

SARKEYS, INC.

IBLA 76-384, 76-573

Decided August 2, 1976

Appeals from two separate decisions of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas competitive lease bids NM 26942 (Okla.) and NM 27732 (Okla.).

Affirmed.

1. Oil and Gas Leases: Competitive Leases -- Regulations: Waiver

The requirement that a bidder in a competitive oil and gas lease sale must submit one-fifth of the amount bid with his bid is mandatory and will not be waived.

APPEARANCES: DeWayne Pitt, Vice-President, Land, Sarkeys, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

At a competitive oil and gas lease sale held on October 21, 1975, in the New Mexico State Office, Bureau of Land Management, Sarkeys, Inc., was declared the high bidder for Parcel No. 21, NM 26942 (Okla.). The parcel consisted of 94.97 acres and Sarkeys had submitted a bid of \$ 157.77 per acre. By decision of November 20, 1975, the State Office rejected appellant's high bid on the ground that appellant had not submitted one-fifth of the amount bid with its bid as required by 43 CFR 3120.1-4(b). The State Office decision recited that one-fifth of the amount bid totaled \$ 2,997.63 whereas appellant had only submitted \$ 851.64 with its bid.

At a competitive oil and gas lease sale held on February 26, 1976, in the New Mexico State Office, BLM, appellant was declared the high bidder for Parcel No. 3, NM 27732 (Okla.). The parcel consisted of 67.13 acres and Sarkeys had submitted a bid of \$ 181.19 per acre. By decision of March 26, 1976, the State Office rejected appellant's high bid on the ground that appellant had not submitted one-fifth of the amount bid with its bid as required by 43 CFR

3120.1-4(b). The State Office decision recited that one-fifth of the amount bid totaled \$ 2,464.19, whereas the appellant had only submitted \$ 1,601.00. Inasmuch as these appeals involve the same party and the same issues of law they have been consolidated for consideration.

The problem in these cases apparently arose from the fact that in both instances appellant utilized an incorrect acreage figure in computing the bonus. Thus, in the October sale of Parcel No. 21 appellant utilized an acreage figure of 26.99 rather than 94.97. As appellant computed the acreage, the total bid was \$ 4,258.21, and one-fifth of that was \$ 851.64. In its statement of reasons for appeal appellant declares that it intended to offer the per acre bonus of \$ 157.77 for all of the acreage in Parcel No. 21, and it has submitted full payment to the State Office of the bonus that would be due for the entire 95-acre tract.

Similarly, in the February sale of Parcel No. 3 appellant utilized an acreage figure of 44.18 rather than 67.13. As appellant computed the acreage, the total bid was \$ 8,004.98, and one-fifth of that was \$ 1,601.00. In its statement of reasons for appeal appellant similarly declares that it intended to offer the per acre bonus of \$ 181.19 for all of the acreage in Parcel No. 3, and it has submitted full payment to the State Office of the bonus that would be due for the entire 67.13-acre tract.

We note that in both instances the mistake was clearly that of the appellant. The description of Parcel No. 21 ended with the statement that: "Parcel 21 contains a total of 94.97 Acres." The description of Parcel No. 3 likewise ended with the statement that: "Parcel 3 contains a total of 67.13 Acres."

The applicable regulation states:

The successful bidder at a sale by public auction must on the day of the sale, deposit with the authorized officer of the proper office or other officer conducting the sale, and each bidder, if the sale is by sealed bid, must submit with his bid the following: Certified check on a solvent bank, money order, or cash, for one-fifth of the amount bid by him. [Emphasis supplied.]

43 CFR 3120.1-4(b).

While the regulation is couched in mandatory terms, it must be noted that the Department has held that failure to submit a statement of citizenship with the bid, as required by 43 CFR 3120.1-4(a), is a waivable defect. North American Coal Corp., 74 I.D. 209 (1967). Recent Board cases have drawn a distinction between mandatory compliance with the regulations applicable in noncompetitive lease situations and compliance with those applicable

regulations in a competitive lease situation. As this Board noted: "Mandatory compliance with the regulation is essential for determining the priority of noncompetitive lease offers. The factor of priority in filing is lacking in the competitive lease situation, where high bid is the overriding criterion." Silver Monument Minerals, Inc., 14 IBLA 137, 139 (1974). See also Ballard E. Spencer Trust, Inc., 18 IBLA 25, 28 (1974). Provided the element of fairness to all participants is present, the Department has not insisted on rigid and unyielding application of its regulations in all circumstances in the competitive leasing milieu.

Nevertheless, in the instant cases where the difference between the amount required and the amount paid as a deposit was substantial, we feel that waiver of the requirement that a bidder submit one-fifth of the entire bid with his offer would be so prejudicial to the conduct of lease sales that it cannot be permitted. Indeed, in the North American Coal Corp., *supra* at 211, the Solicitor of the Department noted "[w]e agree that if a bidder could withhold his bid deposit without penalty he would be in a much better position than other bidders. * * * [S]ince the consequences of permitting deviations in so important an aspect of competitive bidding as the bid deposit would be so destructive to the orderly conduct of lease sales, such a lapse would not be excused." As that decision pointed out, the high bidder could withhold his deposit until he determined the desirability of obtaining the lease and either submit or not submit the deposit after he had completed his evaluation thus gaining a considerable advantage over other bidders. This analysis is valid whether the bidder deposited part of the one-fifth required or none of it. In short, we hold that failure to submit one-fifth of the amount bid with the sealed bid necessitates rejection of the high bid.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge

