

EL MONTE BINDERY SYSTEMS, INC.

IBLA 2000-198

Decided January 6, 2005

Appeal from a decision of the Field Manager, Yuma (Arizona) Field Office, Bureau of Land Management, rejecting a competitive bid for a parcel of public land offered at a competitive sale and declaring bid deposit forfeited. AZA-29972.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Deposits and Forfeitures--Federal Land Policy and Management Act of 1976: Sales--Public Sales: Bidding

BLM properly cancels a sale of a parcel of public land offered at a competitive sale and declares the bid deposit forfeited in accordance with 43 CFR 2711.3-1(d) where payment of the full bid price is not submitted to BLM prior to the expiration of 180 days from the date of the sale.

APPEARANCES: Daniel G. Field, Esq., Parker, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, Phoenix, Arizona, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

El Monte Bindery Systems, Inc. (El Monte), <sup>1/</sup> has appealed from the February 25, 2000, decision of the Field Manager, Yuma (Arizona) Field Office,

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<sup>1/</sup> El Monte is the party pursuing the instant appeal, since its competitive bid was rejected by the decision under appeal. The appeal was filed by Helga Loyd, who, as El Monte's president, is entitled to practice on its behalf before the Department under 43 CFR 1.3(b)(3). Thus, it does not appear that the appeal is being pursued by Helga Loyd and her husband Jim Loyd in their personal capacities, "dba El Monte." (Motion for Summary Judgment, filed May 30, 2000 (Motion), at 1.)

Bureau of Land Management (BLM), nominally rejecting its bid (AZA-29972) for a 15-acre parcel of public land (No. 97-09) in La Paz County, Arizona.<sup>2/</sup> BLM's decision also declared El Monte's bid deposit forfeited.

BLM's competitive sale included about 315 acres of public lands (both the surface and mineral estates) within the Town of Quartzsite, Arizona, and was held pursuant to sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1713 and 1719 (2000), and implementing regulations at 43 CFR Parts 2710 and 2720.

In December 1996, a notice of realty action (NORA) notifying the public that the 320 acres of land would be offered for sale was published in the Federal Register. 61 FR 67342 (Dec. 20, 1996).<sup>3/</sup> The NORA provided as follows concerning the procedure for the sale:

All parcels will be offered using competitive sale procedures as authorized under 43 CFR 2711.3-1. The land will be offered for sale by sealed bid only. Detailed information regarding the number or parcels, specific parcel locations, appraised fair market value of each parcel, bidding procedures, bid submission and opening dates and location, and terms and conditions of the sale will be made available no less than 45 days prior to bid submission date.

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Under competitive sale procedures, an apparent high bid will be declared at the time of bid openings. To eliminate split estates, mineral interests will be conveyed simultaneously with the surface estates. A bid will constitute an application to purchase the mineral estate. All qualified bidder(s) must include with their bid deposit for each parcel a \$50.00 filing fee for conveyance of the mineral estate.

<sup>2/</sup> That parcel is described as the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  and NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 23, T. 4 N., R. 19 W., Gila and Salt River Meridian, La Paz County, Arizona.

<sup>3/</sup> The NORA provided notice that the lands had been found suitable for competitive sale under FLPMA and classified them for disposal by sale in accordance with Section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (2000) and Executive Order Number 6910. It also provided notice that, upon publication of the NORA in the Federal Register, the lands would be segregated from appropriation under the public land laws.

If the land identified in this notice is not sold on the date of the first sale offering, the unsold parcels will be offered competitively on a continuing basis until the land is either sold or withdrawn from sale. All over-the-counter sale parcels will be sold subject to the terms and conditions and at no less than the appraised market value.

Id. Thus, the NORA did not identify the parcels being put up for sale. Nor did it specify the date, time, place, or manner for submitting bids.

Following publication of the NORA, BLM reviewed the parcels for sale and appraised them, issuing its public sale review statement and appraisal report on June 20, 1997. That report identified 26 separate parcels ranging in size from 5 to 40 acres. On October 15, 1997, BLM issued an environmental assessment/finding of no significant impact and decision record to proceed with the sale.

