



# Florida Department of Transportation

CHARLIE CRIST  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450

STEPHANIE C. KOPELOUSOS  
SECRETARY

May 30, 2007

Lisa Shearer Nelson, Esquire  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

FILED  
07 MAY 30 PM 2:05  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

**VERTEX STANDARD**  
**DOAH CASE NO.: 07-488BID**  
**DOT CASE NO.: 06-146**

Dear Ms. Nelson:

Enclosed is a copy of the Final Order, filed May 30, 2007, in the above-styled case.

Sincerely,

A handwritten signature in cursive script that reads "James C. Myers".

James C. Myers  
Clerk of Agency Proceedings  
(850) 414-5393

jcm:m

Attachment(s)

STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION  
Haydon Burns Building  
605 Suwannee Street  
Tallahassee, Florida

FILED  
07 MAY 30 PH 2:05  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

**VERTEX STANDARD,**

**Petitioner,**

vs.

DOAH CASE NO.: 07-0488BID  
DOT CASE NO.: 06-146

**DEPARTMENT OF TRANSPORTATION,**

**Respondent,**

and

**MIDLAND RADIO CORPORATION,**

**Intervenor.**

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**FINAL ORDER**

This proceeding was initiated by the filing of a notice of protest on November 30, 2006, and the filing of a Petition on December 11, 2006, by **Petitioner, VERTEX STANDARD** (hereinafter **VERTEX**), in response to a Posting of Intended Award by the **Respondent, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**), for ITB-DOT-06/07-9025-GB for the purchase of radio equipment.

The matter was referred to the Division of Administrative Hearings (hereinafter **DOAH**) for assignment of an administrative law judge and a formal hearing.

On February 22, 2007, a petition to intervene was served by **Intervenor, MIDLAND RADIO CORPORATION** (hereinafter **MIDLAND**).

A formal administrative hearing was held in Tallahassee, Florida, on March 16, 2007, before Lisa Shearer Nelson, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Daniel Hernandez, Esquire  
Michael Donaldson, Esquire  
Carlton Fields  
215 South Monroe Street  
Tallahassee, Florida 32301

For Respondent: C. Denise Johnson, Esquire  
Assistant General Counsel  
Department of Transportation  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

For Intervenor: Stacy M. Schwartz, Esquire  
Isicoff, Ragatz & Xoanigsberg  
1200 Brickell Avenue, Suite 1900  
Miami, Florida 33131

At the hearing, **VERTEX** presented the testimony of Randy Pierce, Brian Kopp, Thomas Wineland, and David George, and offered Respondent's Exhibits 1 through 4, which were admitted into evidence. The **DEPARTMENT** presented the testimony of Roger Madden, and offered Petitioner's Exhibit 1, which was admitted into evidence. Joint Exhibits 1 through 10 were also offered and admitted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript of the hearing was filed on March 29, 2007. The **DEPARTMENT** and **VERTEX** filed their respective Proposed Recommended Orders on April 16, 2007. Judge Nelson issued her Recommended Order on April 30, 2007. **VERTEX** filed its

exceptions to the Recommended Order on May 10, 2007, and the DEPARTMENT filed its responses to VERTEX'S exceptions on May 17, 2007.

### **STATEMENT OF THE ISSUE**

As stated by the administrative law judge in her Recommended Order, the issue presented was:

Whether the Department of Transportation's decision to award the contract contemplated in its Invitation to bid ITB-DOT-06/07-9025-GB (Purchase of Radio Equipment) is contrary to the agency's governing statutes, the agency's rules or policies, or the proposal specifications.

### **EXCEPTIONS TO RECOMMENDED ORDER**

VERTEX first takes exception to the last sentence of Finding of Fact 16 claiming that it should be rejected because it is contrary to the record evidence. Pursuant to Section 120.57(1)(l), Florida Statutes (2006), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, it cannot do so unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent, substantial evidence in the record to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Id.

Finding of Fact 16 states:

16. Vertex Standard did not take exception to the five-year warranty requirement. Representatives from Vertex Standard were required to check with officials at their headquarters overseas in order to bid on a project requiring a five-year warranty. While Vertex Standard's representative indicated that there was additional cost to the company in providing a five-year warranty, the company decided to absorb the cost of the additional two years. No specific dollar amount attributable to the additional warranty period was identified.

