



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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OFFICE OF ADMINISTRATIVE HEARINGS HEARINGS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	PDH-2015-009
)	
ON-LINE COMPUTER PRODUCTS, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	Senior Hearings Officer:
)	David H. Karlen
OFFICE OF ENTERPRISE TECHNOLOGY)	
SERVICES, STATE OF HAWAII)	
)	
Respondent.)	
_____)	

**HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION**

I. INTRODUCTION

Petitioner ON-LINE Computer Products, Inc. ("ON-LINE") filed a Request for Administrative Hearing ("RFAH") in this matter on October 23, 2015. No procurement protest bond was filed in connection with this RFAH.

By Notice of Hearing and Pre-Hearing Conference filed October 27, 2015, a pre-hearing conference was set for November 4, 2015, and a hearing was set for November 17, 2015.

Respondent Office of Enterprise Technology Services filed its Response on November 3, 2015.

The pre-hearing conference was held on November 4, 2015. Mr. Alfred Butters, president of ON-LINE, appeared by telephone on behalf of ON-LINE. Deputy Attorney

General Valri Lei Kunimoto, Esq., appeared on behalf of Respondent. A Prehearing Order was filed on November 5, 2015, rescheduling the hearing to November 19, 2015.

Respondent filed its Motion for Summary Judgment on November 12, 2015.

ON-LINE did not file a written response to this Motion.

The Respondent's Motion was heard on November 19, 2015. Mr. Alfred Butters again appeared for ON-LINE by telephone. Deputy Attorney General Valri Lei Kunimoto again appeared on behalf of Respondent.

At the conclusion of argument on the Respondent's Motion, the Hearings Officer took the Motion under advisement. The parties then agreed that all issues in the case would be decided as part of the decision on the Motion and that there was no need for an evidentiary hearing. Accordingly, the proceedings were adjourned pending a decision on the Motion.

This Decision, based on the record as of the conclusion of oral argument on November 19, 2015, stands as the formal order with respect to the aforesaid Motion.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. The Information and Communications Services Division of the Department of Accounting and General Services required tape cartridges for the storage of backup data for its servers. The tape cartridges are used as a repository for backup data for some of its critical servers and for the long term retention of data. Some of the more critical departments served are Public Safety, the Judiciary, the Hawaii Criminal Justice Data Center, the Office of Elections, Budget and Finance, and the Honolulu Police Department.

2. On September 10, 2015, Respondent posted, as a small purchase, Solicitation No. Q16000285 for a tape cartridge procurement on the Hawaii E-Procurement website known as HiePRO, with a due date of September 29, 2015.

3. The Instructions for Solicitation No. Q16000285 stated, in relevant part:

COMPLIANCE, DOCUMENTATION AND HAWAII COMPLIANCE EXPRESS: Vendors are required to be compliant with all appropriate state and federal statutes. Proof of compliance (compliance documentation) is required. VENDOR REGISTRATION IN HAWAII COMPLIANCE EXPRESS (HCE) Proof of compliance/documentation is obtained through Hawaii Compliance Express (HCE). Vendors may register in Hawaii Compliance Express (HCE), a program separate from HlePRO. ... The vendor is responsible for maintaining compliance. If the vendor does not maintain timely compliance in Hawaii Compliance Express (HCE), an offer otherwise deemed responsive and responsible may not be awarded. NOTE: State agencies may check HCE for compliance at any time. Non-compliance may result in a vendor not receiving an award, delay of payment or cancelation of award. (Capital letters in original; other emphasis supplied)

4. At the bid closing on September 29, 2015, ON-LINE was the lowest bidder at the price of \$31,960.00

5. On September 29, 2015, at the time of bid closing, ON-LINE was listed by Hawaii Compliance of Express as “Not Compliant” with respect to Form A-6 of the Hawaii Department of Taxation, and ON-LINE failed to provide Respondent with documentary evidence of compliance with the requirements of HRS §103D-310, specifically, Chapter 237 Hawaii Department of Taxation compliance.

6. On September 29, 2015, Respondent’s Procurement Specialist Quinn K. Cikaitoga informed ON-LINE by e-mail that it was the lowest bidder at the close of the bids. He also informed ON-LINE that it was not compliant with the HCE database, specifically Hawaii Department of Taxation’s A-6 Form. He gave ON-LINE an additional five (5) business days, until October 6, 2015, to achieve compliance and provide the necessary documentation.

7. On October 2, 2015, ON-LINE informed Mr. Cikaitoga that ON-LINE still had not heard from anyone regarding the A-6 compliance status even though it had sent in the necessary completed forms to obtain compliance status. Mr. Cikaitoga then informed ON-LINE by e-mail the same day that since ON-LINE provided proof that it had submitted the necessary paperwork, Respondent would give ON-LINE an extension of another week.

8. By October 13, 2015, proof of compliance had still not been obtained by ON-LINE. By e-mail that day, ON-LINE informed Mr. Cikaitoga that the package of documents had been sent to the Hawaii Department of Taxation and that it was “trying to get this done today.”

9. After the two week extension did not produce proof of compliance, the program decided not to extend the time allowance any further because it needed to acquire the goods as soon as possible and could not delay the purchase any longer. The contract was awarded to the second lowest bidder at the price of \$33,140.00.

10. At 2:30 p.m. on October 13, 2015, Mr. Cikaitoga sent ON-LINE an e-mail informing ON-LINE that Respondent had proceeded to the next lowest offer because ON-LINE’s compliance with HCE had not been reached.

11. By e-mail to Mr. Cikaitoga dated October 14, 2015, ON-LINE disputed the award to the next lowest bidder. In this e-mail, ON-LINE admitted that it was still classified as non-compliant.

12. Respondent treated the ON-LINE e-mail of October 14, 2005, as the initiation of a procurement protest. By letter dated October 16, 2015, Respondent denied the protest because ON-LINE was not compliant at the time of the award and could not produce proof of compliance during the two week extension period.

13. Respondent’s letter of October 16, 2015, noted that ON-LINE was initially given one week to submit proof of compliance, and it was then given an extension of another week. After the second week of the extension passed and ON-LINE still could not provide proof of compliance, the program needed to acquire the goods as soon as possible and would not delay the purchase any longer. As a result, Respondent awarded the contract to the second lowest bidder on October 13, 2015.

14. ON-LINE then filed its RFAH on October 23, 2015, appealing the decision made in the Respondent's letter of October 16, 2015. ON-LINE's RFAH is in the form of a letter dated October 21, 2015, and the signed original of that letter was received by the Office of Administrative Hearings on October 23, 2015.

15. ON-LINE asserted in its e-mail of October 14, 2015, that it was compliant with Form A-6 because "we had already submitted." It also stated that it resubmitted a completed A-6 Tax Clearance Application on September 30, 2015.

16. ON-LINE's e-mail of October 14, 2015, also acknowledged that after a week of trying to contact the Department of Taxation, it submitted additional documentation requested by that Department, namely copies of its 2012, 2013, and 2014 tax returns. Those documents were received by the Department of Taxation on October 9, 2015.

17. ON-LINE's letter of October 21, 2015, stated that it had finally reached someone in the Department of Taxation on October 20, 2015, and convinced him that it did not have to file corporate tax forms because it had no nexus or presence within the State of Hawaii. Accordingly, on October 20, 2015, ON-LINE's status was changed to compliant.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed to be Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Under the Hawaii Procurement Code, a procurement protest filed with the Office of Administrative Proceedings must concern a minimum amount in controversy and must be accompanied by a protest bond if the solicitation or award that is the subject of the protest involves a procurement under HRS §103D-302 or HRS §103D-303.

See HRS §§103D-709(d) and 103D-709(e).

Procurements pursuant to HRS §103D-302 involve competitive sealed bids, and procurements pursuant to HRS §103D-303 involve competitive sealed proposals. The procurement herein, however, is a small purchase procurement pursuant to HRS §103D-305. Accordingly, the minimum amount in controversy and procurement protest bond statutes, HRS §§103D-709(d) and 103D-709(e), do not apply to this procurement protest.