We find nothing in the record showing when or by what means BLM published notice of detailed information regarding the number or parcels, specific parcel locations, appraised fair market value of each parcel, bidding procedures, bid submission and opening dates and location, and terms and conditions of the sale.<sup>4/</sup> The serial register page for parcel 97-09 states that bids were requested on October 5, 1997, even though that date was prior to the date BLM issued its decision record approving the sale. It may be that BLM published a complete notice of sale at that time, but neglected to include it in the case record.

The record contains a copy of a by-lined newspaper story (as opposed to a published public notice) dated November 6, 1997, published in The Desert Gem, a local newspaper, announcing a “Quartzsite land auction set for December 10, 1997.” The body of the article states that “[m]ore than 300 acres of federal land adjacent to the desert community of Quartzsite, Arizona will be sold to private bidders on December 10, 1997”; that the “sealed bid sale of 315 acres involves 24 parcels ranging in size from 5 to 40 acres”; that “[s]ealed bids will be accepted through 4:30 pm on Friday, December 5, 1997,” at BLM’s Yuma District Office; and that “[b]id opening will be at 10 am Monday, December 8, 1997, at the Quartzsite Town

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<sup>4/</sup> Although the record contains three “extensions” of the NORA (published in September 1997, May 1998, and January 1999), those documents do not contain any of that information, but merely extend the segregation of all the 315 acres being put up for sale.

Hall.” <sup>5/</sup> The serial register page indicates that a sale was held on December 8, 1997. The case record contains a list of the two sealed bids BLM had received as of December 8, 1997, neither of which covered the parcel at issue here.

Nothing in the record indicates whether or when BLM notified the public in advance (as stated in the NORA) that it would accept bids for the parcel each month after “the date of the first sale offering” or, if so, how that was accomplished. However, the serial register notes that “sale[s]” were “held” in the middle of each month from January 1998 through and including May 1999 without bids being received for Parcel No. 97-09. The record indicates that another bid was filed and accepted for a different parcel for a sale on January 21, 1998, thus confirming that sales were held as indicated in the NORA. <sup>6/</sup>

The record does not show that any bids were filed for parcel No. 97-09 until June 16, 1999, when El Monte’s bid was noted on the serial register. The record contains El Monte’s sealed bid form, which it filed with BLM on June 15, 1999. The total bid amount was \$82,800. Along with the bid form, El Monte provided a cashier’s check drawn on the Wells Fargo Bank, N.A. (Wells Fargo), in Parker, Arizona, in the amount of \$16,610. This check constituted payment of a 20-percent deposit (\$16,560) towards the total amount bid. As El Monte also applied to purchase the parcel’s mineral estate, it submitted an additional \$50 filing fee.

The case record shows that BLM “had a bid opening” at 9 am on June 16, 1999. (Conversation Record dated June 18, 1999.) It appears that the competitive bid form submitted by El Monte was not complete, in that it “did not have any box marked as to the type of entity intending to take title (Individual, Partnership, or Corporation).” Id. A BLM employee contacted Helga Loyd by telephone “and she said that it would be fine for” the BLM employee to mark the box “Corporation” for her, (id.) and BLM apparently did so.

By decision dated June 18, 1999, BLM notified El Monte that its bid for Parcel No. 97-09 had been accepted. BLM noted that El Monte had submitted “the required 20 percent deposit plus \$50.00 for the mineral conveyance fee.” (Decision at 1.) BLM stated as follows concerning payment of the balance: “You are allowed 180 days from the date of the sale to pay the balance of \$66,240.00.” BLM expressly

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<sup>5/</sup> The notice does not list the parcels for sale, describe their location or fair market value, or refer to the earlier NORA. Presumably, acceptance of the highest bids was to occur on December 10, 1997, the date specified by BLM in the article as when the lands would be “sold to private bidders.”

