INTERIOR BOARD OF INDIAN APPEALS

Emil Haliewicz, d.b.a. Skyline Logging & Equipment v. Makah Indian Tribe and Commissioner of Indian Affairs

3 IBIA 136 (11/07/74)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF

EMIL HALIEWICZ d/b/a SKYLINE LOGGING

AND EQUIPMENT SALES

v.

MAKAH INDIAN TRIBE AND COMMISSIONER,

BUREAU OF INDIAN AFFAIRS

IBIA 75-24-A Decided November 7, 1974

Appeal from administrative order retaining bid deposit upon failure to meet requirements of bid advertisement. Skyline #1 Logging Unit, Makah Reservation, Washington.

Docketed and affirmed.

1. Indian Lands: Forestry: Timber Sales Contracts: Bid Conditions

   Failure of a successful bidder to meet the conditions included in the bid advertisement within time

limitations renders the bid deposit subject to retention as liquidated damages pursuant to the advertisement and the provisions of 25 CFR 141.10(d).

APPEARANCES: For the appellant, B. Franklin Heuston and the firm of Bean, Gentry and Rathbone; for the Makah Tribe, the firm of Ziontz, Pirtle, Morisset and Ernstoff.

NOTICE, ORDER AND OPINION BY

CHIEF ADMINISTRATIVE JUDGE McKEE

Two separate notices of appeal were timely filed in this matter with the Area Director, Portland, on May 31, 1974, by Emil Haliewicz d/b/a Skyline Logging and Equipment Sales:

One notice of appeal filed in appellant's behalf by B. Franklin Heuston, attorney of Shelton, Washington, is directed to the decision dated May 16, 1974, by the Area Director in a letter to the appellant over the signature of the Forest Manager's ruling that a $21,000 bid deposit paid by appellant was declared to be liquidated damages

and was to be retained as such. In this notice appellant requests a hearing; and

One notice of appeal filed in appellant's behalf by the law firm of Bean, Gentry and Rathbone of Olympia, Washington, is directed to the action of April 25, 1974, by the Makah Tribal Council rejecting appellant's request for a time extension in which to complete and file the contract documents for a sale of tribal timber, and further directing retention of the appellant's liquidated damage deposit of $21,000 filed with his bid.

On June 4, 1974, the Makah Tribe appearing by the law firm of Ziontz, Pirtle, Morisset & Ernstoff of Seattle, Washington, filed a motion to dismiss the appeal from the tribal action alleging that the Area Director had no jurisdiction to entertain the appeal under 25 CFR 2.2.

The appeal record was transmitted to the Commissioner by the Area Director's memorandum of June 11, 1974. The Commissioner in turn referred the appeal notices and the administrative record to this Board where they were received October 1, 1974.

By delegation of authority issued December 14, 1973, amending 211 DM 13.7, the Secretary directed that appeals from the administrative decisions of the Bureau of Indian Affairs should be decided by the Board of Indian Appeals.

NOTICE IS HEREBY GIVEN that the appeals are hereby docketed before the Board on this date under the above number. The Makah Indian Tribe is considered the principal party in interest and the Commissioner represents the United States.

The facts are these. On February 26, 1974, the appellant, Emil Haliewicz d/b/a Skyline Logging and Equipment Sales, was the successful bidder at the advertised sale of Skyline No. 1 Logging Unit on the Makah Indian Reservation. The advertisement for the sale required a deposit of $21,000 with the bid, which the appellant furnished, to be applied to the sale price of timber to be cut from the unit at a later date or, if no contract was signed by the high bidder, it was to be retained as liquidated damages. The advertisement required further that the signed contract and a satisfactory bond in the amount of $35,000 should be furnished by the successful bidder within 30 days of the acceptance of his bid.

On March 8, 1974, the Forest Manager notified appellant by letter that his bid had been accepted by the Area Director on March 4, 1974, and he stated, "In accordance with the advertisement, you have 30 days from the date of acceptance to execute the contract and furnish a satisfactory bond in the amount of $35,000." On April 3, 1974, the 30th day after acceptance of the bid the appellant requested a two- or three-week extension, and the request was forwarded by the Superintendent to the Area Director with a recommendation that it be granted. Without any notice to the appellant, on April 8 the Area Director agreed to an extension to April 24 but instructed the Superintendent to contact the Tribe in order to obtain its concurrence. The Tribal Council met on April 25 and adopted a resolution whereby it refused to agree to any extension of time and demanded the forfeiture of the $21,000 bid deposit pursuant to the provisions of the advertisement for sale.

On May 16 the Superintendent advised the appellant according to the instructions from the Area Director that the bid was canceled and the bid deposit money would be retained as liquidated damages. He further advised the appellant of his rights of appeal. The

appeal was filed accordingly and prosecuted to this point pursuant to the regulations.

There is nothing in the record or in the appellant's petition attacking the Area Director's decision to forfeit the $21,000. He alleges hardship and sets forth reasons for his default, none of which are relevant, i.e., he was named as defendant in a collateral law suit and his assets were frozen by a writ of attachment. The appellant makes no allegation that he has any evidence that he has met the requirements of the advertisement for sale under which he submitted his bid and his bid deposit. He does not allege any mistake in his bid nor did he ever demand return of his deposit prior to notice of forfeiture.

It is true that the record reveals that he requested extensions of time in which to complete the contract papers and to supply the necessary $35,000 bond, but the greatest extension of time even considered at all by the Bureau of Indian Affairs was to the date of April 24, 1974. The Tribe never agreed to any extension. By his own statements the appellant was in no position on April 24 or at any date earlier than May 7, 1974, to fully perform the requirements of the advertisement. He

made no tender of performance between May 7 and the date of May 16, when the Area Director terminated the negotiations.

It is noted that the conditions of the advertisement providing for the disposition of deposits are in full compliance with 25 CFR 141.10(d) which reads:

> The deposit of the successful bidder will be retained as liquidated damages if the bidder does not execute the contract, and furnish the performance bond required by § 141.14, within the time stipulated in the advertisement of timber sale.

It is true that in the appellant's petition of May 29, 1974, which is signed by both of his attorneys, B. Franklin Heuston and Fred R. Gentry, appellant alleges he was on such date in a position to perform the requirements of the bid advertisement, and he offers, in addition to performance of the contract, to make allowances out of the $21,000 for damages which the Tribe may have suffered. Nothing in this decision shall be taken as a bar to further negotiations which may be initiated if the parties are in a position to reach a meeting of the minds. The unit was readvertised for sale but no bids were received at the bid opening on July 2, 1974, and the unit remains unsold and unproductive.

A finding is made that by the appellant's own admissions he was in default in performance of the terms of the bid advertisement on and for some days prior to issuance of the notice and order of cancellation. The reasons given may be taken at face value as true, but they do not present a legal ground to excuse default. Thus no controverted issue of a material fact is presented, and a fact-finding hearing would serve no purpose. The appellant's request for hearing is refused.

The Tribe's motion to dismiss the appeal as being beyond the jurisdiction of the Area Director becomes a moot issue in view of the decision reached herein on other grounds. Therefore, no ruling is made disposing of the Tribe's motion to dismiss.

[1] A finding is made that the appellant failed to perform or to tender performance within the time specified; that in contracts of this nature time is of the essence; that the action of the Area Director in retaining the $21,000 bid deposit was within the provisions of the regulations; there is no legal ground presented by the appellant for setting aside the requirements of the invitation to bid as published; and that this appeal should be dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of Interior, 43 CFR 4.1, it is hereby ORDERED: the appeal of Emil Haliewicz shall be, and the same is hereby, DISMISSED.

This decision is final for the Department.

//original signed
David J. McKee
Chief Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge