

SOUTHERN UNION EXPLORATION CO.

IBLA 85-657

Decided May 15, 1987

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting the high bid for oil and gas lease NM 58048.

Set aside and remanded.

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

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to appellant to establish that the bid submitted represents fair market value.

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

Where the record establishes that a number of bids submitted for various parcels of land in a competitive oil and gas lease sale were below BLM's presale estimate of value and that some were accepted while others were not, and no justification for this seemingly disparate treatment has been provided, the Board will set aside a decision rejecting a high bid and remand and case to BLM so that an explanation of the procedures utilized may be provided.

APPEARANCES: Dennis K. Morgan, Esq., Dallas, Texas, for Southern Union Exploration Company.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southern Union Exploration Company (SX) has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated April 16, 1985, rejecting, for the second time, its competitive oil and gas lease high bid for 320 acres constituting parcel 32 at the October 26, 1983, lease sale.

When we first reviewed the record in the instant case, the file disclosed neither a presale evaluation, post-sale analysis, nor, indeed, any reasonable basis for the conclusion that appellant's high-bid for parcel 32 did

not represent fair market value. The totality of the justification for rejection was set forth in a memorandum from the Deputy State Director, New Mexico State Office, Bureau of Land Management, and cited in our decision:

The high bids for parcels 9, 13, 14, 27, 28, 31, 32, 36, 38, 39, 43, 48, 49, 52, 54, 56, 58, 60, 61, 62, and 63 were lower than our presale estimates of value. We recommend rejection of the high bids for 7 parcels - 14, 28, 32, 41, 49, 52, and 63. The presale valuation of parcel 41 was based upon terms of the communitization agreement (part 6 of Corporation Counsel Order No. 118809.) The valuation was revised on the post-sale analysis due to the amount of money being held in suspense to be assumed by the successful bidder. [Emphasis supplied.]

Southern Union Exploration Co., 79 IBLA 225, 225-26 (1984).

The Board noted that neither the presale evaluation nor the method of its calculation had been disclosed either to appellant or the Board. Further, the Board noted that "there is no comparison of the criteria by which 14 of the 21 bids lower than the presale estimates were found to be acceptable, whereas 7 were not." Id. at 226 n.6. Faced with such a paucity of information, the Board set aside that decision and remanded it to the State Office for readjudication, noting that, if the State Office determined to reject the high bid again, it "shall set forth the reasons for doing so, including the presale evaluation, so the Board can properly consider the issues in case of an appeal."

Subsequent to our remand, the acceptability of appellant's high bid was reevaluated by the Southwest Regional Evaluation Team which again recommended rejection. The report noted:

The standard used in determining whether the bonus bid on a given tract is acceptable involves a comparison of the high bid to the BLM estimated value of the tract. If the high bid is substantially beneath the BLM value of the tract, then such a bid is deemed to be unacceptable \* \* \*.

The high bid of \$ 16,000 (\$ 50.00 per acre) is substantially beneath the BLM estimated value of \$ 24,000 (\$ 75.00 per acre.)

On August 31, 1983, at the KGS oil and gas lease sale a tract with a "dry hole" in the southwest quarter of Section 22, T26S, R35E, received an acceptable high bid of \$ 76.87 per acre. The subject tract is portions of Sections 17 and 20 of the same township and range. The high bid for the tract in Section 22, together with the fact that an "Atoka" well in section 21 has produced over 2.2 billion cubic feet of gas, is considered to be excellent support for the estimate for the subject of \$ 75.00 per acre as of October 26, 1983 (refer to attached plat.)

Based on this report, the State Office again rejected appellant's bid on April 16, 1985. Appellant has again appealed the rejection of its high bid to this Board.

In its statement of reasons, SX cites this Board's frequent statement that an appellant is entitled to a reasoned and factual explanation of the decision rejecting its high bid. See, e.g., Southern Union Exploration Co., 51 IBLA 89, 92 (1980). SX argues that the additional report now provided by BLM meets neither the minimum requirements for such an explanation or our instruction to provide one. SX maintains that in the case of its bid the Board determined that a reasoned and factual explanation must consist of (1) the presale evaluation, (2) an explanation of the method used to calculate the bid, and (3) a comparison of the criteria by which some of the bids at the same sale which were lower than presale estimates for their respective parcels were found to be acceptable while other low bids were rejected. Appellant argues that "BLM has chosen to disclose only one of these items: SX and the Board now know the presale evaluation." Appellant requests that the Board reverse the State Office decision and direct issuance of the lease.

