

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VERTEX STANDARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-0488BID  
 )  
 DEPARTMENT OF TRANSPORTATION, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 MIDLAND RADIO CORPORATION, )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

On March 16, 2007, a hearing was held in Tallahassee, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Michael Donaldson, Esquire  
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STATEMENT OF THE ISSUE

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.

PRELIMINARY STATEMENT

On January 29, 2007, a Petition was forwarded to the Division of Administrative Hearings challenging the Department of Transportation's (DOT's or Department's) Notice of Intent to award a contract pursuant to its Invitation to Bid ITB-DOT-06/07-9025-GB (Purchase of Radio Equipment). On February 1, 2007, the parties filed a Stipulation to Waive Thirty-Day Requirement, and indicated that the parties were available for hearing March 16 and 18, 2007. On that same day, a Notice of Hearing was issued setting the case for hearing March 18, 2007. On February 8, 2007, an Amended Notice of Hearing was issued, scheduling the matter for both days, i.e., March 16 and 18, 2007.

Petitioner moved to amend the Petition without objection, and the Motion was granted February 14, 2007. On February 22, 2007, Midland Radio Corporation (Midland) petitioned to intervene in the proceedings, and was granted intervenor status March 5, 2007. On March 9, 2007, the parties advised that, in view of discovery conducted by the parties, only one day would be necessary for the hearing and requested that the matter be re-

noticed for March 18, 2007, alone. Accordingly, an Amended Notice of Hearing was issued March 12, 2007, for March 18, 2007.

The parties filed a Joint Pre-Hearing Statement which included stipulated findings of fact that have been incorporated into the Findings of Fact found below. At hearing, Joint Exhibits numbered 1 through 10 were admitted. Petitioner presented the testimony of four witnesses and submitted Petitioner's Exhibit 1, which was a demonstrative exhibit. Respondent presented the testimony of one witness, and Respondent's Exhibits numbered 1 through 4 were admitted without objection. The Intervenor presented no witnesses or exhibits.

At hearing, it was anticipated that the transcript would be filed with the Division April 6, 2007. However, the transcript was actually filed March 29, 2007, and an Order was issued advising the parties accordingly. Petitioner moved without objection for an extension of time for the filing of proposed recommended orders until April 16, 2007. All parties Proposed Recommended Orders are accepted as timely filed. These submissions have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. On September 28, 2006, the Department issued the Invitation to Bid, ITB-DOT 06/07-9025-GB (ITB) for the purchase of radio equipment.

2. The ITB contemplated that one five-year contract would be awarded.

3. The ITB reserved to the Department the right to accept or reject any and all bids, and reserved the right to make an award without further discussion of the bids submitted.

4. The ITB reserved to the Department the right to reject any response not in compliance with the requirements of the ITB. The Bid Sheet of the ITB stated:

NOTE: In submitting a response, the bidder acknowledges they have read and agree to the solicitation terms and conditions and their submission is made in conformance with those terms and conditions.

ACKNOWLEDGMENT: I certify that I read and agree to abide by all terms and conditions of this solicitation and that I am authorized to sign for the bidder. I certify that the response submitted is made in conformance with all requirements of the solicitation.

5. Likewise, the Special Conditions of the ITB provided in pertinent part:

11) ADDITIONAL TERMS AND CONDITIONS

No conditions may be applied to any respect of the ITB by the prospective bidder. Any conditions placed on any aspect of the prospective bidder may result in the bid being rejected as a conditional bid (see "RESPONSIVENESS OF BIDS"). DO NOT WRITE IN CHANGES ON ANY ITB SHEET. The only recognized changes to the ITB prior to bid opening will be a written addenda issued by the Department.

12) RESPONSIVENESS OF BIDS

Bids will not be considered if not received by the Department on or before the date and time specified as the due date for submission. All bids must be typed or printed in ink. A responsive bid is an offer to provide the items specified in this Invitation to Bid in accordance with all requirements of this Invitation to Bid. Bids found to be non-responsive will not be considered. Bids may be rejected if found to be irregular or not in conformance with the specifications and instructions herein contained. A bid may be found to be irregular or non-responsive by reasons that include, but are not limited to, failure to utilize or complete prescribed forms, modifying the bid specifications, submitting conditional bids or incomplete bids, submitting indefinite or ambiguous bids, or executing forms or the bid sheet with improper and/or undated signatures. Other conditions which may cause rejection of bids include evidence of collusion among bidders, obvious lack of experience or expertise to provide the required items, and failure to perform or meet financial obligations on previous contracts.

\* \* \*

23) PRODUCT REQUIREMENTS/SPECIFICATIONS

Items furnished shall be standard products of the manufacturer or their suppliers, shall be new, unused, clean, and free from any defects or features affecting appearance, serviceability, or the safety of the user in normal intended use.

Any deviation from specifications indicated herein must be clearly pointed out; otherwise, it will be considered that items offered are in strict compliance with these specifications, and successful bidder will be held responsible therefore. Deviations must be explained in detail on separate attached sheet(s).

\* \* \*

32) WARRANTY

A warranty is required on all items purchased against defective materials, workmanship, and failure to perform in accordance with required industry performance criteria, for a period of not less than two (2) years from the date of acceptance by the purchaser. Any deviation from the criteria must be documented in the bid response or the above statement shall prevail.

6. The State of Florida PUR 1001 (General Instructions to Respondents) was also included in the ITB. The General Instructions to Respondents specified that all responses to the ITB are subject to the following sections of the ITB, which, in case of conflict, shall have the following order of precedence:

- 1) Technical Specifications;
- 2) Special Conditions;
- 3) Instructions to Respondents (PUR 1001);
- 4) General Conditions (PUR 1001), and
- 5) Introductory Materials.

Section 9 of the General Instructions provides in pertinent part:

Respondent's Representation and Authorization. In submitting a response, each respondent understands, represents, and acknowledges the following (if the respondent cannot so certify to any of the following, the respondent shall submit with its response a written explanation of why it cannot do so).

\* \* \*

- The product offered by the respondent will conform to the specifications without exception.

- The respondent has read and understands the Contract terms and conditions, and the submission is made in conformance with those terms and conditions.

7. The ITB specifications also included information about what must be included in the bid to be considered responsive:

- 3.1 This specification includes required equipment that the vendor shall provide to be compliant with the bid. This specification also includes non-required equipment that FDOT considers important but not critical to obtaining a successful bid. Vendors can elect to bid on any or all of these non-required equipment items. Bidding on non-required items does not affect the bid evaluation process however the Vendor will be held to the contract requirements and technical specifications for all bid products.
- 3.2 All required and non-required equipment items are identified in the specification compliance matrix at the end of this technical specification.
- 3.3 Required Equipment. The vendor shall supply all of the required types of equipment. There is also optional equipment that is required though it may not be procured with each order. An example of such a required, optional piece of equipment is the mobile radio dual control head.
- 3.4 Non-Required Equipment. To ensure a successful bidding process FDOT has identified radio equipment that they consider important but not critical to the success of this contract. This equipment is fully specified in this document and if a vendor elects to bid any non-required equipment item, they must comply with the associated specifications. An example of such a non-required piece of equipment is the low-band VHF portable radio.

8. Specifications 4.2.1.22.1 (with respect to portable radios) and 4.3.1.22.1 (with respect to mobile radios) both included the requirement that "[t]he last channel selected shall appear as the selected channel after the radio is turned back on. The last selected scan mode shall also reinitiate after the radio is turned back on."

9. With respect to warranties, the specifications provided:

8. VENDOR WARRANTY

8.1 Parts and Labor Warranty. The vendor shall warranty all parts and accessories against defects in materials and workmanship while under normal use and service by FDOT personnel. Parts shall include but not be limited to all products, all product subsystem LLRUs disassembled by trained FDOT maintenance personnel, and all product accessories. The vendor labor necessary to diagnose and repair a defect shall be provided by the vendor at no cost to FDOT. Defective parts may be repaired by the vendor or replaced with new parts. The vendor shall also be responsible for return shipping costs to FDOT of a repaired or replaced part.

2.2 Warranty Period.

8.2.1 Parts and Labor. With the exception of portable battery power ratings, the vendor shall warranty all parts and labor for 5 years.

8.2.2 Portable Radio Battery Power Rating. The vendor shall warranty parts and labor associated with the portable radio power rating for 18 months. If during this 18 month period the battery power rating falls below 80% of the specified battery power rating the



battery shall be replaced with a new battery.

10. No bidder challenged the specifications contained in the ITB.

11. On November 8, 2006, Vertex Standard submitted its response to the ITB. Four other vendors submitted proposals, including Midland.

12. Four of the responding bidders, including Vertex Standard, were found to be non-responsive in part because they did not bid on all of the required items identified in the RFP.

13. Midland's proposal contained a signed copy of the Bid Sheet referenced in paragraph 4, acknowledging the solicitation terms and certifying that its proposal is made in conformance with all requirements of the solicitation.

14. However, Midland's proposal also contained a page entitled "Midland Radio Corporation Exceptions to Technical Requirements for Florida Department of Transportation Purchase of Radio Equipment ITB-DOT-06/07-9025-GB." On this page, Midland indicated that it "takes exceptions to the following Technical Requirements" of the ITB:

Exception to 4.2.1.22.1

Midland Radio Corporation Model 80-125/425 Portable Radios return to the programmed scan mode after On/Off/On Cycle.

Exception to 4.2.4.5

Midland Corporation Model 81-391 Smart Rapid Charger meets Technical requirements for 4.2.4.5.1, 4.2.4.5.2, 4.2.4.5.3, and

4.2.4.5.4. Analyzer Functions is under review for a possible future function.

Exception to 4.3.1.22.1

Midland Radio Corporation Titan Series Mobile Radios return to programmed scan mode after On/Off/On cycle.

Exception to 8.2

Midland Radio Corporation warrants our Base Tech Base/Repeater stations for a period of five (5) years from date of purchase against defects in material and workmanship.

Midland Radio Corporation warrants or [sic] Titan mobile radio, and our Midland portable radio products for a period of three years from date of purchase against defects in material workmanship.

15. On the page following the "Exceptions," was a Warranty Certificate for Midland's equipment. The Warranty Certificate stated that all mobiles, portables and Titan Vehicular Repeaters were warranted for a period of three years. Base-Tech II Base/Repeater Stations were warranted for five years. With respect to accessories, Midland's Warranty Certificate stated that rechargeable batteries would be warrantied for 18 months; battery chargers for 1 year; and all other accessories for 120 days.

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.

17. The responses to the ITB were reviewed by an evaluation committee comprised of Randy Pierce, Roger Madden and Brian Kopp. These three gentleman were also instrumental in developing the ITB in the first place. The evaluation committee members independently reviewed the responses submitted by the vendors and met collectively to compare the individual scores.

18. 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.

19. Similarly the requirement that radios return to the last channel selected had been included in the specifications because a prior vendor had included this option on equipment the Department now owned. The committee members determined that this requirement was a minor issue that would not affect the overall function and performance of the radio equipment, but could be addressed through training.

20. On November 20, 2006, a Radio Bid Evaluation Response Justification Attachment (Justification Attachment) was prepared by Randy Pierce, Roger Madden and Brian Kopp. In this document, the evaluation team members reported that four vendors, including Vertex Standard, failed to comply with Specification Section 3.3 requiring the vendor to bid all required types of equipment. Based on this failure, all four were disqualified. The Justification Attachment also indicated that these four vendors were also non-compliant with several technical specifications in the ITB.

21. The Committee determined that Midland Radio was the only vendor that bid on all required products. The Justification Statement stated in pertinent part:

- 2) Midland, the fifth and remaining vendor bid all required products. Midland took exception to the following:
  - a. Midland took exception to Specification Sections 4.2.1.22.1 and 4.3.1.22.1 regarding the start-up configuration of Portable and Mobile Radios. FDOT has reviewed the exceptions and agree [sic] to them.
  - b. Midland took exception to Specification Sections 4.2.4.5 regarding the portable radio smart charger. This charger is not a required product and FDOT will therefore not award this item.
  - c. Midland took exception to Specification Section 8.2 regarding the Warranty Period for Portable and Mobile Radios. The specified warranty period is five years, however Midland has bid a 3 year warranty period for Portable and Mobile Radios. FDOT has determined that the 3 year warranty period offered by Midland meets or exceeds the current industry standards. Therefore, FDOT agrees to the exception.

3) With the agreed to exceptions Midland is the only compliant bidder and therefore they are selected.

22. On November 27, 2006, the Department posted its notice of intent to award the contract to Midland.

23. On November 30, 2006, Vertex Standard filed its Notice of Intent to Protest the intended award.

24. On December 11, 2006, Vertex filed its Petition requesting a hearing pursuant to Section 120.57(1), Florida Statutes.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

26. Vertex submitted a bid proposal that did not conform to the requirements of the ITB. Because the relief sought by Vertex Standard is the rejection of all other nonresponsive proposals, Vertex Standard has standing to bring this protest. Capelletti Brothers, Inc. v. Department of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983); NTI Group, Inc. v. Department of Education, DOAH Case No. 06-4449BID (Recommended Order January 9, 2007; Final Order January 31, 2007).

27. Petitioner, as the party challenging the proposed agency action, has the burden of proof in this proceeding and must show that the agency's proposed action is contrary to the

agency's governing statutes, rules or policies, or the bid or proposal specifications. A de novo hearing was conducted to evaluate the action taken by the agency. Section 120.57(3)(f), Florida Statutes; State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). The administrative law judge may receive evidence, as with any hearing held pursuant to Section 120.57(1), but the purpose of the proceeding is to evaluate the action taken by the agency based on the information available to the agency at the time it took the action. Id.

28. In this case, Midland is the only vendor that bid on all required products specified in the ITB. Its bid, however, is contrary to proposal specifications with respect to the "last channel" feature and the length of the warranties for products subject to the ITB. The crux of the case is whether the exceptions to the specifications submitted by Midland constituted material deviations from these specifications.

29. The test for determining whether a deviation from specifications is material is whether the variance gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. Tropabest Foods, Inc. v. Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986); Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977). Put another way, "a minor irregularity is a variation from the bid invitation or proposal

terms and conditions which does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders, or does not adversely impact the interests of the Department." Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992).

30. It is concluded, based on the totality of the evidence presented, 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. Section 23 of the Special Conditions allowed a vendor to submit a bid with deviations, as long as those deviations were clearly identified and explained in detail. A similar provision allowing some deviation was included in Section 32 regarding warranties. Midland complied with these directives.

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 that cost factor would be. Indeed, Petitioner indicated that it had decided to absorb the 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.

32. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Brothers, Inc. v. State, Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof as to whether the proposed action was clearly erroneous, contrary to competition, arbitrary or capricious.

33. A decision is considered to be clearly erroneous when although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is capricious if the agency takes the action without thought or reason or irrationally. Agency action is arbitrary if is not supported by facts or logic. See Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (1931).



34. Here, the Department was faced with either rejecting all bids or acceding to minor modifications requested by the only vendor who bid on all required products. It determined that the accepting Midland's bid was in the best interest of the agency. Compare Intercontinental Properties. Under these circumstances, it is concluded that Petitioner has not met its burden under Section 120.57(3)(f), Florida Statutes, of showing that the decision to award the contract at issue to Midland is clearly erroneous, contrary to competition, arbitrary or capricious.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing Vertex Standard's petition.

DONE AND ENTERED this 30th day of April, 2007, in Tallahassee, Leon County, Florida.

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LISA SHEARER NELSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2007.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.