Review of the record in its entirety reveals that the last sentence of Finding of Fact 16 is supported by competent, substantial evidence. While VERTEX makes reference to its witnesses' testimony indicating that there would be additional costs associated with a five (5) year warranty, VERTEX's vice president for sales and marketing admitted that the actual cost of an additional two years of warranty coverage had not been not specifically calculated. VERTEX'S exception to Finding of Fact 16 is rejected.

VERTEX next takes exception to the portion of Conclusion of Law 30 which states that "the exceptions reflect minor deviations from the specifications and their acceptance by the Department does not give Midland a substantial advantage over the other bidders who submitted proposals" and argues that it is not supported by the record, is contrary to well-established law, and is inconsistent with Finding of Fact 18. Regarding an agency's treatment of conclusions of law, Section 120.57(1)(I), Florida Statutes, provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a

finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

The primary thrust of VERTEX'S exception is that the DEPARTMENT'S acceptance of MIDLAND'S three (3) year warranty was not a minor deviation under controlling authority because it affected the price of MIDLAND'S bid. VERTEX'S position is not well-taken because the record shows that MIDLAND did not receive a competitive advantage in terms of pricing. VERTEX elected to absorb the cost of the additional two (2) years of warranty coverage because it was desirous of getting the bid. This being the case, it can be reasonably inferred that its bid was based on a three (3) year warranty. Conclusion of Law 30 has adequate record support and is consistent with controlling authority.

Nor is Conclusion of Law 30 inconsistent with Finding of Fact 18.<sup>1</sup> Mr. Pierce also testified that the primary focus of the ITB was to secure radios that met what was defined under Florida Statutes as public safety grade or "the best of the best." The warranty issue was viewed as a minor irregularity that was not going to impact the public safety system design. VERTEX'S exception to Conclusion of Law 30 is rejected.

VERTEX'S final exception is directed to Conclusion of Law 31 which states:

31. While there may be a cost factor involved in extending the warranty over five years in conformance with the specifications, **there was no credible evidence as to [sic] that cost factor would be.** Indeed, Petitioner indicated that it had decided to absorb the

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<sup>1</sup> Finding of Fact 18 provides: "Randy Pierce, who was the primary author of the ITB, determined that the five-year warranty specification was an error on his part that should have been addressed before the ITB was finalized. The committee members looked at the industry standard for warranties and determined that most failures occur in the first year and that the industry standard for warranties was two to three years."

cost. Likewise, there was no indication at hearing that not furnishing the last channel feature had any material significance in providing a proposal. On the other hand, the Department and its consultants all indicated that neither issue was particularly significant in their view. [Emphasis added]

**VERTEX** takes issue with the language emphasized above and relies upon its previous arguments concerning the absence of a specific dollar amount attributable to the additional warranty period and the conclusion that the warranty issue was a minor deviation.

The record contains ample support for the conclusion that there was no credible evidence as to what the cost factor for the additional warranty would be. Although **VERTEX'S** witnesses testified that there would be a cost factor involved, this conclusion was largely based upon hypotheses and previous experience of the witnesses. **VERTEX'S** witnesses indicated generally that there would be a cost of some nature rather than a specifically calculable dollar amount. **VERTEX'S** exception to Conclusion of Law 31 is rejected.

#### FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the administrative law judge's Findings of Fact in paragraphs 1 through 29 are supported by competent, substantial evidence, and are adopted and incorporated as if fully set forth herein.

#### CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 287, Florida Statutes.

2. The Conclusions of Law in paragraphs 25 through 34 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

**ORDERED** that **Petitioner's, VERTEX STANDARD**, bid protest challenging the award of ITB-DOT-06/07-9025-GB for the purchase of radio equipment to **Intervenor, MIDLAND RADIO CORPORATION**, is hereby dismissed.

**DONE AND ORDERED** this 30<sup>th</sup> day of May, 2007.



STEPHANIE C. KOPELOUSOS

Secretary

Department of Transportation

Haydon Burns Building

605 Suwannee Street

Tallahassee, Florida 32399

FILED D.O.T. CLERK  
2007 MAY 30 AM 7:33



**NOTICE OF RIGHT TO APPEAL**

**THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.**

Copies furnished to:

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