

SOUTHERN UNION EXPLORATION CO.

IBLA 79-551

Decided November 5, 1980

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting appellant's competitive oil and gas lease offer NM 33037.

Set aside and remanded.

1. Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

2. Confidential Information -- Words and Phrases

"Proprietary information." Proprietary information means information which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future resulting in a substantial detrimental effect on a Government program. Internally generated Governmental decisions and information are not proprietary.

3. Administrative Procedure: Decisions -- Oil and Gas Leases: Generally  
-- Oil and Gas Leases: Competitive Leases

Where BLM incorporates by reference a Geological Survey memorandum into its decision rejecting a competitive oil and gas lease offer and where such memorandum was the principal basis on which the decision rejecting the offer was made, the memorandum must be made available to the offeror.

4. Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases:  
Discretion to Lease

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose the factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A justification memorandum which merely describes the process by which the Geological Survey determines the presale value for a parcel and states the resulting value without revealing the underlying facts is not sufficient to support a bid's rejection.

APPEARANCES: Paul M. Zeis, Esq., Southern Union Exploration Company, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southern Union Exploration Company appeals the decision of the New Mexico State Office, Bureau of Land Management (BLM), dated July 12, 1979, rejecting for the second time its high bonus bid to lease a 237.1-acre parcel of land located in the Puerto Chiquito Field in Rio Arriba County, New Mexico.

At a competitive oil and gas lease sale held by BLM on February 21, 1978, appellant submitted the high bid of \$ 6 per acre on Parcel No. 2. By decision dated July 7, 1978, BLM rejected the bid as inadequate, based on a report from the United States Geological Survey (Survey) evaluating the parcel at \$ 25 per acre. Appellant appealed to this Board and by decision, Southern Union Exploration Co., 41 IBLA 81, dated May 31, 1979, we set aside the BLM decision and remanded the

case for compilation of a more complete record and readjudication of the bid. In that decision, we held in part:

The United States Geological Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases and the Secretary is entitled to rely on the Survey's reasoned analysis. Gerald S. Ostrowski, 34 IBLA 254 (1978); Coquina Oil Corp. [29 IBLA 310 (1977)]; Arkla Exploration Co. [25 IBLA 220 (1976)]. When BLM relies on Survey's analysis in rejecting a bid as inadequate, it must ensure that a reasonable explanation is provided for the record to support that decision. In this case, the Board agrees that the Survey's explanation of the basis for its presale evaluation is, in itself, conclusory because it fails to provide facts for the record showing the basis of its estimate of the expected recoverable reserve.

Where an upland competitive oil and gas lease bid is not clearly spurious or unreasonable on its face and the record fails to disclose the factual basis for the conclusion that the bid is inadequate, the Board has held that the decision must be set aside and the case remanded for compilation of a more complete record and readjudication of the acceptability of the bid. Charles E. Hinkle, 40 IBLA 250 (1979); Gerald S. Ostrowski, *supra*; Yates Petroleum Corp., 32 IBLA 196 (1977); Frances J. Richmond, 24 IBLA 303 (1976); Arkla Exploration Co., 22 IBLA 92 (1975). The Board finds that the lack of facts in the record to support the Survey's estimate of a 55,500 barrel expected recoverable reserve of oil underlying parcel No. 2 and the absence of any description of the Survey's simulation method, leave the Board with no basis to determine whether the Survey's conclusion as to presale value and BLM's decision to reject appellant's bid were reasonably based in fact. Moreover, we are unable to ascertain what consideration, if any, was afforded the fact that the lands were to be leased under a no surface disturbance stipulation.

Following remand, BLM requested a new evaluation report which Survey submitted by memorandum dated June 25, 1979. The report again recommended rejection of the bid and provided a more extensive description of the evaluation process used to determine the presale value of Parcel No. 2. BLM thereafter issued its second rejection of appellant's bid, stating:

A new evaluation report was requested from the U.S. Geological Survey on June 12, 1979. By memorandum dated

June 25, 1979, the U.S. Geological Survey submitted additional substantial evidence supporting the rejection of the bid.

In view thereof, the appellant's bid of \$ 6.00 per acre is still inadequate and NM 33037 is hereby rejected for a second time.

In its statement of reasons for this second appeal, appellant indicates that it requested a copy of the Survey memorandum but did not receive it. Appellant then argues that BLM has still failed to provide any basis for the presale evaluation, has not compiled a more complete record, and has itself issued a conclusory decision. Appellant asserts: "[T]he mere statement that the rejection of the bid is based on some secret memorandum which is not part of the record violates both the Board's explicit order and Appellant's right to due process under the Constitution of the United States."

We assume that the reason that BLM did not send a copy of the Survey's memorandum to appellant or incorporate Survey's evaluation into its decision is the fact that the concluding paragraph of the memorandum reads:

This information is considered proprietary; therefore, your office is hereby designated as a secondary office of control and is responsible for maintaining the confidentiality of this information. This information should not be exposed to the public in either whole or part without approval from the Area Oil and Gas Supervisor.

The copy of the memorandum contained in the record also shows the penciled notation, "confidential."

[1, 2, 3] The main thrust of our earlier decision in this case, which both BLM and Survey have evidently missed, is that the appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal. Steven and Mary J. Lutz, 39 IBLA 386 (1979); Basil W. Reagel, 34 IBLA 29 (1978); Yates Petroleum Corp., 32 IBLA 196 (1977); Frances J. Richmond, 24 IBLA 303 (1976); Arkla Exploration Co., 22 IBLA 92 (1975).

The characterization of the material in the June 25, 1979, Survey memorandum as "proprietary" and "confidential" is totally inappropriate and improper for a number of reasons.

The Survey memorandum merely expands the description of Survey's evaluation process given as a basis for the original rejection and repeats the presale value of \$ 25 per acre determined for Parcel No. 2. However, "proprietary" or "confidential" generally refers to information which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would also inhibit the Government's ability to obtain this type of information in the future resulting in a substantial detrimental effect to the oil and gas leasing program. See National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974); Freedom of Information Act, Appeal of Tenneco, M-36918, 86 I.D. 661, 663 (1979). The term, proprietary, should not be applied to internally generated Government information such as the description contained in the Survey memorandum.

The second reason why the Survey memorandum may not be kept secret is that by referencing the memorandum in its decision, BLM incorporated its contents into the decision. The Survey memorandum was the principal criterion on which BLM made its decision to reject appellant's bid and therefore, should have been made available to the appellant. See American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 702-703 (D.C. Cir. 1969).

We take note that, by memorandum of July 31, 1980, to the Acting Chief Judge of this Board, the Acting Deputy Division Chief, Onshore Mineral Regulation, attempted to justify the position of the Geological Survey that the estimated value as determined by Survey should not be released to an appellant. That memorandum states, in relevant part:

We feel that there is sound reasoning for this procedure. Very often the unleased parcels are reoffered for competitive sale. If the minimum acceptable resource value is released before the sale is held, it might preclude the Government from leasing the publicly owned tract at a price greater than the minimum acceptable figure established by the Geological Survey. In order to insure fair market value to the Government, the figure should not be made public until the parcel has been leased or it has been determined not to reoffer the parcel. This position finds judicial sanction in Pitman v. Interior, Civil Action No. 76-F-1022 (D-Colo. 1977). Another reason for not releasing the information is the fact that if the information is made public in a decision, it is possible that only the appellant in the case may be aware of the information, thus placing him at an unfair advantage should the parcel be reoffered for sale.

Whatever merit the position of the Geological Survey may have in connection with either attempts by individuals to gain the minimum

estimated resource value prior to a lease offer, or, as in Pitman, *supra*, efforts by non-participants in a lease sale to obtain the figure after a lease offering in which all of the bids are rejected, such concerns must fall before the overriding need of this Board to fairly and completely adjudicate appeals pursuant to the authority delegated by the Secretary. Where, as here, the high bidder whose offer is rejected for insufficiency pursues a proper appeal, and the bid cannot be said to be spurious, the basis of Survey's recommendation, including specifically its monetary evaluation, must be made available to the party. Indeed, the Department's regulations expressly prohibit the Board from considering any information in the course of deciding an appeal where that information is not made available to the parties to the appeal. See 43 CFR 4.24(a)(4). To the extent that an appellant cannot be apprised of the high bid and the basis of its computation, such documentation is not part of the appeal record and cannot serve as a basis for sustaining an appealed decision.

Moreover, the position of the Geological Survey in the instant matter is contrary to the position taken by the Solicitor. In Appeals of Freeport Sulphur Co. and Texas Gulf Sulphur Co., M-36779 (Nov. 17, 1969), the Geological Survey pressed much the same argument as it presents herein. This Solicitor's Opinion dealt with attempts to obtain the presale estimates both for parcels upon which appellants had submitted high bids which were rejected for inadequate consideration, as well as parcels on which no bids were tendered at all. Solicitor Melich held that the estimated resource values on all of the parcels should be made available to the appellants and the public. In Freedom of Information Act, Appeal of Tenneco, *supra*, which was approved by Solicitor Krulitz, the Associate Solicitor examined the developments in the law, subsequent to the Freeport Sulphur Opinion, taking special notice of the Pitman decision. The Associate Solicitor stated:

Consequently, we conclude that the withholding of the presale value of this tract, where no bid has been received would be within exemption (5). See NLRB v. Sears, [421 U.S. 132 (1975)], and Pitman v. Interior, Civil Action No. 76-F-1022 (D.Colo. 1977). Since the Solicitor's opinion, M-36779, was issued prior to the recent cases interpreting exemption (5) such as NLRB v. Sears, *supra*, and Pitman v. Interior, *supra*, we do not consider that opinion as requiring release of the Government's prebid values of a tract in the situation presented. [Emphasis added.]

86 I.D. at 663. Thus, the opinion of the Associate Solicitor did not purport to reverse the opinion of Solicitor Melich that, where bids are received and a proper appeal is filed, the presale evaluation must be released to the party.

Finally, we note that the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), does not establish the limits of disclosure; rather, it delineates only what is required to be disclosed. Except to the extent that the release of certain information is expressly

prohibited by law, the Department may disclose any information, even that for which an express exemption is provided under the FOIA, that it determines proper. Section 102(a)(5) of the Federal Land Policy and Management Act of 1976 (FLPMA) admonishes the Secretary to "structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decision-making." 43 U.S.C. § 1701(a)(5) (1976). Refusal to inform a good-faith appellant of the basis for the rejection of a high bid renders the right of appeal, which the Secretary has afforded, virtually meaningless. Regardless of whether or not an exemption is provided by the FOIA which the Department might invoke, we hold that, except to the extent that the release of certain information is prohibited by law, an appellant who has submitted a high bid, which is not clearly spurious, must be informed not only of the estimated minimum values, but the subsidiary factual data which served as the predicate for the derivation of that estimate.

[4] Turning to the Survey memorandum itself, we find that, even if it were disclosed, it provides insufficient basis for the record of the rejection which is the subject of this appeal as required by our earlier decision in this case and other decisions of this Board. It again does not provide sufficient factual basis for the BLM decision. As already noted, it expands the description of the Survey evaluation process submitted to justify the original rejection of appellant's bid, but provides little factual background and no actual analysis of the parcel's value. We willingly concede that the Survey undoubtedly must use some proprietary information in formulating presale values. However, examination of the description of the evaluation process indicates that during the process Survey comes to its own conclusions and value estimates as elements of the evaluation process. Such internally generated analysis and data is not proprietary. To focus on just one example, the Survey memorandum states: "A cash flow program, discounting 20%, was run utilizing simulation techniques wherein ranges of values determined to be representative of the subject parcel was used. \* \* \* The ranges of values were then entered into a program which calculated an 'average net present worth' and 'an average expected recoverable reserves' (55,500 barrels of oil), for the subject parcel." In determining what range of values was representative, Survey may have considered proprietary data, which need not be identified nor disclosed; however, the analysis and choice of values to be entered into the program were part of the Government's own evaluation and must be disclosed so that a sufficient basis for the rejection is reflected in the record. The only instances where Survey made the appropriate factual disclosure was the above quoted 55,500 barrel of oil figure and the presale value of \$ 25 for the parcel.

Moreover, both BLM and Survey failed to indicate what consideration, if any, was afforded the fact that the lands were to be leased under a "no surface occupancy stipulation" in response to our comment on remand. 41 IBLA at 84.

Finally, although BLM may rely on Survey's expertise, it must independently review and make a decision as to the adequacy of competitive oil and gas bids. We note that the Survey memorandum submitted in this case is essentially the same memorandum submitted as justification for rejecting high bids in other appeals now before this Board. Although each memorandum reflects the determined presale value, we believe that BLM would be hard put to explain how the same justification provides an adequate basis for the rejection of different bids on different parcels of land at different times.

We conclude that this case must once again be remanded to BLM for further documentation of the factual basis for the rejection of appellant's bid and disclosure of such documentation to appellant. We feel constrained to note that should the appropriate factual basis for the decision not be provided, we will be forced to assume that no such basis exists and order acceptance of appellant's bid. See Stephen and Mary Lutz, supra.

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 set aside and the case remanded for further action consistent with this opinion.

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James L. Burski  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