<sup>6/</sup> BLM apparently did not include information concerning bids for other parcels in the current case record.

warned El Monte that “[f]ailure to submit the balance prior to, but not including, the 180th day following the date of the sale shall result in cancellation of the sale and forfeiture of your deposit.” BLM did not specify when the “date of the sale” was, but the parties have accepted that it was June 16, 1999. El Monte received BLM’s decision by certified mail on June 19, 1999.

The serial register indicates that, on December 13, 1999, a bid (presumably El Monte’s) was rejected. On December 14, 1999, El Monte filed another sealed bid with BLM for Parcel 97-09 and for the “sale to be held on Dec. 15, 1999.” The total bid amount was, as before, \$82,800. The serial register indicates that sale occurred on December 15, 1999.

Other than the serial register page, the record contains no contemporaneous explanation for what transpired in December 1999 concerning El Monte’s first bid. However, on February 25, 2000, BLM issued its decision stating as follows:

On June 16, 1999, you bid \$82,800.00 for [Parcel 97-09] at a sealed bid competitive public land sale held at the Bureau of Land Management, Yuma Field Office, Yuma, Arizona.

On the date of the bid opening, you submitted a cashier’s check in the amount of \$16,610.00. You were allowed 180 days from the date of the sale to pay the balance of \$66,240.00. By letter dated June 18, 1999, you were notified that failure to submit the balance prior to, but not including the 180th day following the date of the sale will result in cancellation of the sale and forfeiture of your deposit (43 CFR 2711.3-1(d)). The balance was not paid on time.

Therefore, your \$16,610.00 deposit is hereby forfeited. The \$50.00 filing fee for conveyance of the mineral interests is non-refundable (43 CFR 2720.1-2).

(BLM Decision at 1.) BLM’s decision is captioned “Bid Rejected.” Id. El Monte appealed from that decision, challenging retention of its deposit. <sup>7/</sup>

<sup>7/</sup> BLM also held that the \$50 filing fee for El Monte’s application to purchase the mineral estate was non-refundable under 43 CFR 2720.1-2(c). It does not appear that El Monte challenges this action on appeal. See Notice of Appeal at 1; Motion at 4.

We note that, also on Feb. 25, 2000, BLM accepted El Monte’s second bid for the same parcel. We are informed that the land has subsequently been patented to El Monte.

El Monte contends that it had made a good faith effort to pay the balance of its competitive bid, but was prevented from doing so by “circumstances beyond [its] control,” which resulted in its payment being “one day late.” (Notice of Appeal at 1.) El Monte shows that it tried to raise the funds necessary to pay the balance due by taking out a loan from Wells Fargo Bank (WFB) secured by a parcel of private land owned by Ms. Loyd. However, Loyd could not close on this loan until after the BLM deadline because title to the private land she offered to WFB as security was not clear, owing to the failure of a local County recorder to properly file a release of a judgment filed of record against that property. This was explained in a letter from WFB to Loyd:

[WFB] was to take a first deed [of trust] on a separate parcel of property that you own. The preliminary title work, pre-closing, reflected a prior cloud or judgment against the property. You had indicated that this judgment was released several years earlier, and that your attorney had assisted in this matter. You then contacted the attorney who assured you that the cloud on the property title was released. State Title Company indicated to me that the release had actually been sitting at the County Courthouse for several years, but it had not been filed. These delays resulted in the loan funding actually taking place, or being in place, approximately one day after your initial deadline.

(Letter from WFB to Loyd dated Mar. 20, 2000 (attached to Notice of Appeal).) El Monte asserts that it was this delay, “at the last minute,” that prevented WFB from making the loan and thus funding El Monte’s payoff of the balance due to BLM for the lot, for a “period of 24 hours.” (Notice of Appeal at 1.) It also notes that no one else has offered to purchase Parcel No. 97-09, despite the fact that it has been available for competitive sale for many years.

[1] Section 203(f) of FLPMA, 43 U.S.C. § 1713(f) (2000), provides that sales of public lands “shall be conducted under competitive bidding procedures to be established by the Secretary” of the Interior. The Department has adopted bidding procedures set out in 43 CFR Part 2710. Regulation 43 CFR 2711.3-1(d) provides that, following BLM’s public declaration of the highest qualifying bid,

[t]he successful bidder \* \* \* shall submit the remainder of the full bid price prior to the expiration of 180 days from the date of the sale. Failure to submit the full bid price prior to, but not including the 180th day following the day of the sale, shall result in cancellation of the sale of the specific parcel and the deposit shall be forfeited and disposed of as other receipts of sale.

(Emphasis added.) Thus, having been declared the successful bidder, a bidder is required by that regulation to submit the remainder of its bid before the 180th day following the sale, and its failure to do so results in cancellation of the sale and forfeiture of its original deposit.<sup>8/</sup> The regulation neither provides a basis for extending the time for submission of the required payment nor permits any justification or excuse that would avoid the regulatory consequences of a failure to make timely payment.

In these circumstances, BLM had no authority under the regulations to consider whether a delay in payment of the remainder of El Monte's bid beyond the 180-day period might be excused or waived because it occurred due to circumstances beyond its control or for any other reason. The only question is whether the payment was made within the 180-day period; it was not.

El Monte's payment of the remainder of its bid was due within 180 days following the date of sale, as it was so notified on June 19, 1999. Since the sale occurred on June 16, 1999, payment was due by no later than December 13, 1999, the next day following the 180th day that BLM's offices were officially open. 43 CFR 1822.14.

Although El Monte asserts that payment was submitted "one day late" (Notice of Appeal at 1), BLM's case record contains no evidence that any payment of the remainder of the full bid price was ever submitted to BLM. The absence of any record raises a rebuttable presumption that no payment was submitted. Forcenergy Inc., 151 IBLA 3, 8 (1999); Nahama & Weagant Energy Co., 108 IBLA 209, 213-14 (1989); Richard W. Kulis, 72 IBLA 251, 252-53 (1983). El Monte provides no evidence on appeal that any check or other instrument in payment of the remainder of the full bid price was ever submitted to BLM.

The consequences of this late payment, cancellation of the sale and forfeiture of the bid deposit, are mandated by regulation, and thus cannot be avoided by BLM or this Board.

El Monte argues, however, that BLM merely "rejected its bid" in its February 2000 decision, which (it asserts) is not the same as "cancellation of the sale" under 43 CFR 2711.3-1(d), such that forfeiture of the bid deposit is not in order. (Motion

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<sup>8/</sup> We have adopted a similar approach in competitive oil and gas lease sales. See D. B. Allsup, 92 IBLA 197, 199 (1986) (rejection of bid for failing to timely pay balance of bonus bid and to take other steps to obtain competitive oil and gas lease properly results in bid deposit forfeiture under 43 CFR 3120.6 (1985)), and cases cited therein.

at 5-6.) We acknowledge that BLM's February 25, 2000, decision described its action in those terms and that the serial register page contains the notation "bid rejected" on December 13, 1999. The term "bid rejected" would more properly be used to describe rejection of a bid that was too low or was otherwise incurably defective at the time of the bid opening. Its use to describe BLM's action here was plainly inappropriate. BLM had accepted El Monte's bid in June 1999 when it approved the sale, subject to timely submission of the remainder of the full bid price. It is equally clear that, in February 2000, BLM was providing notice that the remainder of the full bid price had not been timely submitted as required by 43 CFR 2720.1-2(c). In those circumstances, the regulation dictates that "cancellation of the sale" (not "bid rejection") must result and that the "deposit shall be forfeited." To the extent that BLM's decision used the incorrect terminology, it is hereby modified.

However, we do not find that BLM's use of incorrect terminology creates any basis to disregard the plain terms of the regulation or its applicability in the present case. The terms of the regulation are clear and mandatory, and the regulation applies here, where El Monte failed to timely submit the remainder of the full bid price for Parcel No. 97-09.

El Monte evidently made a good faith effort to timely pay the remainder of the full bid price on its competitive bid for Parcel No. 97-09 by attempting to borrow the necessary funds. However, it is equally clear that it failed in this effort. Although we cannot attribute the entire blame for this failure to El Monte,<sup>2/</sup> it was ultimately responsible for complying with Departmental regulations.

El Monte argues that it was dissuaded from submitting a personal check, which it could have done timely, by BLM, and, since it thus justifiably relied on this erroneous statement by BLM to its detriment, BLM should now be equitably estopped to declare the bid deposit forfeited. (Motion at 6-8.) We disagree with this analysis.

El Monte states that it was dissuaded from submitting a personal check by an unidentified BLM employee: "We called and were told that only certified funds would be accepted to pay off the balance." (Notice of Appeal at 1; see Motion at 3, 8.) Since neither 43 CFR 2711.3-1(d) nor any other regulation of which we are aware specifies that payment of the remainder of the full bid price must be made other than by personal check, we find no basis for such statement. However, even

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<sup>2/</sup> El Monte had almost 6 months to arrange its financing. Thus, we cannot completely justify its failure to do so in a manner that would have allowed more time to deal with unforeseen complications such as those presented by the failure of the County recorder to demonstrate clear title to its collateral.

assuming that the statement made by the BLM employee was wrong, we find no equitable estoppel.

It is well established that BLM, like any private party, may be equitably estopped when a party that is ignorant of the true facts has reasonably relied to its detriment on conduct by BLM. Hugh D. Guthrie, 145 IBLA 149, 152-53 (1998) (citing United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970)). However, in order for estoppel to lie against the United States, it must also be demonstrated that the conduct by BLM rose to the level of affirmative misconduct, such that it either affirmatively misrepresented to the party or concealed material facts from it. Hugh D. Guthrie, 145 IBLA at 153 (citing United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979)). Further, in accordance with the U.S. Supreme Court's ruling in Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 65 (1984), we have held that the affirmative misconduct must consist of a crucial misstatement by BLM in writing. David E. Best, 140 IBLA 234, 236 (1997); James W. Bowling, 129 IBLA 52, 55 (1994).

In the present case, BLM cannot be equitably estopped from declaring El Monte's bid deposit forfeited, as required by 43 CFR 2711.3-1(d), by virtue of an oral statement attributed to BLM, as that does not amount to affirmative misconduct in writing. Compare with Watkins v. U.S. Army, 875 F.2d 699, 707-08 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990) (invoking equitable estoppel, based on affirmative misrepresentation in official records). El Monte cannot thus justify or excuse its failure to submit payment of the remainder of the full bid price on or before the December 13, 1999, deadline.

We also note that the circumstances cited by El Monte do not indicate that they were placed in the position of being unable to pay the deposit by BLM's asserted misrepresentation. They state that they "were advised by [WFB] that their funding of the balance of the purchase price on the subject land was delayed due to the failure of the La Paz County Superior Court to file a satisfaction of judgment for several years." <sup>10/</sup> BLM cannot be blamed for that error and is completely blameless in the Loyds' failure to be able to timely complete the loan in question.

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<sup>10/</sup> It is explained elsewhere that Helga Loyd was attempting to borrow funds from WFB to use to pay the balance on the land being purchased from BLM, and that she used as collateral a separate piece of property that she owned, with WFB taking a "first deed" of trust on that property. However, preliminary title work done in connection with that loan revealed a cloud on the Loyds' title to that property in the form of a judgment. El Monte asserts that, although the judgment had been satisfied and a release filed with the County recorder, no action had been taken to note the County records to show that the judgment had been satisfied and to remove the cloud on title.

In view of the clarity of 43 CFR 2711.3-1(d), which (as a duly promulgated regulation of the Department) we are bound to follow, we reject El Monte's argument that it is entitled to a refund under section 305 of FLPMA, 43 U.S.C. § 1735 (2000). We therefore conclude that, upon the failure to timely pay the balance of the amount due for the sale of Parcel No. 97-09, that sale was properly canceled and the 20-percent deposit was forfeited, as required by that regulation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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David L. Hughes  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge