearings on: Oahu, Kauai, Hilo, Kona, Maui and Molokai. Monthly status reports on the progress of the rulemaking process were submitted to SPO. On November 10, 2008, the Director of Commerce and Consumer Affairs adopted the proposed rule amendment as circulated without any changes. On November 24, 2008, Governor Lingle approved the rule amendment which then became effective on December 3, 2008. A copy of the newly revised rules, Hawaii Administrative Rules section 16-131-70, is attached for your information.

To ensure the continued provision of PEG access services to cable television subscribers while the procurement process continues, DCCA is requesting a six month extension to the procurement exemption (i.e., from January 1, 2009 to June 30, 2009). During this period, DCCA anticipates that SPO will address the pending protests, and, depending on the result of that process, will assist DCCA with further processing of the RFP or the development of a revised RFP if necessary.

Enc. HAR 16-131-70