ON-LINE was required to be compliant with HCE, including having a Form A-6 excise tax clearance from the Department of Taxation, at the time of award of the contract. HRS §103D-310(c) concerning the responsibility of offerors states, in relevant part:

(c) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. ..The procuring officer shall verify compliance with this subsection for all contracts awarded pursuant to sections 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts and procurements of \$2,500 or more awarded pursuant to section 103D-305...

(Emphasis supplied)

The terms of the solicitation, set forth in Finding of Fact No. 3 above, reiterate these requirements and make it clear that “[t]he vendor is responsible for maintaining compliance.”

ON-LINE could not demonstrate compliance at the time bids were opened. Respondent did not have to provide ON-LINE with additional time after bid opening in order to allow ON-LINE to obtain proof of compliance.

Having granted ON-LINE two extension of time after bid opening to demonstrate compliance, Respondent acted reasonably under the circumstances in denying ON-LINE any additional extensions of time. As of October 13, 2015, when ON-LINE was not given any more time extension and the contract was awarded to the next lowest bidder, ON-LINE was not responsible.

ON-LINE has asserted that it was in fact compliant as of October 13, 2015 (and earlier). As of October 13, 2015, however, it appeared that ON-LINE was noncompliant because it had to submit additional information on October 9, 2015, that it had never

submitted before and the Tax Department had not replied concerning the sufficiency of this newly submitted information.

The information that the Tax Department finally declared ON-LINE to be compliant was not submitted by ON-LINE to Respondent in connection with the procurement protest submitted to Respondent because it only became known after the procurement protest of October 14, 2015, was denied. Technically, ON-LINE cannot supplement its procurement protest with newly discovered information provided only to the Office of Administrative Hearings. Instead, it should have first filed a new protest with Respondent.

In the present situation, the Hearings Officer concludes that it would have been futile for ON-LINE to file a second protest with Respondent. Respondent did not complain about the failure to file a second protest and instead incorporated ON-LINE's letter dated October 21, 2015 as Exhibit H to its Motion for Summary Judgment. In addition, it is clear that Respondent would not have changed its decision if this new information had been included in a second protest.

In any event, after receiving this new information, Respondent was not required to retroactively change its decision to make the contract award to the second lowest bidder. The decision was appropriate at the time it was made, there were important reasons for making the decision at the time it was made, and there is no basis for claiming that decisions such as this one must remain open for however long it takes the low bidder to demonstrate compliance with HCE requirements.

Finally, the Hearings Officer has considered the possibility that ON-LINE was in fact compliant as of October 13, 2015, and that its e-mails up to that date demonstrated that it was in fact compliant. Nevertheless, under this scenario, ON-LINE could not provide verification of that compliance by the Tax Department or HCE due to the negligence of the Tax

Department as well as the Tax Department's lack of responsiveness to ON-LINE's communications that began after the bids were opened.

Even under this scenario, ON-LINE was not a responsible offeror because it could not meet the terms of HRS §103D-310(c) and the terms of the solicitation by producing documents demonstrating compliance--the Tax Department still listed ON-LINE as noncompliant. The Respondent cannot make its own decisions on compliance that contradict the stated position of the Tax Department. In addition, the Respondent was not responsible for the Tax Department's negligence, and it was not responsible to itself get the Tax Department to issue the correct documentation. As the solicitation states, the vendor on small purchases is responsible for maintaining compliance.

ON-LINE could have itself checked its HCE compliance status when it found out about the solicitation and/or when it submitted its bid. This would have given ON-LINE pre-award time to correct the situation. Furthermore, instead of being continually frustrated with its inability to have effective long-distance communications with the Tax Department, it could have retained someone in Hawaii to make in-person contact. An expensive attorney's services would not have been required, as a paralegal service could have done this work. Such actions could have negated the Tax Department's negligence.

For all of the reasons stated above, the Hearings Officer has concluded that the material facts are not in dispute and that Respondent is entitled to judgment in its favor as a matter of law.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The Respondent's Motion for Summary Judgment is granted.

b. ON-LINE Computer Products, Inc.'s Request for Administrative Hearing herein is dismissed with prejudice.

c. The parties shall each bear their respective costs and/or attorney's fees.

NOV 25 2015

DATED: Honolulu, Hawaii, _____



DAVID H. KARLEN

Senior Hearings Officer

Department of Commerce and Consumer Affairs