

MICHAEL SHEARN

IBLA 85-943

Decided February 26, 1987

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting a high bid for a competitive oil and gas lease NM-58536.

Affirmed.

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

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome by a preponderance of the evidence BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and fails to establish that its bid reasonably reflects fair market value.

APPEARANCES: Michael Shearn, pro se; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Michael Shearn has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated August 16, 1985, rejecting his high bid for competitive oil and gas lease NM-58536.

Appellant was the high bidder for parcel No. 39, described as 640 acres of public land situated in sec. 23, T. 26 S., R. 35 E., New Mexico Principal Meridian, Lea County, New Mexico, at a February 23, 1984, competitive oil and gas lease sale, with a bid of \$ 34,000 or \$ 53.75 per acre. By a decision dated March 19, 1984, BLM rejected appellant's bid, stating only that the bid was "less than the pre-sale tract valuation." Appellant appealed the March 1984 BLM decision and in Michael Shearn, 87 IBLA 168 (1985), the Board set aside the BLM decision and remanded the case to BLM for a readjudication of appellant's bid because BLM had not provided a "reasoned explanation" for rejection of the bid and appellant had offered "persuasive reasons why his bid

represents the fair market value of the tract." Id. at 169, 170. We directed BLM to respond to the "points raised in appellant's statement of reasons." Id. at 171.

In its August 1985 decision, BLM again rejected appellant's bid based on the recommendation of the Southwest Region Evaluation Team (SRET), set forth in an August 6, 1985, memorandum to the Chief, Mineral Leasing Unit 1. This appeal followed.

In its August 1985 memorandum, the SRET stated that the "presale valuation" for parcel No. 39 had been determined to be \$ 75 per acre prior to the February 1984 competitive lease sale, "based principally upon a previous lease sale high bid of \$ 76.87 per acre (August 31, 1983 lease sale) for a parcel in section 22, which adjoins the section containing parcel 39 to the west." The SRET stated that it had also "noted" a high bid of \$ 104.05 per acre for a parcel in sec. 30, T. 26 S., R. 36 E., New Mexico Principal Meridian, New Mexico, "a little over a mile to the southeast of parcel 39," at an April 19, 1983, lease sale.

[1] As appellant stated in his original statement of reasons for appeal, he does not challenge the exercise by BLM of its discretionary authority to reject a high bid for a competitive oil and gas lease where the bid does not represent the fair market value of the parcel for oil and gas leasing purposes. See Suzanne Walsh, 94 IBLA 249 (1986); Coquina Oil Corp., 29 IBLA 310 (1977); see 43 U.S.C. § 1701(a)(9) (1982). Rather, appellant objects to BLM's fair market valuation of parcel No. 39. In such circumstances, appellant has the burden of demonstrating BLM's valuation does not represent fair market value, and appellant's valuation does represent fair market value. Viking Resources Corp., 80 IBLA 245 (1984).

Appellant argues first that BLM's "presale valuation" of \$ 75 per acre does not constitute fair market value because it fails to reflect a "decline" in the fair market value of Federal oil and gas leases at the time of the February 1984 lease sale. Appellant notes this decline is illustrated by the two Federal lease sales relied upon by the SRET, i.e., a decline from a high bid of \$ 104.05 per acre in April 1983 to \$ 76.87 per acre in August 1983. Appellant states that since 1982 this "downward transition" is reflected in the fall of gas prices, the decrease in drilling, the slow down in gas sales, the hostile merger of oil and gas companies, and the departure of many "independents" from the industry.

Appellant posits a similar downward "trend" in the fair market value of Federal oil and gas leases in the area of parcel No. 39. However, he has offered no evidence to establish that the divergence in the two cited high bids is reflective of a decline in fair market value, rather than a dissimilarity in the two parcels of land for oil and gas leasing purposes. Nothing in the SRET's August 1985 memorandum indicates that the two parcels were considered to be comparable. Indeed, in establishing the fair market value of parcel No. 39, the SRET relied "principally" on the \$ 76.87 per acre high bid for the August 1983 lease sale. Moreover, appellant has not established that the purported "trend" continued at the same rate between August 1983 and February 1984. The SRET's August 1985 memorandum indicates that,

even assuming a decline prior to August 1983, the fair market value of Federal oil and gas leases subsequently stabilized. In support of this position the SRET cites a high bid of \$ 76.89 per acre for a parcel in sec. 25, T. 26 S., R. 35 E., New Mexico Principal Meridian, New Mexico, at a June 19, 1985, lease sale. We acknowledge there has been a "dramatic change" in the oil and gas industry in the last several years. However, appellant has not demonstrated that this is translated into a fair market value for parcel No. 39 equal to or below appellant's bid. Read & Stevens, Inc., 93 IBLA 61 (1986); Billy Krumbein, 92 IBLA 362 (1986); Dan Nelson, 85 IBLA 156 (1985).

Appellant also argues that he based his bid on two bids, respectively, \$58.82 and \$68.39, by Amoco for parcels in secs. 32 and 36, T. 26 S., R. 35 E., New Mexico Principal Meridian, New Mexico. <sup>1/</sup> In its August 1985 memo-*r*andum, the SRET stated that these bids were taken from State lease sales:

Although we utilize State lease sales in our previous lease sale data, we place greater emphasis on Federal lease sale data because of the similarity in lease terms. Most of the State's 5 year leases contain a provision for 1/6 royalty versus 1/8 royalty for most Federal onshore leases. This has the effect of making these State leases worth less from a bonus standpoint.

Appellant counters that State leases "should bring a higher price" than Federal leases because State leases "carry a maximum of 1/6 royalty; whereas, Federal leases use a sliding scale royalty from 1/8 to 1/4." Appellant states that State leases are "more desirable from a purchaser's standpoint."

Both the SRET and appellant agree that royalty terms affect the fair market value of land for leasing purposes. See Peabody Coal Co., 93 IBLA 317, 93 I.D. 394 (1986) (coal lease). With the generally higher royalty for State leases, such leases would, in most cases, be more valuable to the lessor and less valuable to the lessee. It would be reasonable to expect that, unless a higher royalty rate can reasonably be expected, Federal leases would bring a higher "bonus bid" than State leases. BLM is, therefore, correct that bonus paid for a State lease does not automatically translate into a fair market value for a Federal lease. Appellant has not established how the fair market value of State leases can be made comparable, by adjusting for the difference in royalty terms to account for these economic "dissimilarities." See Uniform Appraisal Standards for Federal Land Acquisitions, Interagency Land Acquisition Conference, 1973, at 9. Thus, we do not know how the bid amounts for the two State leases referred to by appellant equate to the fair market value of parcel No. 39 for Federal oil and gas leasing

<sup>1/</sup> In his original statement of reasons, appellant stated that in formulating his bid he had also relied on the fact that the Southern Union Producing Company had been "awarded a lease" for a parcel in sec. 20, T. 26 S., R. 35 E., New Mexico Principal Meridian, New Mexico, based on a \$ 50 per acre bid. The SRET's August 1985 memorandum points out that this bid "was rejected for being too low." Appellant now admits that he "used this bid, not knowing it had been rejected," but asserts that the bid remains reflective of fair market value. As we state infra, a single rejected bid, by itself, is not reflective of fair market value.

purposes. This being the case, we cannot find the State lease bid amounts to be a basis for finding BLM erred when making an analysis of comparable bids.

Appellant next argues that the area surrounding parcel No. 39 is characterized by uneconomic production, pointing to a "deep gas test" well in sec. 21, T. 26 S., R. 35 E., New Mexico Principal Meridian, New Mexico, and a "plugged" well in sec. 25, T. 26 S., R. 35 E., New Mexico Principal Meridian, New Mexico. In its August 1985 memorandum, the SRET admitted that the sec. 25 well was "uneconomic," but stated that the sec. 21 well, which had been drilled "primarily to obtain valuable deep geologic information," had produced significant amounts of oil and gas "by the end of 1984." Appellant counters that the sec. 21 well will "most likely \* \* \* not pay out its original costs." No specific information regarding the sec. 21 well is found in the record. We therefore cannot determine whether the well will prove to be profitable. Speculation by appellant will not suffice.

Finally, appellant challenges BLM's "presale valuation," claiming it is not consonant with any of the bids submitted for parcel No. 39 in the February 1984 lease sale. <sup>2/</sup> These bids ranged from \$ 8.60 to \$ 53.75 per acre. This argument stems from a contention in appellant's original statement of reasons that BLM's estimate of fair market value is only a "guess" and that the "[t]rue" fair market value "is determined by industry for that precise moment at the time of the oil and gas [lease] sale." Appellant's argument is conceptually flawed. Fair market value is not necessarily determined by bids submitted by potential lessees (see note 4), but, rather, by what a willing and knowledgeable lessor and lessee would accept in a fair and open sale, which is not affected by undue stimulus. <sup>3/</sup> Billy Krumbein, supra at 364 n.1; Ronald C. Agel, 83 IBLA 76, 78 (1984), and cases cited

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<sup>2/</sup> Appellant also argues generally that acceptance of his bid is in the national interest because it fosters oil and gas development by "independents," who would otherwise not participate in Federal oil and gas leasing. Appellant states that with a diminution in such participation "future sales can be comfortably held in large closets." We recognize that "independents" are an important segment of the oil and gas industry. On the other hand, it is still the primary policy of the Department to obtain fair market value in competitive oil and gas leasing. Until that policy is changed, when the record supports BLM's determination that a high bid does not constitute fair market value, the Board cannot disavow that policy in an effort to lend a helping hand to "independents."

