

LEE E. LOEFFLER

IBLA 78-17

Decided November 22, 1977

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, designating the high bidder and offering bidder a competitive oil and gas lease W 60677.

Vacated and remanded.

1. Contracts: Formation and Validity: Bid Award -- Oil and Gas Leases: Competitive Leases

The Bureau of Land Management may not accept a bid in a competitive lease sale where the bid proposes a royalty different from that set out in the lease sale notice.

2. Oil and Gas Leases: Competitive Leases

In a competitive lease sale, the royalty provisions in the lease are those specified in the notice of sale.

3. Oil and Gas Leases: Competitive Leases

The highest bidder in a competitive lease sale does not forfeit his deposit of one-fifth the amount of the bid where he is ineligible to be awarded the lease because he conditions his bid upon royalty provisions other than those set out in the lease sale notice.

APPEARANCES: Lee E. Loeffler, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Lee E. Loeffler (Loeffler) appeals from a decision dated September 14, 1977, of the Wyoming State Office of the Bureau of Land Management (BLM), which designated him as high bidder in a competitive oil and gas lease sale. The decision requested

Loeffler to execute the lease forms and to submit payment for rental advertising costs and the balance of his bonus bid in excess of the 20-percent deposit he had submitted with his bid. Loeffler argues that he is entitled to reject the lease because the lease contains royalty provisions contrary to those Loeffler stipulated in his bid and he requests the return of his deposit.

The notice for the August 17, 1977, lease sale of the 319-acre Wyoming tract in question specified that "[r]oyalties payable to the United States will be at the rate of 12-1/2 to 25 percent for oil and 12-1/2 to 16-2/3 percent for gas in accordance with "Schedule B" in the lease form." The lease form prescribes a variable royalty rate within that range based on varying amounts of production. Nevertheless, Loeffler noted on his bid and reiterated in a cover letter that "[t]his bid is submitted with the understanding that lease will provide for a 12 1/2 % royalty to the United States" -- the minimum royalty rate permitted by 30 U.S.C. @ 226(b). (The language quoted is that of the bid; the letter was to the same effect but read somewhat differently.)

Of the two sealed bids submitted, Loeffler's was the higher by more than threefold -- a fact which he ascertained almost immediately after the opening date. When BLM sent Loeffler a lease containing the royalty schedule referred to in the notice of sale, Loeffler, invoking the condition in his bid, returned the lease unsigned, demanded repayment of his deposit, and filed a notice of appeal to this Board.

Each bidder in a competitive lease sale must accompany his bid with a deposit of one-fifth the amount of the bid, 43 CFR 3120.1-4(b). After the opening of the sealed bids (or report of the public auction), the successful bidder is determined, a lease is awarded to him, and he is required to pay the balance of his bonus bid. In the event that the successful bidder fails to execute a lease or otherwise fails to comply with the applicable regulations, the deposit is forfeited, 43 CFR 3120.4-1.

The appeal raises two issues: first, whether a bid which departs in a material matter from the requirements of the regulation and lease sale notice may be accepted, and second, whether a deposit submitted with an unacceptable bid can be declared forfeit.

As to the first issue, we find that a material departure renders the bid invalid.

[1] In order for acceptance and award to take place, the Government must have in its possession a responsive and viable bid. Limitations contained in a bid may deprive the Government of any

right to create a contract, B-179929, 53 Comp. Gen. 737 (1974), cited with approval in Phillips Petroleum Company, 28 IBLA 175 (1976). Although the limitation that prevented acceptance in B-179929 was of the time in which acceptance must take place, there is no reason to distinguish an express condition on acceptance that the lease must contain particular royalty terms.

[2] The royalty terms on which BLM may accept a bid are those of the notice. Section 3120.2-2 of 43 CFR prescribes "[n]otice of the offer of lands for lease at a royalty and rental to be specified in the notice." Prior publication of lease terms goes to the very core of the competitive bidding process. As the Solicitor has said: "Competitive bidding is based upon the underlying assumption that all bidders have an equal opportunity to compete upon a common basis with other bidders." North American Coal Corporation, 74 I.D. 209 (1967). Price becomes the primary criterion for selection. Loeffler excluded himself from competition by conditioning his bid on terms contrary to those of the notice. Therefore, his bid could not have been accepted and should have been rejected.

[3] Having so held, we may now consider whether the bid deposit is forfeited. The Solicitor has alluded to the rationale for the deposit provisions in his decision in North American Coal Corporation, *supra*. Without such a deposit, a successful bidder could, without cost to himself, spurn the results of the sale after learning how much lower his competitor's bids were, or accept the lease if he deems it more desirable. He might avoid making the diligent, independent value assessment on the leased tract that the competitive bidding system strives to foster. This Board has held that preventing such a free second guess is sufficiently important to justify rejecting a bid unaccompanied by a deposit. Sarkeys, Inc., 26 IBLA 141 (1976). We can find no justification for retaining the deposit of a bidder who, either through careless preparation of his application or self-imposed condition, has rendered himself ineligible to be awarded a lease. However ill-motivated he might be, he should have no first chance -- let alone second chance -- to bid for the lease. It is into this category that Loeffler's stipulation puts him. In other words, there is no purpose to be served in forfeiting a deposit submitted by a bidder who could have no chance to be awarded a lease. Therefore, all else being regular, Loeffler's deposit is to be returned to him, as though his bid had been rejected. 1/

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1/ Although the State Office did not rule on Loeffler's request for a refund, we do so here in order to expedite administrative action.

Therefore, 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 vacated and remanded.

Martin Ritvo  
Administrative Judge

We concur:

Joan B. Thompson  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