[1] Based on our review of the record, we conclude that the information submitted by BLM in support of its estimate of value is sufficient, under a number of recent Board decisions, to establish the prima facie validity of its estimate and shift to appellant the burden of showing that its bid represented fair market value. See, e.g., Harris-Headrick, 95 IBLA 124 (1987); Green v. BLM, 93 IBLA 237 (1986); Viking Resources Corp., 80 IBLA 245 (1984). <sup>1/</sup> Since Viking Resources, we have consistently pointed out that ultimate success on an appeal from a high bid rejection can only be achieved where an appellant shows, by a preponderance of the evidence, that its bid represents fair market value. As we noted in Harris-Headrick, supra,

Merely establishing that the Government's presale estimate is too high cannot justify issuance of a lease to any appellant absent a showing that its bid does, indeed, represent fair market value for the parcel in question, because it is possible that even though the Government's estimate may be too high, the appellant's bid could, at the same time, be too low.

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<sup>1/</sup> The concurrence's reliance on pre-Viking decisions is substantially misplaced. First of all, most of those cases involved situations in which virtually no information, including the BLM estimate, was disclosed as to why a specific bid was rejected. Thus, the statements made in those decisions were made outside of specific factual contexts which might have served to focus attention on exactly what quantum of information was required to justify rejection of a high bid. More fundamentally, Viking represents a major development in our approach to high bid rejections, in which we shifted the focus of our analysis from the BLM estimate to the appellant's bid. See Harris-Headrick, supra at 125-26. The concurrence, it would seem, fails to recognize and give proper weight to this fundamental proposition.

Thus, while BLM must, as an initial matter, provide the Board with the basis for its determination that the bid was too low, an appellant must ultimately carry the burden of establishing the acceptability of its bid. 2/ Merely establishing error in the Government's presale estimate will not suffice.

In the instant case, BLM has informed the Board that its estimate was \$ 75 per acre and that this estimate was based on the sale of a tract of land located just over a mile away, which tract contains a dry hole, for \$ 76.87 2 months prior to the instant sale. It also relied on the existence of a gas well on the land between the two parcels to show the existence of producible hydrocarbons. While this data could not be said to conclusively establish that appellant's bid did not represent fair market value, un rebutted it provides a sufficient basis to reject appellant's bid. See Suzanne Walsh, 91 IBLA 119 (1986). And, in fact, this data is totally un rebutted at the present time. Appellant has not even made a passing attempt to justify its bid. 3/

If we were to decide the instant appeal upon the present record, we would have no choice but to affirm the decision of BLM. We are troubled, however, by the absence in the record of any effort on the part of BLM to explain why it accepted 14 bids which were below its presale estimates but rejected 7 others, including appellant's. This information is relevant for two separate reasons. First, BLM's willingness to accept some bids below its presale estimate shows a factor of uncertainty in its reliance on its own evaluation. In other words, BLM is not so confident in its evaluation program that it will automatically reject any bids under its presale estimate. What, then, are the limits of its uncertainty? It may be that BLM applied

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2/ This approach merely replicates the traditional view of the Board that, where challenged on appeal, decisions of BLM officials are presumed to be valid and it is an appellant's burden to show that they are erroneous. See, e.g., In re Pacific Coast Molybdenum Co., 75 IBLA 16, 22, 90 I.D. 352, 356 (1983). Where BLM has rejected a high bid, it has necessarily found that the high bid did not represent fair market value. An appellant can only succeed on an appeal if it can show that its bid does represent fair market value. Thus, the real focus of adjudication must always be on the acceptability of the high bid tendered and not on whether BLM's estimate of value is correct.

3/ Indeed, the concurrence's rigid insistence on requiring BLM to establish what the concurrence considers to be a justifiable basis for the presale estimate (as opposed to the basis upon which BLM actually rejected the high bid) ultimately succeeds only in wasting the time and resources of BLM, appellant, and this Board. Regardless of how weak the initial basis for rejection by BLM might be, this Board can order issuance of a lease in response to the high bid only upon the showing that the high bid represents fair market value. Absent such a showing, the approach of the dissent leads merely to a succession of remands. Rather than treating these cases like yo-yos, it is far better for all concerned if we focus on the real question these appeals present: does the submitted bid represent fair market value? If an appellant cannot establish this fact, an appellant can never get the lease and doesn't deserve it either.

either a fixed percentage of variation or a fixed dollar per acre factor in determining which bids under its presale evaluation would be accepted. It may, on the other hand, have applied a considerably more complex analysis. In either event, it is necessary for the Board to know how BLM determined the acceptability of underbids so that we can ascertain whether appellant was fairly treated.

The second consideration is related to the first. It is absolutely essential that those who submit high bids perceive that the system is fairly administered. Nothing so undermines this perception as a situation in which numerous individuals submit bids below BLM's presale evaluation, but only some have their bids accepted for reasons undisclosed to any of the participants. It is one thing to believe that BLM is consistently overvaluing its assets in ascribing values to parcels under bid. It is quite another thing where the perception is fostered that BLM is either playing favorites in its acceptance of high bids or is totally arbitrary in deciding which bids to accept. Disclosure of the considerations which led BLM to accept 14 of 21 underbids while rejecting the remaining 7 would, we hope, highlight the concerns which led BLM to differentiate between the former and latter categories and answer any questions concerning the fundamental fairness of the bid-acceptance process.

For this limited reason, we conclude the case should be remanded so that BLM might put on the record its basis for the acceptance or rejection of bids which were below the presale evaluation. Appellant would be advised to take this remand as an opportunity to submit geologic and economic analyses in support of its bid, since it bears the ultimate responsibility of showing that its bid represents fair market value.

While the foregoing is dispositive of the instant appeal, we wish to directly address two aspects of the concurrence's analysis, lest it give rise to misperceptions as to the course of future adjudications. First, the concurring opinion suggests that post-Viking decisions "bear little uniformity." The simple fact of the matter is that while individual opinions do, indeed, vary in their characterizations of the post-Viking approach, the actual adjudicatory results are remarkably consistent. Thus, in those instances where the record did not contain either the presale evaluation or an explanation as to how this presale figure was computed, the decision rejecting the high bid was set aside and the case was remanded. See Burton/Hawks, Inc., 85 IBLA 193 (1985); Suzanne Walsh, 83 IBLA 274 (1984); Craig Folsom, 82 IBLA 294 (1984); R. T. Nakaoka, 81 IBLA 197 (1984); Larry White, 81 IBLA 19 (1984). Where, on the other hand, BLM provided this Board with both its presale estimate and an explanation of how it was derived, the Board has then turned to the question of whether an appellant has shown that its bid was actually fair market value, and where an appellant has failed to meet this burden, rejection of the high bid has been affirmed. See, e.g., Harris-Headrick, *supra* at 126; Green v. BLM, *supra* at 240, 247; Billy Krumbein, 92 IBLA 362, 363-64 (1986); Suzanne Walsh, 91 IBLA at 122; Petrovest, Inc., 88 IBLA 166, 167 (1985). Thus, dispassionate analysis of our recent decisions lends no credence to the assertion of the concurring opinion that post-Viking decisions "bear little uniformity."

The second point which we desire to make relates to the assertion by the concurring opinion that, under our decision, "[t]he manner in which BLM reached its presale value will not matter on appeal unless an appellant presents its own analysis. Nor, for that matter, will the presale value itself need be supplied." This statement has no basis in the Board's present decision. It is the result of an apparent confusion concerning what this Board has already decided and the position which it will continue to maintain. BLM would be in error if it were to assume that the analysis quoted above correctly describes the course of future adjudications.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is set aside and the case files are remanded for further action consistent with this opinion.

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James L. Burski  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge.

## ADMINISTRATIVE JUDGE ARNESS CONCURRING IN THE RESULT:

I share the majority's concern with the absence of a record showing the reason why the Bureau of Land Management (BLM) accepted some bids below its presale estimates but rejected others and agree that the decision should be set aside and remanded for this reason. I write separately because I believe the same result is required for the more basic reason that, as stated in appellant's statement of reasons, the record still does not provide a reasoned and factual basis for the rejection of the high bid.

In our initial opinion reviewing BLM's rejection of appellant's bid, we recited the accepted standard governing this Board's review of high bid rejection cases. In pertinent part we said that when BLM rejects a high bid as inadequate, "it must ensure that a reasoned explanation is provided for the record to support the decision." Southern Union Exploration Co., 79 IBLA 225, 226 (1984). As in numerous other such cases, we quoted from Southern Union Exploration Co., 51 IBLA 89, 92 (1980):

[T]he 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. [Citations omitted.]

Finally, we stated "the Board will require sufficient facts and analysis to ensure that a rational basis for the determination is present." Southern Union Exploration Co., 79 IBLA at 226.

Whether termed a "reasoned explanation," a "reasoned and factual explanation," or a "rational basis," the requirement that a high bid rejection be supported by facts and analysis has long been part of this Board's standard of review of rejection of high bids by BLM, *see, e.g., H & W Oil Co.*, 22 IBLA 313, 315 (1975), and numerous decisions have been rendered as to the adequacy of the information in the record on appeal. The report prepared by the Southwest Regional Evaluation Team (SRET) on remand, quoted in the majority opinion, discloses the presale value and adds two facts to the record but fails to present any analysis relating these facts to the parcel bid for by appellant or its presale value.

The fact that a lease in sec. 22 of the same township as this lease received a high bid of \$ 76.87 2 months earlier is clearly relevant, but no explanation is provided showing why this lease was considered to be comparable. There is no indication that it shares geological features or formations with the parcel bid for by appellant or even that it is within the same known geologic structure (KGS). Nor does the report indicate whether the \$ 76.87 was representative of amounts received for other leases in the area or the highest bid received. While the production figure for the gas well in sec. 21 is pertinent, its usefulness is limited. As with the lease in sec. 22, the report does not state why the parcel is comparable. In

addition, it fails to state the period of time the production figure represents, the well's then current rate of production, or even if the well was still productive.

The lack of such information is significant. The Board does not limit the types of information which may be considered by BLM; nor has it specified the method of analysis necessary for a record to present a reasoned and factual basis for rejecting a high bid. In the case before us, BLM has used bid information from another parcel to evaluate the parcel bid on by appellant. The logic supporting this practice is that if parcel A is similar to parcel B in some respect, such as geology, it should also be similar as to the lease price per acre it receives. In such cases the Board has required that the basis of the comparability be shown in the record. Larry White, 81 IBLA 19, 21-22 (1984); Davis & Smith, Ltd., 73 IBLA 22, 24 (1983); Harris-Headrick, 66 IBLA 84, 86 (1982). The lack of a factual basis for the premise that the parcel bid on by appellant is comparable to those in secs. 21 and 22 undercuts the conclusion that the presale value of the parcel in sec. 20 should be similar to the amount received for the parcel in sec. 22.

Rather than accepting that the SRET report is deficient, the majority first declares its information to be sufficient under several recent Board decisions and then later supplies a reasoning, not stated in either the SRET report or BLM's decision, to find the record sufficient. In doing so the majority treats comparability as a matter of physical proximity. The problem with this approach in the present case is not only that it is post hoc, but the oil and gas plat for the township included in the case file shows numerous other leases in the vicinity of the parcel bid for by appellant. If the lease in sec. 22 is comparable based on proximity, presumably all leases within the same approximate distance are also comparable. To ignore them in favor of that in sec. 22 would appear to be arbitrary.

Nor is it apparent that the decisions cited by the majority factually support the determination of sufficiency of the record in this case. In Viking Resources, 80 IBLA 245 (1984), the minimum acceptable bid was based on comparative sales data and a risk weighted present worth analysis. In addition, the analysis was based on all wells within a radius of the parcel. See id. at 250 (quoting memorandum). In Green v. Bureau of Land Management, 93 IBLA 237, 245 (1986), the minimum bid was set based on a discounted cash flow projection. No systematic analysis was used in the present case. In Harris-Headrick, 95 IBLA 124, 125 (1987), BLM's decision was originally remanded for failure to "explain why it believed that the sales which had been referenced were comparable." See Harris-Headrick, 66 IBLA at 86.

Ultimately, however, my differences with the majority as to the sufficiency of the record do not arise from a disagreement as to what the standard of a reasoned and factual evaluation supporting the rejection of a high bid requires, but rather a more fundamental disagreement as to the effect the decision in Viking Resources and subsequent cases have had on this standard.

In Viking the Board stated that an appellant has "an affirmative obligation of establishing a basis for a determination that there was an error

in the decision appealed from, *i.e.*, that appellant's bid represents the fair market value." *Id.* at 247. Subsequently, in *Larry White*, 81 IBLA 19, 22, n.2 (1984), we stated that "the burden of justifying his own bid cannot be shifted to appellant in the absence of sufficient documentation of the Government's estimate as would establish its prima facie correctness." This point was repeated in *R. T. Nakoaka*, 81 IBLA 197, 200 (1984), which also paraphrased *Viking* to state that "ultimately, appellant must not merely show that the Government's estimate did not constitute fair market value but must also affirmatively show that his bid did represent the fair market value, since absent this latter showing the Board could not order issuance of an oil and gas lease to appellant."

Similar language now appears in every decision the Board issues on the subject. While it is clear that *Viking*, *White*, and *Nakoaka* have changed the law, it is unclear what the change has been. The result is that our decisions bear little uniformity. Some have continued to decide appeals on the basis of whether the record provides a rational basis or a reasoned and factual explanation for the presale value, *e.g.*, *Petrovest, Inc.*, 88 IBLA 166 (1985); *Burton/Hawks, Inc.*, 85 IBLA 193 (1985); see *Green v. Bureau of Land Management*, *supra* at 245, and to find records inadequate for failing to provide "the presale evaluation, any information on which it is based, or the manner in which it was calculated." *Craig Folsom*, 82 IBLA 294, 296 (1984); see *Suzanne Walsh*, 83 IBLA 274, 276 (1984) ("calculations, explanations or analysis"). Other opinions have stated that the record need only be sufficient to show that the decision was not "arbitrary, capricious, or in error." *Suzanne Walsh*, 91 IBLA 119, 122 (1986); see *Green v. BLM*, *supra* at 247 (Mullen, A.J. concurring). Yet other cases have used *Viking* to suggest that the matter has become a question of the preponderance of the evidence. *E.g.*, *Billy Krumbein*, 92 IBLA 362, 363 (1986); *Suzanne Walsh*, 91 IBLA at 122. In *Harris-Headrick*, 95 IBLA at 126, cited by the majority, the words "rational basis" and "reasoned and factual explanation" do not appear and the standard mentioned is that "the Government must first establish the prima facie correctness of its action \* \* \*." After finding that the information in the record "does not conclusively establish the accuracy of the Government's estimate," the decision nevertheless finds it sufficient to meet the prima facie standard and affirms because the appellant fails to show that its bid was fair market value. Compare *Harris-Headrick*, 66 IBLA at 86 (BLM "must ensure that a reasoned explanation is provided for the record to support the decision").

It is clear that the Board cannot reverse a decision by BLM and order issuance of a lease absent proof that appellant's bid represents the fair market value of the parcel. Despite such a suggestion by appellant, that is not the issue in this case. Rather, the issue is whether the record on appeal supports the decision to reject appellant's bid. The majority finds the record deficient for one reason, but concludes that it otherwise establishes the "prima facie validity" of BLM's estimated value. I have seen no case holding that the law stated in our initial decision on the present case has been overruled. Therefore, I understand *Viking* to have established an additional standard that, once a reasoned and factual basis appears in the record to support the decision, the Board will affirm the decision appealed

from unless appellant shows that his bid represents the fair market value of the parcel. For the same reason, I understand the term "prima facie" introduced in Viking to represent no lesser standard than "a reasoned and factual explanation." <sup>1/</sup> Accordingly, because the present record fails to present a reasoned and factual basis for rejection of appellant's bid, I would set aside the decision and remand the case to BLM.

If Viking has changed the law more radically than I believe it has, the Board has an obligation to both BLM and parties bidding for leases to make clear that our decisions prior to Viking have been effectively overruled. An appellant would no longer be entitled to a reasoned and factual explanation for the rejection of his bid; rather, as the present case indicates, the disclosure of a presale value and a fact or two will be sufficient to establish the prima facie correctness of BLM's decision. Consequently, appellants should be advised that they must submit geological information, market data, and other facts to establish that their bid represents the fair market value of the parcel, and if they fail, BLM's decision will be affirmed. See Green v. BLM, supra at 249 (Irwin, A.J., concurring). If this is to be our approach, I submit that given the crucial need for appellants to present information sufficiently persuasive to order issuance of a lease, we should also inform BLM that it is generally relieved of the need to perform discounted cash-flow analysis, risk-weighted present worth evaluations, comparative sales analysis, or any other systematic approach for determining the presale value of a parcel. The manner in which BLM reached its presale value will not matter on appeal unless an appellant presents its own analysis. Nor, for that matter, will the presale value itself need be supplied. If we are to adopt such an approach, BLM can later justify its decision to reject a high bid in responding to an appellant's analysis.

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Franklin D. Arness  
Administrative Judge

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<sup>1/</sup> The lead opinion, by shifting the focus of analysis to the perceived results of our post-Viking decisionmaking, admits that the standard for evaluation of low bids has changed. The need to justify a bid rejection by showing a "reasoned and factual basis" for concluding the bid was low is now effectively replaced by the lower "prima facie" standard. The term "prima facie" in the context in which it is used in these cases is, as pointed out by this separate opinion, a meaningless metaphor. The justification for this change in the standard for evaluation is found in the requirement that a bid, to be acceptable, must offer fair market value. The majority assume that the difficulty inherent in proving that a rejected bid represented fair market value eliminates any practical need to evaluate the basis for BLM's presale valuation because most appellants are unable or unwilling to meet the evidentiary requirements involved in proving a bid was qualified for acceptance. I do not necessarily disagree with this conclusion, but only contend that we should restate our rules for evaluating these cases by admitting they have changed, not only for the benefit of the bidding public, but also for our own instruction, so that we can know what we are doing.