<sup>3/</sup> The Department has recognized the merit, in some circumstances, of comparing presale parcel evaluations with postsale evaluations which consider the amount of the bids actually tendered. This approach, utilized primarily in uncharted, frontier areas such as the Outer Continental Shelf, involves comparison of bids with the presale value to arrive at an average evaluation of a tract. See Superior Oil Co. v. Watt, 548 F. Supp. 70 (D. Del. 1982), and Kerr-McGee Corp. v. Watt, 517 F. Supp. 1209 (D.D.C. 1981) (involving offshore oil and gas leasing); Exxon Corp., 73 IBLA 176 (1983). Under that approach, the "industry's consensus" of the value of the parcel offered is used to double check BLM's preliminary estimate of fair market value. Superior Oil Co. v. Watt, supra at 72.

therein. That is the meaning of fair market value. As we said in Viking Resources Corp., *supra* at 247-48: "Because the concept of fair market value involves terms which are mutually agreed upon by both the buyer and the seller, an unaccepted bid from a single party carries little probative weight as evidence of fair market value." Thus, reliance on comparable lease sales, as BLM did in the case of valuing parcel No. 39, is considered a reliable approach to determining fair market value. Ronald C. Agel, *supra* at 79. Such sales reflect that mutually acceptable value. Thus, in the absence of probative contrary evidence, the "presale valuation" established by BLM in this manner reflects fair market value and, lacking a showing of error, is sufficient to support rejection of a bid where the bid is less than that valuation. 4/

After reviewing the evidence offered by BLM, we conclude that BLM has corrected the deficiency in the earlier record by providing a reasoned explanation for rejection of appellant's high bid, thereby establishing the prima facie correctness of its valuation of parcel No. 39. The Westlands Co., 83 IBLA 43 (1984). Furthermore, we conclude that appellant has not carried his resulting burden of proving by a preponderance of the evidence that BLM's valuation was inaccurate and that appellant's bid represents the fair market value of parcel No. 39. Billy Krumbein, *supra*. At best, the case presents a reasonable difference of opinion regarding the fair market value of parcel No. 39. Kerr-McGee Corp. v. Watt, *supra*; Read & Stevens, Inc., *supra*. We do not doubt that appellant engaged in a reasonable bidding strategy, calculated to acquire the lease at a price acceptable to appellant. However, this does not mean BLM was not justified in rejecting appellant's bid.

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4/ As a matter of policy, the Director, BLM, has permitted some deviation from the requirement that BLM accept only high bids which meet or exceed the "presale valuation." This policy permits the acceptance of marginal bids based on a downward post sale adjustment in the accepted fair market value in the course of a post sale analysis. See Superior Oil Co. v. Watt, *supra* at 72 ("problem bids"); Kerr-McGee Corp. v. Watt, *supra* at 1213 ("close calls"). The policy acts as a "means of checking BLM's own presale evaluation." Ronald C. Agel, *supra* at 77. Using this method, described in Instruction Memorandum (IM) No. 85-490, dated May 29, 1985, BLM decides whether to accept a high bid based on comparison with an average of two or more "probative bids" received on the parcel offered and the presale valuation, termed the AEOT (average evaluation of tract) (IM No. 85-490, Encl. 1, at 7). "Any high bid that is above the AEOT for the parcel is recommended for acceptance." *Id.* at 8. However, a probative bid is only that bid which is "at least 25 percent of the [pre-sale estimate of value] for the tract on which the bid was entered." *Id.* at 7 n.1; cf. Kerr-McGee Corp. v. Watt, *supra* at 1213 (approving elimination of "anomalously low bids" in calculating AEOT). Thus, this policy cannot avail appellant where the only probative bid was appellant's bid. None of the other three bids exceeded the AEOT minimum of \$ 18.75 per acre. Accordingly, we will not set aside the August 1985 BLM decision and remand the case for a consideration of the applicability of IM No. 85-490.

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 affirmed.

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R. W. Mullen  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge